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How Employment Discrimination Plaintiffs Fare in Federal Court

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This article presents the full range of information that the Administrative Office's data convey on federal employment discrimination litigation. From that information, the authors tell three stories about (1) bringing these claims, (2) their outcome in the district court, and (3) the effect of appeal. Each of these stories is a sad one for employment discrimination plaintiffs: relatively often, the numerous plaintiffs must pursue their claims all the way through trial, which is usually a jury trial; at both pretrial and trial these plaintiffs lose disproportionately often, in all the various types of employment discrimination cases; and employment discrimination litigants appeal more often than other litigants, with the defendants doing far better on those appeals than the plaintiffs.

I. Introduction

Employment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.

This tough tale does not describe some tiny corner of the litigation world. Employment discrimination cases constitute an increasing fraction of the federal civil docket, now reigning as the largest single category of cases at nearly 10 percent.

In this article, we use governmental data to describe this important segment of federal litigation. When any civil case terminates in a federal dis-

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trict court or court of appeals, the court clerk transmits to the Administrative Office of the United States Courts a form containing information about the case. The forms include, inter alia, data regarding the names of the parties, the subject matter category and the jurisdictional basis of the case, the case's origin in the district as original or removed or transferred, the amount demanded, the dates of filing and termination in the district court or the court of appeals, the procedural stage of the case at termination, the procedural method of disposition, and, if the court entered judgment or reached decision, who prevailed. The computerized database, compiled from these forms, contains all the millions of federal civil cases over many years from the whole country. So, from these data gathered by the Administrative Office, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research, we know the outcome of every civil case terminated in the federal courts from fiscal year 1970 (the start of computerized record keeping) to fiscal year 2001 (the most recently released data).[1]

Inevitably, these data do not reveal all the things one would like to know.[2] Most obviously, they do not cover state cases. Also, the standards for coding have changed over time, which necessitates careful attention. Only in fiscal year 1979 did the Administrative Office start to record which party prevailed by judgment in the district court. Only in fiscal year 1988 did the Administrative Office start to code the district courts' docket numbers in the appellate data set so that one could trace district court cases to their treatment in the federal courts of appeals. Only in fiscal year 1998 did the Admin-

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[1]See Administrative Office of the U.S. Courts, Civil Statistical Reporting Guide (1999); 11 Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures transmittal 64, at II-18 to II-28 (Mar. 1, 1985) (district court); 11 Administrative Office of the U.S. Courts, Statistics Manual ch. I, at 7–43 (June 1989) (court of appeals). For a complete description of the Administrative Office database, see Inter-university Consortium for Political and Social Research, Federal Court Cases: Integrated Data Base, 1970–1997, ICPSR 8429 (1998). For easy access to part of this database, see Theodore Eisenberg & Kevin M. Clermont, Judicial Statistical Inquiry Form, at <http://empirical.law.cornell.edu> (last modified Sept. 20, 2002), which is discussed in Theodore Eisenberg & Kevin M. Clermont, Courts in Cyberspace, 46 J. Legal Educ. 94 (1996).

[2]For a more detailed discussion of this database's strengths and weaknesses, see Kevin M. Clermont & Theodore Eisenberg, Litigation Realities, 88 Cornell L. Rev. 119, 127–29 (2002) [hereinafter Realities]; 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 (2003).

istrative Office start to distinguish among discrimination statutes; even now, the data cannot reliably distinguish between race and sex discrimination claims.

Nevertheless, the data are complete enough, we feel, to give accurate bearings about the nature of employment discrimination litigation in federal court. We focus on one of the Administrative Office's approximately 90 category codes: Code 442, "Civil Rights: Jobs" or "Employment," which includes mainly Title VII actions, but also ADA, § 1983, ADEA, § 1981, and FMLA actions.[3] Only around fiscal year 1970, following the tremendous increase in civil rights actions in the 1960s,[4] did the Administrative Office create a separate category for civil rights actions concerning employment, this Code 442. Because of the unavoidable delay in the code's full utilization in termination data, and because of the later improvements in the Administrative Office's coding, we shall give most of our results from 1979 onward. Indeed, because it is clearer to speak in terms of calendar years rather than fiscal years, we shall speak henceforth in terms of calendar years.

The Appendix presents in tabular form the more meaningful data. Although assertions dominate discussions of employment discrimination litigation, and treatment of most facts proceeds as if they were unknowable, the exercise of creating this table demonstrates how much information about a category of litigation is readily available from governmental data. Unsupported factual assertions need not dominate discussions of litigation. Readily available data paint a fairly complete picture of employment discrimination litigation.

The article's text extracts from the Appendix three particular, especially telling aspects: the number of cases and trials, success in the district court, and effect of appeal. We tell each of these three stories of litigating, deciding, and appealing employment discrimination actions mainly through graphs and tables.[5] But for each of the stories, the text will sketch the overall picture and then make a specific observation.

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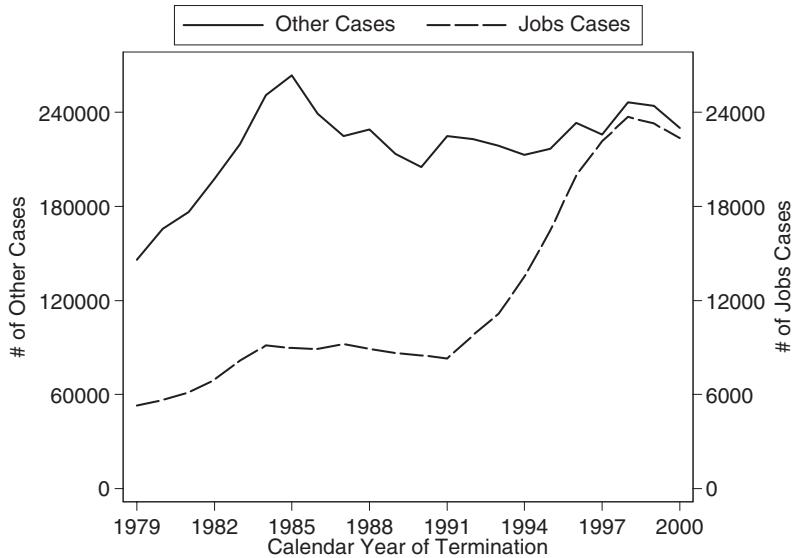
[3]Code 442 includes actions under 42 U.S.C. § 1981 or § 1983 only if they were employment related. Most actions under these sections fall into Code 440, "Other Civil Rights."

[4]See infra note 6; 1971 Annual Report of the Director of the Administrative Office of the United States Courts 120.

[5]But see Nicholas J. Cox, Speaking Stata: Problems with Tables, Part I, 3 Stata J. 309, 309 (2003) ("In a wider context, therefore, tables and graphs are all reasonably considered as exhibits or displays of some kind.").

Figure 1: Number of cases, for employment discrimination and other civil cases, 1979–2000, U.S. district courts.



NOTE: This graph shows the differently timed rises in employment discrimination and other cases, looking at those terminated since 1979. The other cases peaked in 1985 at 263,804, and they were 230,239 in 2000. Employment discrimination cases peaked in 1998 at 23,722, and they were nearly as high in 2000 at 22,359.

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

II. LITIGATING

A. Overall Picture

As Figure 1 reveals, employment discrimination cases constitute an increasing fraction of the federal civil docket. By 2000, employment discrimination cases constituted nearly 10 percent of federal civil cases.

The rest of the civil docket expanded rapidly in the early 1980s to reach an all-time peak of 263,804 cases in 1985, which was an increase of over 80 percent from six years earlier. Since 1985, however, the rest of the civil caseload has been flat, with only 230,239 cases terminated in 2000.

The employment discrimination caseload expanded later.[6] Figure 1 shows that the number of cases grew modestly in the early 1980s, and not at

[6]The 1970s also saw a dramatic percentage increase in employment discrimination cases, but because the base was so low, the absolute increase is rather modest in these years. We have not been able to determine from the Administrative Office exactly when it created Category 442

all in the late 1980s. In the 1990s, however, employment discrimination cases exploded from 8,303 cases terminated in 1991 to 22,359 cases terminated in 2000, a 270 percent increase.

The 1990s explosion of employment discrimination cases presumably resulted from several factors, most of which are beyond explanation by Administrative Office data. For example, the Civil Rights Act of 1991 made Title VII law more favorable to plaintiffs in several ways, increasing the propensity to sue. These changes included a right to jury trial and the availability of compensatory and punitive damages (capped depending on the employer's size).[7]

Around the same time, new statutes created federal causes of action for new classes of plaintiffs. These included the Americans with Disabilities Act of 1990 and the Family and Medical Leave Act of 1993.[8] One should not overemphasize these new statutes, however. As Table 1 shows, barely one in nine employment discrimination cases arise under the ADA or the FMLA. Title VII cases constitute the bulk of cases, nearly 70 percent.

Incidentally, the proportion of plaintiffs proceeding pro se varies dramatically by statute. As Table 1 further shows, about one in five Title VII or 42 U.S.C. § 1983 plaintiffs is not represented by a lawyer, whereas only about one in twenty Age Discrimination in Employment Act or FMLA plaintiffs is without a lawyer.

Even more dramatic than the rise in employment discrimination caseload is the increasing prominence of employment discrimination trials as a fraction of all trials.[9] As pretrial dispositions such as settlement have blos-

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or when that category became a reliable indicator of the number of employment discrimination cases. Our data show only 423 cases in 1971; this number increased to 5,289 cases by 1979, more than a 12-fold increase, but an absolute increase of fewer than 5,000 cases. By contrast, the rest of the civil docket had 90,820 terminations in 1971 and 146,160 terminations in 1979, "only" a 60 percent increase, but an absolute increase of over 55,000 cases.

[7]Pub. L. No. 102-166, 105 Stat. 1071; cf. John J. Donohue III & Peter Siegelman, Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle, 66 S. Cal. L. Rev. 709, 714–16 (1993) (data through 1989); Peter Siegelman & John J. Donohue III, The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis, 24 J. Legal Stud. 427 (1995) (same).

[8]See David L. Hudson Jr., Changing Act, A.B.A. J., Sept. 2003, at 15 (saying that FMLA is gaining on ADA as an employee weapon).

[9]"Trials" combine jury and judge trials. We used the procedural progress codes of 7 and 9—termination during and after jury trial—to define jury trial usage. However, we abandoned the procedural progress codes for judge trials because, unfortunately, the Administrative Office

Table 1: Employment Discrimination Cases, by Type, 1998–2001, U.S. District Courts

Type	*Number*	*% of Total*	*% Pro Se*
Title VII	47,249	69.35	18.87
ADA	7,001	10.28	11.51
§ 1983	5,423	7.96	20.76
ADEA	5,092	7.47	6.34
§ 1981	2,737	4.02	13.70
FMLA	632	0.93	4.91
Total	68,134	100.00	16.99

NOTE: This table shows the predominance of Title VII cases in Administrative Office Code 442 cases.

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

somed in the last two decades, the civil trial has withered in other cases.[10] Many have noted this trend,[11] although there is less agreement on cause.[12]

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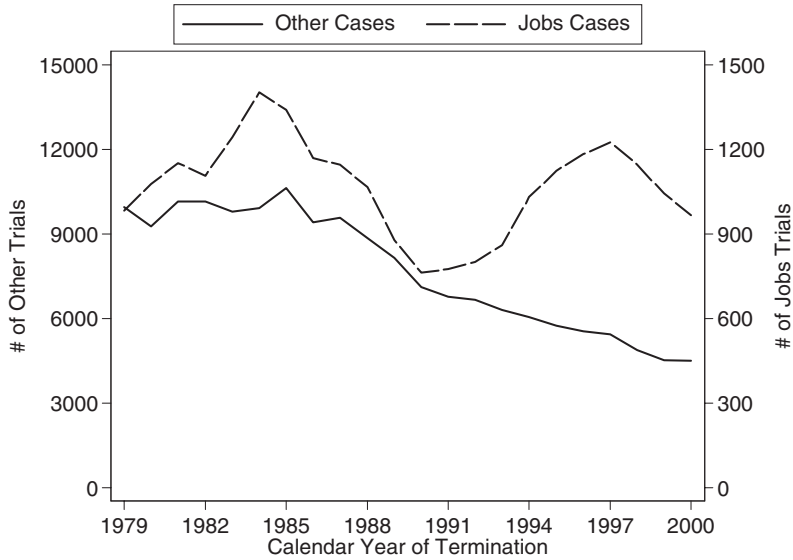
defines "trial" to include all contested proceedings in which evidence is introduced. See Administrative Office of the U.S. Courts, Civil Statistical Reporting Guide 3:18 (1999). This definition would distort analysis of the data by categorizing some motion hearings as judge trials. So, instead, we used disposition method code 9—judgment on court trial—to define judge trial usage. We used these mixed definitions for trials throughout, except in Figure 6 and the Appendix where we were breaking down the cases by method of disposition or by procedural progress.

[10]See Realities, supra note 2, at 135–37, 142–44.

[11]The trend of the vanishing civil trial is apparent from the hard copy of the Annual Report of the Director of the Administrative Office of the United States Courts. Over the years its Tables C-4, prepared with the procedural progress codes for cases terminated during or after trial, show a steady decrease from almost 12 percent of civil terminations reaching trial in the 1960s to the current levels approaching 2 percent. As that period progressed, the growing number of federal judges managed to increase the absolute number of civil trials as the caseload grew, until reaching a peak in fiscal year 1985 at 12,570 trials according to the Administrative Office's measure. But civil trials per year have since dropped to fewer than half that number, so today in absolute numbers there are about as many civil trials as in fiscal year 1961.

[12]See, e.g., Sara Sun Beale, Federalizing Crime: Assessing the Impact on the Federal Courts, 543 Annals Am. Acad. Pol. & Soc. Sci. 39, 46–48 (1996) (emphasizing growth of criminal trial docket); Samuel R. Gross & Kent D. Syverud, Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. Rev. 1, 1–3 (1996) (emphasizing systemic pressure to settle); Patrick E. Longan, The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials, 35 Ariz. L. Rev. 663, 669–72, 677–78 (1993) (emphasizing, in part, the growth in number and complexity of civil cases); Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev.

Figure 2: Number of trials, in employment discrimination and other civil cases, 1979–2000, U.S. district courts.



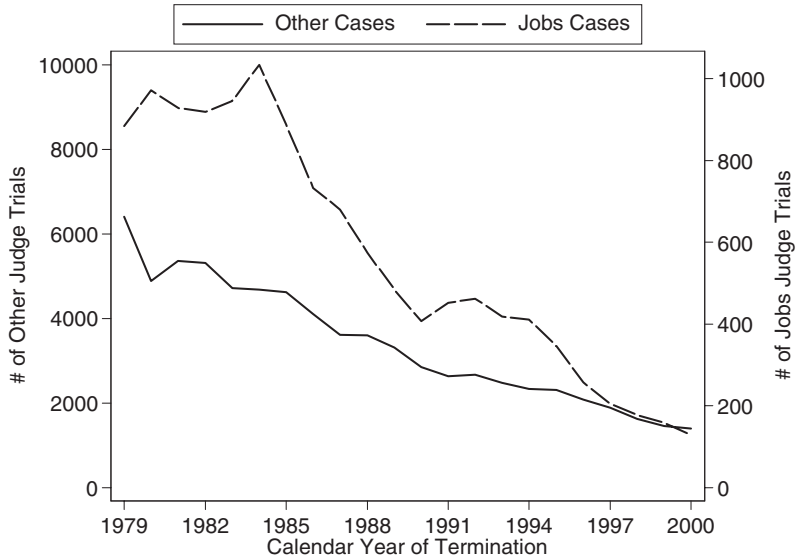
NOTE: This graph shows the decreasing numbers of other cases terminated by trial. There were 9,956 such trials in 1979 and only 4,504 in 2000. Meanwhile, there were 983 employment discrimination trials in 1979, a peak of 1,402 in 1984, a trough of 764 in 1990, and 966 in 2000. As to definitions, "trials" combines jury and judge trials. A jury trial includes any case for which the procedural progress variable has a value of 7 or 9 (termination "during" or "after" a jury trial). A judge trial is defined as any case for which the method of disposition variable has a value of 9 ("judgment on court trial").

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

Figure 2 shows more than a 50 percent decline in the number of other trials in two decades. The number of employment discrimination trials, on the other hand, has held steady. Thus, whereas the ratio of other trials to employment discrimination trials was 10:1 in 1979, it was only 4.66:1 in 2000.

494, 526–39 (1986) (emphasizing judicial and cultural assumptions); Hope Viner Samborn, The Vanishing Trial, A.B.A. J., Oct. 2002, at 24, 26–27 (emphasizing push toward ADR); Milton I. Shadur, Trials or Tribulations (Rule 56 Style)?, Litig., Winter 2003, at 5 (emphasizing ascendance of summary judgment practice); Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. Rev. 631, 632–39 (emphasizing increase in judges' pretrial tasks). See generally Adam Liptak, U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Says, N.Y. Times, Dec. 14, 2003, at 1 (discussing ongoing ABA project to study the vanishing trial).

Figure 3: Number of judge trials, in employment discrimination and other civil cases, 1979–2000, U.S. district courts.



NOTE: This graph shows the plummeting numbers of judge trials. There were 884 employment discrimination judge trials in 1979, a peak of 1,034 employment discrimination judge trials in 1984, and 130 employment discrimination judge trials in 2000. For other cases, there were 6,403 judge trials in 1979 and only 1,401 judge trials in 2000. Judge trials are those in which the method-of-disposition variable is coded as 9 (judgment on court trial).

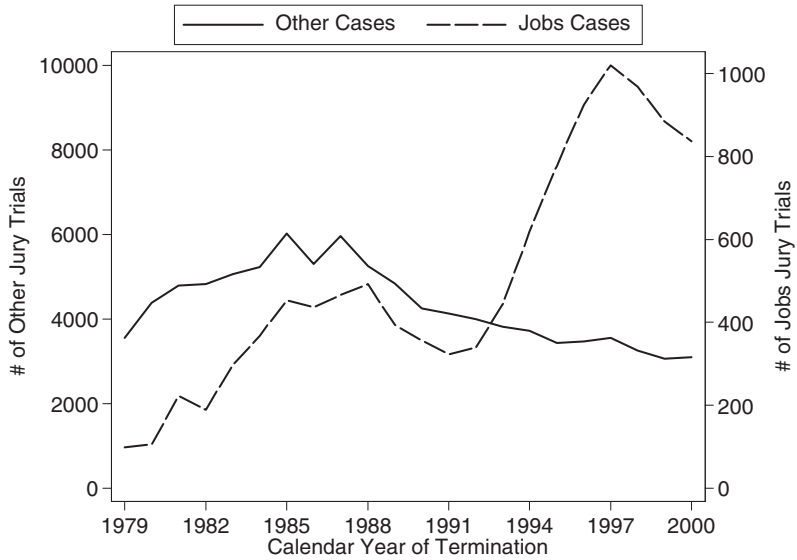
SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

B. Specific Story: Judge and Jury Trials

The previous discussion lumped judge and jury trials together, which masked some remarkable divergences in trends. In this subsection, we parse the separate trends in employment discrimination and other cases for judge and jury trials.

As Figure 3 shows, the number of judge trials has plummeted in the last two decades, for employment discrimination cases and for other cases. Indeed, in percentage terms, judge trials have fallen more in employment discrimination cases. In the early 1980s, judges tried as many as 1,000 employment discrimination cases each year. In 2000, there were only a hundred or so. But the downward trend is dramatic for both types of cases.

Figure 4: Number of jury trials, in employment discrimination and other civil cases, 1979–2000, U.S. district courts.



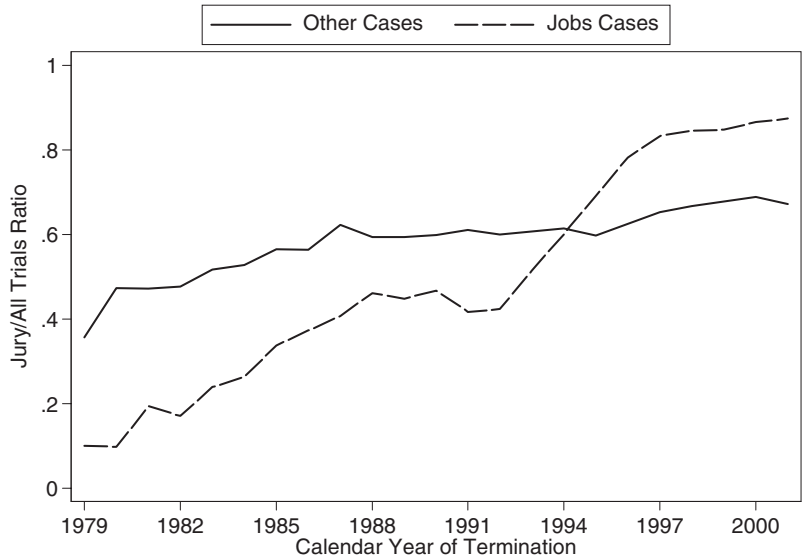
NOTE: This graph shows the different time trends for jury trials in employment discrimination and other cases. The number of employment discrimination jury trials rose from 99 in 1979 to a peak of 1,020 in 1997, and then fell to 836 in 2000. For other cases, there were 3,553 jury trials in 1979, a peak of 6,017 in 1985, and 3,103 in 2000. Jury trials are those in which the procedural progress variable is coded as 7 or 9 (termination during or after jury trial).

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

Jury trials tell a different story, as related by Figure 4. In employment discrimination cases, the annual number of jury trials has increased. The increase has been dramatic since 1991, when jury trials were first allowed for Title VII cases, but the trend was upward for most of the 1980s as well. By contrast, jury trials in other cases have fallen by 30 percent from their peak in the mid-1980s.

The upshot emerges in Figure 5. The ratio of jury to all trials has increased in all cases. In cases other than employment discrimination, over the two decades the ratio went from about two out of five to three out of five. The ratio in employment discrimination cases is much more dramatic: in 1979, only about one in ten trials was a jury trial; by 2001, jury trials were well more than eight in ten.

Figure 5: Ratio of jury trials to all trials, in employment discrimination and other civil cases, 1979–2001, U.S. district courts.



NOTE: This graph shows the increasing predominance of the jury mode of trial. In 1979, 10 percent of employment discrimination trials were to juries; in 2000, 87 percent were jury trials. In 1979, 36 percent of trials in other cases were to juries; in 2000, 69 percent were jury trials. Jury trials are identified by a procedural progress variable equal to 7 or 9 (termination during or after jury trial). Judge trials are identified by a method of disposition variable equal to 9 (judgment on court trial).

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

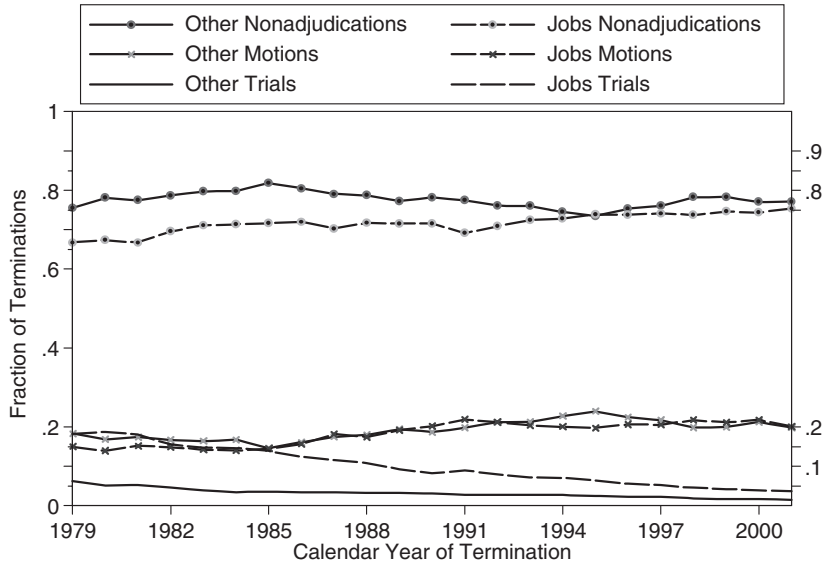
The explanation for the rising ratios resides in the drop in the use of judge trial. The explanation for this latter drop would have to be a broad one, not linked to a particular category of case. Perhaps the explanation lies in judicial distaste for a time-consuming task like bench trial. Or, as the disincentives to any trial have increased, those litigants who prefer jury trial have proved to be the hardier group.

III. DECIDING

A. Overall Picture

Using percentages rather than absolute numbers, Figure 6 shows again that trials are now rare in employment discrimination cases (3.7 percent of

Figure 6: Adjudication rates, in employment discrimination and other cases, 1979–2001, U.S. district courts.



NOTE: This graph shows the greater occurrence of late adjudication in employment discrimination cases. As the bottom two lines show, the fraction of cases resolved after trial has fallen from 18.2 percent in 1979 to 3.7 percent in 2001 for employment discrimination cases, but from 6.2 percent in 1979 to the even lower level of 1.5 percent in 2001 for other cases. As the middle two lines show, nontrial adjuciations, labeled as "motions" here, are more equivalent. As the top two lines show, the fraction of cases that reach a disposition other than adjudication, which predominately means settlement, is lower for employment discrimination cases than for other cases. As to definitions, see note 14.

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

employment discrimination cases), unlike a generation ago when one in six employment discrimination cases was decided by trial.[13] Trials in other cases have always been relatively rare, and now are exceedingly rare (only 1.5

[13]Also, a study of docket sheets from the Southern District of New York over four years showed an employment discrimination trial rate of 3.8 percent, with a plaintiff win rate at trial of 33.6 percent. See Michael Delikat & Morris M. Kleiner, An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?, Disp. Resol. J., Nov. 2003–Jan. 2004, at 56, 56–57.

percent). The other types of disposition have picked up the slack left by the vanishing trial.[14]

Nontrial adjudication, such as by pretrial motion, has stayed comparable over the years for employment discrimination and other cases, at about 20 percent of the cases overall. It seems to be gently increasing with time.

Like other cases, most employment discrimination cases settle, and more and more do so with the passing years. As the Appendix shows in its treatment of disposition method, almost 70 percent of employment discrimination and other cases are terminated by settlement. A much smaller number of dispositions fall into a welter of other classification codes, predominately remand or transfer to another court. As a matter of probability, most of these will result, after additional proceedings, in an eventual settlement rather than a final adjudication. So, the bigger this other-disposition grouping is, the more settlement there is as well. Far fewer than half as many dispositions fall into this other-disposition grouping for employment discrimination cases as for other cases. What this means is that employment discrimination cases settle less frequently, as a relative matter, than other cases. Figure 6, grouping settlement along with these other dispositions as "nonadjudications," shows the time trends.

Moreover, the Appendix further shows, in its treatment of procedural progress, that far fewer employment discrimination cases end early in the litigation process (37 percent, compared to other cases at 59 percent).

In sum, only a small percentage of any category of cases makes it through the procedural system to a contested judgment, nontrial or trial. Figure 6 tells an overall story of continuing and probably growing dominance of settlement, against a backdrop of a diminishing role for trial. However, compared to other plaintiffs, employment discrimination plaintiffs

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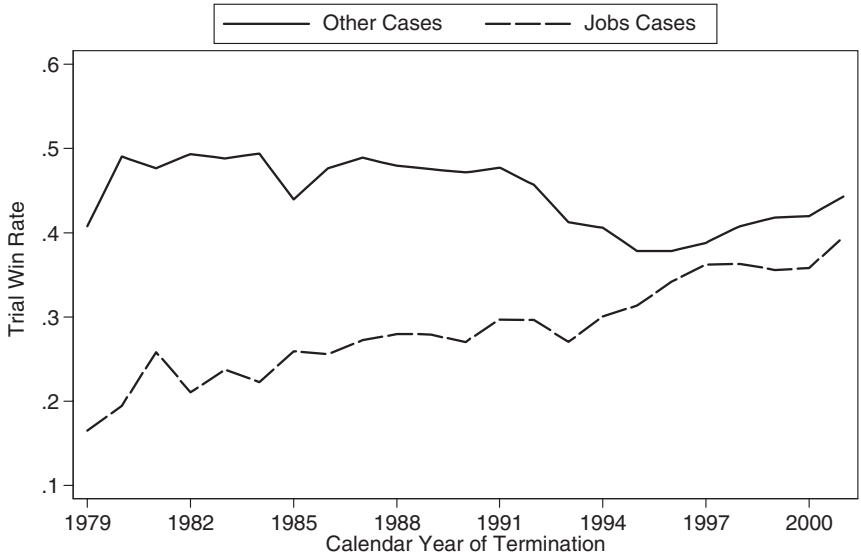
[14]First, tried cases are those with a method of disposition value of 7–9. Second, cases adjudicated without trial are those with a method of disposition value of 6, 15, 17, 19, or 20. Third, settled cases are those with a method of disposition value of 2, 4, 5, 12–14, or 18. Code 3 switched in usage about 1991 from voluntary dismissal to dismissal for lack of jurisdiction, so we grouped its earlier usage with settlement, but its later usage with nontrial adjudication. Fourth, other dispositions are all remaining method of disposition values, predominantly remand or transfer to another court. See Realities, supra note 2, at 136–37 (using a slightly different grouping of method of disposition codes to come to similar conclusions). But see Gillian K. Hadfield, Most Cases Don't Settle, There's More (Non-Trial) Adjudication Than Ever and the "Haves" May Be Coming Out Ahead: Some Preliminary Observations on the Characteristics and Determinants of the "Vanishing Trial" and the Changing Disposition of Federal Civil Cases 5–6 (Nov. 2003) (unpublished manuscript) (using a different grouping of method of disposition codes, which contributed to her different conclusions).

Figure 7: Plaintiff win rates, at trial, in employment discrimination and other civil cases, 1979–2001, U.S. district courts.



NOTE: This graph shows the closing gap in plaintiff win rates for all trials. Win rates in employment discrimination cases rose from 16.5 percent in 1979 to 39.5 percent in 2001. Win rates in other cases ranged from a peak of 49.4 percent in 1984 to a low of 37.8 percent in 1995, and then to 44.3 percent in 2001. "Trials" combines jury and judge trials. Jury trials are identified as those cases whose procedural progress was coded as 7 or 9 (termination during or after jury trial). Judge trials are identified as those cases whose method of disposition was coded as 9 (judgment on court trial).

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

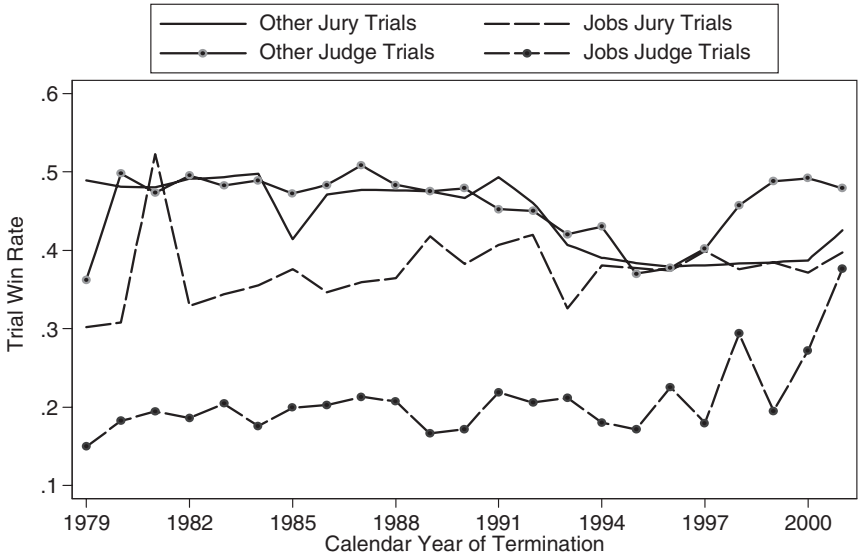
may be closing the gap, but they still remain less likely to obtain an early settlement from the defendant and more likely to have to slog onward to trial.

Of cases going to trial, employment discrimination plaintiffs win less often than other plaintiffs. In the 1980s, employment discrimination plaintiffs won trials at only half the rate of other plaintiffs. As Figure 7 shows, however, in recent years the gap in win rates has narrowed substantially.

Figure 8 breaks down the trial win rates to show the jury and judge win rates over time.[15] It reveals that employment discrimination plaintiffs (unlike many other plaintiffs) have always done substantially worse in judge trials than in jury trials. Until very recently, the win rate in judge trials (but not

[15]See Realities, supra note 2, at 144–47.

Figure 8: Plaintiff win rates, at jury and judge trials, in employment discrimination and other civil cases, 1979–2001, U.S. district courts.



NOTE: The top two lines shows the nearly indistinguishable plaintiff win rates in jury and judge trials in other cases. The bottom two lines show the large gap in win rates in employment discrimination trials. Jury trials are identified as those whose procedural progress was coded as 7 or 9 (terminated during or after jury trial). Judge trials are identified as those whose method of disposition was coded as 9 (judgment on court trial).

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

in jury trials) has been much lower in employment discrimination cases than in other cases.

Again, as the Appendix alternatively puts it, employment discrimination plaintiffs have won only 19.29 percent of judge trials but 37.77 percent of jury trials. Although employment discrimination plaintiffs have won fewer than one in five of their judge trials, other plaintiffs have won 45.91 percent of their judge trials (and 44.82 percent of their jury trials). The win rates in jury trials of employment discrimination and other cases are not far apart.

Thus, one reason for the rising trial win rate in employment discrimination cases seen in Figure 7 could be the shift to jury trial usage seen earlier in Figure 5. A shift toward the likely more successful jury trial might be increasing the overall trial win rate in employment discrimination cases.

These trends are easy to misinterpret, however. For example, an employment defense lawyer recently advised defendants to get a judge trial:

"Before 1991, employees brought [federal employment discrimination] cases at the rate of 8,000 to 9,000 a year, and employers won most of them. Since then, the filing rate has nearly tripled, and surveys show that employers have lost almost half of the cases tried to a jury."[16] Those facts are pretty much true literally, but the advice is misleading. The increased defendant losses reflect the shift to jury trials, but not necessarily any pro-plaintiff bias in juries. Indeed, over the relevant time period, the plaintiff win rate before judges is what shows a real change. As the judges' trial duties have shifted to juries, the win rate before judges has increased sharply. Perhaps defendants should therefore avoid judge trial!

In all likelihood, juries and judges are acting similarly, but have always seen a different flow of cases. We thus concluded at the end of a lengthy article based on a wealth of data covering all sorts of cases: (1) the most plausible explanation of the data lies in small differences between judges' and juries' treatment of cases and, much more substantially, in the parties' varying the case selection that reaches judge and jury; (2) litigants' stereotypical views about juries may lead them to act unwisely in choosing between judge trials and jury trials; and (3) atypical differences in win rates before judges and juries for certain case categories may stem from the especially strong misperceptions litigants hold about jury behavior in these cases. More simply put, certain groups of plaintiffs do far worse before judges, but the reason likely lies in prevailing misperceptions about juries, rather than in differences between judges and juries. Judges and juries are in fact not so different.[17]

The most significant observation about the deciding of cases, then, is the long-run lack of success at trial for employment discrimination plaintiffs, relative to other plaintiffs. The gap in win rates between employment discrimination plaintiffs and other plaintiffs appears not only at trial but in pretrial disposition as well.[18] Figure 9 show the fairly persistent gap over time,

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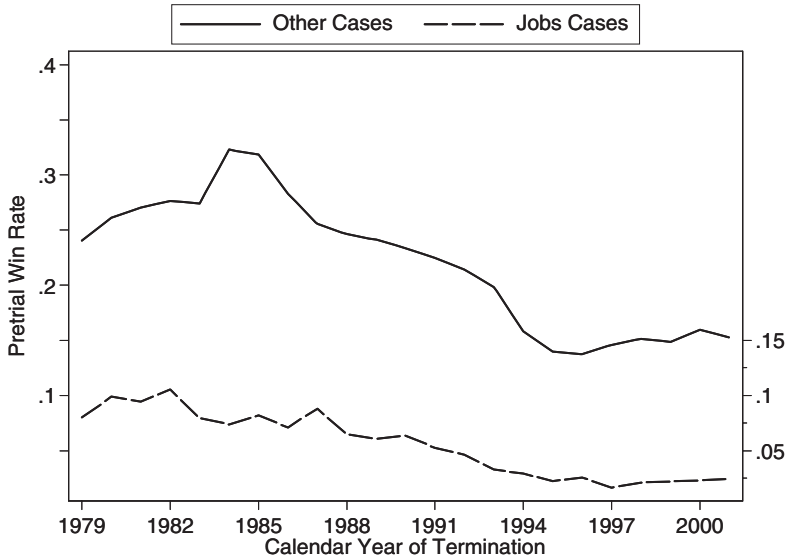
[16]Stephen F. Fink, Insist on Bench Trials, Nat'l L.J., Jan. 13, 2003, at A17.

[17]See Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124, 1170–74 (1992) [hereinafter Jury/Judge].

[18]See Michael Selmi, Why Are Employment Discrimination Cases So Hard to Win?, 61 La. L. Rev. 555, 557 (2001) (footnotes omitted):

> There is it seems a general consensus that employment discrimination cases are too easy to file, and all too easy to win. This sentiment is doubtlessly, at least in part, fueled by the spate of popular books decrying the damage done by employment suits, as well as the

Figure 9: Plaintiff win rates, for pretrial adjudication, in employment discrimination and other civil cases, 1979–2001, U.S. district courts.



NOTE: This graph shows that employment discrimination plaintiffs fare worse on pretrial adjudication than other plaintiffs. Pretrial adjudication is identified as those cases whose method of disposition was coded as 6.

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

even while the pretrial win rate is trending down in all cases.[19] As the Appendix states, employment discrimination plaintiffs have won 4.23 percent of their pretrial adjudications, while other plaintiffs have won 22.23 percent of their pretrial adjudications.

B. Specific Story: Win Rates by Type of Discrimination

Until now, our analysis of win rates has lumped all employment discrimination plaintiffs together, masking potential differences between them. For

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relentless efforts by well-financed lobbying and philanthropical groups with a conscious aim to limit the reach of the antidiscrimination laws. But this picture is grossly distorted, and while there are large numbers of employment discrimination suits . . . these suits are far too difficult, rather than easy, to win.

[19]See also Kevin M. Clermont & Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments, 2002 U. Ill. L. Rev. 947, 965–67 [hereinafter Plaintiphobia].

Table 2: Plaintiff Win Rates, by Type of Employment Discrimination Case, 1998–2001, U.S. District Courts

Type	*Pretrial Adjudication Win Rate % (Total #)*	*Jury Trial Win Rate % (Total #)*	*Judge Trial Win Rate % (Total #)*
Title VII	1.96	36.36	24.84
	(8,048)	(1,598)	(318)
ADA	2.14	41.27	34.29
	(1,264)	(189)	(35)
§ 1983	1.82	44.91	27.03
	(1,151)	(216)	(37)
ADEA	2.31	40.50	20.93
	(824)	(200)	(43)
§ 1981	1.33	31.13	23.08
	(527)	(106)	(13)
FMLA	7.35	50.00	80.00
	(68)	(10)	(5)
Total	1.99	37.73	25.94
	(11,882)	(2,319)	(451)

NOTE: This table shows the similarity of outcomes in the different types of discrimination cases. Pretrial adjudication is identified as those cases whose method of disposition was coded as 6. Jury trials are identified as those case whose procedural progress was coded as 7 or 9 (termination during or after jury trial). Judge trials are identified as those cases whose method of disposition was coded as 9 (judgment on court trial).

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.

example, one might suspect that age discrimination plaintiffs do far better, especially before juries, than other plaintiffs.

As Table 2 shows, however, pretrial and trial win rates are similar across types of discrimination cases, such as Title VII, the ADA, and the ADEA[20]—despite the different nature of, and resulting reaction to, suits based on race, sex, disability, and age[21] and even despite the differences in pro se representation noted above in Table 1.

Our analysis above showed the importance of separating jury trials from judge trials. Table 2 presents the results for that as well. It shows that, across all types of discrimination cases, plaintiffs do better before juries than judges. But within jury trials and judge trials, the win rates are roughly equivalent for all types of discrimination, with mainly insignificant differences.

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[20]See Jon M. Werner, Employment Discrimination Cases in U.S. Courts of Appeals: A Brief Commentary on Mollica, 2 Employee Rts. & Emp. Pol'y J. 255, 261–63 (1998).

[21]See Selmi, supra note 18, at 562–69.

Thus, differences in win rates seem driven much more by the type of disposition than the type of discrimination at issue. Worth noting, however, is the limited range of these data. Only since fiscal year 1998 did the Administrative Office enter the title and section of the U.S. Code on which each case is brought, so our breakdown by type of discrimination can begin only at that point. Moreover, because the data only go through fiscal year 2001, the data from the last three months of calendar year 2001 are not included.

IV. Appealing

A. Overall Picture

Using our data set previously constructed by linking docket numbers in the Administrative Office's civil data from the federal district courts and from the federal courts of appeals,[22] we can trace developments in cases after district court judgments entered formally for one side, plaintiff or defendant, that the other side puts on the appellate court docket.[23] We present data from 1988 through 2000.[24]

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[22]See Plaintiphobia, supra note 19, at 950–51; Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Non-Tried Cases 6–8 (Nov. 17, 2003) (unpublished manuscript); see also supra text accompanying notes 1–4. For this article, we extended our previous data set through fiscal year 2000.

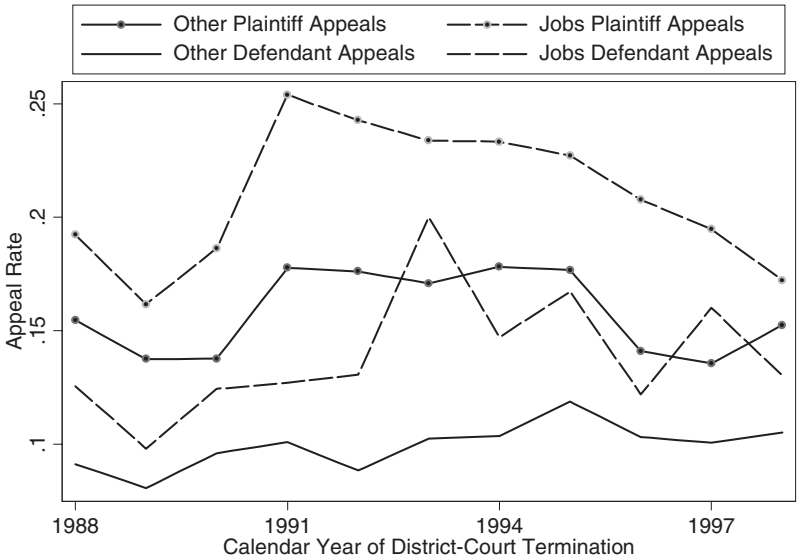
[23]If the judgment below was for plaintiff, we initially inferred that the defendant was the appellant. However, examining the parties' names revealed that more than a quarter of the appeals from judgment for plaintiff have a plaintiff as the named appellant. So, we simply discarded appeals from judgment for plaintiff in which an apparently dissatisfied but winning plaintiff was the named appellant or the defendant was the named appellee. Thus, by looking at the remaining appeals, we were more surely comparing appeals by plaintiffs and defendants from judgments entered against them.

We continue to drop this special category of appeals—appeals by plaintiffs from judgments for plaintiff—in order to be consistent with our earlier work. See, e.g., Plaintiphobia, supra note 19, at 951 & n.12. Subsequent investigation, however, leads us now to think that many of these appeals are really defendant appeals in which the clerk has mistakenly listed as appellant the first-named party in the appellate case's caption (always the plaintiff under current rules). One strong piece of evidence is that these appeals are geographically segregated, coming by far most frequently from the Fifth Circuit. Moreover, the reversal rate for this special category of appeals is virtually identical to the defendants' reversal rate. See Eisenberg, supra note 22, at 3 n.5, 21–23.

If instead of discarding this special category of appeals we were somehow to treat it, either as plaintiff appeals from a larger body of masked plaintiff losses or as mislabeled defendant appeals, the effect would likely be to raise the defendants' appeal rate.

[24]Because our district court and appellate court termination data for these purposes come from calendar year 1988 (the first year linkage became fully possible) through fiscal year 2000 (the

Figure 10: Appeal rates from trial losses, for plaintiffs and defendants, in employment discrimination and other civil cases, 1988–1998, U.S. courts of appeals.



NOTE: This graph compares appeal rates from trials, combining judge and jury trials. Plaintiffs appeal more, and employment discrimination litigants appeal more. Jury trials are identified as those case whose procedural progress was coded as 7 or 9 (termination during or after jury trial). Judge trials are identified as those cases whose method of disposition was coded as 9 (judgment on court trial).

SOURCE: Our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying notes 22–24.

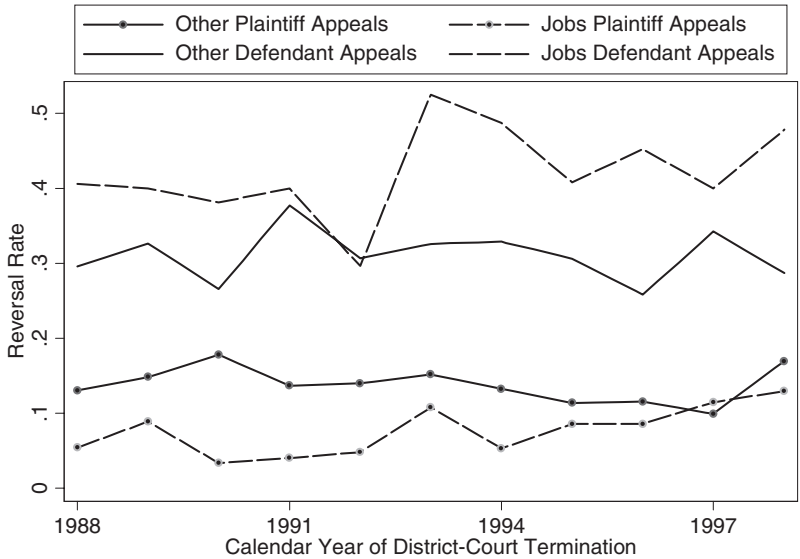
We define the *appeal rate* as the percentage of those cases terminated in the district court (by pretrial adjudication or at trial), with a judgment expressly for plaintiff or defendant, in which the appellate court issues a decisive outcome on the merits.[25]

last year for which these data are available), the data from the last three months of calendar year 2000 are not included.

Because some of the district court judgments late in our sample period did not have sufficient time to mature into an appellate outcome included in the sample, our overall appeal rates are slightly understated. In our year-by-year results, this data censoring becomes a more serious problem, so that in Figures 10 and 11 we present results only through 1998.

[25]We do not count as appeals the cases in which an appeal is docketed but no decisive outcome is reached on appeal, which is often because the case settles. A substantial number of appeals terminate without a decisive outcome, and in fact these dropped appeals are very often appeals

Figure 11: Reversal rates on appeals from trial losses, for plaintiffs and defendants, in employment discrimination and other civil cases, 1988–1998, U.S. courts of appeals.



NOTE: This graph compares reversal rates from trials, combining judge and jury trials. The defendant-plaintiff differential in reversal rates is much more extreme in employment discrimination cases than in other cases. Jury trials are identified as those case whose procedural progress was coded as 7 or 9 (termination during or after jury trial). Judge trials are identified as those cases whose method of disposition was coded as 9 (judgment on court trial).

SOURCE: Our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying notes 22–24.

By far, as shown in Table 3, most appeals in federal employment discrimination cases are appeals by plaintiffs. This fact mainly reflects that plaintiffs suffer most of the losses at the district court level. That is, although the defendants' appeal rate is not far below the plaintiffs' appeal rate, espe-

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by defendants. Although defendants might appeal more often than plaintiffs and thus are somewhat less selective about the cases they appeal (e.g., in our sample defendants initiated appeals from 43.55 percent of their trial losses, while plaintiffs pursued 32.59 percent), fewer of their appeals result in a decisive outcome (the analogous numbers become 12.35 percent and 18.88 percent). That is, defendants drop more appeals than do plaintiffs, so that a smaller percentage of defendant losses conclude in a decisive appellate outcome. For our purposes, then, defendants exhibit a lower appeal rate than plaintiffs. See Plaintiphobia, supra note 19, at 951–52; Eisenberg, supra note 22, at 4–6.

Table 3: Appeal Rates (and Numbers), in Employment Discrimination Cases, by Decisional Stage, 1988–2000, U.S. Courts of Appeals

Decisional Stage	*Cases Appealed After Plaintiffs' Wins % (# Appeals/# Wins)*	*Cases Appealed After Defendants' Wins % (# Appeals/# Wins)*	*Total % (# Appeals/# Wins)*
Pretrial	3.63 (35/964)	20.29 (6,243/30,770)	19.78 (6,278/31,734)
Trial	12.35 (421/3,410)	18.88 (1,424/7,542)	16.85 (1,845/10,952)
Total	10.43 (456/4,374)	20.01 (7,667/38,312)	19.03 (8,123/42,686)

NOTE: The second column of this table shows the defendants' decisive appeals from decisive adjudications below, with defendants unlikely to appeal the solid plaintiff wins by pretrial adjudication, but much more likely to appeal plaintiff wins at trial. The third column shows the plaintiffs' appeals, with plaintiffs appealing in much greater absolute numbers than defendants. Pretrial adjudication is identified as those cases whose method of disposition was coded as 6. "Trials" combines jury and judge trials. Jury trials are identified as those case whose procedural progress was coded as 7 or 9 (termination during or after jury trial). Judge trials are identified as those cases whose method of disposition was coded as 9 (judgment on court trial).

SOURCE: Our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying notes 22–24.

cially after trial, in absolute numbers, plaintiffs' appeals (7,667) are 17 times more frequent than defendants' appeals (456).

Figure 10 shows that both defendants' and plaintiffs' appeal rates are higher in employment discrimination cases than in other cases. That is, the employment discrimination category continues on appeal to be a heavily litigated set of cases.

We define the *reversal rate* as the percentage of those appeals reaching a decisive outcome that emerge as reversed rather than affirmed. We define the appellate outcome of "reversed" as comprising the three codes for reversed, remanded, and affirmed in part and reversed in part, while we narrowly define "affirmed" as comprising only the codes for affirmed and dismissed on the merits. One can then readily calculate a defendants' reversal rate and a plaintiffs' reversal rate.

In employment discrimination cases, the clear fact is that the defendants' reversal rate far exceeds the plaintiffs' reversal rate.[26] That is, the

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[26]See also Plaintiphobia, supra note 19, at 957–59 (treating civil rights cases); Kevin M. Clermont & Theodore Eisenberg, Judge Harry Edwards: A Case in Point!, 80 Wash. U. L.Q. 1275 (2002) (defending our results) [hereinafter Edwards].

Table 4: Reversal Rates (and Numbers), in Employment Discrimination Cases, by Decisional Stage, 1988–2000, U.S. Courts of Appeals

Decisional Stage	*Cases Appealed After Plaintiffs' Wins %* *(# Reversals/# Appeals)*	*Cases Appealed After Defendants' Wins %* *(# Reversals/# Appeals)*	*Total %* *(# Reversals/# Appeals)*
Pretrial	54.29 (19/35)	10.72 (669/6,243)	10.96 (688/6,278)
Trial	41.81 (176/421)	7.51 (107/1,424)	15.34 (283/1,845)
Total	42.76 (195/456)	10.12 (776/7,667)	11.95 (971/8,123)

NOTE: The second column of this table shows the defendants' decisive appeals, with defendants doing very well in obtaining reversals from decisive adjudications below. The third column shows the plaintiffs' appeals, with plaintiffs appealing in much greater absolute numbers than defendants, but doing quite badly on appeal. Pretrial adjudication is identified as those cases whose method of disposition was coded as 6. "Trials" combines jury and judge trials. Jury trials are identified as those case whose procedural progress was coded as 7 or 9 (termination during or after jury trial). Judge trials are identified as those cases whose method of disposition was coded as 9 (judgment on court trial).

SOURCE: Our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying notes 22–24.

appellate courts reverse plaintiffs' wins below far more often than defendants' wins. As shown in Table 4, this differential prevails for appeals from wins at the pretrial stage (54 percent to 11 percent), and it becomes somewhat more pronounced for appeals from wins at the trial stage (42 percent to 8 percent). These differentials are highly statistically significant. This sort of differential also appears in studies looking at case files and the like, as opposed to bare Administrative Office data.[27]

Figure 11 shows that the advantage of defendants on appeal prevails in other cases, too. This effect appears in almost all case categories, which show 31 percent for the defendants' reversal rate and 14 percent for the

[27]See, e.g., Edwards, supra note 26, at 1281–84; Ruth Colker, Winning and Losing Under the Americans with Disabilities Act, 62 Ohio St. L.J. 239 (2001) (confirming, by an in-depth consideration of ADA employment discrimination opinions on Westlaw, the defendants' advantage on appeal that the author had earlier reported from bare outcome data); Lynne Liberato & Kent Rutter, Reasons for Reversal in the Texas Courts of Appeal, 44 S. Tex. L. Rev. 431, 458 (2003) (showing similar results to ours, in a comprehensive study of a year's appellate decisions in one state's courts, including a defendant-plaintiff differential in reversal rates for employment cases of 52 percent to 20 percent).

plaintiffs' reversal rate from trial losses in other cases.[28] But the 42 percent to 8 percent spread in employment discrimination cases between defendants' and plaintiffs' reversal rates is much more extreme, with defendants doing better and plaintiffs doing worse than other litigants.

B. Specific Story: Anti-Plaintiff Effect

The critical point here is that the data show defendants succeeding more than plaintiffs on appeal, and much more so in employment discrimination cases. Indeed, from the perspective of a plaintiff victorious after trial in an employment discrimination case, the appellate process offers a chance of retaining victory that cannot meaningfully be distinguished from a coin flip.[29] Meanwhile, a defendant victorious after trial can rest secure in retaining that victory after appeal. Thus, defendants, in sharp contrast to plaintiffs, emerge from the appellate court in a much better position than when they left the district court. In short, we think we have unearthed a troublesome *anti-plaintiff effect* in federal appellate courts.

That the relatively few trial victories for plaintiffs in employment discrimination cases are especially vulnerable on appeal is more startling in light of the nature of these cases and the applicable standard of review. The vast bulk of employment discrimination cases turn on intent, and not on disparate impact, as Donohue and Siegelman have shown.[30] The subtle question of the defendant's intent is likely to be the key issue in a nonfrivolous employment discrimination case that reaches trial, putting the credibility of witnesses into play. When the plaintiff has convinced the factfinder of the defendant's wrongful intent, that finding should be largely immune from appellate reversal, just as defendants' trial victories are largely immune from reversal. Thus, reversal of plaintiffs' trial victories in employment discrimination cases should be unusually uncommon. Yet we find the opposite.

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[28]The story of appeals was told in comparison to other case categories by Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals, 7 Employee Rts. & Emp. Pol'y J. (forthcoming 2004) (using somewhat different definitions of pretrial and trial); see also Plaintiphobia, supra note 19 (treating all civil cases); Edwards, supra note 26 (defending our results).

[29]See Plaintiphobia, supra note 19, at 957–58.

[30]See John J. Donohue III & Peter Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 989, 998 & n.57 (1991).

As to the best explanation of the anti-plaintiff effect, we have argued elsewhere that an attitudinal explanation is most persuasive.[31] We think that the defendants' higher reversal rate stems from real but hitherto unappreciated differences between appellate and district courts. Both descriptive analyses of the results and more formal regression models tend to dispel explanations based solely on selection of cases, and instead support an explanation based on appellate judges' attitudes toward trial court level adjudicators. The appellate judges may be acting on their perceptions of the district courts being pro-plaintiff. The appellate court consequently would be more favorably disposed to the defendant than are the lower court judge and the jury.[32]

This appellate favoritism would be appropriate if the district courts were in fact biased in favor of the plaintiff. Yet employment discrimination plaintiffs constitute one of the least successful classes of plaintiffs at the district court level, in that they fare worse there than almost any other category of civil case.[33] In this case category, the plaintiffs win a very small percentage of their actions. So if district courts were biased in favor of employment discrimination plaintiffs, and still are producing such a low plaintiff win rate, the district courts must be starting with a class of cases truly abysmal for plaintiffs. More likely, district courts process employment discrimination cases with a neutral or even jaundiced eye toward plaintiffs.[34] Indeed, as

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[31]See Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage, 3 Am. L. & Econ. Rev. 125 (2001) [hereinafter Defendants' Advantage]; Kevin M. Clermont & Theodore Eisenberg, Anti-Plaintiff Bias in the Federal Appellate Courts, 84 Judicature 128 (2000); Plaintiphobia, supra note 19; Realities, supra note 2, at 150–54; Edwards, supra note 26.

[32]Alternatively, unconscious biases may be at work. Perhaps appellate judges' greater distance from the trial process creates an environment in which it is easier to discount harms to the plaintiff. See Stanton Wheeler, Bliss Cartwright, Robert A. Kagan & Lawrence M. Friedman, Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970, 21 Law & Soc'y Rev. 403, 409 (1987). In this event, the data on appellate leaning in favor of the defendant remain a cause for concern.

[33]See supra Part II and Appendix; Jury/Judge, supra note 17, at 1175.

[34]See Realities, supra note 2, at 144–47; cf. Valerie P. Hans & Stephanie Albertson, Empirical Research and Civil Jury Reform, 78 Notre Dame L. Rev. 1497, 1506–09 (2003) (discussing evidence of anti-plaintiff sentiment among jurors); Valerie P. Hans & Nicole Vadino, Whipped by Whiplash? The Challenges of Jury Communication in Lawsuits Involving Connective Tissue Injury, 67 Tenn. L. Rev. 569, 572–73 (2000) (discussing evidence of anti-plaintiff sentiment among the public).

empirical evidence accumulates in refutation of district court pro-plaintiff bias on the plaintiff/defendant axis,[35] appellate judges' perceptions of district court bias appear increasingly to be misperceptions.

To the extent the plaintiffs' disadvantage on appeal rests on appellate court misperceptions of district court pro-plaintiff leanings, one might expect the disadvantage to be strongest in cases systematically involving underdogs as plaintiffs, where appellate court suspicion of district court sympathy might be at its maximum. The very high defendant-plaintiff differential in reversal rates for other civil-rights-type cases that we have observed thus reinforces the likelihood of anti-plaintiff appellate bias as an explanation.[36] These cases share a near-systematic feature of underdog plaintiffs.[37] Moreover, civil-rights-type cases include many discrimination, police misconduct, and First Amendment issues that may ultimately depend on the motives of official decisionmakers,[38] and this factor may create similar biases.

What is the best counterargument to our attitudinal explanation of the anti-plaintiff effect? It would be that these kinds of plaintiffs start with weak cases and then present them less effectively than the defendants. As we have repeatedly said, however, we see no empirical basis for inferring such a difference between these plaintiffs and defendants, even though one might initially picture these plaintiffs as prone to fight the valiant-though-losing-battle as a form of protest. They face much the same economic incentives as other litigants. For plaintiffs and their attorneys, those incentives should discourage weak claims. Indeed, as many studies show, people are not very

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[35]See Realities, supra note 2, at 144–47.

[36]See Clermont, Eisenberg & Schwab, supra note 28.

[37]See, e.g., Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 454 (1978) (federal judge noting: "Except in those rare instances when the party injured is the white, middle-class victim of police mistake, the section 1983 plaintiff is likely to be black or Puerto Rican, poor, disheveled, a felon, and often a drug addict.").

[38]See Theodore Eisenberg & Sheri Lynn Johnson, The Effects of Intent: Do We Know How Legal Standards Work?, 76 Cornell L. Rev. 1151, 1164–65 (1991); Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719, 735 (1988).

ready to sue except in egregious situations.[39] The pool of employment discrimination claims might therefore be overpopulated by strong rather than weak claims.

Moreover, even if employment discrimination plaintiffs are flooding the district courts with weak cases, those stalwart few who make it through pretrial, through settlement, and then through to trial victory should at the least have relatively strong cases.[40] These are cases that survived the pretrial screening and so are nonfrivolous cases with a genuine factual issue. The settlement-litigation process should weed out the lopsided cases, leaving a pool of claims comprising mainly close cases. Yet these tried cases exhibit a more extreme anti-plaintiff effect on appeal than do pretrial cases. This result is strongly inconsistent with any weak-cases-produce-extreme-reversal-rates argument.

Similarly worth noting, the closing gap over time between employment discrimination plaintiffs and other plaintiffs in trial win rates (Figure 7) does not appear in appeal reversal rates (Figure 11). If employment discrimination plaintiffs are learning from their trial failures and acting more like other plaintiffs in their case selection, then we would expect the defendant-plaintiff differential on appeal to diminish. But it has not.

Finally, our prior research found the anti-plaintiff effect on appeal prevails even between corporate parties.[41] Also, the anti-plaintiff effect exists separate from any "repeat-player haves"/"one-shot have nots" effect between opponents, as neither governmental litigants nor corporate litigants fared much differently from nongovernmental, noncorporate litigants in reversal rates.[42] That is, although there might be a "repeat-player haves"/"one-shot have nots" effect, there is a more important anti-plaintiff effect. When the "one-shot have nots" are the plaintiffs, that effect conjoins with the usual anti-plaintiff effect. The result is a defendant-plaintiff differential of extraordinary magnitude in employment discrimination cases.

Nevertheless, it bears stressing that we have never claimed that our attitudinal explanation is irrefutable. We are looking at output data, after all;

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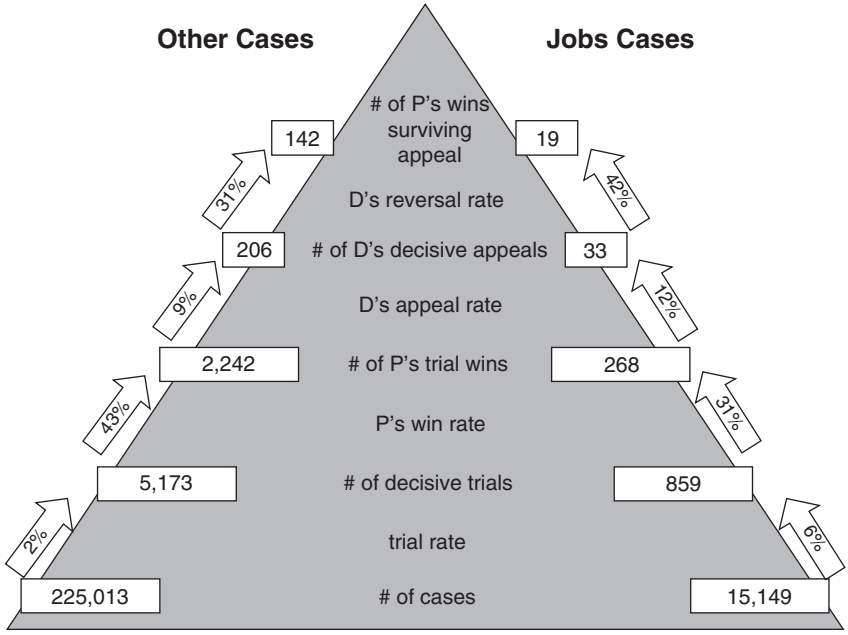
[39]See, e.g., David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72 (1983).

[40]See Realities, supra note 2, at 137–42.

[41]See Defendants' Advantage, supra note 31, at 136–38.

[42]Id. at 138, 148–49, 157; Plaintiphobia, supra note 19, at 956–57, 970.

Figure 12: Litigation pyramid, for employment discrimination and other civil cases, yearly average during 1988–2000, U.S. courts.



NOTE: This figure tells a tough tale: at every stage of the litigation pyramid, employment discrimination plaintiffs do worse than other plaintiffs—they have to go to trial more often because they are less likely to obtain a favorable early disposition; they win those trials less often; they face proportionately more appeals from those wins; they suffer proportionately more reversals of those wins. More particularly, this figure shows for an average year the number of cases terminated; the number of trials, whether by jury or judge, that resulted in a judgment expressly for plaintiff or defendant—a jury trial includes any case for which the procedural progress variable has a value of 7 or 9 (termination during or after a jury trial), and a judge trial is defined as any case for which the method of disposition variable has a value of 9 (judgment on court trial); and the number of appeals that came to a decisive outcome on the merits.

SOURCE: Administrative Office data, as described in text accompanying notes 1–4, and our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying notes 22–24.

and by making appropriate assumptions about the input, one can produce any particular pattern in the output data. Thus, weak cases pushed by overly litigious plaintiffs, who also appeal too readily, will mathematically result in a higher reversal rate for defendants, and so could produce the look of an anti-plaintiff effect in reversal rates even before perfectly neutral courts.

We repeat that we see no empirical basis for inferring such a difference between plaintiffs' and defendants' behavior. Moreover, even assuming

that plaintiff-defendant differences explain the anti-plaintiff pattern seen on appeal in other case categories, employment discrimination cases stand out so sharply in this regard that one simply has to resort in part to an attitudinal explanation. As shown in research now underway,[43] no reasonable assumptions as to case strength, appeal rates, and judicial accuracy would produce the observed pattern.

Therefore, rather than yielding to the intuitive attraction of the view that employment discrimination plaintiffs are overly litigious, we tentatively conclude that appellate judges are acting as if it is they who accept that view. Their resulting attitude then produces at least some of the anti-plaintiff effect that we observe.

Study of appeals is thus critical to understanding employment discrimination litigation. One can easily see that these plaintiffs do not do well in the lower courts, but it is difficult to say why.[44] One can, with more effort, see that these plaintiffs do not do well in the appellate courts, and here one can somewhat more solidly conclude that judicial bias is at play. The anti-plaintiff effect on appeal raises the specter that appellate courts have a double standard for employment discrimination cases, harshly scrutinizing employees' victories below while gazing benignly at employers' victories.

V. Conclusion

Employment discrimination plaintiffs must swim against the tide—at pretrial, trial, and appeal. This article has told the sad stories for these three stages. We can combine those stories into one view of the litigation pyramid. Figure 12 is worth a thousand words.

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[43]See Eisenberg, supra note 22, at 16–23.

[44]See Selmi, supra note 18.

Appendix: Range of Information Concerning Employment Discrimination Cases from Administrative Office Data, 1979–2000

Data/Cases	*All Jobs*	*Pre-1992 Jobs*	*Post-1991 Jobs*	*All Nonjobs*	*Torts & Contracts*
Number	265,356	102,847	162,509	4,810,772	1,432,626
(% of all cases)	(5.23)	(3.59)	(7.34)	(94.77)	(28.22)
Origin					
Original %	85.42	89.48	82.85	83.48	70.79
Removed %	9.28	4.30	12.43	9.90	19.45
Transferred %	0.93	1.04	0.86	1.57	2.13
Other %	4.37	5.19	3.86	5.04	7.62
Amount demanded					
Mean in $	1,288,047	1,045,554	1,468,984	958,398	1,183,304
Median in $	250,000	150,000	300,000	50,000	100,000
Pro se (#)	(49,878)	recently added code		(522,706)	(144,789)
Neither party %	79.40			71.15	95.51
Plaintiff %	19.80			25.95	3.15
Defendant %	0.58			2.55	1.17
Both parties %	0.21			0.35	0.17
Arbitration					
Exempt #	1,914	recently added code		27,247	6,303
Mandatory referral #	521			11,563	6,725
Voluntary referral #	509			3,314	1,625
Class action					
No allegation %	97.55	95.79	99.62	99.07	99.33
Denied %	2.12	3.68	0.29	0.77	0.59
Certified %	0.33	0.53	0.09	0.16	0.09
Docket time—mean in days	454	524	410	354	439
Procedural progress					
Early %	37.48	40.53	35.55	59.05	49.18
Middle %	52.87	44.36	58.25	37.06	44.57
Trial %	9.65	15.11	6.20	3.89	6.25
Disposition method					
Settled %	69.10	67.20	70.31	68.05	71.09
Nontrial adjudication %	19.24	16.63	20.89	19.13	8.73
Trial adjudication %	8.36	13.00	5.42	3.17	4.88
Other disposition %	3.30	3.17	3.38	9.65	15.29
Jury trials—as % of judge and jury trials	46.21	28.82	72.31	55.64	69.15
Win rate					
Overall %	16.71	21.43	12.99	52.90	62.42
Pretrial adjudication %	4.23	7.55	2.43	22.23	32.62
Jury trial %	37.77	37.48	37.94	44.82	50.48
Judge trial %	19.29	18.92	20.68	45.91	58.76
Nature of judgment					
Damages %	46.33	47.67	44.6	52.97	68.73
Damages & other %	19.37	14.14	26.18	12.81	14.75
Injunction %	3.27	4.57	1.58	2.14	0.60
Miscellaneous %	31.03	33.62	27.64	32.08	15.92

Appendix: Continued

Data/Cases	*All Jobs*	*Pre-1992 Jobs*	*Post-1991 Jobs*	*All Nonjobs*	*Torts & Contracts*
Amount awarded					
Mean in $	751,637	626,358	889,182	575,294	827,323
Median in $	40,000	25,000	70,000	75,000	43,000

NOTE: This table shows the sort of information readily available from governmental data. The columns present the jobs data, and then split them up into the periods before and after the Civil Rights Act of 1991; for comparison purposes, the last two columns give the comparable data for all other cases and then for the 13 sizable torts and contracts categories with a clear jury/judge choice studied, and specified, in Jury/Judge, supra note 17, at 1135–37. The rows treat matters that include the case's **origin** in the district, whether original or removed or transferred or whether from some other source (which would include such unusual events as a case being reopened), as studied in Kevin M. Clermont & Theodore Eisenberg, Exorcising the Evil of Forum-Shopping, 80 Cornell L. Rev. 1507, 1512, 1528–29 (1995), and Kevin M. Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction, 83 Cornell L. Rev. 581, 593–95 (1998); **amount**, as studied in Theodore Eisenberg & Margo Schlanger, supra note 2, at 1489–90; the **docket time** from filing to termination in the district court, as studied in Theodore Eisenberg & Kevin M. Clermont, Trial by Jury or Judge: Which Is Speedier?, 79 Judicature 176, 177 (1996); the **procedural progress**, or stage, of the case at the time of termination, as studied in Kevin M. Clermont & Theodore Eisenberg, Xenophilia in American Courts, 109 Harv. L. Rev. 1120, 1136–37 (1996) (explaining that "early" means termination before filing of an answer or before any significant court action; "trial" describes where judgment is entered during or after trial; and "middle" comprises the other codes); and the **disposition method**, or procedural device utilized to dispose of the case, as explained supra note 14. For **jury and judge trials** and **win rate**, we used the procedural progress codes of 7 and 9—termination during and after jury trial—to define jury trial usage, but we used the disposition method code of 9—judgment on court trial—to define judge trial usage; pretrial adjudication means a disposition method code of 6.

SOURCE: Administrative Office data, as described in text accompanying notes 1–4.