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How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals

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I. INTRODUCTION

Employment-discrimination plaintiffs swim against the tide. Compared to the typical plaintiff, they win a lower proportion of cases during pretrial and after trial.[1] Then, many of their successful cases are

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1. *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 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

appealed. On appeal, they have a harder time in upholding their successes, as well in reversing adverse outcomes.

This tough story 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.[2]

In this article, we use official government data to describe the appellate phase of this important segment of federal litigation. After describing the database, the text tells the appellate story for employment-discrimination actions through graphs and tables,[3] with some general observations followed by a specific lesson.

II. DATA

From data gathered by the Administrative Office of the United States Courts, 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).[4] When any civil case terminates in a federal district court or court of appeals, the court clerk transmits to the Administrative Office a form containing information about the case. The forms include 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,

distorted, and while there are large numbers of employment discrimination suits . . . these suits are far too difficult, rather than easy, to win.

2. *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).

3. *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.").

4. *See* ADMIN. OFFICE OF THE U.S. COURTS, CIVIL STATISTICAL REPORTING GUIDE (1999); 11 ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICIES AND PROCEDURES transmittal 64, at II-18 to -28 (Mar. 1, 1985) (district court); 11 ADMIN. 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).

who prevailed. Thus, the computerized database, compiled from these forms, contains all of the millions of federal civil cases over many years from the whole country.

Inevitably, these data do not reveal all the things one would like to know.[5] 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 trial 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 Administrative 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 ninety category codes: code no. 442, "Civil Rights: Jobs" or "Employment," which includes mainly Title VII actions, but also ADA, § 1983, ADEA, § 1981, and FMLA actions. Only around fiscal year 1970, following the tremendous increase in civil rights actions in the 1960s,[6] did the Administrative Office create a separate category for civil rights actions concerning employment, this code no. 442.

Using our data set previously constructed by linking docket numbers in the Administrative Office's civil data from federal district courts and the federal courts of appeals,[7] we can trace developments in cases after district court judgments formally for one side, plaintiff or defendant, that the other side puts on the appellate court docket.[8]

5. 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*].

6. *See* 1971 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 120.

7. *See* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 950-51 [hereinafter *Plaintiphobia*]. For this present article, we extended the data set through fiscal year 2000.

8. 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 judgments for plaintiff had a dissatisfied plaintiff as the named appellant. So, we simply discarded appeals from judgments for plaintiff in which the plaintiff was the named

Because it is clearer to speak in terms of calendar years rather than fiscal years, we present data from calendar years 1987 through 2000.[9]

III. OVERALL PICTURE: APPEAL AND REVERSAL RATES

We define the *appeal rate* as the fraction of those cases terminated in the trial court (during pretrial or after trial[10]), with a judgment expressly for plaintiff or defendant, in which the appellate court issues a decisive outcome on the merits.[11]

As shown in Display 1, most appeals in federal employment-discrimination cases are appeals by plaintiffs. This fact reflects that plaintiffs suffer most of the losses at the district court level. That is, defendants' and plaintiffs' appeal rates are fairly similar, especially after trial, but in absolute numbers plaintiffs' appeals (8,599) are fifteen times more frequent than defendants' appeals (571).

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.*, Clermont & Eisenberg, *Plaintiphobia*, *supra* note 7, 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. If we were somehow to treat rather than discard this special category of appeals, the effect would likely be to raise the defendants' appeal rate.

9. Because we constructed our linked district-appeals data set with only the data from calendar year 1987 (the year linkage became possible) through fiscal year 2000, the data from the last three months of calendar year 2000 are not included.

10. We distinguish pretrial from trial by defining "trial" as bearing Administrative Office's procedural progress code of 8 or 9.

11. 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 heavily appeals by defendants. Although defendants might appeal more often than plaintiffs and thus are somewhat less selective about the cases they appeal (for example, in our sample defendants initiated appeals from 43.99% of their trial losses, while plaintiffs pursued 32.01%), fewer of their appeals result in a decisive outcome (the analogous numbers become 12.83% and 18.27%). 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* Clermont & Eisenberg, *Plaintiphobia*, *supra* note 7, at 951-52.

Because of data censoring problems early and late in our sample period, our appeal rates are slightly understated.

DISPLAY 1

Appeal Rates (and Numbers), in Employment-Discrimination Cases, by Decisional Stage, 1987-2000, U.S. Courts of Appeals.

DECISIONAL STAGE	CASES APPEALED AFTER PLAINTIFFS' WINS % (no. appeals/no. wins)	CASES APPEALED AFTER DEFENDANTS' WINS % (no. appeals/no. wins)	TOTAL % (no. appeals/no. wins)
Pretrial	2.95 (123/4,175)	19.70 (7,217/36,626)	17.99 (7,340/40,801)
Trial	12.83 (448/3,492)	18.27 (1,382/7,566)	16.55 (1,830/11,058)
Total	7.45 (571/7,667)	19.46 (8,599/44,192)	17.68 (9,170/51,859)

The second column shows the defendants' appeals, with defendants unlikely to appeal the solid plaintiff wins at the pretrial stage, but much more likely to appeal plaintiff wins after the trial stage. The third column shows the plaintiffs' appeals, with plaintiffs appealing in much greater absolute numbers than defendants. Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying note 7.

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 federal employment-discrimination cases, the clear fact is that

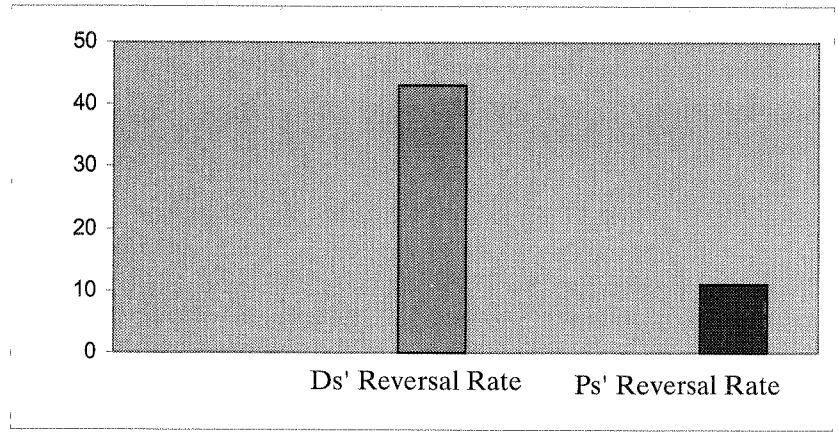
the defendants' reversal rate far exceeds the plaintiffs' reversal rate.[12] That is, the appellate courts reverse plaintiffs' wins below far more often than defendants' wins. As shown in Displays 2 and 3, this difference prevails for appeals from wins at the pretrial stage (42 percent to 11 percent), and it becomes somewhat more pronounced for appeals from wins after the trial stage (42 percent to 7 percent). These differences are highly statistically significant. This sort of difference also appears in studies looking at case files and the like, as opposed to bare Administrative Office data.[13]

12. *See also* Clermont & Eisenberg, *Plaintiphobia*, *supra* note 7, 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 results) [hereinafter *Edwards*].

13. *See, e.g.*, Clermont & Eisenberg, *Edwards*, *supra* note 12, 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 anti-plaintiff effect on appeal that the author had earlier reported from bare outcome data).

DISPLAY 2

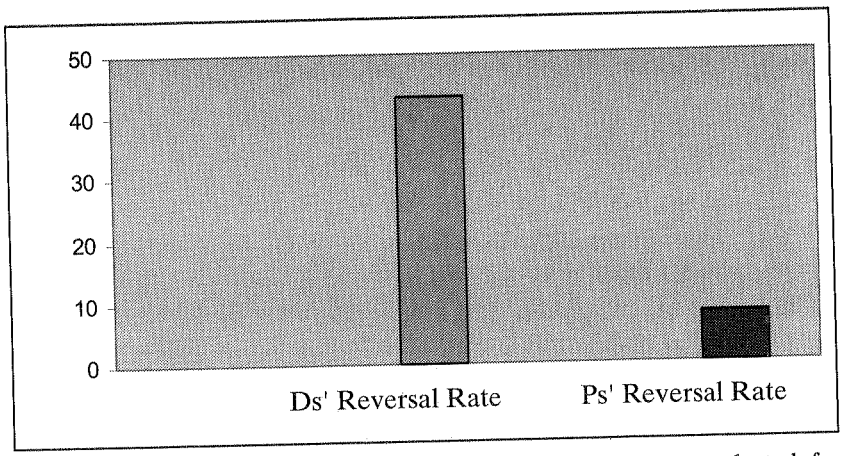
Reversal Rates, in Employment-Discrimination Cases Decided at Pretrial Stage, 1987-2000, U.S. Courts of Appeals.



This bar graph shows the dramatically greater success that defendants enjoy in appealing plaintiffs' wins at the pretrial stage (42.28 percent), relative to the plaintiffs' success in overturning their losses (10. 66 percent). Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying note 7.

DISPLAY 3

Reversal Rates, in Employment-Discrimination Cases Decided After Trial, 1987-2000, U.S. Courts of Appeals.



This bar graph shows the dramatically greater success that defendants enjoy in appealing plaintiffs' wins after trial (42.19 percent), relative to the plaintiffs' success in overturning their losses (6.87 percent). Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying note 7.

IV. SPECIFIC STORY: ANTI-PLAINTIFF EFFECT

Observation. The critical point here is that the data show defendants succeeding more than plaintiffs on appeal. Indeed, from the perspective of a plaintiff victorious after trial, the appellate process offers a chance of retaining victory that cannot meaningfully be distinguished from a coin flip.[14] 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 trial court. In short, we think we have unearthed an *anti-plaintiff effect* in federal appellate courts that is troublesome.

This anti-plaintiff effect appears in almost all case categories,

14. *See* Clermont & Eisenberg, *Plaintiphobia*, *supra* note 7, at 957-58.

which overall show 33 percent for the defendants' reversal rate for trial decisions and 12 percent for the plaintiffs' reversal rate.[15] But our interest here is employment-discrimination cases. Do federal employment-discrimination plaintiffs, relative to their opponents, fare better or worse on appeal than contracts plaintiffs? torts plaintiffs? trademark plaintiffs? ERISA plaintiffs? prisoners in civil rights cases or in habeas cases? The simple answer is that employment-discrimination cases, along with other civil-rights-type cases, show the anti-plaintiff effect in as extreme a form as one sees.

Look first at tried cases across the country. Display 4 shows the defendants' reversal rate in employment-discrimination cases as the second-highest of all the case categories. Display 5 shows the plaintiffs' reversal rate as the third-lowest of all the case categories. Display 6 combines the results of these two displays to show the civil rights cases grouped at the top, clearly separated from all other categories, in showing the highest defendant-plaintiff difference that we call the anti-plaintiff effect.

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.[16] That is, 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.

15. *See also Clermont & Eisenberg, Plaintiphobia*, *supra* note 7 (treating all civil cases); Clermont & Eisenberg, *Edwards*, *supra* note 12 (defending results). In the coming displays, we separately present the twenty-three sizable case categories that contained a sufficient number of cases showing a decisive outcome on appeal, but we then lumped all the other small categories of cases into a twenty-fourth catch-all group of Others.

16. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989, 998 & n.57 (1991).

DISPLAY 4

Reversal Rates for Defendants' Appeals from Plaintiffs' Wins, in Civil Cases Decided After Trial, by Case Category, 1987-2000, U.S. Courts of Appeals.

RANK		CASE CATEGORY	DEFENDANTS' REVERSAL RATE %	DEFENDANTS' APPEALS no.
1	440	Other Civil Rights	50.33	302
2	**442**	**Jobs**	**42.19**	**448**
3	550	Prisoner Civil Rights	42.05	88
4	850	Securities, Commodities	36.36	44
5	362	Medical Malpractice	36.11	36
6		Product Liability	34.92	189
7	791	ERISA	34.21	76
8	890	Other Statutory Actions	33.68	95
9	710	Fair Labor Standards Act	32.65	49
10	370	Fraud	32.43	37
11	530	Habeas Corpus	31.82	22
12	120	Marine Contracts	31.82	44
13	110	Insurance Contracts	28.43	204
14	360	Other Personal Injury	28.17	252
15		Others	26.96	382

(Table continued on next page)

16	350	Motor Vehicle	26.47	68
17	720	Labor/Management	26.32	38
18	190	General Contracts	26.25	541
19	870	Tax Suits	25.49	51
20	790	Other Labor Litigation	25.00	40
21	340	Marine Torts	25.00	60
22	840	Trademark	24.49	49
23	140	Negotiable Instruments	20.75	53
24	330	FELA	20.59	34
		ALL TRIAL DECISIONS	32.79	3,202

This table shows the defendants' reversal rate in employment-discrimination cases as the second-highest of all the cases categories. The Product Liability category includes the Administrative Office's eight product liability categories (nos. 195, 245, 315, 345, 355, 365, 368, and 385). The Others category here combines those categories that had too few cases to be properly included as a separate category. Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompany note 7.

DISPLAY 5

Reversal Rates for Plaintiffs' Appeals from Defendants' Wins, in Civil Cases Decided After Trial, by Case Category, 1987-2000, U.S. Courts of Appeals.

RANK		CASE CATEGORY	PLAINTIFFS' REVERSAL RATE %	PLAINTIFFS' APPEALS no.
1	140	Negotiable Instruments	37.50	16
2	850	Securities, Commodities	26.67	60
3	370	Fraud	25.71	35
4	840	Trademark	24.39	41
5	890	Other Statutory Actions	22.44	156

(Table continued on next page)

6	710	Fair Labor Standards Act	20.37	54
7		Others	19.07	535
8	120	Marine Contracts	18.75	48
9	870	Tax Suits	17.86	84
10	110	Insurance Contracts	17.65	289
11	190	General Contracts	17.37	426
12	791	ERISA	15.62	128
13	790	Other Labor Litigation	15.56	45
14	440	Other Civil Rights	13.98	901
15		Product Liability	12.68	339
16	340	Marine Torts	12.50	128
17	330	FELA	12.07	58
18	720	Labor/Management Relations	11.90	42
19	360	Other Personal Injury	11.14	359
20	362	Medical Malpractice	10.49	143
21	350	Motor Vehicle	08.15	184
22	**442**	**Jobs**	**06.87**	**1,382**
23	530	Habeas Corpus	06.15	130
24	550	Prisoner Civil Rights	05.75	1,201
	ALL TRIAL DECISIONS		11.85	6,784

This table shows the plaintiffs' reversal rate in employment-discrimination cases as the third-lowest of all the case categories. The Product Liability category includes the Administrative Office's eight product liability categories (nos. 195, 245, 315, 345, 355, 365, 368, and 385). The Others category here combines those categories that had too few cases to be properly included as a separate category. Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying note 7.

DISPLAY 6

Defendant-Plaintiff Differences in Reversal Rates, in Civil Cases Decided After Trial, by Case Category, 1987-2000, U.S. Courts of Appeals.

RANK		CASE CATEGORY	DEFDENDANT-PLAINTIFF DIFFERENCE IN REVERSAL RATES
1	440	Other Civil Rights	36.35
2	550	Prisoner Civil Rights	36.30
3	**442**	**Jobs**	**35.32**
4	530	Habeas Corpus	25.67
5	362	Medical Malpractice	25.62
6	720	Labor/Management	24.42
7		Product Liability	22.24
8	791	ERISA	18.59
9	350	Motor Vehicle	18.32
10	360	Other Personal Injury	17.03
11	120	Marine Contracts	13.07
12	340	Marine Torts	12.50
13	710	Fair Labor Standards Act	12.28
14	890	Other Statutory Actions	11.24
15	110	Insurance Contracts	10.78
16	850	Securities, Commodities	9.69
17	790	Other Labor Litigation	9.44
18	190	General Contracts	8.88
19	330	FELA	8.50

(Table continued on next page)

20		Others	7.89
21	870	Tax Suits	7.63
22	370	Fraud	6.72
23	840	Trademark	0.10
24	140	Negotiable Instruments	-16.75
		ALL TRIAL DECISIONS	20.94

This table shows the civil-rights-type cases grouped at the top for the defendant-plaintiff difference, or the anti-plaintiff effect, clearly separated from all other categories. The Product Liability category includes the Administrative Office's eight product liability categories (nos. 195, 245, 315, 345, 355, 365, 368, and 385). The Others category here combines those categories that had too few cases to be properly included as a separate category. Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying note 7.

No simple cause exists for this observation of the anti-plaintiff effect in employment-discrimination cases. For example, Display 7 shows that the anti-plaintiff effect in these cases prevails in every circuit across the country. Display 8 shows that the same anti-plaintiff pattern prevails in all civil cases decided by judgment at the pretrial stage.

DISPLAY 7

Defendants' and Plaintiffs' Reversal Rates, in Employment-Discrimination Cases Decided After Trial, by Circuit, 1987-2000, U.S. Courts of Appeals.

CIRCUIT	REVERSAL RATE IN DEFENDANTS' APPEALS % (no.)	REVERSAL RATE IN PLAINTIFFS' APPEALS % (no.)
D.C.	66.67 (9)	1.79 (56)
1st MA, ME, NH, PR, RI	34.78 (23)	0.00 (18)
2nd CT, NY, VT	45.45 (11)	6.52 (92)
3rd DE, NJ, PA, VI	31.03 (29)	5.26 (76)
4th MD, NC, SC, VA, WV	29.03 (31)	1.79 (112)
5th LA, MS, TX	53.85 (52)	4.65 (215)
6th KY, MI, OH, TN	44.19 (43)	10.58 (104)
7th IN, IL, WI	47.83 (46)	9.64 (83)
8th AR, IA, MN, MO, ND, NE, SD	40.74 (54)	8.02 (162)
9th AK, AZ, CA, GU, HI, ID, MT, NV, OR, WA	40.00 (30)	8.82 (102)
10th CO, KS, NM, OK, UT, WY	45.24 (42)	8.80 (125)
11th AL, FL, GA	38.46 (78)	8.44 (237)
ALL TRIAL DECISIONS	42.19 (448)	6.87 (1,382)

This table shows that the anti-plaintiff effect in employment-discrimination cases exists in every circuit across the country. Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying note 7.

DISPLAY 8

Defendant-Plaintiff Differences in Reversal Rates, in Civil Cases Decided at Pretrial Stage, by Case Category, 1987-2000, U.S. Courts of Appeals.

RANK	CASE CATEGORY	REVERSAL RATE IN DEFENDANTS' APPEALS % (no.)	REVERSAL RATE IN PLAINTIFFS' APPEALS % (no.)	DEFENDANT-PLAINTIFF DIFFERENCE IN REVERSAL RATES
1	550 Prisoner Civil Rights	57.41 (54)	8.40 (12,375)	49.01
2	530 Habeas Corpus	59.58 (240)	10.61 (7,141)	48.97
3	330 FELA	56.25 (16)	22.42 (223)	33.83
4	440 Other Civil Rights	44.83 (232)	12.35 (8,136)	32.48
5	**442 Jobs**	**42.28 (123)**	**10.66 (7,217)**	**31.62**
6	710 Fair Labor Standards Act	42.00 (50)	18.15 (248)	23.85
7	790 Other Labor Litigation	37.50 (40)	15.43 (499)	22.07
8	Product Liability	37.25 (51)	16.29 (982)	20.96
9	720 Labor/Management Relations Act	33.14 (169)	16.73 (825)	16.41
10	350 Motor Vehicle	38.10 (21)	22.30 (296)	15.80
11	791 ERISA	37.76 (241)	22.03 (1,171)	15.73
12	890 Other Statutory Actions	33.98 (512)	18.67 (1,998)	15.31
13	870 Tax Suits	31.12 (196)	16.58 (597)	14.54

(Table continued on next page)

14	340	Marine Torts	28.57 (28)	16.19 (278)	12.38
15		Others & Medical Malpractice	26.18 (1,379)	16.17 (11,320)	10.01
16	370	Fraud	22.86 (35)	17.44 (344)	5.42
17	110	Insurance Contracts	23.95 (714)	18.81 (1,664)	5.14
18	360	Other Personal Injury	20.75 (53)	16.48 (1,832)	4.27
19	190	General Contracts	20.60 (767)	17.23 (2,490)	3.37
20	840	Trademark	26.74 (86)	23.45 (145)	3.29
21	850	Securities, Commodities, Exchange	26.44 (87)	24.94 (421)	1.50
22	120	Marine Contracts	22.62 (84)	26.00 (100)	-3.38
23	140	Negotiable Instruments	13.95 (129)	24.73 (93)	-12.78
		ALL PRETRIAL DECISIONS	29.82 (5,316)	13.27 (60,677)	16.55

This table shows that the same anti-plaintiff pattern seen in tried cases also prevails in cases decided at the pretrial stage. Jobs again appears near the top for the defendant-plaintiff difference, or the anti-plaintiff effect. The Product Liability category includes the Administrative Office's eight product liability categories (nos. 195, 245, 315, 345, 355, 365, 368, and 385). The Others category now also includes Medical Malpractice, which had too few cases where defendants appealed a pretrial decision to be properly included as a separate category. Source: our linked district-appeals data set constructed from the Administrative Office's data sets, as described in text accompanying note 7.

Best Explanation. As we have argued elsewhere, an attitudinal explanation of the anti-plaintiff effect is most persuasive.[17] We think that the plaintiffs' lower reversal rate stems from real but hitherto unappreciated differences between appellate and trial courts. Both

17. *See* Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125 (2001) [hereinafter *ALER*]; Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000); Clermont & Eisenberg, *Plaintiphobia*, *supra* note 7; Clermont & Eisenberg, *Realities*, *supra* note 5, at 150-54; Clermont & Eisenberg, *Edwards*, *supra* note 12.

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 act on their perceptions of the trial courts' being pro-plaintiff. The appellate court consequently would be more favorably disposed to the defendant than are the trial judge and the jury.[18]

This appellate favoritism would be appropriate if the trial 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.[19] 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.[20] Indeed, as empirical evidence accumulates in refutation of trial court pro-plaintiff bias on the plaintiff/defendant axis,[21] appellate judges' perceptions of trial court bias appear increasingly to be misperceptions.

To the extent the plaintiffs' disadvantage on appeal rests on appellate court misperceptions of trial court pro-plaintiff leanings, one might expect the disadvantage to be strongest in cases systematically involving underdogs as plaintiffs, where appellate court suspicion of trial court sympathy might be at its maximum. The very high defendants' reversal rate for other civil-rights-type cases that we observe thus reinforces the likelihood of anti-plaintiff appellate bias as an explanation, because of their near-systematic feature of underdog plaintiffs.[22] Moreover, they include many discrimination, police

18. 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. In any event, the data on appellate leaning in favor of the defendant become a cause for concern.

19. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. (forthcoming 2004).

20. *See* Clermont & Eisenberg, *Realities*, *supra* note 5, at 144-47; *cf.* 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).

21. *See* Clermont & Eisenberg, *Realities*, *supra* note 5, at 144-47.

22. *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

misconduct, and First Amendment cases that may ultimately depend on the motives of official decisionmakers,[23] and that factor may create similar biases.

Best Counterargument. The natural counterargument is 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 plaintiffs and defendants. They face much the same economic incentives. For plaintiffs and their attorneys, those incentives should discourage weak claims. Indeed, as many studies show, people are not very ready to sue except in egregious situations.[24] The pool of 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.[25] 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-high-reversal-rates argument.

Finally, our prior research found the anti-plaintiff effect on appeal prevails even between corporate parties.[26] Also, the anti-plaintiff effect exists separate from any "repeat-player haves"/"have nots" effect between opponents, as neither government litigants nor corporate litigants fared much differently from nongovernmental, noncorporate litigants in reversal rates.[27] That is, although there might

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.").

23. *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).

24. *See, e.g.*, David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983).

25. *See* Clermont & Eisenberg, *Realities*, *supra* note 5, at 137-42.

26. *See* Clermont & Eisenberg, *ALER*, *supra* note 17, at 136-38.

27. *See id.* at 138, 148-49, 157; Clermont & Eisenberg, *Plaintiphobia, supra* note 7, at 956-57, 970.

be a "repeat-player haves"/"have nots" effect, there is a more important anti-plaintiff effect. When the "have nots" are the plaintiffs, the have-not explanations conjoin with the usual anti-plaintiff effect. The result is a defendant-plaintiff difference of extraordinary magnitude in civil-rights-type cases.

Nevertheless, it bears stressing that we have never claimed that our attitudinal explanation is irrefutable. We are looking at output data, after all, and by making appropriate assumptions about the input anyone can reproduce 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 we are showing in research now underway, no reasonable assumptions as to case strength, appeal rates, and judicial accuracy would produce the observed pattern.

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

V. CONCLUSION

We began by asserting that on appeal employment-discrimination plaintiffs have a harder time upholding their successful trial outcomes and reversing adverse trial outcomes. We can now put numbers on those effects. The defendants' reversal rate stands at 42 percent, while the plaintiffs manage only a 7 percent reversal rate. Thus, it is indeed a tough story for employment-discrimination plaintiffs.

Study of appeals is critical to understanding employment-discrimination litigation. One can easily see that these plaintiffs do not do well in the trial courts, but it is difficult to say why.[28] One can,

28. *See* Selmi, *supra* note 1.

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.