

UNWRAPPING RACIAL HARASSMENT
LAW

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Pat K. Chew and Robert E. Kelley

Abstract

This article is based on a pioneering empirical study of racial harassment in the workplace in which we statistically analyze federal court opinions from 1976 to 2002. Part I offers an overview of racial harassment law and research, noting its common origin with and its close dependence upon sexual harassment legal jurisprudence. In order to put the study's analysis in context, Part I describes the dispute resolution process from which racial harassment cases arise.

Parts II and III present a clear picture of how racial harassment law has played out in the courts—who are the plaintiffs and defendants, the nature of the claims, who wins and loses, and what factors affect those outcomes. We consider dozens of characteristics of the parties, the nature of the harassment, and litigation characteristics (such as the forum, type of proceedings, and legal issues). While it reveals that individuals in all kinds of occupations, in all parts of the country, of all races, and of both genders complain about racial harassment—it also shows that African Americans are disproportionately likely to be plaintiffs. While Whites are the most likely harassers, minority individuals also are defendants. The data also discloses that the most typical legal proceeding is the court's consideration of the defendants' motion for summary judgment where the judges end up terminating most plaintiffs' cases. In fact, the judicial opinions in this study find in the plaintiffs' favor only 21.5% of the time. (In contrast, an earlier study revealed that judges in sexual harassment cases find in the plaintiffs' favor 48% of the time – more than twice as often as in racial harassment cases.) As it turns out in racial harassment cases, the race of the plaintiff and of the alleged harasser makes a difference in the parties' success rates, but the gender of the plaintiff does not. Judges are a bit more likely to find racial harassment when plaintiffs allege blatant racist behavior rather than more subtle and contextual racism. Results vary depending

on the location of the case. Part IV provides an integrated analysis of the data, including a look at how racial harassment litigation has evolved over time. It also offers explanations and implications of the study's results.

This article contributes detailed baseline data for litigants, judges, and legislators. Each group can draw upon the totality of racial harassment cases to guide their decisionmaking. The article also offers a sound basis for creating a new racial harassment jurisprudence that should be distinct from both sexual harassment and racial discrimination jurisprudence.

UNWRAPPING RACIAL HARASSMENT LAW

Pat K. Chew* & Robert E. Kelley*

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Part I: Introduction

*Rogers v. EEOC*¹ is widely cited as the first case to recognize an employer's hostile working environment as a form of illegal discrimination in general, and of racial harassment in particular.² Since this 1971 landmark case, however, very little systematic assessment of racial harassment case law has occurred. This article and the empirical study on which it is based begin to fill this void in scholarship. They offer a window into racial harassment law and, subsequently, into actual racial harassment practices in the workplace.

Much of American society, particularly White Americans, imagines that racial discrimination and harassment are no longer prevalent in the workplace.³ When racial discrimination or harassment do occur, they are perceived as out of the ordinary, perhaps perpetrated by an uneducated and unsophisticated boss in an isolated industry or part of the country where such socially antiquated behavior is tolerated. A common assumption is that blatant racist insults, such as using racial epithets or the flaunting of nooses, no longer occur—and in the rare instances in which they do, judges and juries certainly would conclude that they are illegal.

Despite these societal beliefs that the workplace is not racist, evidence to the contrary is mounting.⁴ Racial harassment is a particular form of racism and of

¹ *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

² While the plaintiff in the *Rogers* case based her lawsuit on Title VII of the Civil Rights Act of 1964, the *Rogers* case and subsequent cases under Title VII have also been applied to cases under Sections 1981 and 1983 of the Civil Rights Act of 1866.

³ See, e.g., JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, & FUTURE REPARATIONS 123-24 (2000) (citing various surveys of White Americans including those on job discrimination) [hereinafter FEAGIN]; Adam Goodheart, *The New America: A Change of Heart*, AARP MAG., May/June 2004, at 43-49, 82 (survey indicating that majority of Whites deny persistent discrimination against minorities); HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 166-67 (1997) (survey showing that three-quarters of Whites reject the proposition that Blacks face workplace barriers). See also *infra* discussion accompanying notes 63-65 (describing contrasting perceptions of White Americans with other racial and ethnic groups).

⁴ Research documents all kinds of racial discrimination in the workplace, including racial harassment. See, e.g., Aaron Bernstein, *Racism in the Workplace*, BUS. WK., July 30, 2001, at 64-67 (noting patterns of racial harassment in the workplace); Alfred Blumrosen & Ruth Blumrosen, *The National Report: The Reality of Intentional Job Discrimination in Metropolitan America*, available at <http://www.EE01.com> (revealing a widespread pattern of “intentional” discrimination, which is defined as underutilization of minorities or women at more than two standard deviations below the standard of utilization within an industry with the inference that such underutilization cannot be explained by chance or because of a lack of available candidates) [hereinafter Blumrosen & Blumrosen]; *Catalyst, Women of Color in Corporate Management: Three Years Later*, available at <http://catalystwomen.org> (reporting a decline in opportunities for minority women to reach senior management roles); and Marianne Bertrand & Sendhi Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, NBER WORKING PAPER NO. w9873 (July 2003), available at

harassment⁵ which occurs when individuals are intimidated, insulted, bullied, excessively monitored or otherwise harassed because of their race. Racial harassment occurs in a range of settings, including in the workplace.⁶ This research study notably reveals a more complex and sometimes dramatically different picture than American society imagines.

Unlike traditional legal analysis where authors build their arguments with a few carefully selected and persuasive leading cases, this empirical study follows a different process and serves a different purpose.⁷ It methodically studies hundreds of randomly-selected representative judicial opinions and then draws well-reasoned inferences from a statistical analysis of these cases. The purpose is to provide a carefully documented survey and analysis of the facts, issues, and holdings of racial harassment cases. Rather than reviewing the facts, legal principles, and judicial reasoning with an advocacy position in mind, this study analyzed each case and gathered information on each variable as objectively, validly, and reliably as possible.⁸ Empirical research thus tests our

<http://www.nber.org/papers/w98973> (their findings suggesting that either employers are prejudiced or employers perceive that race signals different productivity levels: (1) job applicants with White names needed to send about 10 resumes to get one callback, but those with African American names needed to send around 15 resumes to get one callback; and (2) Whites with higher quality resumes received 30% more callbacks than Whites with lower quality resumes, but the positive impact of a better resume for those with African-American names was much smaller).

⁵ Employees of course can be harassed and treated in an uncivil manner on the basis of attributes other than race. See, e.g., CHARLOTTE RAYNER, HELGE HOEL & CARY L. COOPER, *WORKPLACE BULLYING: WHAT WE KNOW, WHO IS TO BLAME, AND WHAT CAN WE DO?* (2002); David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475 (2002); GIOVINELLA GONTHIER, *RUDE AWAKENINGS: OVERCOMING THE CIVILITY CRISIS IN THE WORKPLACE* (2002); SETH ALLCORN, *ANGER IN THE WORKPLACE: UNDERSTANDING THE CAUSES OF AGGRESSION AND VIOLENCE* (1994). Harassment also occurs in settings other than work. See ROBIN M. KOWALSKI, *COMPLAINING, TEASING, AND OTHER ANNOYING BEHAVIORS* (2003). As an illustration of the occurrence of racial harassment in a non-work setting, consider Michael A. Olivas, *The Political Economy of Immigration, Intellectual Property, and Racial Harassment: Case Studies of the Implementation of Legal Changes on Campus*, 63 J. HIGHER EDUC. 570-598 (1992) (describing racial harassment of students on college campuses).

⁶ As examples of social science research and discussions on racial harassment in the workplace, see Edward J. Harrick & George M. Sullivan, *Racial Harassment: Case Characteristics and Employer Responsibilities*, 8 EMPLOYEE RESP. AND RTS. J. 81 (1995); Kimberly T. Schneider, Robert T. Hitlan & Radhakrishnana Phanikiran, *An Examination of the Nature and Correlates of Ethnic Harassment Experiences in Multiple Contexts*, 85 J. APPLIED PSYCHOL. 3 (2000) [hereinafter Schneider]; FEAGIN, *supra* note 3, at 164-66; and Sunner Shin & Brian H. Kleiner, *The Psychological Effects of Working in a Racially Hostile Environment*, 21 INT'L J. OF SOC. AND SOC. POL'Y 59 (2001).

⁷ For an excellent resource that explains empirical research and methodology, including its possible application and prior misapplication to legal topics, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002). See also Lee Epstein & Gary King, *Building an Infrastructure for Empirical Research in the Law*, 53 J. LEGAL EDUC. 311 (2003); Franklin M. Fisher, *Multiple Regression in Analysis*, 80 COLUM. L. REV. 702 (1980); and MEASURING RACIAL DISCRIMINATION 71-202 (Rebecca M. Blank, Marilyn Dabady & Constance F. Citro eds., 2004).

⁸ Much of the information compiled on each case in this study is objective. For instance, information on the litigation process, such as the judicial district and state in which the lawsuit was litigated, are all objectively determined. Much of each case opinion, however, is essentially that particular judge's narrative of the events. While judges may quite consciously and in good faith attempt to be objective, every judge views disputes through his or her own cultural lens. See, e.g., Pat K. Chew, *"The Pervasiveness of Culture*

assumptions about the law and the social paradigm in which we frame and interpret the legal principles.⁹

Part I offers an overview of racial harassment law and research, noting its common origin with and its close dependence upon sexual harassment legal jurisprudence. Attributable in part to its dependence on sexual harassment jurisprudence, development of racial harassment jurisprudence has been limited. Part I continues with an explanation of the dispute resolution process and the legal proceedings from which racial harassment cases arise.

Part II begins in earnest discussing the findings of the empirical study which is the focus of this article. An interdisciplinary team of legal, social science, and business researchers designed and implemented the research methodology for this study. We began by identifying all reported federal district court and appellate judicial opinions

in Conflict,” 54 J. LEGAL EDUC. 60 (2004) (discussing, for instance, how judges in racial harassment cases view the facts through their own cultural lens). Hence, some inherent shifting and sifting of the information occurs as judges make sense of the dispute and apply the legal principles to the specific case. In addition to the natural bias any person would have, the judge must justify his or her judgment. As described by Professors Juliano and Schwab, “The cynical legal realist might say that the facts the judge chooses to relate are inherently selective and a biased subset of the actual facts of the case. This is an overstatement, but it is instructive.” Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001) [hereinafter Juliano & Schwab].

⁹ Basing an empirical study on published opinions also has certain limitations. As we will discuss, some individuals believe they are racially harassed but do not file formal complaints nor do they bring lawsuits. Even disputes involving employees who do file formal charges with the EEOC and then ultimately engage in litigation are not all captured in these reported cases. See *infra* discussion accompanying notes 81-122. Hence, while this study of cases provides valuable insights into racial harassment litigation and racial harassment in the workplace—it remains a proxy.

Traditional legal scholarship of course is subject to these same caveats since it also focuses on published opinions written by judges. This empirical study offers some advantages over traditional legal scholarship. In describing their empirical study of sexual harassment cases, Professors Juliano and Schwab explain: “In broadening the traditional analytical legal approach, we have foregone the ability to examine the nuances of particular cases and doctrinal debates among judges. However, we have gained perspective on the bulk of the issues and fact patterns with which federal judges wrestle . . . This sweep of cases, then, presents a particularly important perspective.” Juliano & Schwab, *supra* note 8, at 553-54. It is purposefully a more representative depiction of racial harassment cases than the traditional approach of citing and analyzing only a handful of “leading” cases that are purposefully selected to support a particular legal or policy proposition.

For examples of empirical research in employment law, see Juliano & Schwab, *supra* note 8; Kevin M. Clermont & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) [hereinafter Clermont & Schwab]; 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. 547 (2003); Blumrosen & Blumrosen, *supra* note 4; Vicki Shultz & Stephen Peterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003); and Kathryn Moss, Scott Burris, Michael Ullman, Matthew Johnsen & Jeffrey Swanson, *Unfunded Mandate: An Empirical Study of the Implementation of the American with Disabilities Act by the Equal Employment Opportunity Commission*, 50 KAN. L. REV. 1 (2001).

where the plaintiffs brought racial harassment claims under the major federal statutes for harassment claims in the workplace in six federal judicial circuits through 2002 (“the racial harassment cases”).¹⁰ These circuits represent different geographical regions and include large states with ethnically diverse populations. Through this method, 625 cases were identified. (Thus, an estimate of all reported federal cases on racial harassment would be 1250 cases.¹¹) Given this universe of 625 cases, a social science “rule of thumb” would recommend a sampling of at least 10-15% of these cases. We exceeded this recommended percentage by drawing 260 cases, representing 40% of all cases, in a stratified random sampling within each circuit. The first case in our study occurred in 1976. Thus, the study covers cases spanning 26 years.¹²

Each of the 260 cases in this study was independently read and analyzed by at least two individuals.¹³ We coded the information onto a “case profile” form that carefully collected over 100 discrete pieces of information for each case. Then, we statistically analyzed this information in various ways. Processes included (where appropriate) frequencies, percentages, averages, correlations, and regressions. In addition, qualitative observations of the court’s analysis also were compiled.

¹⁰ This study analyzes published judicial opinions. While a particular legal dispute could have multiple judicial proceedings and judicial opinions, the disputes in this study typically only had a single judicial proceeding and judicial opinion. Thus, the authors opted to use the more conventional term of “cases” throughout this article although the study technically studies judicial opinions. *See also* Juliano & Schwab, *supra* note 8 (also using the term “case” to describe judicial opinions).

The search terms were “(rac! w/3 haras!) & ((title vii) or (42 w/5 1981 or 1983))” in the LEXIS/NEXIS and WESTLAW data bases for all cases in the First, Second, Fifth, Seventh, Ninth, and Eleventh federal circuits through 2002. This search resulted in reported cases brought in these federal circuits at either the district courts or the appellate courts with racial harassment claims based on Title VII or Sections 1981 or 1983. While we subsequently discuss the case characteristics in detail, a brief summary here is helpful. Approximately 80% of the cases in the study are district court cases; 20% are appellate court cases. Of the district court cases, about 96% are either motions for summary judgments, motions for dismissals, or bench trial on the merits. The appellate court cases are reviews of district court motions for summary judgment, bench trials, or jury trials. Many of the cases included other claims. For example, 13.5% of these racial harassment cases also include a sexual harassment claim. Judicial opinions dealing with claims of racial harassment based only on state law analogs to Title VII or dealing with Title VII claims pursued only in state courts are not included in this study.

¹¹ The number of federal racial harassment cases in the six federal circuits in this study is 625 cases. Since there are twelve federal circuits (excluding the Federal Court of Appeals), an estimate of the number of cases in all circuits would be 1,250 cases (assuming the remaining six circuits are comparable to those in this study).

¹² For the five years after the *Rogers* case in 1971, *supra* note 1, there apparently were few if any other racial harassment cases.

¹³ After a period of training on how to collect and analyze the cases, at least one research assistant read every case. In addition, Professor Chew read every case. There were detailed coding instructions for each variable. Professor Chew’s and the research assistants’ readings of the case were done independently, and the results were then compared as a cross-check for reliability. If there was a difference in the information gathered on any case, Professor Chew reviewed the case again to confirm that the information was correct. Professor Chew or a graduate student in statistics and economics then inputted the information onto an Excel spreadsheet. The statistical packages SPSS and EXCEL were used for performing the various statistical analyses. The statistical analysis was supervised by Professor Kelley in consultation with Professor Chew.

Part II offers an analysis of racial harassment law, as based on a detailed analysis of the cases in this empirical study. It begins by describing the individuals and companies that are involved—both those who claim they were harassed and those they accused of harassing them—thus personalizing the characters and settings in which harassment occurs.¹⁴ Part II continues with an exploration of the acts of harassment. It describes how alleged harassers use words, conduct, and their decision-making authority to create a hostile working environment.¹⁵ This discussion then focuses on myriad characteristics of the litigation process itself: the forum, type of proceedings, plaintiffs' claims, and legal issues.¹⁶

This analysis of racial harassment cases indicates, for instance, that employees in all kinds of occupations complain about harassment in all parts of the country and in all types of companies. Blacks are the most likely plaintiffs, but there are also Asian, Hispanic, and White plaintiffs as well. Whites are the most likely harassers, but minority individuals are also defendants. Harassment involving multiple harassers including both supervisors and co-workers is not unusual, suggesting that racial harassment may be more socially tolerated than we acknowledge. There are also revelations about the litigation process. For instance, while most lay people assume that racial harassment judicial opinions describe trials on the merits of a plaintiff's racial harassment claim, this study indicates that trials are unusual. The cases deal more typically with defendants' pretrial motions for summary judgments, which defendants hope will stall or end plaintiffs' cases.

Part III moves the empirical analysis a further step by focusing on the outcome of the proceedings in these judicial opinions. Each case was coded as a "win" for the party whose legal position is favored by the court. Thus, an "employee/plaintiff win" means that the outcome of the legal proceeding described in the judicial opinion is in the plaintiff's favor; an "employer/defendant win" means the outcome is in the defendant's favor; and "both the employee/plaintiff and employer/defendant win" means the outcome is in part in the defendant's favor and in part in the plaintiff's favor.¹⁷ Given that a substantial majority of the cases are employers' motions for summary judgment, a "plaintiff win" in these cases means that the motion is denied and a "defendant win" means that the motion is granted. Given the legal effect of the court's decision on a motion for summary judgment, the outcome of these proceedings is often dispositive.¹⁸

¹⁴ See *infra* discussion accompanying notes 123-40.

¹⁵ See *infra* discussion accompanying notes 141-50.

¹⁶ See *infra* discussion accompanying notes 151-87.

¹⁷ In 5.38% of the cases, *both* the plaintiff and the defendant had a favorable outcome on some portion of the motion or different motions related to the racial harassment claim. In these cases, both the plaintiff and the defendant are credited with a "win." Hence, the cumulative percentage of "plaintiff wins" and "defendant wins" exceeds 100%.

¹⁸ See *infra* discussion accompanying notes 110-22.

Part III begins with grim news for prospective plaintiffs and heartening news for defendants. Plaintiffs are successful in only 21.5% of the cases analyzed in this study.¹⁹ Part III considers how the different characteristics of racial harassment cases, as described in detail in Part II, affect the outcome of the cases.²⁰ Many interesting patterns appear. For example, Part III reveals that the race of the plaintiff and of the defendant makes a difference in the plaintiffs' success rate, but the gender of the plaintiff does not. The nature of the harassment does not seem to alter outcomes significantly, although judges are a bit more likely to find racial harassment when there is blatant and egregious racist conduct rather than more subtle and contextual racism. Plaintiffs are particularly likely to lose both their arguments that the harassment was "severe or pervasive" and "because of race," and the defendants' pretrial motions for summary judgment.²¹ Therefore, judges are not only the gatekeepers but they typically keep plaintiffs out, stopping them from pursuing their litigation any further. Plaintiffs also fare differently among federal circuits and states.²² In addition, our study suggests that plaintiffs in racial harassment cases are more likely than plaintiffs in sexual harassment cases to fare poorly.²³

Thus, the extensive empirical study described in this article provides rich data on racial harassment case law and breaks new ground. Prior to this study, employees, employers, judges, lawyers, and academics could only speculate on the characteristics and outcomes of racial harassment cases. Part IV offers an integrated analysis and discussion of the study results and provides a baseline for creating a racial harassment jurisprudence.²⁴

A. Racial Harassment Law and Research

1. Rogers as the Beginning of the Harassment Doctrine

An unlikely fact pattern, a novel Equal Employment Opportunity Commission (EEOC) theory, and an independent thinking jurist in *Rogers v. EEOC*²⁵ led to the birth of the hostile environment doctrine. The rarely-told story begins in 1969, when Mrs. Josephine Chavez filed a charge with the EEOC against her employer. The

¹⁹ See *infra* discussion accompanying notes 188-89.

²⁰ See *infra* discussion accompanying notes 190-219.

²¹ See *infra* discussion accompanying notes 41-48 (describing these elements of a racial harassment case).

²² See *infra* discussion accompanying notes 199-202.

²³ In sexual harassment cases, plaintiffs win in 48.2% of the cases (51.2% of the district court cases and 39% of the appellate court cases). Juliano & Schwab, *supra* note 8, at 596. In contrast, plaintiffs in racial harassment cases win in only 21.5% of the cases (20.8% of the district court cases and 24.5% of the appellate court cases). Hence, plaintiffs in sexual harassment cases are more than twice as likely to win their case as plaintiffs in racial harassment cases.

²⁴ See *infra* discussion accompanying notes 220-32.

²⁵ 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

employer were brothers S.J. and N. Jay Rogers doing business as “Texas State Optical” in Beaumont, Texas. Mrs. Chavez’s charge stated in full:²⁶

“The above company has discriminated against me because of my national origin Spanish surnamed American [sic] by:

a. Terminated me from my job without a reason. I was the only Spanish surnamed American employed with seven Caucasian females who abused me. The manager told me my work was allright [sic] but he had to let me go because of friction.

b. segregating the patients.”

After frustrating and unsuccessful efforts to get the optometrists to voluntarily produce office records, the EEOC issued a Demand for Access to Evidence. In particular, the EEOC wanted documents purportedly showing that the optometrists’ employees color-coded customers’ office forms by race—using red ink or red pencil for Black customers’ “applications for service” and blue or black ink or pencil for non-Black customers. These records presumably would support Mrs. Chavez’s charge that the business segregated patients by race. Given that Mrs. Chavez was bringing an employee discrimination claim on her own behalf, Rogers argued that the demand for this information about patient treatment was overbroad. The EEOC countered with the novel theory that the segregation of patients, “though not directed against Mrs. Chavez, could ‘create an atmosphere that would adversely affect the terms and conditions of her employment’ and thus have an effect that is proscribed by Title VII.”²⁷ Thus, the legal issue before the district and appellate courts was whether information about a business’s discriminatory treatment of its customers was a reasonably relevant request in investigating an employee’s own charge of racial discrimination.²⁸

The novelty of the EEOC’s theory is evidenced by district court Judge Fisher’s perfunctory rejection of it.

Accepting *arguendo* the Commission’s contention that if Petitioners in fact ‘segregated the patients’ then such a practice might be so offensive to Mrs. Chavez’s sensibilities as to make her uncomfortable in her job, there still is no showing that she is ‘aggrieved’ in the sense contemplated by [Title VII]. . . . The Commission’s contention in the case at bar that an employee can claim the protection of Title VII because of the employer’s

²⁶ 454 F.2d at 236.

²⁷ 316 F. Supp. at 425.

²⁸ The district court expressly declined to determine the merits of the underlying controversy. 316 F. Supp. 422, 424 (E.D. Tex. 1970).

discrimination against his customers is . . . unsupported by authority. We reject it.²⁹

The appellate court similarly found the theory controversial. Of the three Fifth Circuit judges, one jurist, Judge Rooney, flatly rejected the EEOC's theory, concluding:

The question of whether or not the relationship between an employee and his working environment is of such significance that it ought to be cloaked with statutory protection as an employment practice is a question for Congress, not for the EEOC, and not for us.³⁰

The second jurist, Judge Godbold, was able to support the EEOC's demand for evidence (and thereby provide a majority for the EEOC) only by reconstructing the facts in a way that allowed him to avoid the EEOC theory altogether. In his concurring opinion, Judge Godbold accepted an alternative construction of the facts offered by the EEOC in its appellate brief: that Mrs. Chavez, because of her ethnic status as a "Spanish surnamed American," was required by her employers to attend to or have contact with only segregated patients.³¹ By construing the facts in this way, Judge Godbold was able to find a direct link between the employers' actions and the employee's claim of discrimination. He eliminated the need to consider a bold new theory based on less tangible arguments about a discriminatory work environment:

This strikes me as a much sounder judicial approach than construing the charge as asserting a type of discrimination indirect and collateral, pursuant to which Mrs. Chavez was offended by segregation practices directed against others who are of another ethnic group, and who are not employees, and directed at such others because of their race, national origin, etc.³²

The third jurist, Judge Goldberg, instead interpreted the charge (as did the district court) of segregating of the patients but not including an allegation of Mrs. Chavez being required to have contact with only segregated patients.³³ Thus, he decided to acknowledge the EEOC's theory and use it as an opportunity to elaborate:

While the district court may have viewed lightly the connection between the petitioners' alleged discrimination

²⁹ 316 F. Supp. at 425.

³⁰ 454 F.2d at 245.

³¹ As Justice Rooney in his dissenting opinion pointed out, this construction of the facts appeared incorrect. 454 F.2d at 243.

³² 454 F.2d at 242.

³³ 454 F.2d at 237, 239.

against its patients and Mrs. Chavez's sensibilities, I think that the relationship between an employee and his [or her] working environment is of such significance as to be entitled to statutory protection.³⁴

Writing the majority opinion, he noted that Congress intended Title VII to be liberally and flexibly interpreted to achieve its anti-discriminatory purposes:

I regard this broad-gauged innovative legislation as a charter of principles which are to be elucidated and explicated by experience, time, and expertise. Therefore, it is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.³⁵

Although never using the terms "harassment" or "hostile environment," Judge Goldberg began to delineate the scope of racial harassment jurisprudence. He articulated language that has been frequently cited in subsequent cases:

I do not wish to be interpreted as holding that an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of Section 703. But by the same token I am simply not willing to hold that a discriminatory atmosphere could under no set of circumstances ever constitute an unlawful employment practice. One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think Section 703 of Title VII was aimed at the eradication of such noxious practices.³⁶

³⁴ 454 F.2d at 237-38.

³⁵ 454 F.2d at 238. Rogers argued that the charge alleged discrimination against the employers' patients but not toward any employees and that therefore, Mrs. Chavez could not personally claim discriminatory treatment. Judge Goldberg rejected Rogers' argument. Noting support from the then recent Supreme Court case, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), Judge Goldberg explained that Title VII is also aimed at consequences and effects of an employment practice even in the absence of evidence of discriminatory motivation. *Id.*

³⁶ *Id.*

2. Limited Development of Racial Harassment Jurisprudence

The Supreme Court in *Meritor Savings Bank v. Vinson*,³⁷ among numerous other courts, describes *Rogers* as “apparently the first case to recognize a cause of action based upon a discriminatory work environment.” Though the doctrine of discriminatory harassment originated with this landmark racial harassment case in 1971, the development of key legal constructs and jurisprudence in discriminatory harassment subsequently focused on sexual harassment.

Beginning with the pioneering work of Catherine MacKinnon in her 1979 book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*,³⁸ the conceptual debates and evolving models of harassment jurisprudence have been set in the context of sexual harassment.³⁹ For instance, important work by Katherine Franke, Kathryn Abrams, Anita Bernstein, Vicki Shultz, Teresa Beiner and others, all discussing sexual harassment, subsequently received scholarly recognition.⁴⁰ This research was in part prompted by five major Supreme Court cases in harassment law, again all dealing with

³⁷ 477 U.S. 57 (1986). The *Meritor* court cited the *Rogers* case with approval, although it erroneously described the facts as a Hispanic complainant charging that her employer created an offensive work environment for employees by giving discriminatory service to its “Hispanic” clientele. The correct facts, as just described, involved an Hispanic employee plaintiff and the optometrists’ Black clientele. It is unclear how to explain this inadvertent but interesting factual error. Was it merely an error in transcription or, in the alternative, was it a “Freudian slip” because the judges found it too unconventional or dissonant that one minority group might be personally distressed over the treatment of another minority group?

³⁸ CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979). MacKinnon’s work, along with pioneering cases such as *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) and *Barnes v. Castle*, 561 F.2d 983 (D.C. Cir. 1977), began to crack the judicial consciousness that sexual harassment of women at work is illegal sexual discrimination. MacKinnon’s work brought attention to long-time abuses of women in all kinds of jobs and industries and linked them to legal remedies. She envisioned sexual harassment as a male supervisor or coworker using sexual demands or sex-linked conduct to victimize a female employee. She also articulated two major forms of sexual harassment: (1) *quid pro quo* harassment defined by the more or less explicit exchange of a woman’s forced sexual compliance for an employment benefit, and (2) condition of work harassment in which sex-linked conduct makes the work environment unbearable. *Id.* at 32-46.

³⁹ A review of major legal casebooks on employment discrimination, for instance, indicates that casebook authors use sexual harassment cases and discussion almost exclusively to explain harassment jurisprudence under Title VII. See, e.g., SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW* 365-97 (2000); and ROBERT BELTON, DIANNE AVERY, MARIA L. ONTIVEROS & ROBERTO L. CORRADA, *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 440-540 (7th ed. 2004) (but recently expanding coverage to include 10 pages on racial harassment cases out of 100 pages on the harassment jurisprudence generally).

⁴⁰ See Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691 (1997); Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445 (1997); Vicki Shultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998); Teresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002). See also Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN’S L.J. 37 (1993) (describing waves of research).

sexual harassment fact patterns. These scholars analyzed and often criticized the Supreme Court's and other courts' theoretical grounding of sexual harassment claims. This quintet of cases—*Meritor*, *Harris*, *Oncala*, *Burlington* and *Faragher*—have been integral to the emerging legal framework for discriminatory harassment.

Meritor in 1986 was the first Supreme Court case to recognize sexual harassment as a form of sex discrimination, noting that Title VII of the Civil Rights Act of 1964 is not limited to “economic” or “tangible” discrimination.⁴¹ As Justice Rehnquist wrote, the phrase “terms, conditions, or privileges of employment evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.” Thus, when the workplace is permeated with “discriminatory intimidation, ridicule, and insult” that is “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,” Title VII is violated.⁴² The Court added, however, that the plaintiff must by her conduct demonstrate that the harassment was “unwelcome.”

Harris v. Forklift in 1994 clarified the elements of a hostile environment claim under Title VII, including the critical requirement that the harassment must be sufficiently “severe or pervasive to alter the work environment.”⁴³ Justice O’Connor noted that relevant factors include “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” It also held that the severe or pervasive requirement must satisfy both an objective and a subjective standard:⁴⁴ “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”⁴⁵ Furthermore, she explained that these determinations should be made in consideration of “all the circumstances,” rather than focusing on any one factor.⁴⁶ In addressing whether proof that the employer’s conduct seriously injured the psychological well-being was required, the court held that psychological harm may be relevant but not determinative.

⁴¹ 477 U.S. 57 (1986). *See also* *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981) (recognized as the first case to endorse the hostile work environment theory of sexual harassment).

⁴² 477 U.S. at 64-67.

⁴³ 510 U.S. 17 (1993). *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (earlier articulated the elements in a harassment claim: (1) that the employee belong to a protected class; (2) that the employee was subjected to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment affected a term, condition, or privilege of employment; and (5) that the doctrine of respondeat superior applies).

⁴⁴ 510 U.S. at 370.

⁴⁵ *Id.*

⁴⁶ 510 U.S. at 371.

Oncale v. Sundowner Offshore Services in 1998 explored the evolving conception of sexual harassment by considering another critical issue in harassment cases: whether the harassment was “because of sex.”⁴⁷ This element looks for a motivational link between the employer’s conduct and the employee’s protected status. Holding that same-sex harassment may be actionable under Title VII, the Court acknowledged factual variations from the heterosexual paradigm originally envisioned by Catherine MacKinnon were possible. Justice Scalia also emphasized the relevance of the “social context” in which the conduct occurs, including factors such as the status of the employee, the nature of the job, and the specific locale of the enterprise.⁴⁸

Finally, the twin cases of *Burlington Industries, Inc. v. Ellerth*⁴⁹ and *Faragher v. City of Boca Raton*⁵⁰ in 1998 offered guidelines on employer liability. These cases announced that employers would be held vicariously liable for their supervisors’ unlawful harassment of employees if such harassment resulted in “tangible employment action” such as a denial of promotion or a firing.⁵¹ However, if the harassment did not culminate in tangible employment action (such as significant changes in employment status), employers had an affirmative defense if they made reasonable efforts to prevent and address the harassment and if employees unreasonably failed to take advantage of the employers’ efforts.

Despite the origin of these legal principles in sexual harassment fact patterns, the courts and the EEOC presumptively assume that they apply to racial harassment.⁵² Justice Ginsburg, in a concurring opinion in *Harris*, explicitly analogized the legal standards for sexual and racial harassment.⁵³ The prominence of the *Harris* case, moreover, in racial harassment jurisprudence is substantiated by its omnipresent citing in racial harassment cases.⁵⁴

Social science and empirical research on harassment in the workplace also have focused more on sexual harassment than on racial harassment.⁵⁵ In part, the comparative

⁴⁷ 523 U.S. at 75.

⁴⁸ 523 U.S. at 83.

⁴⁹ 524 U.S. at 742.

⁵⁰ 524 U.S. at 775.

⁵¹ 524 U.S. at 809; 524 U.S. 759. The *Faragher/ Ellerth* cases, however, only provide the standard for *supervisor* harassment. The “knew or should have known and failed to take prompt corrective action” standard still apparently applies to *coworker* harassment.

⁵² EEOC Compliance Manual par. 3116; *see, e.g.*, 29 C.F.R. § 1604.11 n.1 (2003) (providing that legal principles originating in sexual harassment cases apply to other types of harassment cases, including harassment based on race, color, religion, or national origin).

⁵³ 510 U.S. at 24.

⁵⁴ In a Westlaw search of most cited cases in racial harassment caselaw on Sept. 24, 2004 (search of West Key “Civil Rights (78k1147) Hostile environment” with addition of “race or racially or racial”), the *Harris* case was cited 1,000 times, while the *Rogers* case was cited only 164 times.

⁵⁵ JSTOR (*available online at* <http://www.jstor.org.com>) is an electronic database that contains the full text of journals in a wide range of social science subjects. A search for articles on “racial harassment” in

lack of research on racial harassment is attributable to our still emerging understanding of what racial harassment is. For instance, previous research has not clearly differentiated between racial harassment and racial discrimination, so the causes, characteristics and consequences of the two are confounded.⁵⁶ Likewise, the differences between racial harassment and other types of harassment, such as sexual harassment, as well as the intersection between racial harassment and other types of harassment, are just beginning to be recognized and understood.⁵⁷

Our understanding about racial harassment is further complicated because there are different forms of racial harassment, including verbal racial harassment, physical forms of harassment directed at a racial group, and exclusion from work-related or social interactions because of one's race.⁵⁸ This treatment can be blatantly racist, where the harasser manifests overt hostility and animosity toward those of other races.⁵⁹ In the alternative, racism can take other forms that are more subtle, indirect, and covert.⁶⁰

JSTOR on Sept. 24, 2004 (search of West Key "Civil Rights (78k1147) Hostile environment" with addition of "race or racially or racial"), produced 121 matches; in contrast, a search for articles on "sexual harassment" produced 1,037 matches.

⁵⁶ See, e.g., Schneider, *supra* note 6, at 3-12. Schneider and her coauthors note that social science research has not clearly distinguished between fundamental concepts such as racial/ethnic discrimination versus racial/ethnic harassment, or between racial/ethnic harassment versus sexual harassment. Attempting to add some clarity, they define racial/ethnic discrimination and racial/ethnic harassment in the following ways. Racial/ethnic discrimination is defined as unequal treatment because of one's race or ethnicity, and is conceptualized as a structural or institutional variable. Racial/ethnic harassment in the workplace has two parts: (i) slurs or derogatory comments about a target's group, and (ii) exclusion of the target from work-related or social interactions as a result of the target's ethnicity or race.

Legal scholars also have not sorted out all the differences between racial discrimination and racial harassment. For instance, Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 309 n.8 (2004), identifies four basic frameworks of Title VII liability: individual disparate treatment, systemic disparate treatment, disparate impact, and harassment. Harassment, she argues, has sufficiently distinctive elements to classify it separately, although the courts technically regard it as a variation of individual disparate treatment.

⁵⁷ See *infra* discussion accompanying note 72.

⁵⁸ See Schneider, *supra* note 6.

⁵⁹ See, e.g., FEAGIN, *supra* note 2.

⁶⁰ A great deal of research and commentary on the topic of subtle discrimination exists. See, e.g., Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) [hereinafter Krieger]; Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, J. SOC. ISSUES 835-48 (2004); Tristan K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) [hereinafter Green]; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) [hereinafter Carbado & Gulati]; Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529 (2003); Ann C. McGinley, *!Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 421-33 (2003); John Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOCIAL ISSUES 829-49 (2001); and Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1022-35 (2003).

These latter forms of racism, sometimes called “aversive racism,” can also be unconscious and unintentional. Linda Hamilton Krieger, for instance, points to a number of cognitive processes that are unintentional but nevertheless result in biased employment decisions and conduct.⁶¹ In addition, aversive racism has substantial negative effects on the performance of both the targeted individuals and their work groups.⁶²

We also are at the early stages of sorting out the perceptions of and the effects on different racial groups. Social science research indicates that racial groups perceive differently whether their organizational environment is racist.⁶³ In particular, it shows that ethnic minorities are more likely than Whites to conclude that minorities have been treated unfairly.⁶⁴ Perhaps these differences in perception are largely attributable to minorities recognizing aversive racism and Whites not recognizing it. In a similar vein, a study by Gutierrez, Saenz, and Green⁶⁵ found that, while individuals of all racial and ethnic backgrounds have greater job stress when they perceive high levels of discrimination against women and minorities, important differences among racial groups exists. For example, Hispanics who perceive high levels of workplace discrimination report more health problems than those who perceive low levels of discrimination. Among White participants, in contrast, perceived discrimination was not related to health.

⁶¹ See Krieger, *supra* note 60.

⁶² See Green, *supra* note 60; and Carbado & Gulati, *supra* note 60.

⁶³ A range of social science research indicates that Americans of different racial backgrounds perceive the workplace differently. See, e.g., K.A. Dixon, Duke Storen, & Carl E. Van Horn, *A Workplace Divided: How Americans View Discrimination and Race on the Job* (2002), available at <http://www.heidrich.rutgers.edu> (joint project with Center for Survey Research and Analysis, University of Connecticut and John J. Heidrich Center) [hereinafter Dixon et al.]. Based on a survey of 1,005 workers, the researchers concluded:

Race is the most significant determinate in how people perceive and experience discrimination in the workplace . . . more so than income and education. White workers are far more likely than minority workers to believe that everyone is treated fairly at work. For instance, half of African-American workers believe that African Americans are treated unfairly, compared to 10% of white workers. 22% of Hispanic-Americans believe that (and) Hispanic-American workers are much more likely to believe that they are treated unfairly in the workplace than workers of other racial backgrounds.

Id. at 1, 8.

Also see generally RACIAL ATTITUDES IN THE 1990S (Steven A. Tuch & Jack K. Martin eds., 1997); HOWARD SCHUMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 250-78 (1997); Christopher P. Parker, Boris B. Baltes & Neil D. Christiansen, *Support for Affirmative Action, Justice Perceptions, and Work Attitudes: A Study of Gender and Racial-Ethnic Group Differences*, 82(3) J. APPLIED PSYCHOL. 376-89 (1997); FEAGIN, *supra* note 2, at 126-28.

⁶⁴ See Dixon et al., *supra* note 63.

⁶⁵ S.E. Gutierrez, D.S. Saenz & B.L. Green, *Job Stress and Health Outcomes Among White and Hispanic Employees: A Test of the Person-Environment Fit Model*, in JOB STRESS IN A CHANGING WORKFORCE: INVESTIGATING GENDER, DIVERSITY, AND FAMILY ISSUES 107-125 (G.P. Keita & J.J. Hurrells, Jr. eds., 1994).

Thus, while racial harassment is pervasive and while racial harassment litigation is prevalent, comparatively little scholarship on racial harassment jurisprudence has surfaced.⁶⁶ While considerable academic discourse exists on the varied ways to conceptualize sexual harassment and sexual harassment jurisprudence, not one major legal article exists to conceptualize racial harassment as a unique social phenomenon and harm deserving its own jurisprudential framework.

Law review articles on racial harassment instead tend to be more narrow in focus, often emphasizing a particular case, work context or jurisdiction.⁶⁷ Or scholarship has focused on how racial harassment can be analogized to or considered part of the discourse on sexual harassment and sexual harassment laws.⁶⁸ Admirable work by Camille Hebert and Tanya Kateri Hernández exemplify this. Professor Hebert confirms that courts routinely analogize sexual harassment laws and racial harassment laws to each other.⁶⁹ Moreover, she criticizes the importation of overly strict standards for sexual harassment into the law of racial harassment, arguing that racial harassment claims should not be saddled with some of the same hurdles as sexual harassment.⁷⁰ Positing that there is more societal recognition of obvious racial harassment, she proposes instead

⁶⁶ A literature search on Sept. 24, 2004 of all U.S. law reviews and journals for the term “racial harassment” at least 10 times in the article on LEXIS/NEXIS resulted in 57 items. In contrast, an identical search for the term “sexual harassment” resulted in 1,640 items.

⁶⁷ See, e.g., Robert J. Gregory, *You Can Call Me “Bitch” Just Don’t Use the “N-word”*: Some Thought on *Galloway v. General Motors Service Parts Operations and Rodgers v. Western Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741 (1997); Phoebe Weaver Williams, *Performing in a Racially Hostile Environment*, 6 MARQ. SPORTS L.J. 287 (1996); and Carol MacKenzie, *The Second Circuit Review—1985-1986 Term: Constitutional Law: Jailhouse Rocked: The Second Circuit Confronts a Racially Hostile Work Environment in a Correctional Facility*: *Snell v. Suffolk County*, 53 BROOK. L. REV. 357 (1987).

⁶⁸ See, e.g., L. Camille Hebert, *Analogizing Race and Sex in Workplace Harassment Claims* 58 OHIO ST. L.J. 819 (1997) [hereinafter Hebert]; Tanya Kateri Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183 (2001) [hereinafter Hernández]; Tanya Kateri Hernández, *Gender, Race, and Sexuality: Historical Themes and Emerging Issues in Women’s Rights Law: The Next Challenge in Sexual Harassment Reform: Racial Disparity*, 23 WOMEN’S RTS. L. REP. 227 (2002); and Virginia W. Wei, Note, *Asian Women and Employment Discrimination: Using Intersectionality Theory to Address Title VII Claims Based on Combined Factors of Race, Gender, and National Origin*, 37 B.C. L. REV. 771 (1996).

For examples of social science research where both racial and sexual harassment are considered, see Audrey J. Murrell, *Sexual Harassment and Women of Color: Issues, Challenges, and Future Direction*, in *SEXUAL HARASSMENT IN THE WORKPLACE: PERSPECTIVES, FRONTIERS, AND RESPONSE STRATEGIES* 51 (Margaret S. Stockdale ed., 1996); and Nicole T. Buchanan & Alayne J. Ormerod, *Racialized Sexual Harassment in the Lives of African American Women*, in *VIOLENCE IN THE LIVES OF BLACK WOMEN: BATTERED BLACK AND BLUE* 107 (Carolyn M. West ed., 2002).

⁶⁹ Hebert, *supra* note 68, at 32-33.

⁷⁰ *Id.* (suggesting that the stringent requirements of sexual harassment laws, such as those articulated in *Meritor*, would not be deemed applicable to racial harassment cases). This study suggests instead that courts do not allow lower standards of proof in racial harassment cases. See *infra* discussion accompanying notes 217-18. Hence, while courts may use very egregious behavior as the threshold requirement for “severe or pervasive” sexual harassment, as Professor Hebert suggests, they appear to require at least the same and more likely a higher level of egregiousness for “severe or pervasive” racial harassment.

that courts and society should generalize from their recognition of racial harassment and be more cognizant of “obvious” sexual harassment.⁷¹ Professor Hernández particularly considers issues that arise when we consider the intersection of race and sex in the harassment context. In one provocative piece, for example, she queries why women of color are over-represented among those who file sexual harassment charges with the EEOC. She suggests that minority women are disproportionately targeted not just for sexual harassment, but also as targets of a combined, cumulative harassment that is based both on race and sex in ways that are intersectional and not just additive.⁷²

While building on “what we know” about sexual harassment is a useful place to begin, it has diverted our attention from the inquiry into whether a novel legal or social perspective on racial harassment that is not linked in any way to sexual harassment is necessary. Although some parallel issues exist, other issues seem more apropos to one or the other form of harassment.⁷³ Despite the important and impressive work on sexual harassment laws, it cannot substitute for work on racial harassment laws.⁷⁴

B. Dispute Resolution Process for Racial Harassment Claims

The empirical study, which is the focus of this article, analyzes federal judicial opinions. As important contextual information, we now explain the dispute resolution process and the legal proceedings from which these opinions arise. This background information helps explain the study’s findings which we will subsequently discuss.

In fact, by the time these racial harassment cases come before a federal district court or appellate court, the aggrieved employee, accused employer, and accused harasser have already been part of a complex dispute resolution process. We can graphically

⁷¹ Hebert, *supra* note 68, at 33.

⁷² Hernández, *supra* note 68, at 183. Furthermore, many minority women are in the lowest playing jobs with little prospect for advancement (for instance, in agricultural, domestic services, and low-level assembly) and thus particularly vulnerable to harassment by their supervisors.

⁷³ As an example, the plaintiff’s demonstration that the harassment was “unwelcome” has become a critical issue in sexual harassment cases. The requirement has opened the door to controversial scrutiny of the plaintiff’s conduct (her dress, joking, flirting, and past behavior). In contrast, in racial harassment cases, the plaintiff’s “unwelcomeness” of racial harassment is rarely an issue. On the other hand, the requirement that the harassment is “because of sex” is infrequently an obstacle in heterosexual sexual harassment cases. In contrast, whether the harassment is “because of race” is a frequent issue in racial harassment cases. *See infra* discussion accompanying notes 176-93. The comparative emphasis on “quid pro quo” harassment offers another example. We can more readily imagine a supervisor coercing a women employee into unwanted sexual activity with the threat of being fired than a supervisor coercing a Black woman into accepting racial debasement with the threat of being fired. *See infra* note 97.

⁷⁴ There is the same need for the discrete exploration of other forms of harassment, such as harassment on the basis of age, religion, or disability that may have been inadvertently overshadowed by the dominance of research on sexual harassment. Assuming that other forms of harassment, such as racial harassment, are indistinguishable from sexual harassment threatens to obscure and belittle the importance of these other forms of harassment and discrimination. At the same time, sexual harassment and sexual harassment jurisprudence continue to be important and evolving areas for legal and social science research. The substantial scholarship, *see, e.g., supra* note 40, exists in part because of the ongoing discourse on their meanings.

depict the process as a funnel, where you begin with a very large number of racial harassment incidents (or at least employees' perceptions of such) at the wide end of the funnel.⁷⁵ Every published case begins with an employee believing he or she was racially harassed.⁷⁶ (See Figure 1.) As employees move through the various stages of the dispute resolution process, the number of cases declines.⁷⁷ Ultimately, only a small percentage of the original incidents are litigated, and even a smaller number are then reported in opinions.⁷⁸ To illustrate, over 56,000 racial harassment charges were filed with the EEOC between 1980 and 1999 (as further described below).⁷⁹ In contrast, our study estimates 735 judicial opinions on racial harassment during approximately that same time period, which amounts to only 1.3% of the charges.⁸⁰ Since not all individuals who believe they have been harassed bring an EEOC charge, the percentage of those who believe they have been harassed and ultimately have their case published is even smaller.

1. Process Overview

Any time during the dispute resolution process (up to the time of final judicial resolution), the parties may negotiate a settlement or participate in some ADR process.⁸¹ Some employees drop out at every stage of the process and simply never resolve their racial harassment claim through a private, administrative, or judicial proceeding.

⁷⁵ The general dispute resolution process has been described in various ways. See, e.g., William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 635-36 (1981); and David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86-87 (1993).

⁷⁶ Even before this point, the employee must overcome social-psychological forces that discourage people (women and persons of color especially) from acknowledging to themselves that they have experienced discrimination. See *infra* discussion accompanying notes 85-87.

⁷⁷ As Professor Pether reveals, federal judges determine (often on the basis of ad hoc criteria) which of their opinions are released to publishers (i.e., West and LEXIS) and these publishers then edit out (on the basis of various policies) opinions for the Federal Reporter system and for posting on their websites. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 1465-74 (2004) [hereinafter Pether]. See also Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1144-45 (1990) (finding that 80-90% of employment discrimination cases filed in federal court do not produce a published opinion).

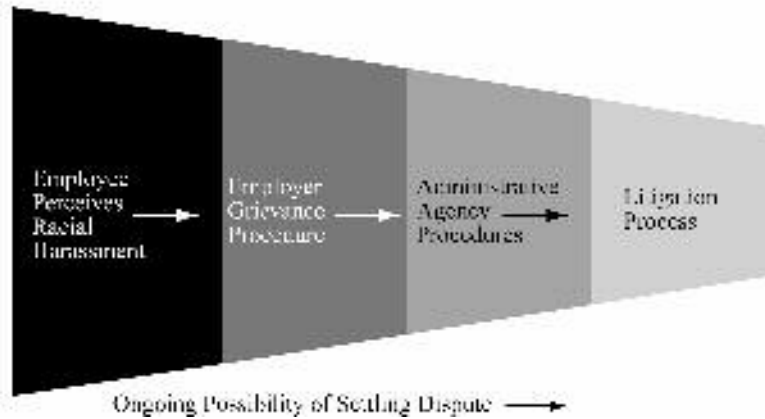
⁷⁸ See Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26-27 (1983) (indicating that the settlement rate for cases is very high). In addition, some employees may pursue their racial harassment claims only in state courts under state or federal laws.

⁷⁹ See *infra* discussion accompanying notes 82-84.

⁸⁰ This study included 147 cases during this period. Given that this represents 40% of six federal circuits, an estimate of judicial opinions in all circuits in this period would be 735. See *supra* note 11. In addition, some of those who filed charges during this period may still be awaiting a judicial resolution.

⁸¹ Almost 70% of employment discrimination cases are terminated by settlement. Clermont & Schwab, *supra* note 9, at 11-12, 29.

Figure I
Dispute Resolution Process for Racial Harassment Complaints



(a) Employee Perceives Racial Harassment. Racial discrimination and racial harassment in the workplace occur much more often than we might think. Surveys confirm that a substantial number of African Americans and other minority groups believe that they are treated differently and disadvantageously.⁸² EEOC statistics indicate, for instance, that racial harassment claims are numerically substantial and on the rise.⁸³ Between 1980-1989, the EEOC reports there were 9,757 racial harassment charges. In the following decade of 1990-1999, the number of racial harassment charges jumped over 480% to 47,175.⁸⁴

For a variety of reasons, however, some employees who believe they are harassed do not take further steps.⁸⁵ They may fear retaliation by their supervisors or co-workers, or they may believe that complaining would be ineffective. They may not know of organizational resources or the employer's grievance procedures. Cultural explanations may also play a role.⁸⁶ Asian Americans, for instance, may choose to ignore the problem rather than confront those they believe are harassing them. Other minorities may choose

⁸² See *supra* note 63.

⁸³ *Trends in Harassment Charges Filed with the EEOC During the 1980s and 1990s*, available at <http://www.eeoc.gov/stats/harassment.html>.

⁸⁴ National origin harassment charges had similarly dramatic increases. In 1980-1989, there were 2,289 national origin harassment charges between 1980-1989 and 15,148 charges between 1990-1999. *Id.*

⁸⁵ See Juliano & Schwab, *supra* note 8, at 552 n.9 (citing various studies that explore why women do not file sexual harassment claims).

⁸⁶ Individuals from different cultural backgrounds approach conflict differently. Hazel Rose Markus & Leah R. Lin, *Conflictways: Cultural Diversity in the Meanings and Practices of Conflict*, in *CULTURAL DIVIDES* 302-33 (Deborah A. Prentice & Dale T. Miller eds., 1999) (describing dispute resolution styles of racial and ethnic American groups). While not necessarily indicative of any given individual's behavior, Chinese Americans tend to avoid conflict and confrontation, opting instead to preserve the harmony of the group. *Id.* at 316-21. Both Chinese-Americans and Mexican-Americans are sensitive to the hierarchical system of relationships, often tending to defer to rather than oppose those in authority. *Id.* at 316-24.

to minimize the discriminatory harassment and instead attribute any failures to themselves.⁸⁷

(b) Employer Grievance Procedures. If aggrieved employees decide to do something, a likely next step is to explore grievance procedures within the organization. This may mean complaining to their supervisor, another manager, or someone in the human resources department who has been informally or formally designated as the person who deals with these types of complaints. These procedures range from something very informal, such as an impromptu discussion between the employee and the alleged harasser, to a company-designed alternative dispute resolution (ADR) program,⁸⁸ to a formal grievance procedure including legal representation or union involvement. Some employees conclude that these processes resolve their disputes to their satisfaction, while others do not consider these grievance procedures effective, fair or credible. Some employees may not use any employer grievance procedure, either out of choice, because they are not aware of the procedures, or because the employer does not have a grievance procedure.⁸⁹

(c) Administrative Agency Procedures. If the dispute is not resolved within the company, the employee may consider pursuing litigation on the basis of Title VII or other statutes.⁹⁰ Before a private lawsuit based on Title VII can be filed, however, the

⁸⁷ A study by Harvard psychologists, for instance, found that minority group members tend to minimize discrimination and attribute any failures to themselves. Karen Ruggiero & Donald M. Taylor, *Why Minority Group Members Perceive or Do Not Perceive Discrimination That Confronts Them: The Role of Self-esteem and Perceived Control*, 72 (2) J. PERSONALITY & SOC. PSYCHOL. 373-89 (1997). By attributing their failures to discrimination, minority group members can protect their self-esteem about their ability to perform. By minimizing discrimination, however, they can protect their perception of the social system's esteem and their perception of control. These psychologists hypothesize that minority group members apparently prefer the psychological benefits of minimizing discrimination rather than the benefits derived from acknowledging discrimination.

⁸⁸ An increase in company ADR programs is prompted in part by a string of Supreme Court decisions legitimizing arbitration and other ADR processes for employment disputes, i.e., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); and *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). See generally LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, *ADR IN THE WORKPLACE* 546-672 (2000). Companies believe there are economic and strategic reasons for the increased use of internal ADR programs.

Some of these ADR programs are voluntary, but companies also are instituting mandatory programs in employment contracts or employment handbooks. In other words, to the extent that racial harassment claims fall within the scope of a mandatory ADR program, employees may be barred from pursuing their claims in the courts. While the courts may scrutinize the terms of these mandatory ADR agreements for unconscionability, lack of consideration, or other contractual inadequacies, e.g., *Armendariz v. Foundation Health Psychare Services, Inc.*, 24 Cal. 4th 83 (2000); and *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002), the Supreme Court has unequivocally held in the *Gilmer* and *Circuit City* cases cited above that the agreements in general are enforceable.

⁸⁹ Employees and employers may recognize that grievance procedures are sometimes problematic. See, e.g., David Lewin & R.B. Peterson, *Behavioral Outcomes of Grievance Activity*, 38 INDUSTRIAL RELATIONS 554-76 (1999) (documenting negative outcomes for employees who use grievance procedures). At the same time, the existence of an employer's grievance procedure and the employee's failure to use it is relevant to the employer's affirmative defense. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 808-09.

⁹⁰ See *infra* discussion accompanying notes 97-109.

employee must first go through administrative procedures administered by the Equal Employment Opportunity Commission (EEOC).⁹¹ This includes strict time limits under which the individual must file charges with the EEOC.⁹² This charge triggers a number of EEOC procedures, including notice to the employer, an investigation of the facts, and efforts to settle the charge.⁹³

If the EEOC believes that harassment has occurred, it attempts conciliation with the employer to remedy the harassment. If conciliation is unsuccessful, the EEOC can either bring suit in federal court⁹⁴ or close the case, after which the employee can file a lawsuit on her or his own behalf within a specified time period.⁹⁵ If the EEOC is satisfied that there has not been racial harassment, it may dismiss the charge at any point in the administrative process. The employee can then file a lawsuit.⁹⁶ If the case has been successfully conciliated, mediated, or settled, neither the EEOC nor the employee can go to court unless the agreement between the parties is not honored.

2. Litigation Process

After these administrative procedures, many employees do not proceed further, even if the dispute has not been resolved. They may have exhausted their financial or emotional resources, reassessed their legal claim and determined it is not sufficiently viable, or simply wanted to move on to other priorities in their lives. Some, however, do move ahead with private litigation.

⁹¹ Rush v. McDonald's Corp., 966 F.2d 1104, 1110 (7th Cir. 1992). This allows the EEOC to investigate the claim and provides the employer notice of the complaint and the opportunity to settle the dispute through conference, conciliation, or persuasion. *Federal Laws Prohibiting Job Discrimination Questions and Answers*, available at <http://www.eeoc.gov/facts/qanda.htm>. See generally EEOC Compl. Man. (CCH); 29 C.F.R. §§ 1601.6 to 1601.29 Subpart B—Procedures for the Prevention of Unlawful Employment Practices.

⁹² 29 C.F.R. § 1601.13.

⁹³ As an alternative to a lengthy investigation process, the parties may be selected for the EEOC's expanding mediation program. EEOC mediation is voluntary and confidential. If the mediation is not successful, the dispute returns to the EEOC process. For the EEOC website describing the mediation program, see <http://www.eeoc.gov/mediate/>. See also E. Patrick McDermott, *An Evaluation of the EEOC Mediation Program*, available at <http://eeoc.gov/mediate/report/chapter2/html>.

⁹⁴ Only a small percentage of employment discrimination lawsuits are brought by the EEOC on behalf of the employee. In the 87 EEOC cases that went to trial over five years, the EEOC had a success rate of about 60%, comparing favorably with 27% success rate for private attorneys found in an analysis of the Administrative Office of the U.S. Courts' data cited by the EEOC. Of 15 cases at the appellate level, there was a success rate of 80%, compared to private attorneys' success rate of 16%. *Internal Review Reflects High Success Level of EEOC Attorneys: Recent Filings on Upswing*, BNA 9-19-02 HRR at 906, available at <http://www.eeoc.gov>.

⁹⁵ 29 C.F.R. § 1601.28. In addition, the charging party can also request a notice of "right to sue" from the EEOC 180 days after the charge was first filed, and then bring suit within 90 days after receiving this notice. *Id.*

⁹⁶ Within 90 days of receiving notice of the EEOC's decision. *Id.*

(a) Statutory Bases for Racial Harassment Claim. The most apparent federal cause-of-action for racial harassment in the workplace is Title VII of the Civil Rights Act of 1964. As earlier discussed, the Supreme Court had delineated the broad parameters of Title VII liability for sexual harassment hostile environment, which have also been applied to the racial harassment context.⁹⁷

In addition to Title VII, prospective plaintiffs can also consider two post Civil War statutes, Sections 1981 and 1983 of the Civil Rights Act of 1866, as federal causes of action for racial harassment.⁹⁸ Section 1981 provides that all persons in the United States “shall have the same right . . . to make and enforce contracts . . . to the full and equal benefit of all laws . . . as is enjoyed by white citizens.”⁹⁹ The Civil Rights Act of 1991 amends Section 1981 to expressly cover not only the making and enforcing of the employment contract but also the “enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.”¹⁰⁰ Although Section 1981 applies to settings other than employment, approximately 77% of all Section 1981 claims involve employment claims.¹⁰¹ Given its post Civil War context, it was designed to address anti-

⁹⁷ Theoretically, there are two varieties of racial harassment prohibited by Title VII: quid pro quo harassment and hostile environment harassment. 29 C.F.R. § 1604.11 n.1. Quid pro quo harassment requires that plaintiffs show “tangible job benefits [such as job promotions, raises, favorable reviews, or continued employment] are conditioned on an employee’s submission to conduct of a [racial] nature and that adverse job consequences result from the employee’s refusal to submit to the conduct.” *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1414 (10th Cir. 1987). Thus, if a supervisor communicates directly or indirectly to an employee “If you don’t let me ridicule you with racial epithets and stereotypes, you won’t get that promotion,” this would appear to constitute the kind of improper racial bargaining described above. However, there were no cases in the study where plaintiffs brought a claim of quid pro quo racial harassment. Plaintiffs and their lawyers have apparently bought into the assumption that a claim of quid pro quo racial harassment is not possible, even though it would appear that such a claim is conceptually and realistically plausible.

⁹⁸ 42 U.S.C.A. §§ 1981, 1983. The Civil Rights Act of 1991 amended Title VII and Section 1981. P.L. 102-166 (Nov. 21, 1991) 105 Stat. 1071. The 1991 Act was enacted, at least in part, in response to case law that many legislators felt inappropriately eroded plaintiffs’ rights. 42 U.S.C. § 1981a. *See* Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304 (1992); and Jennifer Miyoko Follette, *Complete Justice: Upholding the Principles of Title VII Through Appropriate Treatment of After-Acquired Evidence*, 68 WASH. L. REV. 651, 653 (1993). Among other things, it allows plaintiffs to recover compensatory and punitive damages and provides for jury trials where compensatory or punitive damages are sought under Title VII; expands coverage of Section 1981 to racial discrimination in all forms in the employment relationship, including racial harassment (overturning *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)); and encourages the use of alternative dispute resolution processes for resolving civil rights disputes.

⁹⁹ 42 U.S.C. § 1981(a). *See* *General Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 102 S. Ct. 3141, 3150, 73 L. Ed. 2d 835 (1982) (recounting history of these statutes).

¹⁰⁰ 105 Stat. 1071, 42 U.S.C. § 1981(b). While the statute was once interpreted in a more limited fashion, it now clearly applies to the private sector and to the employment relationship. 105 Stat. 1071, 42 U.S.C. § 1981(b).

¹⁰¹ Theodore Eisenberg & Stewart Schwab, *The Importance of Section 1981*, 73 CORNELL L. REV. 596, 601 (1988).

Black discrimination. Like Title VII, however, it applies to all forms of racial discrimination including discrimination against Whites.¹⁰²

While both Title VII and Section 1981 address workplace racial discrimination including racial harassment and have essentially the same elements,¹⁰³ they are distinguishable in a number of ways. As the Supreme Court notes, “the remedies available under Title VII and under Section 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.”¹⁰⁴ For instance, in contrast to Title VII, Section 1981 protection is not limited to employees of an employer having fifteen or more employees,¹⁰⁵ and it appears not to apply to federal government employers in certain circumstances.¹⁰⁶ In addition, there are procedural differences: Section 1981 does not have its own built-in statute of limitations, so plaintiffs presumably use the most analogous limitations period provided for under state laws¹⁰⁷ (which likely is longer than the statute of limitations for Title VII claims). Furthermore, it does not require an exhaustion of administrative remedies. Unlike Section 1981, Title VII has a cap on damages and is directed only against employers, not individuals. Jury trials are available for both Title VII (after the Civil Right Act of 1991) and Section 1981 claims.

Section 1983¹⁰⁸ provides a legal and equitable cause of action for individuals who have been denied a constitutional or federal statutory right by a state or local government official, such as the right to equal protection. It does not provide its own substantive rights. Section 1983 provides for an action for injunctive relief and damages against public officials sued in their personal capacity, subject to broad immunities and certain caveats.¹⁰⁹

(b) Legal Proceedings in Racial Harassment Cases. In theory, employees may have their cases heard on the merits before a jury or the bench.¹¹⁰ As substantiated by this study, very few disputes actually reach this point in the litigation process.¹¹¹ More

¹⁰² Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); McDonald v. Santa Fe Trail, Transp. Co., 427 U.S. 273 (1976).

¹⁰³ Thomas v. St. Luke’s Health System, Inc., 869 F. Supp. 1413 (N.D. Iowa 1994), *aff’d*, 61 F.3d 908; Blount v. Alabama Co-op Extension Service, 869 F. Supp. 1543 (M.D. Ala. 1994).

¹⁰⁴ Johnson v. Railway Express Agency, 421 U.S. 454, 462 (1975).

¹⁰⁵ Section 701(b), 42 U.S.C. § 2000e(b).

¹⁰⁶ Section 717, 42 U.S.C. § 2000e-16. Jett v. Dallas Independent School District, 491 U.S. 701 (1989); Brown v. GSA, 425 U.S. 820 (1976). Also, while Section 1981 would clearly cover racial or ethnic harassment, it does not appear to cover harassment on the basis of national origin. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613-614, 107 S. Ct. 2022, 2028-2029, 95 L. Ed. 2d 582 (1987).

¹⁰⁷ Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975).

¹⁰⁸ 42 U.S.C. § 1981.

¹⁰⁹ Davis v. Scherer, 468 U.S. 183 (1984); Monell v. Department of Social Services, 436 U.S. 658 (1978).

¹¹⁰ 42 U.S.C. § 1981a(c).

¹¹¹ See *infra* discussion accompanying notes 156-58. See also Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) [hereinafter Beiner].

commonly, the employers as the defendants initiate a pre-trial proceeding such as a motion to dismiss or a motion for summary judgment in the federal district court. As further described below, these proceedings become the district court judge's substantive analyses of the merits of the plaintiff's case. As such, these pre-trial proceedings often effectively dispose of the case, thus pre-empting the theoretically possible jury or bench trial on the merits. While appealing the district courts' holding on the pre-trial motions is possible, very few cases actually move to the appellate level.¹¹²

A motion for summary judgment tests whether on the evidence before the court, a reasonable jury could return a verdict in the nonmoving party's favor.¹¹³ "The purpose of summary judgment is to isolate, and then terminate, claims and defenses that are factually unsupported."¹¹⁴ By granting the defendant's summary motion, the court is agreeing that the plaintiff has failed to make an adequate showing on an essential element of her or his case on which she or he has the burden of proof.¹¹⁵ If granted, it will result in a "judgment" in the defendant's favor (thus allowing the plaintiff to appeal). By denying the defendant's summary judgment motion, the court finds that a "reasonable jury could return a verdict in favor of the non-moving party."¹¹⁶ If there remains a genuine issue of material fact to be decided by the jury or other fact-finder, the court must deny summary judgment.¹¹⁷ Denial of the defendant's motion constitutes a favorable outcome for the plaintiff in the sense that it allows the plaintiff to continue the litigation if the plaintiff chooses. It is also likely to make the defendant more receptive to settlement negotiations.

In a motion to dismiss, the district judge examines the allegations contained in the pleadings to determine whether the allegations of law and fact, even if true, are legally sufficient.¹¹⁸ (In contrast, in a motion for summary judgment, the district judge consults not only the pleadings, but also evidence such as affidavits, depositions, interrogatory answers, or admissions to determine whether any factual dispute exists between the parties.¹¹⁹) Under this motion, a claim may be dismissed either if it asserts a legal theory that is not cognizable as a matter of law or if it fails to allege sufficient facts to support a

¹¹² See also JUDITH RESNIK, PROCESSES OF THE LAW: UNDERSTANDING COURTS AND THEIR ALTERNATIVES 9-21 (2004).

¹¹³ FED. R. CIV. P. 56; STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN, & JOHN B. CORR, A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 691-701 (2001 4th ed.) [hereinafter BAICKER-MCKEE ET AL.].

¹¹⁴ BAICKER-MCKEE ET AL., *supra* note 113, at 691; Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 327 (1986).

¹¹⁵ BAICKER-MCKEE ET AL., *supra* note 113, at 692.

¹¹⁶ *Id.* at 692-93.

¹¹⁷ *Id.* at 691-92; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

¹¹⁸ FED. R. CIV. P. 12(b)(6); 12(c); BAICKER-MCKEE ET AL., *supra* note 113, at 259-67. 12(b)(6). *Id.* at 259. Motions on other defenses, such as lack of jurisdiction over the subject matter or the person, were rare in this study.

¹¹⁹ BAICKER-MCKEE ET AL., *supra* note 113, at 689.

cognizable legal claim.¹²⁰ The court presumes that all well-pleaded allegations are true, resolves all doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party.¹²¹ There is a strong presumption against dismissal of the claim. Dismissal is granted only "if it appears beyond doubt that the pleader can prove no set of facts in support of the claim that would entitle the pleader to relief."¹²²

Part II: Characteristics of Racial Harassment Cases

Part II paints a picture of racial harassment cases through an empirical description of the parties, the employment setting, the nature of the alleged harassment, and the litigation process. It begins with a profile of the plaintiff employees and the individual and company defendants. Part III then considers the effect of these characteristics on the outcome of racial harassment cases.

A. The Parties and Setting

1. Plaintiffs' Profile

In order to learn more about the individuals who bring racial harassment claims, this study gathers various information on the plaintiffs: their gender, race, ethnicity, and a description of their employment. The percentages given throughout Part II are based on the total number of cases in which the particular information is available. For some variables, the information is not available in all 260 cases. The actual number of cases ("N") represented by the percentage is given in the accompanying Tables so that the reader can consider the sample size for that variable.¹²³

(a) Gender and Race. As shown in Table 1, the plaintiffs in racial harassment cases are more likely to be men (58.5%) than women (41.5%).¹²⁴ This gender distribution approximates the percentages of men and women in the general labor force.¹²⁵

¹²⁰ *Id.* at 260.

¹²¹ *Id.* at 260.

¹²² *Id.* at 260-62.

¹²³ The plaintiffs' gender is identifiable in all 260 cases. Thus, in Table 1, women are plaintiffs in 108 cases, which constitute 41.5% of all the cases in which the gender of the plaintiff is available. The plaintiffs' race or ethnicity, however, is indicated in only 234 cases. Thus, in Table 1, African Americans are plaintiffs in 191 cases, which constitute 81.6% of these 234 cases.

¹²⁴ In coding gender, the study uses the gender designation indicated in the judicial opinion, although the coauthors recognize that the objective determination of "gender" and "sex" is contestable.

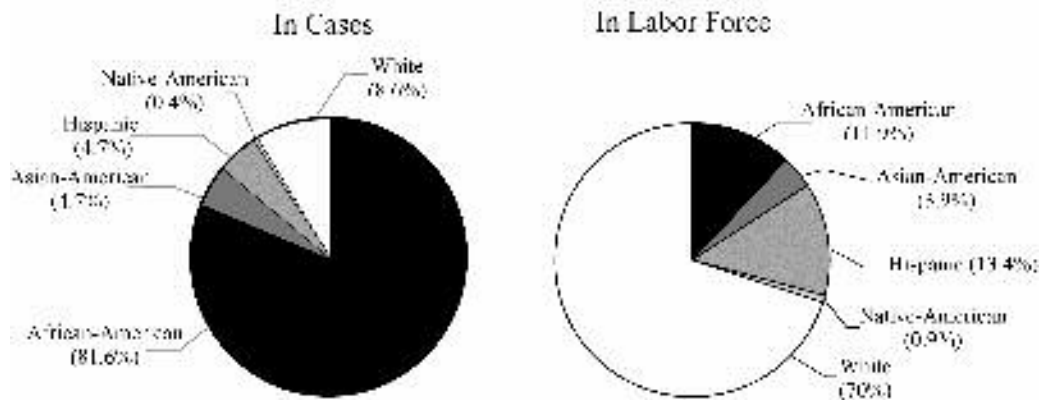
¹²⁵ The gender and racial percentages for both the general population and the general labor force are calculated on the basis of the latest available census data. U.S. Census Bureau, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002: THE NATIONAL DATA BOOK, at 16 (Table 14), 368 (Table 562) (122nd ed. 2002) [hereinafter Census Bureau]. The percentages for the general population and the labor force are fairly comparable. (*E.g.*, African Americans constitute 11.90% of the labor force and 12.21% of the general population; Asian Americans constitute 3.85% of the labor force and 3.86% of the

Table 1. Plaintiffs' Gender and Race

	As % of All Cases	(N)	As % of Labor Force in General
Gender:			
Women	41.5%	(108)	46.6%
Men	58.5	(152)	53.4
Race or Ethnicity:			
African American	81.6	(191)	11.9
Asian American	4.7	(11)	3.9
Hispanic American	4.7	(11)	13.4
Native American	.4	(1)	.9
White American	8.6	(20)	70.0

The ethnic and racial diversity¹²⁶ of plaintiffs is notable in various ways and offers more of a contrast with racial demographics in general. Minority plaintiffs constitute approximately 90% of all plaintiffs. While African Americans are by far the most frequent racial group at 81.6% of all plaintiffs, the percentage of White American plaintiffs is larger than that of either Hispanic or Asian American plaintiffs. Native Americans are virtually invisible as a plaintiff group with only one case.

Figure 2
Race or Ethnicity of Plaintiff Employees



Moreover, the racial distribution of plaintiffs in these cases varies in distinctive ways from the racial distribution in the general labor force. As shown in Figure 2 and Table 1, the comparison of Blacks and Whites is most dramatic. African Americans

general population.) Given the work context of racial harassment cases, however, we opt to use the labor force percentages for comparisons. The percentage for Hispanic Americans is based on a calculation in which Hispanics are deducted from each racial group and their participation in the labor force is taken into account. For a detailed description of these calculations, contact the authors.

¹²⁶ In coding race or ethnicity, the study uses the racial or ethnic category indicated in the judicial opinion, although the authors recognize that the objective determination of “race” and “ethnicity” is contestable. There also are three additional cases where the plaintiff is identified as “not white.”

constitute approximately 12% of the labor force, yet constitute over 80% of plaintiffs in racial harassment cases. In contrast, while Whites constitute approximately 70% of the labor force, they are plaintiffs in less than 9% of racial harassment cases. Asian Americans are plaintiffs at only a slightly higher percentage than their percentage in the general population; Hispanics and Native Americans are notably under-represented in the plaintiff class relative to their representation in the labor force.

We can further study this data by looking at the intersection of gender and race, although we should keep in mind that the number of individuals in the resulting groups is sometimes small. As shown in Table 2, minority men are more likely than minority women to bring these cases. Among African Americans and Asian Americans, approximately 60% of each plaintiff group is male. All the Hispanic plaintiffs are men. In contrast, the percentages are reversed among White Americans, with women more likely to be plaintiffs than men.

Table 2. Intersection of Plaintiffs' Race and Gender

	Gender as % of Each Plaintiff Group in Cases	(N)	Gender as % of Each Racial Group in Labor Force in General
<u>African Americans:</u>			
Women	42.0%	(81)	54.6%
Men	58.0	(112)	45.4
<u>Asian Americans:</u>			
Women	36.4	(4)	47.7
Men	63.6	(7)	52.3
<u>Hispanic Americans:</u>			
Women	0	(0)	42.3
Men	100.0	(11)	57.7
<u>White Americans:</u>			
Women	61.9	(13)	46.5
Men	38.1	(8)	53.5

When we compare these groups' representation in the study to their representation in the labor force, some interesting patterns emerge. African American and Asian American women are under-represented as plaintiffs (varying from about 11-13% less than their percentage in the labor force), while Hispanic women are drastically under-represented (in fact, not represented at all). Thus, it appears that minority women are less likely than their male counterparts to bring racial harassment cases. In contrast, White women are over-represented (about 15% more than their percentage in the labor force), suggesting that they are more likely to bring racial harassment cases than White men.

(b) Employment Profile. While a common perception may be that harassment occurs only in non-professional occupations, the data shows plaintiffs in a wide range of

occupations.¹²⁷ As displayed in Table 3, while approximately 80% of the plaintiffs are in the service and support occupational category, almost 20% are in the management and professional occupational category.¹²⁸ Management occupations include financial analysts and managers, hotel managers, accountants and auditors, information systems managers, and a range of other management roles. Plaintiffs in professional occupations include lawyers, doctors, architects, engineers, counselors, social workers, educators, psychologists, scientists, and economists.

Table 3. Plaintiffs' Occupations

	As % of Cases	(N)
<u>Management and Professional:</u>	19.3%	(45)
Management	10.7	(25)
Professional Occupations	8.6	(20)
<u>Service and Support:</u>	80.7	(188)
(Select Categories)		
Office and Administrative Supervision	21.5	(50)
Production	10.7	(25)
Protective Services	8.2	(19)
Sales	7.3	(17)
Installation and Repair	5.2	(12)
Transportation	4.7	(11)
Healthcare Support	4.3	(10)

Service and support occupations are varied, including the examples in Table 3.¹²⁹ The occupation with the most plaintiffs in any category is office and administrative supervision positions (with over 20% of all plaintiffs), which include secretaries, office assistants, computer operators, drafters, and phone operators. Following in size among service and support occupations are plaintiffs in production, which includes assemblers, fabricators, machinists, welders, food processing, textile production, and woodworkers. The next largest group is protective services occupations, which include police, firefighters, security personnel, corrections officers, and park rangers—an irony given their occupational focus.

¹²⁷ The plaintiffs' occupations are coded according to a categorization system provided by the U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, available at <http://www.bls.gov/oco/home.htm>. There are over 24 different occupational categories under the major headings of management and business and financial operations occupations, professional and related occupations, and service occupations. In addition, the authors added seven categories which appear distinguishable from the 24 original categories. (Complete details are on file with the authors.) Job patterns for women and minorities in private industry for the year 2000, available at <http://www.eeoc.gov>.

¹²⁸ These percentages are based on the 233 cases in which the plaintiffs' occupation is indicated. This study thus substantiates that discriminatory harassment allegedly occurs at all occupational levels, including among management and professionals. See also Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945 (1982).

¹²⁹ All other service and support occupations have nine or fewer cases.

Furthermore, while this is not always the case, many plaintiffs are long-time employees; their average tenure is 8.36 years.¹³⁰ (This runs counter to the notions that increased contact and working with people of different races inevitably decreases racism and that people can only be uncivil to “strangers.”¹³¹)

2. Defendants’ Profile

In addition to learning about the individuals who are the targets of harassment, we learned about the individuals and companies who are accused of misconduct. Gathering this information helps us better understand who, where, and perhaps why harassment occurs. This study considers the gender and race of the accused harassers; whether the alleged harassment is committed by a single individual or multiple individuals; whether the harassers are supervisors, co-workers or both; and the industry and employer settings in which they work.

(a) Individual Harassers. The race and gender information of the alleged harassers reveals interesting patterns, as shown in Table 4. For instance, men constitute two-thirds and women one-third of the alleged harassers.¹³² About three-quarters of these individuals are White, although 20% are Black and a small percentage are Asian.¹³³

Table 4. Alleged Harassers’ Gender and Race

	As % of All Cases	(N)	As % of Labor Force in General
<u>Gender:</u>			
Women	33.3%	(48)	46.6%
Men	66.6	(96)	53.4
<u>Race:</u>			
African American	20.0	(17)	11.9
Asian American	5.9	(5)	3.9
White American	74.1	(63)	70.0

As compared to the general labor force, there are fewer women harassers and more men harassers than one might expect. Interestingly, as shown in Figure 3 and Table 4, there are more Black and Asian harassers than one might expect given their percentages in the workforce. White harassers, on the other hand, approximate their percentage in the labor force, while Hispanics are not represented at all.

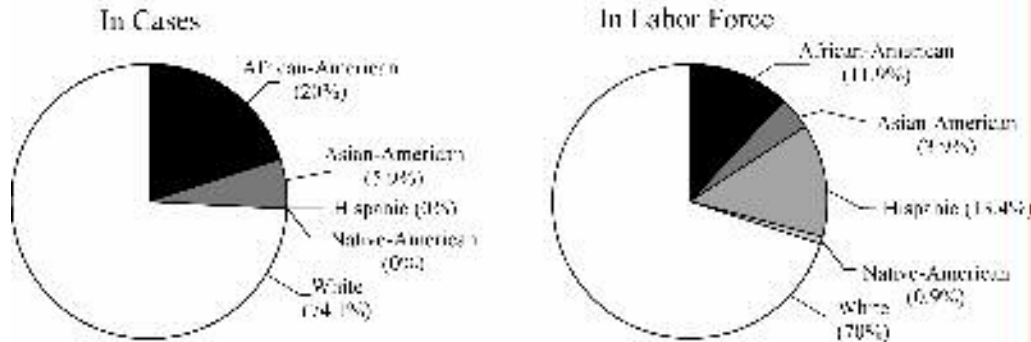
¹³⁰ This average is based on the 207 cases for which tenure is indicated.

¹³¹ In some cases, the alleged harasser is a new boss or coworker.

¹³² The gender of the accused harassers is indicated in 144 cases.

¹³³ The race of the alleged harasser is indicated in 85 cases. There are seven additional cases where the defendant is identified as a race other than the plaintiff’s race, but the opinion did not indicate the specific race or ethnicity.

Figure 3
Race of Alleged Harassers



While the numbers are small, we can make some interesting observations when we consider the race and the gender of defendants simultaneously. As indicated in Table 5, it appears that both African American men and White men are more likely to be accused of racial harassment than are their female counterparts.¹³⁴ White men constitute about two-thirds of White defendants; and Black men constitute 80% of Black defendants. Furthermore, this over-representation of men among African American defendants is unexpected given that African American men are only 45% of all African Americans in the labor force.

Table 5. Intersection of Alleged Harassers' Race and Gender

	Gender as % of Each Defendant Group in Cases	(N)	Gender as % of Each Racial Group in Labor Force in General
<u>African Americans:</u>			
Women	20.0%	(3)	54.6%
Men	80.0	(12)	45.4
<u>White Americans:</u>			
Women	33.3	(21)	46.5
Men	66.7	(42)	53.5

While our image may be that harassment most typically occurs one-on-one with the harasser being the employee's supervisor, that is not the complete picture. As shown in Table 6, in about two-thirds of the cases, plaintiffs claim that more than one person harassed them. The organizational status and the group composition of the harassers are also interesting.¹³⁵ In almost half of the cases, the supervisor is the alleged harasser, but

¹³⁴ Among Asian American defendants, two are women and none are men. In two cases, the defendants are identified as African American but their gender is not indicated. Hence, there are fewer cases with African American harassers indicated in Table 5 than in Table 4.

¹³⁵ The organizational status and the composition of the group of alleged harassers is indicated in 222 cases.

co-workers are harassers as well (20.7%). Perhaps most revealing is that in 31% of the cases, the accused harassers include *both* a supervisor and a co-worker.

(b) Company Defendants. As shown in Table 6, in racial harassment cases the employing company is almost always a named defendant.¹³⁶ Some plaintiffs also sue the specific individuals that they claim harassed them. In 31.5% of the cases, both the company and the individual harasser(s) are named defendants.

Table 6. Alleged Harassers' and Employers' Defendant Profiles

	As % of Cases	(N)
<u>Number of Harassers:</u>		
Individual	35.1%	(74)
More than 1 person	64.9	(137)
<u>Status of Harassers:</u>		
Supervisor Only	47.8	(106)
Co-Worker Only	20.7	(46)
Both	31.5	(70)
<u>Named Defendants:</u>		
Employer	96.9%	(252)
Individual	31.9	(83)
<u>Private v. Public Sectors Defendants:</u>		
Private Sector	69.6	(176)
Public Sector	30.4	(77)
Federal	4.0	(10)
State	10.3	(26)
Local	11.9	(30)
<u>Employers' Industries:</u>		
Manufacturing	17.8	(44)
Health Care and Social Services	13.8	(34)
Transportation	11.7	(29)
Corrections and Security	10.5	(26)
Retail Trade	10.1	(25)
Finance	5.7	(14)
Professional Services	5.7	(14)
Information and Communications	5.3	(13)
Educational Services	4.9	(12)
Accommodations and Food Services	4.5	(11)

Since plaintiffs routinely name their employing company, we could identify the range of employment settings in which harassment allegedly occurs. In addition to identifying the company's industry, we determined that, while about 70% of the work settings in which harassment allegedly occurs are private businesses, public sector

¹³⁶ This is consistent with Title VII's prohibition of the "employer" (rather than individual defendants) to engage in discrimination. 42 U.S.C.A. § 2000e-2 (a).

settings are not immune with about 30% of the cases set there.¹³⁷ (See Table 6.) Among the public sector employers in the study who identify their government level, federal government employers are less likely than state or local employers to be alleged harassers.

While the prior occupational information on plaintiffs in Table 3 tells us what kinds of jobs the plaintiffs have, the information on the industrial categories of the defendant companies tells us with what kinds of employers plaintiffs work.¹³⁸ For instance, plaintiffs may work as lawyers or as secretaries (as previously discussed) in a range of industries such as health care, finance, or professional services. Having both the plaintiff's occupation and the companies' industry gives us a more complete picture of the employment context in which harassment allegedly occurs.¹³⁹ As with the data on private sector versus public sector, the data on industrial categories confirms that charges of racial harassment are not limited to isolated employment settings.

As illustrated in Table 6, the study reveals that there are allegations of harassment across many industrial categories in both the private and public sectors.¹⁴⁰ The largest number of cases occur in the manufacturing sector (17.8%). This sector includes all kinds of manufacturing enterprises, including manufacturers of metal products, computers and electronic products, appliances, transportation equipment, furniture and related products, food, plastics, and textiles. Ironically, given their purposes, two categories have notably high percentages of harassment claims: health care and social services (including hospitals, nursing homes, and other allied health and social service facilities) (13.8%) and corrections and security (including law enforcement, prisons, fire departments and the military) (10.5%). Professional services including law firms, accounting firms, architectural and engineering firms, computer services, and consulting services are not immune with 5.7% of the cases.

¹³⁷ There are six additional cases where the defendants are unions and utilities but it was unclear if they are in the private or public sectors.

¹³⁸ Defendant employers' industries are indicated in 247 of the cases.

¹³⁹ There has been a range of research on racial discrimination, including racial harassment, in specific occupational areas. See, e.g., Giselle Corbie-Smith, Erica Frank, Herbert W. Nickens & Lisa Elon, *Prevalences and Correlates of Ethnic Harassment in the U.S. Women Physicians' Health Study*, 74(6) ACAD. MED. 695 (1999); ARAVINDA NADIMPALLI-REEVES, GENDER MATTERS, RACE MATTERS: A QUALITATIVE ANALYSIS OF GENDER AND RACE DYNAMICS IN LAW FIRMS (2001) (dissertation noting racial and sexual harassment of African American female attorneys); and Heather Antecol & Deborah Cobb-Clark, *Identity and Racial Harassment*, SSRN Paper ID IZA Discussion Paper No. 1149 (May 4, 2004), available at http://papers.ssrn.com/paper.taf?abstract_id=547582 (exploring racial harassment in the military).

¹⁴⁰ The defendant company's industries are coded according to a Standard Industrial Classification (SIC) system provided by the U.S. Department of Labor, Occupational Safety and Health Administration, available at <http://www.osha.gov/pls/imis/sicsearch.html>, although the authors added some additional categories that seemed distinguishable from the original SIC categories. (Complete details are on file with the authors.)

3. Novel Fact Patterns

As one might predict, the most common fact pattern by far involves a White supervisor harassing a minority employee. Novel fact patterns, however, are noteworthy. They prompt us to question our factual assumptions, perhaps suggesting unnoticed but revealing racial dynamics. They also may be predictive of future patterns. These more novel patterns collectively account for over 20% of all the cases in the study, as indicated in Table 7. Hence, although they are not typical, they also are not rare. We therefore thought it useful to identify and label novel fact patterns found in the cases.

Table 7. Novel Fact Patterns

	As % of Cases	(N)
Same-Race Harassment	3.1%	(8)
Minority-on-Minority Harassment	3.5	(9)
Minority-on-White Harassment	3.8	(10)
Third-party Harassment	1.2	(3)
Contra-power Harassment	3.1	(8)
Derivative Harassment	5.0	(13)

Some cases are atypical because of the races of the parties. For instance, in some cases both the harasser and victim are of the same race (“same-race harassment”). In other cases, both the harasser and the victim are minority, but are of different races (“minority-on-minority harassment”). Then there are cases with a minority harasser and a White victim which might be viewed as reverse harassment.

Some cases are novel because of the status of the parties; they do not involve the typical pairing of a harassing supervisor and a plaintiff who is the targeted employee. For example, in some cases, the harasser is not a supervisor or another coworker, but rather a third party such as a customer (“third-party harassment”). In other cases, the power status of the parties of the parties is reversed. Rather than a supervisor with ostensible organizational power, the harasser is an employee who harasses his or her supervisor (“contra-power harassment”). Finally, in some cases, the plaintiff employee is not the target of harassment, but rather the target is some other person such as another employee, a customer, or a family member (“derivative harassment”). In some of these derivative harassment cases, the plaintiff-employee may be harassed because of their association with or support of another person.

B. Nature of the Harassment

1. Types of Harassment

Consistent with social science research,¹⁴¹ plaintiffs' complaints in this study indicate that perpetrators use strikingly varied ways to harass them. Plaintiffs claim that some forms of harassment are patently obvious while others are much more subtle. We identify over 50 discrete types of harassment. These types of harassment are grouped in four major categories, similar to categories recognized in social science research:¹⁴² Verbal Harassment, Physical Objects, Physical Conduct, and Work-related Decisions. In many cases, plaintiffs claim they are harassed in more than one way. In any one case, if there are multiple forms of harassment, each one is identified and coded. Hence, a plaintiff's claim of harassment might fall in one or all of the categories or in multiple ways within each category.

Some cases report very detailed accounts of plaintiffs' experiences while others offer more cursory descriptions. Much of the information obtained in this study is objectively determinable, such as plaintiffs' job positions or the procedural characteristics of the litigation process. The information on the nature of the harassment, however, is filtered through the perception of the plaintiffs and then through the reporting discretion of the judges writing the opinions.¹⁴³ Table 8 shows the major harassment categories and the percentage of cases in which this harassment was noted.¹⁴⁴ The discussion below offers more detailed information.

(a) Verbal Harassment. This category includes all forms of spoken communication and also offensive gestures. In 81.2% of racial harassment cases, plaintiffs claim some form of it. While this communication is sometimes part of a general conversation (31.5%), comments are more typically directed at the plaintiff (60.4%). A range of content in verbal harassment also is identified. Over 63% of the cases include some form of ostensibly race-linked verbal harassment.¹⁴⁵ In about a third of the cases, "nigger" or comparable racial epithets are used.¹⁴⁶ In about half of the cases, there is an offensive reference to a racial group but the "nigger" or comparable epithet is not used. In 11.2% of the cases, harassment is in the form of racial jokes.

¹⁴¹ See *supra* discussion accompanying notes 58-62.

¹⁴² See *supra* note 6.

¹⁴³ See *supra* note 8.

¹⁴⁴ Unless otherwise indicated, the percentages indicated in this discussion of the nature of harassment and as highlighted in Table 8 are based on all 260 cases.

¹⁴⁵ A surprising amount of scholarship on verbal racial harassment exists. See, e.g., Brian Mullen, *Ethnophaulisms for Ethnic Immigrant Groups*, 57 J. SOC. ISSUES 457 (2001); Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 YALE J.L. & FEMINISM 195 (1995); Eugene Volokh, *What Speech Does "Hostile Work Environment" Harassment Law Restrict?*, 85 GEO. L.J. 627 (1997); Randall L. Kennedy, *"Nigger!" as a Problem in the Law*, 2001 U. ILL. L. REV. 935 (2001).

¹⁴⁶ Examples of other racial slurs reported in the cases include "chinks," "spics," and "wetbacks."

In contrast, in 28.9% of the cases, plaintiffs claim that they are harassed by a range of comments that are not on their face race-linked, but which the plaintiffs perceive as racial harassment because of the context in which the comments occur. These include intimidating, insulting, or demeaning remarks and other forms of “aversive” verbal racism. Sex-related comments occur in 9.2% of the cases.

Table 8. Nature of Harassment

	As % of All Cases	(N)
Verbal Harassment	81.2%	(211)
Race-Linked Verbal Harassment	63.9	(166)
Physical Objects	22.7	(59)
Ostensibly Race-linked Objects	5.8	(15)
Physical Conduct	15.0	(39)
Work-Related Decisions	65.8	(171)
Formal Decisions	24.6	(64)
Job Development and Enhancement	58.1	(151)
Denial of Benefits	16.2	(42)
Questioning Plaintiff’s Authority	12.7	(33)

(b) Physical Objects. This form of harassment which plaintiffs claimed in 22.7% of the cases, uses a tangible object or medium. For example, pictures, decals, cards, photos, graffiti, or posters (including those with Swastikas, confederate flags or monkeys) are used in 12.7% of all the cases and letters or emails are used in 5.4% of the cases. Actual physical objects, such as nooses or Klu Klux Klan-associated attire, are left for plaintiffs in their work space (and occasionally at the work site more generally) in 5.8% of the cases.¹⁴⁷

(c) Physical Conduct. This form of harassment which plaintiffs claimed in 15% of all the cases, includes the use of physical force, such as shoving, touching, or hitting of the plaintiff. While it may include physical conduct of a sexual nature, more typically, the physical conduct is non-sexual (12.3%). This category also includes damage to property.

(d) Work-Related Decisions. Discrete types of employers’ work-related decisions are grouped together thematically. For instance, complaints dealing with formal employer decisions (such as plaintiff’s promotion, suspension, demotion, or a denial of compensation) are found in 24.6% of the cases. Complaints dealing with employer treatment affecting the employee’s job development and enhancement (such as less favorable assignments, demeaning work, isolation from meetings, denial of training,

¹⁴⁷ The use of these racially blatant and offensive objects is apparently on the increase. *EEOC Chairwoman Responds to Surge of Workplace Noose Incidents at NAACP Annual Convention*, EEOC Press Release, July 13, 2000, available at <http://www.eeoc.gov/press/7-13-00-b.html> (noting increase in racial harassment complaints about hanging nooses in the workplace).

denial of essential resources for work performance, excessive monitoring, and excessive reprimands) are found in 58.1% of the cases. (In fact, the most frequent claims within this sub-category are less favorable assignments (28.1%), and excessive reprimands (22.7%).) Complaints about employer decisions resulting in a denial of plaintiff's benefits, compensation, or privileges are found in 16.2% of the cases. A cluster of complaints dealt with the employer or others questioning the employee's skills, authority, integrity, or personal stability (12.7%). In summary, the plaintiffs in 65.8% of the cases perceive that these work-related decisions constitute, or at least contribute, to racial harassment.

2. Frequency and Length of Harassment

Harassment more typically occurs over a length of time (an average of about two and a half years) and with multiple incidents.¹⁴⁸ Unlike sexual harassment claims where harassment sometimes moves off the work site and into a more social context,¹⁴⁹ plaintiffs in racial harassment cases rarely claim that harassment occurs outside the work setting.¹⁵⁰

C. Litigation Characteristics

1. Forum

This study also analyzes a number of litigation characteristics: forum, type of proceedings, plaintiffs' claims, and legal issues.¹⁵¹ The forum of each case is studied in three ways: the federal circuit in which the appellate court or the district court is located, the court level, and the state in which the district court sits. (See Table 9.) Six federal circuits were selected to represent areas from different parts of the country, including circuits from the northeast, southeast, south, west, and central parts of the United States. These circuits, the First, Second, Fifth, Seventh, Ninth, and the Eleventh, also include most of the largest metropolitan areas in the country.¹⁵² We then did a random sampling of cases within each of these six circuits (without regard to whether the opinion was from

¹⁴⁸ Based on the information in the opinions, it is sometimes difficult to determine when a particular harassing incident begins and when it ends. Therefore, we could not count the number of incidents, although we did note if the plaintiff alleged multiple incidents and if the harassment appeared "ongoing and continuous."

¹⁴⁹ See Juliano & Scwab, *supra* note 8.

¹⁵⁰ Only six cases reported harassment outside the workplace.

¹⁵¹ Given the key role that judges play in pre-trial and trial outcomes, increasing attention should be given to these decision-makers. In a subsequent study by the authors, a detailed profile of judges and judicial reasoning in racial harassment cases will be considered. In this current study, only one aspect of the judges' profile, their gender, is considered. The vast majority of racial harassment cases at the district court level are heard by male judges, with about 82.8% (N = 192) of the cases before male judges and 17.2% (N = 40) before female judges. Some of the judges preside over more than one case.

¹⁵² Seven of the top ten metropolitan areas in 2000 are located in these circuits. Census Bureau, *supra* note 125, at 32-34 (Table No. 30).

the district court or the appellate court). About 80% of the resulting opinions were from the district courts with the remaining 20% from the appellate courts.¹⁵³

Table 9. Forum

	As % of All Cases	(N)
<u>Level of Court:</u>		
District Courts	79.2%	(206)
Appellate Courts	20.4	(53)
<u>Federal Circuits:</u>		
First Circuit	3.5	(9)
Second Circuit	19.6	(51)
Fifth Circuit	15.0	(39)
Seventh Circuit	33.5	(87)
Ninth Circuit	12.7	(33)
Eleventh Circuit	15.8	(41)
<u>Select States:*</u>		
Alabama	6.5	(17)
California	8.9	(23)
Florida	5.4	(14)
Georgia	3.9	(10)
Illinois	24.2	(63)
Indiana	7.3	(19)
Louisiana	4.2	(11)
New York	17.7	(46)
Texas	9.6	(25)
<u>Clustering of States:</u>		
Large Diverse States	70.8	(184)
Smaller Less Diverse States	29.2	(76)
*These states are also included in the study, but have five or fewer cases: Arizona, Connecticut, Hawaii, Massachusetts, Maine, New Hampshire, Oregon, Rhode Island, Washington, Wisconsin. There are four other states (Alaska, Nevada, Vermont, and Mississippi) and Puerto Rico in the six federal circuits indicated in Table 9, but no cases from these states were randomly selected for analysis.		

The Seventh Circuit is the circuit with the highest number of reported cases (having approximately a third of all cases). The circuit with the second highest percentage of cases is the Second Circuit, followed by the Eleventh, Fifth, and Ninth Circuits. A significantly smaller number of cases in the study come from the First Circuit.

The courts in this study sit in nineteen states. The number of cases from some states was sometimes surprising. Given their populations sizes, Massachusetts and

¹⁵³ Some of the judicial opinions randomly selected as a district court case in the study were also randomly selected as an appellate court case in the study. Approximately 23 cases in the study are linked in this way. For purposes of analysis, however, they are treated as discrete cases.

Washington have disproportionately fewer racial harassment cases but Alabama and Louisiana have disproportionately more cases than one would expect.¹⁵⁴ Two states account for the lion's share of litigation activity: Illinois with 24% and New York with 18% of all cases. While Texas, California, and Indiana are the next most active states, they each represent less than 10% of all cases. These states assure some geographic diversity in the study since they are located in different parts of the country. In addition, we clustered the states into two groups: states that have the largest and most ethnically diverse populations (including New York, Texas, Illinois, California, Florida, and Georgia),¹⁵⁵ and states with smaller and less ethnically diverse populations (all other states). Over 70% of the cases in the study are from the large diverse states.

2. Proceedings, Representation, and Citation

While prospective plaintiffs might initially assume that suing their employers will eventually culminate in a trial on the merits, the study suggests that this occurs infrequently. Trials on the merits occur in less than 5% of the district court cases.¹⁵⁶ (See Table 10.) This result would not surprise those with legal training, however, who realize that very few civil cases, including employment discrimination lawsuits, filed in federal court make it to trial.¹⁵⁷ The most typical judicial opinion in a racial harassment case deals with the district court's disposition of a defendant's pre-trial motion. (The defendants initiate proceedings at the district court level in 90% of the cases.) Over 60% of all the cases and almost 80% of the district court cases deal with a motion for summary judgment at the district court level. The second most likely proceeding in these cases is a motion to dismiss at the district court level. Yet in comparison with the motion for summary judgment, these proceedings are much fewer. They constitute 9.2% of all the cases and 11.7% of district court cases. Both motions are intended to stall or end the litigation before the plaintiff's claims are reviewed in a trial on the merits. At the appellate court level, the most likely proceeding described in judicial opinions is a review of the district court's ruling on the motion for summary judgment (73.6% of the time).¹⁵⁸ Given that plaintiffs may appeal the district court's grant of the defendant's motion, it is also not surprising that the plaintiffs tend to be the moving party (about 80% of the time) at the appellate court level.

¹⁵⁴ Their population size is ranked as follows, with "1" designating the state with the largest population: Massachusetts (13), Washington (15), Louisiana (22), and Alabama (23). Census Bureau, *supra* note 125, at 23 [Table 19].

¹⁵⁵ The states in this group are among the top ten states with the largest populations. In addition, approximately 15% or more of their population is African American, Hispanic, or both. Census Bureau, *supra* note 125, at 23, 27-28.

¹⁵⁶ These cases are bench trials on the merit at the district court level. At the appellate court level, 3.1% of the cases dealt with a review of a bench trial at the district court level.

¹⁵⁷ Adam Liptak, *U.S. Suits Multiply, but Fewer Ever Get to Trial, Study Says*, N.Y. TIMES, Dec. 14, 2003, at 1; Clermont & Schwab, *supra* note 9, at 11 (indicating rareness of trials in employment discrimination cases).

¹⁵⁸ In addition, there are two cases of other appellate proceedings other than those indicated in Table 7. See also Clermont & Schwab, *supra* note 9, at 20-21 (noting that appeal rates in employment discrimination cases are higher than in other cases).

Given the complexity of the dispute resolution process, including the administrative maze that plaintiffs must follow, one would expect plaintiffs to have attorney representation to provide expert counsel. Indeed, in only 20.4% of the cases is *pro se* representation indicated.¹⁵⁹

This study also identifies the citation for each judicial opinion. It distinguishes between the following categories:¹⁶⁰

(i) Federal Reporter cases. These are cases with a citation designating them as a Federal Reporter case. These cases are considered “published opinions,” which traditionally are cited as precedents in the federal courts.

(ii) On-line cases, excluding Federal Reporter cases. These are cases that are available on-line but do not have a citation designating them as Federal Reporter cases. These cases are sometimes called “unpublished opinions.”

Strikingly, only 38.9% of the cases in this study are Federal Reporter cases (published opinions). (See Table 10.) To state it differently, over 60% of racial harassment cases are not available through the Federal Reporter system (unpublished opinions). Given the large number of cases in unpublished opinions, lawyers and parties who rely only on published cases are ignoring a substantial amount of case law that may differ significantly from unpublished cases in their facts, reasoning, and outcomes.¹⁶¹

The high percentage of unpublished cases in this study is consistent with the current trend among federal circuits.¹⁶² In 2001, for instance, 64.2% of the appellate court opinions in the D.C. Circuit were unpublished. This percentage is low compared to the Fourth and Ninth Circuits, where approximately 90% and 80% of the appellate court opinions, respectively, were unpublished.¹⁶³ In fact, data from the Administrative Office of the United States indicates that the percentage of judicial opinions that are unpublished

¹⁵⁹ This compares to *pro se* representation in all Title VII cases (18.9%), Section 1983 cases (20.8%), and Section 1981 cases (13.7%). Clermont & Schwab, *supra* 9, at 5.

¹⁶⁰ About a third of the cases (32.7%) are also available on-line but with a citation (typically from a specialized publication source) other than a Federal Reporter case citation. All the cases in the study are available on-line through LEXIS, WESTLAW or both electronic databases. See *supra* note 10 (describing research methodology).

¹⁶¹ See *infra* discussion accompanying note 209 (describing effect on outcomes).

¹⁶² Jonathan Groner, *Circuit's New Citation Rule: Few Takers*, LEGAL TIMES, Jan. 6, 2003, at 1, 7 [hereinafter Groner]; and Pether, *supra* note 76, at 1465 n.139.

¹⁶³ Groner, *supra* note 162; and Pether, *supra* note 76, at 1471, 1472.

in the Federal Courts of Appeals has been increasing, reaching 80% in 2000.¹⁶⁴ Similar patterns occur in the federal district courts.¹⁶⁵

Table 10. Proceedings, Representation, and Citation

	As % of Designated Cases	(N)
<u>Proceedings (At District Court Level):</u>		
Motion for Summary Judgment	79.1%	(163)
Motion for Dismissal	11.7	(24)
Trial on the Merits	4.9	(10)
Other Proceedings	7.3	(15)
<u>Proceedings (At Appellate Court Level):</u>		
Review of—		
Motions for Summary Judgment	73.6	(39)
Bench Trials	15.1	(8)
Jury Trials	11.3	(6)
<u>Representation (All Cases):</u>		
Attorney Representation	79.6	(207)
<i>Pro se</i> Representation	20.4	(53)
<u>Citation (All Cases):</u>		
Federal Reporter	38.8	(101)
On-Line but not in Federal Reporter	61.2	(159)

Furthermore, this trend has prompted, in part, other issues.¹⁶⁶ For instance, to what extent should courts allow lawyers to cite unpublished opinions and how will judges treat the precedential value of those cases? Circuit courts vary in how they are answering this question.¹⁶⁷ The Fourth and Sixth Circuits allow citation of unpublished cases as full precedents. The D.C., Fifth, Eighth, Tenth, and Eleventh Circuits permit citation only as persuasive authority, but not as precedents. The First, Second, Seventh, and Ninth Circuits do not permit their citation; and the Third Circuit permits citation but does not specify its treatment of the unpublished cases.¹⁶⁸ Penny Pether critiques this widespread practice of unpublished opinions as essentially institutionalizing “private judging” in

¹⁶⁴ Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Court of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 200 (2001); Pether, *supra* note 76, at 1465.

¹⁶⁵ K.K. DuVivier, *Are Some Words Better Left Unpublished?: Precedent and the Role of Unpublished Decisions*, 3 J. APP. PRAC. & PROCESS 397, 400 (2001); Pether, *supra* note 76, at 1472.

¹⁶⁶ Christopher G. Wren & Jill Robinson Wren, *Letting a Thousand Citation Systems Bloom*, ABA LAW PRACTICE MANAGEMENT SECTION NEWSL., June 2002 (describing controversies over domination of West Publishing as official source of cases and proposals for universal citations).

¹⁶⁷ Groner, *supra* note 162. The Advisory Committee on Appellate Rules of the Judicial Conference of the United States voted to recommend a proposal to bar federal courts of appeals from restricting lawyers’ right to cite unpublished opinions (Proposed Rule 32.1). *Judicial Conference Backs Proposal to Ease Restrictions on Citing Unpublished Opinions*, U.S. LAW WEEK, Apr. 20, 2004, at 2626-28.

¹⁶⁸ Groner, *supra* note 162.

ways that have compromised principled decisionmaking and particularly disadvantaged certain classes of litigants.¹⁶⁹

3. Plaintiffs' Claims

In our search of cases, we identified those judicial opinions where plaintiffs bring racial harassment claims under the major federal laws for racial harassment in the workplace: Title VII of the Civil Rights Act of 1964 or Sections 1981 and 1983 of the Civil Rights Act of 1866. Some plaintiffs base their lawsuits on more than one statutory basis.¹⁷⁰ In particular, as indicated in Table 11, 88% of the cases include Title VII and 37% include Section 1981 as a statutory basis for their racial harassment claim. Less than 5% of the plaintiffs in this study base their claim on Section 1983. Cases in the study with dates after 1991 are presumed to be covered by the 1991 Act.¹⁷¹ (Almost two-thirds of the cases fit this description.)

In addition to allegations of racial harassment, plaintiffs often allege other employer illegalities. (See Table 11.)¹⁷² These concurrent claims reveal plaintiffs' perceptions of other employer misconduct, including other forms of discriminatory behavior. It also suggests how racial harassment and other improprieties may be intertwined.

Some plaintiffs brought a separate race discrimination claim charging their employers with a particular intentional business decision, practice or conduct that discriminated against them on the basis of their race.¹⁷³ These race discrimination claims occur in 74% of the cases examined here. Hence, it appears that plaintiffs frequently believe that employers both create a hostile environment and make specific decisions or institute policies that are racially discriminatory.

¹⁶⁹ Consistent with Ninth Circuit Judge McKeown's thesis, she argues that federal judges developed the practice, in part, as a reaction to their "anxiety about floods of civil rights and *pro se* prisoner postconviction appeals litigation in the 1960s." Pether, *supra* note 76, at 1445, 1442-1465.

¹⁷⁰ Therefore, as shown in Table 11, the percentages of cases indicated for all three statutory bases exceeds 100%. Ten percent of the cases also include a state statute as the basis for their racial harassment allegations. *See also supra* discussion accompanying notes 97-109 (explaining statutory bases).

¹⁷¹ Specifically the cases with dates after November 21, 1991 (the effective date of the Civil Rights Act of 1991) are presumed to be covered by the 1991 Act. Technically, the Act would be applicable only if the alleged harassment occurred on or after that date. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) and *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). However, the facts in the judicial opinion did not always provide the dates on which harassment occurred.

¹⁷² Sixty-five cases had concurrent claims other than those identified in Table 11.

¹⁷³ One marker of these cases is that they refer to the framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) providing for (1) the plaintiff having the burden of proving a *prima facie* case, (2) the defendant countering with an articulation of a legitimate reason for the employer action, and (3) the plaintiff proving the defendant's reasons as pretextual. In contrast, the racial harassment cases focus on whether the elements of a "hostile work environment" can be shown. *See supra* discussion accompanying notes 41-48.

Table 11. Plaintiffs' Claims

	As % of All Cases	(N)
<u>Legal Basis of Racial Harassment Claim:</u>		
Title VII	87.7%	(228)
Post-Civil War Statutes		
§ 1981	37.3	(97)
§ 1983	4.6	(12)
<u>Concurrent Claims—Discrimination-Based:</u>		
Race Discrimination	73.9	(192)
Sex-Based Claims	17.3	(45)
Sex Discrimination	10.4	(27)
Sexual Harassment	13.5	(35)
National Origin Discrimination and Harassment	8.8	(23)
Age Discrimination	3.5	(9)
Disability Discrimination	2.3	(6)
Religious Discrimination	2.3	(6)
<u>Concurrent Claims—Other:</u>		
Retaliation	49.2	(128)
Emotional Distress	13.8	(36)
Constructive Discharge	10.8	(28)

Although not as common as the race discrimination charge, some plaintiffs also believe that employers discriminate against them on the basis of sex, national origin, age, disability, or religion.¹⁷⁴ In approximately 14% of the cases, for instance, plaintiffs claim both racial and sexual harassment. This raises interesting questions about the relationship between the two types of harassment.¹⁷⁵

Other concurrent claims are not directly based on discrimination, although they may be derivative to the allegations of discrimination. They also reveal something about how employees react to employers' harassing behavior and how employers react to employees' complaints about harassment. In almost half of the racial harassment cases, for instance, plaintiffs claim that their employers illegally retaliated against them. Plaintiffs' concurrent claims of emotional distress in 13.8% of the cases suggest that some plaintiffs believe their efforts to deal with racial harassment take a psychological toll. Plaintiffs also included a constructive discharge claim 10.8% of the time.

4. Legal Issues

This section explores the key legal issues raised by the parties and addressed by the court, most typically as part of the defendant's motion for summary judgment. Recall

¹⁷⁴ The distinctions between discrimination based on national origin and on race are not always clear. *See, e.g., St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (ruling that "Arab" is a race even though it also could be classified as a national origin).

¹⁷⁵ *E.g., see supra* note 73, and *supra* discussion accompanying note 72.

that key elements of the plaintiffs' racial harassment cases are that (i) the harassment is "severe or pervasive" and (ii) that the harassment is "because of [the plaintiff's] race."¹⁷⁶ These are distinct elements. Thus, there can be "severe or pervasive harassment," but if the harassment is not attributable to the plaintiffs' race, the claim of racial harassment fails. Similarly, if the harassment is "because of race" but the harassment is not sufficiently "severe or pervasive," the claim fails.¹⁷⁷ Predictably, the defendant's motion for summary judgment often argues that one or both of these two elements are missing from the plaintiff's claim. As shown in Table 12, in over 60% of the cases, the courts address whether the harassment was sufficiently "severe or pervasive," and in over a third of the cases, they address whether the harassment was "because of race" or instead attributable to some alternative reason. This study thus affirms the primacy of these particular legal inquiries in racial harassment cases.

The courts also look at procedural issues such as whether the plaintiff's complaint is timely or whether the plaintiff properly exhausted the administrative processes and remedies. Thus, in some cases, the plaintiff's noncompliance with procedural requirements is the basis on which racial harassment suits are terminated. These procedural pitfalls highlight how important it is for plaintiffs, or more particularly for their lawyers, to understand the potentially perplexing administrative and judicial process for employment harassment claims.

Table 12. Legal Issues

Issue	Issue Raised As % of All Cases	(N)	Resolution of This Issue In Plaintiffs' Favor	(N)
<u>Substantive Issues:</u>				
Is harassment "severe or pervasive"?	61.2%	(159)	22.6%	(35)
Is harassment "because of race"?	37.7	(98)	17.0	(16)
<u>Procedural issues:</u>				
Is complaint timely?	18.1	(47)	30.6	(11)
Are administrative remedies exhausted?	4.2	(11)	25.0	(3)

Our study also considers how these specific legal issues are resolved.¹⁷⁸ Given that many cases have multiple legal issues, the court in any particular case may resolve each issue differently. (How a court resolves a discrete legal issue also is not

¹⁷⁶ See *supra* discussion accompanying notes 41-48.

¹⁷⁷ While this was not studied empirically, judges sometimes appeared to require that the "severe or pervasive" requirement was actually a "severe *and* pervasive" requirement. Hence, in these cases, harassment had to be *both* severe and pervasive to sufficiently satisfy this element.

¹⁷⁸ In some cases, the court addresses an issue but does not resolve it. Thus, the percentages shown in Table 12 are based on the number of cases in which the court both addresses *and* resolves the issue. For example, the courts raised the severity issue in 159 cases, but raise *and* resolve the issue in only 155 cases. Of those 155 cases, the issue is resolved in the plaintiff's favor 35 times or 22.6% of the 155 cases.

synonymous with how the court resolves the case as a whole.¹⁷⁹) In only 22.6% of the cases in which the court addresses and resolves the question “Was the harassment severe or pervasive?,” did the court answer affirmatively.¹⁸⁰ In response to the question “Was the harassment because of race?,” in only 17% of the cases did the courts answer affirmatively. From the plaintiffs’ perspective, the courts’ resolution of procedural issues is similarly dismal. They lose their argument of a timely complaint over two-thirds of the time and their argument of exhaustion of their administrative remedies three-quarters of the time.

5. Reasonableness Standard

Plaintiffs must show that their perceptions of and conclusions about harassment and hostility in the workplace are “reasonable.”¹⁸¹ In the context of racial harassment cases, this means that their arguments that the harassment was “severe or pervasive” and “because of race” are justified. In determining whether the plaintiff has met this burden, the judge must select a point of reference on which to evaluate the plaintiffs’ arguments. As many legal and social science researchers observe, this choice of perspective can be both complicated and relevant to the outcome.¹⁸² They point out that the courts may choose between the perspective of a hypothetically gender-neutral, race-neutral “reasonable person,” or, in the alternative, the perspective of a “reasonable person” with the plaintiff’s particular personal characteristics. Thus, this alternative model would use “a reasonable woman” standard in a sexual harassment claim, or “a reasonable Hispanic American” standard in a racial harassment claim where the plaintiff is Hispanic American. Even more particularly, the court could acknowledge both the gender and ethnicity of the plaintiff and utilize “a reasonable Hispanic woman” standard.¹⁸³

This choice of perspective has important practical significance because social science research indicates that the “reasonable person” who is white and the “reasonable

¹⁷⁹ See *supra* discussion accompanying notes 217-19 (indicating outcomes of cases as a whole).

¹⁸⁰ For instance, the court’s affirmative response on the issue of the severity of the harassment includes its finding that (1) there is a genuine issue of material fact regarding the severity of the harassment to be decided by the jury or other fact-finder, or (2) the facts are undisputed and the plaintiff has offered enough evidence on the severity issue that a reasonable jury could find for the plaintiff. See also FED. R. CIV. P. 59; BAICKER-MCKEE ET AL., *supra* note 112, at 691, 693.

¹⁸¹ Although there is more discourse on the reasonableness standard in the context of sexual harassment cases, there also are articles that discuss the reasonableness standard when the plaintiff is an racial/ethnic minority. See, e.g., Tam B. Tran, *Title VII Hostile Work Environment: A Different Perspective*, 9 J. CONTEMP. LEGAL ISSUES 357 (1998); and Melissa K. Hughes, Note, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 1995, 7 YALE J.L. & FEMINISM 195 (1995).

¹⁸² See *supra* discussion accompanying notes 63-65, and note 181.

¹⁸³ This inquiry can take various forms, depending on the nature of the lawsuit. For instance, in a sexual harassment lawsuit, the focus is how Hispanic women perceive sexual harassment (in comparison with any other group including African American women). In a racial harassment lawsuit, the focus is how Hispanic women perceive racial harassment (in contrast to any other group including Hispanic men).

person of color” perceive racial prejudice in the workplace differently.¹⁸⁴ Thus, each perspective might yield different conclusions about whether there is harassment, whether the harassment is severe or pervasive, or whether the harassment is because of the plaintiff’s race.

This study indicates that as far as judges are concerned, the debate on the appropriate reasonableness standard is mostly academic. While social scientists and legal scholars argue the nuances of the issue,¹⁸⁵ courts do not even raise it. Except for the Ninth Circuit, which has expressly adopted the “reasonable woman” standard,¹⁸⁶ other courts cite the “reasonable person” standard¹⁸⁷ or do not articulate a particular standard. Even the judges in the Ninth Circuit do not always expressly refer to the perspective of the plaintiff’s racial group. In only ten cases (3.9%) in the study did the courts explicitly use a reasonableness standard based on the plaintiff’s race. What is notable in the study, therefore, is the absence of the reasonableness standard as an issue in the case law.

Part III: Outcome of Racial Harassment Cases

Part II informs us about plaintiffs and defendants in racial harassment cases, types of racial harassment, and the litigation process. Part III focuses on the outcome of the cases and considers how particular characteristics of the parties, the nature of the harassment, and characteristics of the litigation process affect the outcome.

We begin with the plaintiffs’ and the defendants’ overall success rates. When all the cases in the study are considered, plaintiffs are successful in 21.5% of the cases and defendants are successful in 81% of the cases.¹⁸⁸ Thus, defendants are much more likely to “win” than plaintiffs; or stated differently, it is very difficult for employees to win racial harassment lawsuits. This is a dismal finding for prospective plaintiffs and an encouraging one for prospective defendants. Furthermore, this study indicates that plaintiffs fare worse in racial harassment cases than in sexual harassment cases.¹⁸⁹

¹⁸⁴ See *supra* discussion accompanying notes 63-65.

¹⁸⁵ Juliano & Schwab, *supra* note 8, at 582, 584 (Table 6), 577 (also noting that more articles discuss the reasonableness standard than courts adopting the standard in their study of sexual harassment cases). A research of social science literature by the authors, for instance, reveals literally dozens of studies on the reasonableness standard particularly in the sexual harassment context.

¹⁸⁶ *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

¹⁸⁷ Some courts refer to the “reasonable juror,” “victim,” “person in plaintiff’s position” (without further specificity), or “fact-finder.”

¹⁸⁸ Recall that the percentage of cases where plaintiffs win when combined with the percentage of cases where defendants win exceeds 100%. This is because there are a small number of cases where both plaintiffs and defendants win some portion of the proceeding and hence are counted as a “win” for both parties. See *supra* discussion accompanying note 17.

¹⁸⁹ See *supra* note 23; Clermont & Schwab, *supra* note 9, at 16, 30 (comparing types of employment discrimination cases).

In addition to looking at the parties' success and failure rates in all racial harassment cases as a group, we can also study how the parties fare in cases with different attributes.¹⁹⁰ Thus, this study provides data to answer these kinds of questions: Does the plaintiff's or defendant's gender or race, for instance, make a difference in whether the plaintiff wins the case? Does the kind of harassment weaken or strengthen the defendant's likelihood of winning? Which characteristics of the case (for example, the state, circuit, or the citation) correlate with defendants losing their motions for summary judgment?

While we cannot substantiate a causal link between a case characteristic, the judges' decisionmaking, and the case outcomes, we can look for reasonable inferences about what is occurring. In the last part of this article, we explore these possible explanations. Furthermore, we can statistically test how likely it is that the results are by chance or not. If the outcome is statistically significant at the .05 level, for instance, it indicates that the relationship between that characteristic and the outcome of cases is expected to occur by chance in only 5 of 100 cases. Similarly, if the relationship is statistically significant at the .01 level, it indicates that the relationship between that characteristic and the outcome of cases is expected to occur by chance in only 1 of 100 cases. Effects that are statistically significant at the .05 level or .01 level, therefore, are particularly noteworthy because they indicate that some phenomenon is occurring that is unlikely to be explained by chance and, consequently, is especially appropriate for further study.

A. Effect of Parties' Profiles

The length of time that plaintiffs work with their employers also appears to affect outcome. There is a significant positive correlation between the plaintiffs' tenure and defendants' winning.¹⁹¹ In contrast to what one might expect, the longer the employee has been employed, the more likely the defendant will win the case.

We also considered how a range of other plaintiffs' characteristics affected case outcomes, as shown in Table 13. For instance, women plaintiffs have comparable success rates to men, with women employees winning in 19.4% of their cases compared to men winning in 21.7% of their cases. (As with all the Tables in Part III, the number ("N") of cases represented by these percentages is indicated.¹⁹²) This occurs even though

¹⁹⁰ This study also took into account the gender of the judges in the district courts. See note 151. When the judge is a woman, it appears to improve the plaintiffs' chances of winning slightly to 27.5%, while the plaintiffs' success rate before a male judge is 21.3%. At the appellate court level, where cases are typically heard by multiple judges on panels (and where we did not identify the gender of the judges), the plaintiffs' success rate is 21.1%. See also Vicki Sanders, *Justice in America?*, RADCLIFFE Q. (Winter 2004) (describing research that preliminarily finds that race and sex of appellate court judges affect their decisions in employment discrimination cases).

¹⁹¹ These relationships are statistically significant at the .05 level.

¹⁹² To illustrate, in cases in which the plaintiffs are women (the variable being studied), the plaintiffs won 21 cases, which was 19.4% of the time. In this same set of cases, the defendants won 88 cases, which was 81.4% of the time. For some variables, the combined percentages of the plaintiffs' success rate and the defendants' success rate may exceed 100% because there are some cases in which both the parties succeed,

men have brought more cases than women in recent years.¹⁹³ The success rates of plaintiffs of different races and ethnicities, however, varies considerably. Asian American and Black plaintiffs have the lowest percentage of wins, followed by a significant increase of wins by White plaintiffs. Hispanic plaintiffs have a statistically significant and a dramatically higher win rate than any other ethnic group. In the single case with a Native American plaintiff, the plaintiff loses.

Table 13. Effect of Parties' Profiles on Outcomes

	Plaintiffs' Success		Defendants' Success	
	Rates	(N)	Rates	(N)
<u>Plaintiffs' Gender:</u>				
Women	20.8%	(21)	81.4%	(88)
Men	22.8	(33)	82.2	(125)
<u>Plaintiffs' Race or Ethnicity:</u>				
African American	19.3	(37)	83.0	(159)
Asian American	18.1	(2)	81.8	(9)
Hispanic American	54.5***	(6)	63.6	(7)
White American	35.0	(7)	75.0	(15)
<u>Alleged Harassers' Gender:</u>				
Women	18.7	(9)	87.5	(42)
Men	20.8	(20)	83.3	(80)
<u>Alleged Harassers' Race:</u>				
African American	17.6	(3)	94.1	(16)
Asian American	20.0	(1)	80.0	(4)
White American	26.9	(17)	76.1	(48)
<u>Number of Alleged Harassers:</u>				
Individual	13.5**	(10)	90.5**	(67)
More than 1 person	26.2**	(36)	78.1	(107)
<u>Status of Alleged Harassers:</u>				
Supervisor Only	17.0	(18)	87.7**	(93)
Co-Workers Only	17.4	(8)	84.8	(39)
Both	32.9***	(23)	71.4***	(50)
<u>Defendant Companies:</u>				
Private Sector	18.8	(33)	83.5	(147)
Public Sector	22.1	(17)	83.1	(64)
Federal	20.0	(2)	80.0	(8)
State	23.1	(6)	80.8	(21)
Local	20.0	(6)	86.7	(26)
Length of Employment	As length of E ↑ P more likely to win			
*This variable is significantly correlated with the outcome indicated at the .10 level. **This variable is significantly correlated with the outcome indicated at the .05 level. ***This variable is significantly correlated with the outcome indicated at the .01 level.				

see *supra* note 17, or they may be less than 100% because of rounding of percentages. The combined number (N's) of both plaintiffs and defendants approximates the total sample size for that variable.

¹⁹³ See *infra* Figure 7.

As shown in Table 13, we also considered which of the alleged harassers' characteristics affect the outcomes. Given the small difference in the plaintiffs' success rates when the harassers are female (18.7%) or male (20.8%), it appears that the gender of the harasser does not affect the outcome of racial harassment cases. Thus, it appears neither the gender of the plaintiff nor the gender of the harasser affects the results. In contrast, the race of the harasser does appear to make a difference. In comparison to the overall average plaintiffs' win rate of 22%, plaintiffs (who are most likely to be Black)¹⁹⁴ are less likely to win if the harassers are Black (17.6%) or Asian (20.0%) and more likely to win if the harassers are White (26.9%).

The composition of the harassers, in particular their number and organizational status, makes a difference as well. Plaintiffs are about twice as likely to win when there is more than one harasser. In those cases, they win 26.2% of the time, as compared to 13.5% of the time in cases when there is a single harasser. It is also interesting to consider the organizational status of the harasser. Plaintiffs' success is comparable in cases in which only a supervisor is the harasser (17.0%) and in cases in which only a coworker is the harasser (17.4%). Strikingly, however, the plaintiffs' chances of winning go up markedly (32.9%) when both the supervisor and a co-worker are accused of harassing.

As shown in Table 13, the win rate of public sector employees is only slightly higher (22%) than private sector employees (18.7%). Within the public sector, the success rates of employees at the different level of governments are comparable, although state employees have a slightly higher percent of wins.

Finally, who the plaintiff names as a defendant also appears to have some effect. In cases in which only the company is named as a defendant, plaintiffs win 21% of the time. When both the individual and the company are named defendants, however, the plaintiffs' success rate improves to 28%.

B. Effect of the Nature of Harassment

This discussion considers to what extent various characteristics of the alleged harassment affect the case outcome. These observations are particularly relevant in racial harassment cases, given that the major legal inquiries of whether the harassment is "severe or pervasive" and whether the harassment is "because of race" would seem largely based on the nature of the harassment.

The study indicates some interesting relationships between the duration and persistence of the harassment and the case outcomes. For instance, the length of the total period of alleged harassment has a significant positive correlation with plaintiffs' wins

¹⁹⁴ See *supra* Table 1 & Figure 2.

and negatively correlated with defendants' wins.¹⁹⁵ This means that the longer the harassment continues, the more likely the plaintiff will win and the defendant will lose.¹⁹⁶

Table 14. Effect of Nature of Harassment on Outcomes

	Plaintiffs' Success Rates	Cases (N)	Defendants' Success Rates	Cases (N)
Verbal Harassment	22.8%	(48)	80.6%	(170)
Race-linked	25.9**	(43)	78.3	(130)
Physical Objects	27.1	(16)	76.3	(45)
Ostensibly Race-linked	33.3	(5)	66.7	(10)
Physical Conduct	28.2	(11)	74.4	(29)
Work-Related Decisions	21.6	(37)	80.7	(138)
Formal Decisions	17.5	(11)	81.5	(52)
Job Development	20.5	(31)	82.1	(124)
Denial of Benefit	23.8	(10)	76.2	(32)
Questioning Plaintiff's Authority	21.9	(8)	81.8	(27)
Length of Harassment	As length of H ↑ P more likely to win			
**This variable is significantly correlated with the success rate indicated at the .05 level.				

As suggested in Table 14, the results indicate that the nature of the harassment has some modest relationship to whether plaintiffs or defendants win the cases.¹⁹⁷ For example, plaintiffs' success rates are higher when they claim more physical harassment, either where the harasser uses physical objects (27.1% success rate) or where the harasser physically harasses the employee or the employee's property (28.2%), than when plaintiffs claim either verbal harassment (22.8%) or work-related decisions harassment (21.6%). Physical conduct of a sexual nature is particularly significant.¹⁹⁸

It also appears that when defendants' harassment is blatantly racist, judges are a little more likely to believe plaintiffs' claims. For instance, when defendants use ostensibly race-linked physical objects (such as nooses or Klu Klux Klan-associated attire) (33.3% success rate) or race-obvious verbal harassment (such as the use of "nigger") (25.9%), plaintiffs are more likely to win than the average. The range of work-related decisions harassment also are studied in more detail, to see if judges view different types of employer decisions differently. The type of decision did not seem to make a great deal of difference, although when plaintiffs claim that their harassment is

¹⁹⁵ These relationships are statistically significant at the .05 level.

¹⁹⁶ While it was difficult (based on the description of the facts in the opinions) to determine when an incident began and when it ended, we did note whether there were "multiple" incidents of harassments. Moreover, the study indicated that plaintiffs' wins were positively correlated with multiple incidents.

¹⁹⁷ See supra discussion accompanying notes 141-48 (explaining various types of harassment).

¹⁹⁸ The correlation of this with plaintiff wins is statistically significant at the .01 level.

evidenced by an employer's formal decisions (such as denying plaintiff a promotion, demoting or suspending the plaintiff, or denying the plaintiff compensation), they have the lowest probability of winning (17.2%). Plaintiffs' success rate when claiming harassment through other types of employers' work-related decisions varies between 20.5% to 23.8%.

C. Effect of Characteristics of the Litigation Process

1. Forum

We also consider the range of litigation characteristics and their relationship to the parties' success and failure rates. We study the forum of the cases in various ways: the court level, federal circuit, and state in which the case occurs. (See Table 15.) At the court level, the parties' success rates in the district courts and the appellate courts are comparable. Plaintiff employees are slightly more likely to triumph in the appellate court (24.5%) than in the district courts (20.8%), but not by a significant margin. While plaintiffs at the appellate level follow the general trend of losing, one small subset of cases is the exception. Plaintiffs have very good odds of winning when appellate judges review the district courts' bench trial decisions.¹⁹⁹

The study includes cases from six representative federal circuits; and the outcomes of the cases varied by circuits. Excluding for the moment the First Circuit, the range of plaintiffs' success rate varies from 12.8% in the Fifth Circuit to 23.5% in the Second Circuit. Thus, defendants generally had much higher success rates than plaintiffs, but the gap between the parties was more dramatic in some circuits than others.²⁰⁰ In the Fifth Circuit, defendants clearly appear to be favored, with defendants winning a remarkable 92.3% of the cases. After the Fifth Circuit, the Second Circuit and the Eleventh Circuit have the next greatest defendants' win rates, both with over 80%. In contrast to the other circuits, the plaintiffs in the First Circuit had much more promising odds. In fact, they had better than a fifty-fifty change of winning. Keep in mind, however, that the First Circuit had very few cases (N=12) relative to the other circuits, so inferences should be made cautiously.

We also analyze the relationship between states in which the cases occur and case outcomes. The six federal circuits studied include nineteen states. Of the states in which there are at least ten cases, the plaintiffs' success rate varies between a low of 8.6% in

¹⁹⁹ As shown in Table 16, plaintiffs succeed 75% of the time.

²⁰⁰ Some legal scholars focus on judicial decisionmaking in particular circuits. *See, e.g.*, Cheryl L. Anderson, *Thinking Within the Box: How Proof Models Are Used to Limit the Scope of Sexual Harassment Law*, 19 HOFSTRA LAB. & EMP. L.J. 125, 126-27 (2001) (noting the Seventh Circuit's rigidity in its treatment of Title VII, particularly sexual harassment claims, making it more difficult for plaintiffs to prove their case).

California followed closely by 9.1% in Louisiana, compared to a high of 29.4% in Alabama followed by 21.7% in New York, 21.4% in Florida, and 20.6% in Illinois.²⁰¹

Table 15. Effect of Forum on Outcomes

	Plaintiffs' Success Rates	Cases (N)	Defendants' Success Rates	Cases (N)
<u>Level of Court:</u>				
District Court	20.8%	(43)	81.5%	(168)
Appellate Court	24.5	(13)	79.2	(42)
<u>Federal Circuits:</u>				
First Circuit	55.5**	(5)	77.7	(7)
Second Circuit	23.5	(12)	82.3	(42)
Fifth Circuit	12.8	(5)	92.3*	(36)
Seventh Circuit	21.8	(19)	78.1	(68)
Ninth Circuit	18.1	(6)	75.7	(25)
Eleventh Circuit	21.9	(9)	80.4	(33)
<u>Select States:</u>				
Alabama	29.4	(5)	70.5	(12)
California	8.6	(2)	86.9	(20)
Florida	21.4	(3)	78.5	(11)
Georgia	10.0	(1)	100.0	(10)
Illinois	20.6	(13)	79.3	(50)
Indiana	15.8	(3)	78.9	(15)
Louisiana	9.1	(1)	90.9	(10)
New York	21.7	(10)	82.6	(38)
Texas	16.0	(4)	92.0	(23)
<u>Clustering of States:</u>				
Larger Diverse States	18.7	(32)	83.0	(142)
Smaller Less Diverse States	26.9	(24)	77.5	(69)
*This variable is significantly correlated with the outcome indicated at the .10 level.				
**This variable is significantly correlated with the outcome indicated at the .05 level.				

We also cluster the nineteen states into larger and more ethnically diverse states or smaller less diverse states,²⁰² to see if these groupings are meaningful. The study indicates a dramatic difference between the outcomes in these clusters. Contrary to what one might predict, plaintiffs have notably higher success rates in the smaller less diverse states (26.9%) than the larger diverse states (18.7%).

²⁰¹ In states with fewer than ten cases, it is difficult to draw inferences. However, in New Hampshire and Wisconsin cases, there is a statistically significant positive correlation with plaintiff wins; and in Oregon and Hawaii, there is a significant negative correlation with defendant wins.

²⁰² See *supra* discussion accompanying note 155.

2. Proceedings, Representation, and Citation

The type of legal proceeding appears to make a dramatic difference.²⁰³ (See Table 16.) At the district court level, plaintiffs are successful against defendants' motion for summary judgment only 16.5% of the time. As some civil procedure scholars predict,²⁰⁴ judges are less inclined to grant motions to dismiss. In fact, plaintiffs are three times as likely to be successful against defendants' motions to dismiss, with a comparatively whopping 50% win rate. The few bench trials on the merits end with a 20% plaintiffs' success rate. Because motions for summary judgments are the most common proceeding,²⁰⁵ the parties' success rates there substantially influences the average parties' success rates for all cases.

Table 16. Effect of Proceedings, Representation, and Citation on Outcomes

	Plaintiffs' Success Rates	Cases (N)	Defendants' Success Rates	Cases (N)
<u>Proceedings (Dist. Ct. Level):</u>				
Motion for Sum. Judg.	16.5%**	(27)	85.2%**	(139)
Motion for Dismissal	50.0***	(12)	54.1***	(13)
Bench Trial on the Merits	20.0	(2)	80.0	(8)
Other Proceedings	40.0*	(6)	80.0	(12)
<u>Proceedings (App. Ct. Level):</u>				
Review Sum. Judg. Holding	12.8	(5)	87.1	(34)
Review Bench Trial	75.0***	(6)	37.5***	(3)
Review Jury Trial	50.0*	(3)	50.0**	(3)
<u>Representation:</u>				
Attorney Representation	24.2*	(50)	79.2	(164)
<i>Pro-se</i> Representation	11.3*	(6)	88.7	(47)
<u>Citation:</u>				
Federal Reporter	30.7**	(31)	75.2*	(76)
On-Line but not Federal Reporter	15.7**	(25)	84.9*	(135)
*This variable is significantly correlated with the outcome indicated at the .10 level. **This variable is significantly correlated with the outcome indicated at the .05 level. ***This variable is significantly correlated with the outcome indicated at the .01 level.				

²⁰³ Across all types of employment discrimination claims, plaintiffs fare better at trials than at pretrial adjudications and better before jury trials than judge trials. Clermont & Schwab, *supra* note 9, at 17-18 (Display 11).

²⁰⁴ Beiner, *supra* note 111, at 73 (indicating that liberal notice pleading in combination with rules of amendment under the federal rules of civil procedure have made it difficult to obtain a dismissal on a discrimination claim based on the pleadings); Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM J. TRIAL ADVOC. 433, 469 & n.193 (1987) (concluding that few federal cases are disposed of based on Rule 12 motions).

²⁰⁵ See *supra* Table 10.

At the appellate court level, most of the proceedings are a review of a district court's holding on the defendant's motion for summary judgment. In these proceedings, plaintiffs fare very poorly, winning only 12.8% of the time.²⁰⁶ This suggests that plaintiffs would want to keep this dismal success rate in mind when they are assessing whether to appeal the district court's grant of summary judgment. Plaintiffs do much better in other types of proceedings, ranging from a fifty-fifty chance of winning jury trial reviews to winning three quarters of the appellate courts' reviews of the district court bench trials. The number of cases in some of these proceedings is small, however, so it is difficult to draw strong inferences from this sample.

We also consider whether the party who initiates the proceeding (the movant) makes a difference.²⁰⁷ Although plaintiffs are not the movants at the district court level very often, when they are movants, their success rate of 33.3% is notably higher than the average of 21.5%. The situation reverses at the appellate court level. When plaintiffs appeal the district court decision, their success rate is notably lower at 15.6%. This finding is consistent with our observation above that plaintiffs have a particularly poor success rate at the appellate level.²⁰⁸ Interestingly, however, when the defendant appeals the lower court's ruling, the plaintiff wins significantly at about 78% of the time.

Regarding legal representation, one would predict that plaintiffs that represent themselves *pro se* harm their chances of winning in all kinds of lawsuits. That would seem particularly likely in employment discrimination cases, such as racial harassment claims, where the litigation and administrative rules and process are both complex and evolving.²⁰⁹ The study results are consistent with this prediction. There is a dramatic and statistically significant discrepancy between the outcomes of cases where plaintiffs represented themselves *pro se* and of cases where plaintiffs had legal representation: *pro-se* plaintiffs are much less likely to win (11.3%). Even with attorney representation, however, plaintiffs win only 24.2% of the time.

Another variable that correlated with outcome was whether the judicial opinion was published in the Federal Reporter or available only on-line (unpublished). Notably, cases published in the Federal Reporter ("published opinions") have a significantly higher percentage of plaintiff wins (30.7% success rate) than cases not in the Federal Reporter ("unpublished opinions") (15.7%).²¹⁰

²⁰⁶ In other employment discrimination cases, defendants also have this advantage. Clermont & Schwab, *supra* note 9, at 22, 24-27 (finding that appellate courts hearing employment discrimination cases are much less likely to reverse defendants' wins in the district courts than to reverse plaintiffs' wins); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (substantiating a similar defendants' advantage in ADA cases).

²⁰⁷ In the four cases in which *both* the plaintiff and the defendant are movants, the plaintiffs are successful in three of the cases.

²⁰⁸ On the other hand, when both the plaintiff and the defendant are movants, there is a positive correlation with plaintiffs' wins and a negative correlation with defendants' wins (both at the .01 level).

²⁰⁹ See *supra* discussion accompanying notes 90-122.

²¹⁰ See *supra* discussion accompanying notes 160-61 (explaining different types of citations).

3. Plaintiffs' Claims

As shown in Table 17, the statutory basis of the plaintiff's racial harassment claim can significantly affect whether the plaintiffs or the defendants win.²¹¹ Plaintiffs who include Title VII as a basis of their racial harassment complaint have the lowest win rate (21.9%). Plaintiffs who include Section 1981 have a slightly higher but statistically significant improvement in their success rate (28.9%). Although the number of plaintiffs who include Section 1983 as a basis of their claim is comparatively small, those that do have a much higher win rate than the other two groups, winning over 40% of their cases.²¹²

Table 17. Effect of Plaintiffs' Claims on Outcomes

	Plaintiffs' Success Rates	Cases (N)	Defendants' Success Rates	Cases (N)
<u>Basis of Racial Harassment Claim:</u>				
Title VII	21.9%	(50)	80.7%	(184)
Post-Civil War Statutes				
§ 1981	28.9**	(28)	78.4	(76)
§ 1983	41.7*	(5)	66.7	(8)
<u>Concurrent Claims—Discrimination-Based:</u>				
Race Discrimination	18.22**	(135)	84.9***	(163)
Sex-Based Claims	22.2	(10)	82.2	(37)
Sex Discrimination	29.6	(8)	77.8	(21)
Sexual Harassment	20.0	(7)	82.9	(29)
National Origin				
Discrimination/Harassment	21.7	(5)	89.6	(20)
Age Discrimination	22.2	(2)	100.0	(9)
Disability Discrimination	33.3	(2)	83.3	(5)
Religious Discrimination	16.7	(1)	83.3	(5)
<u>Concurrent Claims—Other:</u>				
Retaliation	19.5	(25)	82.0	(105)
Emotional Distress	30.6	(11)	75.0	(27)
Constructive Discharge	35.7*	(10)	57.1***	(16)
*This variable is significantly correlated with the success rate indicated at the .10 level.				
**This variable is significantly correlated with the success rate indicated at the .05 level.				
***This variable is significantly correlated with the success rate indicated at the .01 level.				

²¹¹ We did not study the different combinations of statutory claims nor of cases with only one statutory claim. It might be, for instance, that cases that are based on Title VII only or on Title VII and Section 1981 but not Section 1983, have higher (or lower) plaintiffs' success rates than the groupings we did study.

²¹² This is in contrast to a study of employment discrimination cases that are filed and terminated in the federal courts, where the win rates of the three types of statutory cases are similar, but showing that Title VII cases had the highest and Section 1981 cases had the lowest win rates. Clermont & Schwab, *supra* note 9, at 18 (Display 11).

In addition to the racial harassment claim, plaintiffs may bring other concurrent claims. Furthermore, the study considers how these concurrent claims affect the outcome in the racial harassment dispute.²¹³ (See Table 17.) Among the overall discrimination-based concurrent claims, plaintiffs who bring a concurrent racial discrimination claim²¹⁴ have a significantly lower success rate in their racial harassment case (18.2%). In contrast, adding a sex discrimination claim appears to improve plaintiffs' success rate to about 30%, while a sexual harassment claim seems to have little effect. The other concurrent discrimination-based claims have varied effects, but for many of these cases, the number is small so it is difficult to draw inferences.

We consider further the gender of the plaintiffs who brought sex-based claims and whether their gender makes a difference on outcome.²¹⁵ Not surprisingly, most of these plaintiffs are women (35 out of 43). Interestingly, the women plaintiffs who also bring a sex-based claim help their racial harassment case slightly (winning 25.7%), but men plaintiffs hurt their racial harassment case (winning only 12.5%). This gender difference is statistically significant.²¹⁶

Among the other concurrent claims, as indicated in Table 17, both constructive discharge and emotional distress claims appear to help plaintiffs' chances of winning their racial harassment claims. When these claims are included in the lawsuits, the plaintiffs' chances of winning improve to over 30%. Many cases include retaliation claims, but their inclusion appears to slightly depress plaintiffs' position regarding their racial harassment argument.

4. Legal Issues

This study offers data on a number of legal issues. As we discussed earlier (see Table 12), it indicates how the courts resolve specific issues.²¹⁷ For instance, it shows that when the issue of whether or not the plaintiff's alleged harassment is "severe or pervasive" is raised, the courts answer that particular issue negatively three-quarters of the time. Table 18 indicates the plaintiffs' success rate in the case as a whole when the "severe or pervasive" harassment is raised (and in which the parties may have raised other issues as well).

²¹³ Sixty-five (25%) of the racial harassment cases have concurrent claims other than those identified in Table 17. If one were to study representative disability harassment or religious harassment cases, for example, the plaintiffs' success rate would be distinct from the success rate in racial harassment cases with concurrent disability or religious harassment claims. Thus, the outcomes in cases in this study are not predictive of the outcomes in those cases. Interestingly, however, we will subsequently compare and discuss outcomes in racial harassment cases and outcomes in sexual harassment cases. *See infra* discussion accompanying notes 241-56.

²¹⁴ *See supra* discussion accompanying note 173 (distinguishing between racial harassment and racial discrimination claims).

²¹⁵ These sex-based claims include sex discrimination and hostile environment but not quid pro quo harassment claims.

²¹⁶ At the .01 level of significance.

²¹⁷ *Also see supra* discussion accompanying notes 177-80.

Not unexpectedly, the particular issues before the court can make a statistically significant difference in the outcome of the case as a whole. When the defendants raise the core issues of the severity or pervasiveness of the harassment or of racial attribution (“because of race”), the plaintiffs’ prospects of winning the case as a whole are particularly dismal. Plaintiffs lose their cases 82.4% of the time when the courts are asked to consider whether the harassment is severe or pervasive enough and an astounding 87.8% of the time when the courts are asked to consider whether the employer’s conduct is racially motivated or attributable to some other basis.

Table 18. Effect of Legal Issues on Outcomes

Issue	Plaintiffs’ Success Rates	(N)	Defendants’ Success Rates	(N)
<u>Substantive Issues:</u>				
Is harassment “severe or pervasive”?	18.9%	(30)	82.4%	(131)
Is harassment “because of race”?	2.2**	(12)	87.8**	(86)
<u>Procedural issues:</u>				
Is complaint timely?	25.5	(12)	80.9	(38)
Are administrative remedies exhausted?	27.3	(3)	72.7	(8)
**This variable is significantly correlated with the success rate indicated at the .05 level.				

This data also substantiates that plaintiffs who succeed in regards to one issue do not necessarily succeed in regards to another issue or win the case as a whole. For instance, the courts resolve the “because of race” issue in the plaintiffs’ favor 17% of the time (Table 12), but plaintiffs win these cases as a whole only 12.2% of the time (Table 18). Apparently in some cases where the plaintiffs succeed on the racial attribution issue, they are defeated on another critical issue.²¹⁸

As indicated in Table 18, when the defendants raise procedural issues, the plaintiffs’ chances of winning the case as a whole are about one in four. This is comparable to the average plaintiffs’ win rate of 21.5% for all cases.

As we have noted, courts tend not to discuss the appropriateness of one reasonableness standard over another.²¹⁹ In the ten cases in which the courts did expressly cite their use of the reasonableness standard of the plaintiff’s race, however, the plaintiffs won three of those cases. While this is still dismal plaintiffs’ odds, it is slightly better than the average plaintiffs’ success rate of 21.5%.

²¹⁸ In the relatively few cases in which the issue of individual harassment is before the court, the plaintiffs’ chances of winning their case are substantially improved (53.3% success rate). This is true even though the courts tend not to resolve the particular issue of individual harassment in the plaintiffs’ favor (resolved in plaintiffs’ favor only 25% of the time).

²¹⁹ See *supra* discussion accompanying notes 181-87.

Part IV: Analysis and Discussion

The extensive empirical study described in this article provides rich data on racial harassment case law. Prior to this study, employees, employers, judges, lawyers, and academics had to speculate about the factual backgrounds, the litigation processes, and the outcomes of these cases. Based on a detailed analysis of a representative sample of federal district court and appellate court cases between 1976 and 2002, this study offers an overview of the history of racial harassment cases. This article reveals who brings these cases, the kinds of harassment they claim, the critical issues the courts consider, and the most frequent forums, among other important topics. These cases also are proxies for racial harassment in the workplace—suggesting for instance, who the perpetrators are and how they harass their targets.

In this final part of the paper, we briefly summarize key findings of this study and offer plausible explanations of these results. We shift, therefore, from a statistical description of the case characteristics (in Part II) and the case outcomes (in Part III), to an integrated analysis and discussion of these results.

As we explore why some cases are brought and others are not, we acknowledge that myriad explanations are possible. Some general explanations may explain a number of results. For starters, legal standards can make a difference. For instance, how courts interpret “severe and pervasive” and “because of race” can encourage or discourage disgruntled employees from moving ahead with litigation. Likewise, the cultural backgrounds of employees, supervisors, and coworkers also may be relevant. For instance, individuals of certain cultures may hesitate to be confrontational, and thus may be less likely to engage in an adversarial process such as litigation. Given the large and representative sampling of cases, however, it is also likely that the cases simply mirror what is happening in the workplace. For instance, individuals of a particular race may constitute a disproportionately high percentage of plaintiffs in racial harassment cases because they are particularly and disproportionately targeted.

Why are the plaintiffs in cases with certain characteristics more likely to succeed and the plaintiffs in cases with other characteristics more likely to lose? When considering possible explanations, the key point to keep in mind is that the actual data regarding outcomes does not change, even though attempts to explain the data might. Thus, any explanation is persuasive only if it is consistent with the data. As we examine causal connections, we acknowledge various potential explanations for case outcomes. A particular group of plaintiffs or defendants may simply have “stronger” cases or “weaker” cases, given the applicable legal principles. Some plaintiffs and defendants may have “better” lawyers or “worse” lawyers, given their resources and coincidence. However, given the high number of cases analyzed, these individual case attributes would be expected to balance out statistically.

A more plausible explanation is that judges have a collective bias in favor or disfavor of cases with particular characteristics. Judges must review and assess

plaintiffs' description and interpretation of the events and contrast it with defendants' version of the story. Judges then must apply the applicable legal principles to the facts as they understand them. This interpretive and evaluative process of others' narratives deliberately and necessarily occurs in racial harassment cases. In the defendant's motion for summary judgment, for instance, the judge must decide whether the plaintiff's narrative adequately shows that she or he was "severely or pervasively" harassed "because of her race," or in the alternative, whether the defendant's narrative is more convincing.

During this process, judges interpret and evaluate the plaintiffs' and defendants' stories from a frame of reference that they have acquired over time from their professional, educational, and social experiences and backgrounds. This mental model provides a conceptual framework that helps them sort through the factual details and to decide what is relevant and in what ways they are relevant. As products of their socialization, judges may be consciously and deliberately, or as likely, unconsciously and unintentionally biased.

A. Racial Harassment Cases Over Time

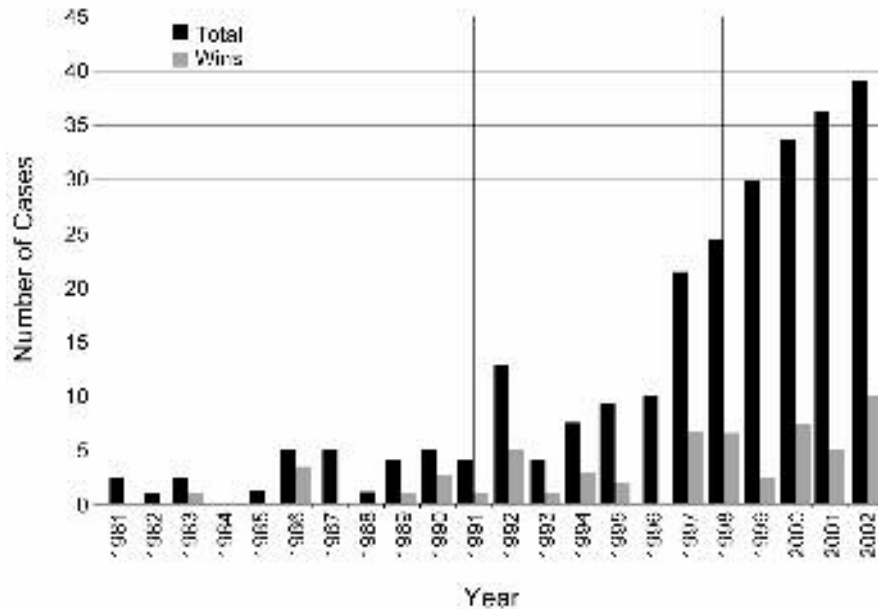
Even though the *Rogers* case marks the judicial birth of the harassment doctrine in 1971, plaintiffs were slow to utilize the theory. As illustrated in Figure 4, there are comparatively few cases each year between 1981 and 1991, a spike in 1992, some activity between 1993 and 1996, and then a clear annual increase every year from 1997 on. A peak of 38 cases occurred in 2002. Hence, the courts saw a distinct upswing in litigation activity in recent years. In fact, about 87% of all cases occurred since 1991. The jurisprudence of racial harassment law, therefore, has essentially been developed within the last fifteen years. (The growth in racial harassment cases generally reflects the same growth pattern of all employment discrimination cases.²²⁰) This has presented judges during this period with the opportunity to essentially shape the doctrine. Moreover, because racial harassment law has received less attention than sexual harassment law, judges have been able to craft the laws largely unmonitored by legislators, academics, and advocacy groups.

What explains the ups and downs in the number of cases and in particular the surge of cases brought after 1997? Legal developments and societal events during this time do not necessarily favor plaintiffs' position. They may have nonetheless heightened public awareness of harassment in the workplace, including racial harassment, and possible legal causes of action. The Anita Hill and Clarence Thomas hearings in 1991 and important Supreme Court cases occurring in 1994 and 1998 brought these issues to the fore. (At the same time, documented evidence of the plaintiffs' dismal prospects in these particular lawsuits was not available until this study. Lawyers could only speculate

²²⁰ Employment discrimination cases have become an increasingly larger percent of federal civil cases, constituting nearly 10% by 2000. Clermont & Schwab, *supra* note 9, at 1, 29-30 (study on civil cases, including employment discrimination cases (Title VII, ADA, § 1983, ADEA, § 1981, and FMLA), that terminate in a federal district court or court of appeals). While employment discrimination cases peaked in 1998, however, racial harassment cases continued their upward trend.

on the general prospect of winning or losing and they may have overestimated the probability of success.) It may also be that these events particularly motivated certain plaintiffs who believed legal and social developments were strategically advantageous for them.²²¹ For instance, cases brought by African American plaintiffs show a greater increase than cases brought by other racial and ethnic groups (Figure 5). Similarly,

Figure 4
Cases Brought and Won by All Plaintiffs



²²¹ Major legal events in contemporary harassment jurisprudence include: the *Meritor* case in 1986, the 1991 Civil Rights Act, the *Harris* case in 1994, and the *Oncale*, *Faragher*, and *Ellerth* cases in 1998. See *supra* discussion accompanying notes 42-49. The impact of major legal events is difficult to ascertain. Among other issues, there is an undeterminable time lag between the legal events and their consequences. As we have noted, the time between the beginning of a plaintiff's dispute resolution process (perhaps prompted in part by a particular legal event) and when a district court decides the defendant's motion and reports it, may be years. Nonetheless, we can at least observe to what extent these legal events appear to prompt or chill reported racial harassment litigation in the cases in general and in the different groupings of cases above.

Given Figure 4, the *Meritor* case in 1986 appears to have had minimal short-term effect, perhaps because the case was perceived as a sexual harassment case rather than one dealing more broadly with harassment in general. The 1991 Act was much heralded as pro-plaintiff which may have spurred increased litigation in 1992. While the Hill-Thomas hearings in 1991 are remembered mostly as focusing on sexual harassment issues, much of the conduct at issue had racial overtones as well. There also was controversy over to what extent the Act would be retroactive, which may also have spurred some litigation activity. The *Harris* case in 1994 marks the beginning of a small incremental increase in lawsuits. The 1998 cases, however, are part of the dramatic surge in cases that began in 1997. While we can only speculate on their precise influence, these 1998 cases perhaps in conjunction with the cumulative impact of the prior legal events including the 1991 Act, do not appear to chill litigation.

around the time of the *Oncale* and *Faragher* cases in 1998, cases brought by men and by African Americans surged more dramatically than cases brought by women or other racial and ethnic groups (Figures 5 and 7). Perhaps racial harassment in the workplace simply increased, as suggested by EEOC statistics on employee complaints. Finally, judges may have been particularly willing to hear, write, and release opinions on racial harassment. Perhaps they were cognizant of an increasing number of charges and sensed an opportunity to influence evolving legal principles.

While noting that the number of racial harassment cases has increased in the last decade and a half, keep in mind that these cases still represent only a very small percent of employee complaints of racial harassment. Thus, many employee allegations of racial harassment are never considered by the judicial system. Legal standards may be so daunting that some prospective plaintiffs, even those with very legitimate claims, decide that pursuing a remedy through the judicial system is not worth the effort.

Although the volume of cases increased over time, as shown graphically in Figure 4, plaintiffs' and defendants' success rates in general did not change significantly over the entire 21 year time period.²²² Plaintiffs historically have been much more likely to lose and defendants more likely to win. This pattern has continued in recent years. On average, the plaintiffs' probability of winning a case between 1981 and 1991 was about one in four (26.7%). When cases increased in number between 1992 and 2002, the plaintiffs' average success rate was 20.8%, even worse than in the prior eleven years. The legal standards have not changed effectively or at least not in ways that affect case outcomes, despite various Supreme Court clarifications and interpretations. A partial explanation may also be that the perception of more protective harassment laws in 1986, 1991, 1994, and 1998 prompted weaker fact patterns, thus counteracting the effect of more protective laws.

B. Plaintiffs and Defendants

This study substantiates that employees in diverse occupations, including doctors, lawyers, and executives of all kinds, complain about being racially harassed. A higher percentage of plaintiffs, however, come from the more subordinate and lower-paying service and support occupations (such as secretaries, production line personnel, police officers, bus drivers, and health care technicians). Therefore, it appears that no occupational groups are excluded from racial harassment, while those in more subordinate roles are particularly vulnerable to abuse.

Plaintiffs are both men and women of different racial and ethnic backgrounds, although there are some notable distinctions among groups. In particular, Blacks are disproportionately represented, given their percentage in the labor force. Are Blacks the most likely plaintiffs because they are the most likely to be targeted; that is, the most discriminated against? Or is part of the explanation that Blacks are the most conscious of

²²² There were only a few cases between 1976 and 1981, so that an analysis by year did not appear meaningful. In 1984, there were no reported cases in our sample; and in some years there were cases but none of which the plaintiffs won.

racism and the most likely to complain about it? We should also pay attention to groups that are not bringing as many lawsuits as we might expect and consider why they are not using the judicial system. There is substantial evidence that Hispanics are targets of harassment in American society, including in the workplace. Hispanic plaintiffs, however, are underrepresented relative to their percentage in the labor force. Are Hispanics less likely to formally complain about workplace harassment because of cultural characteristics, lack of knowledge of legal resources and remedies given language or socioeconomic limitations, or other legal risks that might be implicated? For instance, some Hispanics may opt to ignore racial harassment rather than bring attention to their immigration status. Thus, before they bring a lawsuit, their work situation may need to be extremely intolerable and egregious.²²³ In addition, the Black-White binary paradigm of race may also be unduly shaping racial harassment laws. Judges have in mind Black plaintiffs and White defendants, so that other types of workplace discrimination that Hispanics and Asians face—for example, based on accent, perceived foreignness, or immigration status—might easily not strike lawyers and judges as racial in nature. For many, “race” means “Black” and Blacks do not tend to experience harassment on these grounds. The law of racial remedies, including harassment law, might turn out to be available to Hispanics and Asians only to the extent they succeed in analogizing what happened to them to events that, if they happened to Blacks, would be actionable.

When it comes to outcomes for particular racial or ethnic groups, the number of cases brought by Blacks surged beginning the mid- to and late-nineties.²²⁴ (See Figure 5.) The increase in all racial harassment cases in this time period, in fact, is largely attributable to these plaintiffs. This increase in cases, however, does not appear to be fueled by Blacks’ prospects for success. In fact, as depicted in Figure 6, as compared to the period of 1981-1991 when Black plaintiffs’ average success rate was 22.7%, the success rate was 19.3% between 1992-2002.²²⁵ More recently in 1999-2002, when the case number steadily increased, the success rate was 18.7%. Judges appear to be increasingly critical of African American plaintiffs, perhaps as a way of coping with what they perceive as the excessive number of cases.

²²³ Perhaps this explains in part the comparatively high 54.5% success rate of Hispanic plaintiffs.

²²⁴ Hispanic American, Asian American, and White American plaintiff groups had modest increased litigation activity beginning in the mid 1990s. Given this relatively brief litigation history, it is unclear if these early cases are representative of future cases to be brought by members of these racial groups. It is possible, for instance, that given the novelty of their claim that these plaintiffs were more risk-taking. It is also possible that plaintiffs and their counsel pursued litigation in these pioneering cases in part because they felt they had particularly strong cases.

²²⁵ There are too few cases for other racial and ethnic groups to meaningfully analyze their wins over time.

Figure 5
Cases Brought by Plaintiffs' Race

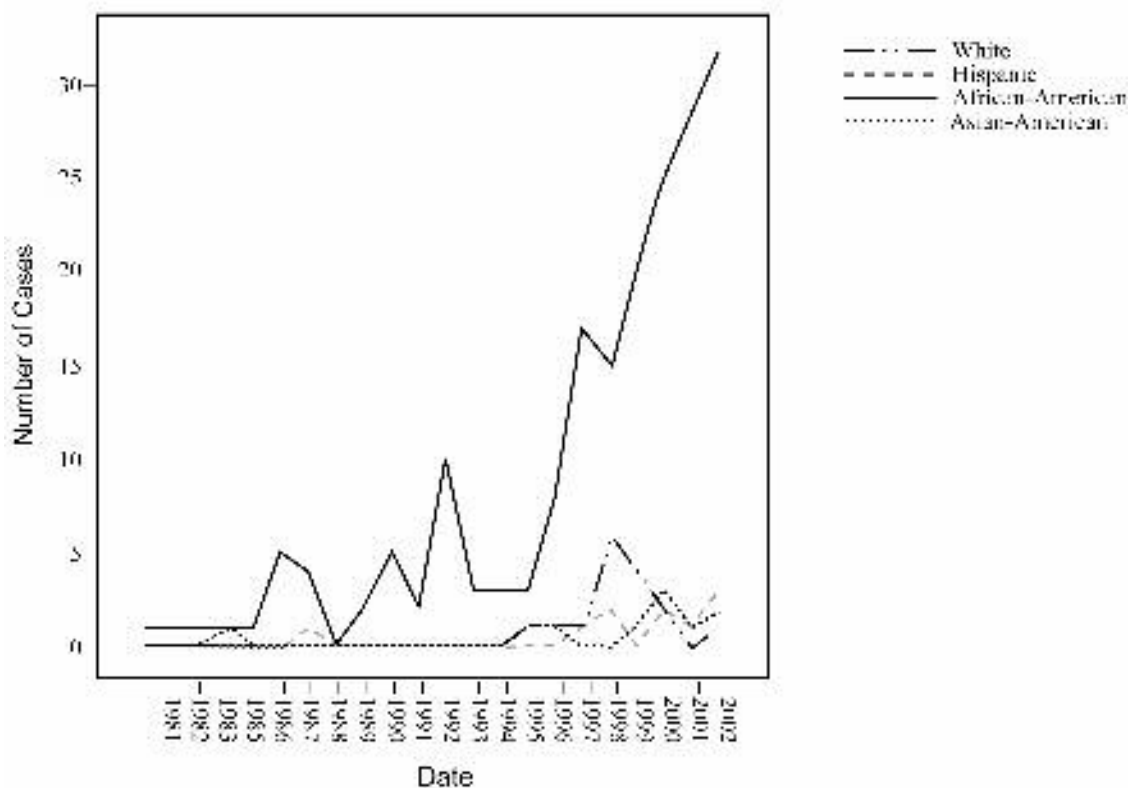
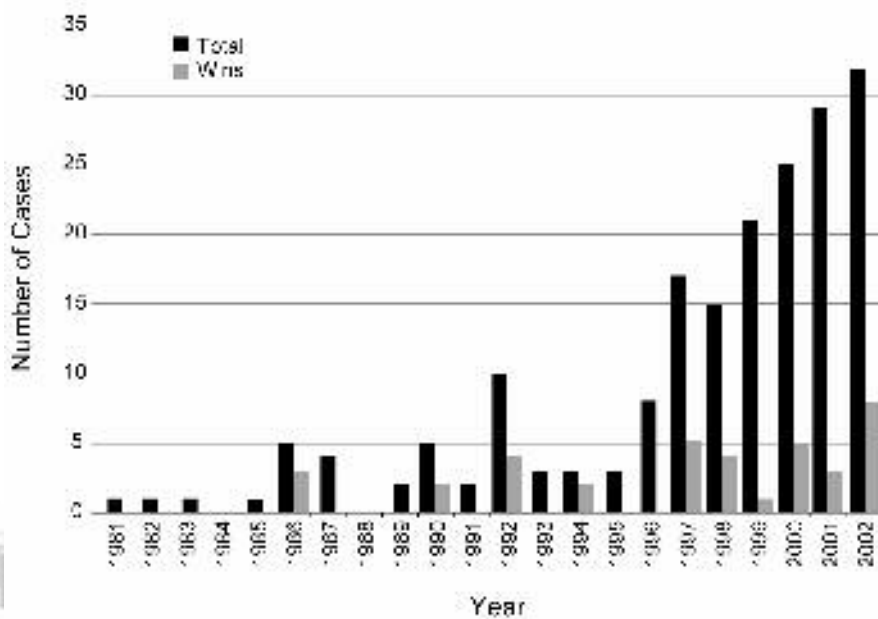


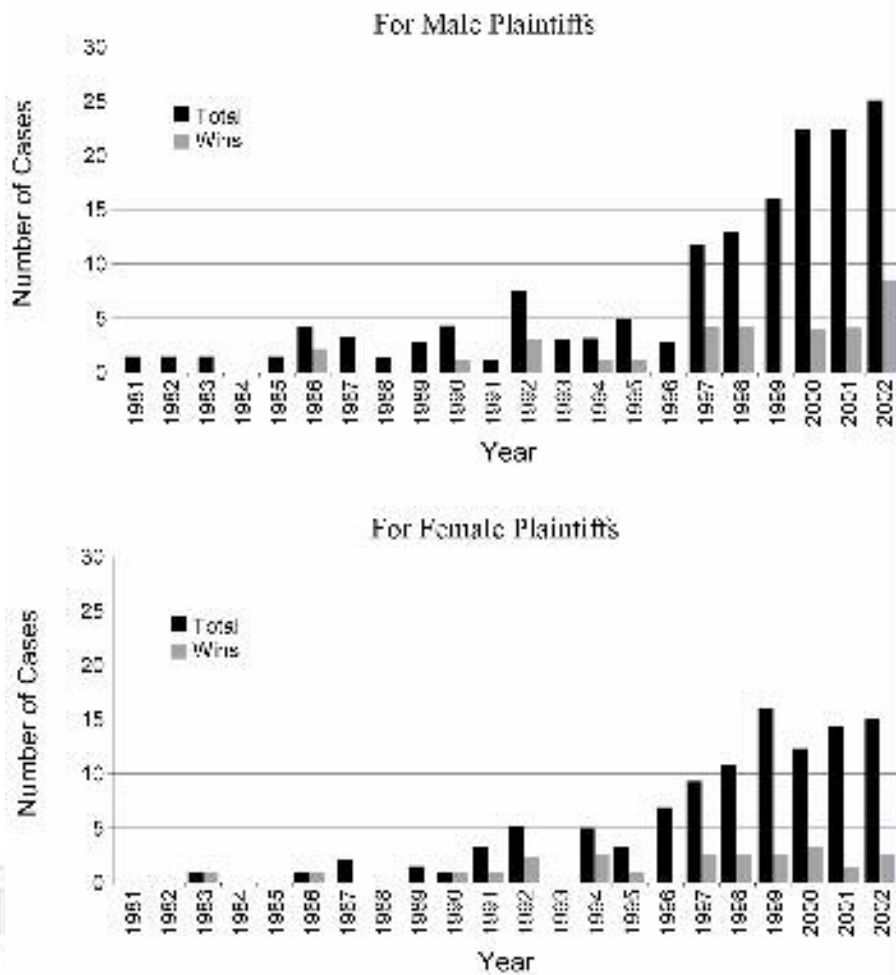
Figure 6
Cases Brought and Won by Black Plaintiffs



tory

In terms of gender, while women are slightly less likely than men to be plaintiffs in racial harassment cases over time, men are much more frequent plaintiffs in recent years. (See Figure 7.) Beginning around 1999, however, the number of male plaintiffs dramatically increased while the number of female plaintiffs stayed flat. The general surge in racial harassment cases in the most recent years, therefore, is more attributable to cases brought by men than by women. Men and women plaintiffs had very different success rates over time and more recently. Although women did not bring many cases during 1981-1991, they had a comparatively high average 44.4% win rate. This contrasts markedly with their average win rate of only 17.5% during 1992-2002. The success rate for men who brought lawsuits improved over time. Between 1981-1991, it was an average 15% (substantially lower than female plaintiffs during that period). Between 1992-2002, it averaged 22.1%. Thus, the trend in recent years is that women bring fewer racial harassment cases and are more likely to lose their litigation than men. It appears that, even without empirical evidence, women employees are getting the message that courts are increasingly inhospitable to their claims.

Figure 7
Cases Brought and Won by Gender



Considering the intersection of plaintiffs' gender and race reveals interesting differences. Minority men are more likely than minority women to be plaintiffs.²²⁶ What explains this gender disparity among minorities? Are minority men more likely targets of racial harassment and more likely to complain about it? Or is it that when minority women are harassed, they are less likely to perceive themselves as targets or to bring and maintain lawsuits? The absence of Hispanic women plaintiffs, for instance, prompts us to ask why this group does not utilize the legal system to address racial harassment abuses in the work environments. It may also be that minority women who experience both sexual and racial harassment do not pursue a racial harassment cause of action, choosing instead to incorporate racial harassment into their sexual harassment cause of action. They may do this at the advice of their lawyers who are more familiar with and thus are drawn toward sexual harassment laws. Their lawyers may further recognize strategic disadvantages of bringing both racial harassment and sexual harassment claims. For instance, lawyers may believe that judges will "count" a racially tainted sexual insult toward either a racial harassment claim or a sexual harassment claim but not toward both claims.

In addition to studying plaintiff employees, we also analyzed the defendants. This provides data to help us better understand who commits racial harassment and fuels our inquiries on why they might be motivated to do so. A distinct profile of alleged harassers emerges from this study. They include women, although two-thirds are men. They include 20% Blacks, 6% Asians, although 74% are White. Men and whites are more likely to hold supervisory or other dominate positions in organizations than women or minorities, and therefore they may believe they can use their positions of power to harass without reprisals. It may also be that these groups are more inclined to harass because, for reasons that are unclear, they are more prejudiced toward minority employees and choose to manifest that prejudice by harassing them. (Given minorities' perception that the workplace is racist, it may also be that some minority employees are more likely to label the conduct of these groups as racial harassment, when in fact, the conduct may not be racially motivated.²²⁷)

The data also indicates another interesting phenomenon. Given the percentages of these groups in the labor force, men are disproportionately represented as alleged harassers but so are Blacks and Asians.²²⁸ The study reveals that minority harassers target the full range of employees, including Whites, other minority groups, and members of their own race. Minority harassers may "just be going along" with ridicule instigated

²²⁶ In contrast, White women are more likely than White men to be plaintiffs.

²²⁷ Some white employees, given societal or organizational pressure to be accommodating to diversity initiatives, may also be hesitant to label a minority supervisor or coworker's conduct as racially motivated. However, since 26% of the defendants are minorities, this does not seem to be widely true.

²²⁸ Men constitute only about half of the labor force. Whites are 70% of the labor force, Blacks about 12%, and Asians about 4%. So, while almost 3/4 of accused harassers are White, Blacks and Asians are defendants at a 50% or higher rate than you would expect given their representation in the labor force.

by their bosses and coworkers, or they may be manifesting their own within-group prejudices or animosity toward other racial groups.²²⁹

We also studied how the plaintiffs' and defendants' profiles affect how the judicial proceedings are resolved. The plaintiff's race is clearly relevant to the outcome of cases. In particular, Black and Asian plaintiffs lose more cases and Hispanic and White plaintiffs win more cases. There are myriad alternative possible explanations for these differences. It could be that Blacks bring a broader range of cases, some with weaker facts. It could also be that the cases brought by Hispanic and White plaintiffs are particularly strong, relative to the cases brought by the other racial groups. Once again, however, these differences are statistically unlikely for the White plaintiffs over such a large number of cases. On the assumption that plaintiffs' cases across racial groups have comparably egregious facts, the more likely explanation is that courts have different tolerance levels for what is permissible harassment. For instance, courts appear to demand more extreme employer harassment before they conclude that Blacks and Asians have been "severely and pervasively" harassed. Judges, who tend to be White, may also be more unconsciously empathic with White plaintiffs' claims, thus finding their positions more persuasive.

The race of the harasser also makes a difference. Plaintiffs (who are most likely to be Black) win a slightly higher percentage of cases if the alleged harassers are White rather than Black. In fact, in the nine cases in which both the plaintiffs and the harassers are minority (minority-on-minority harassment), the plaintiffs lost eight of the cases. Based on this small sub-sample, there is some indication that courts find minority-on-minority harassment even less plausible than White-on-minority harassment.²³⁰ It could be that the mostly White judges are not familiar with intra-minority group "racial" tensions and harassment. For instance, they may not be aware of African Americans' harassing each other because of variations of skin color, Hispanics' harassing each other because of differences in immigration status, or Asians' harassing each other because of historical animosities based on countries of origin.

In contrast to race, the plaintiffs' gender does not seem to affect outcome when considering the entire time period (1976-2002). Female plaintiffs are about as likely to win as male plaintiffs. (As we noted earlier, however, gender does affect outcome within certain time periods.) Nor, for instance, is there any evidence that judges are more sympathetic to the harassment of minority women than minority men. Similarly, the defendants' gender does not seem to affect outcome. Plaintiffs who accuse women of harassing them are as likely to win or lose as plaintiffs who accuse men. Thus, the study indicates that judges are comparably critical of women harassers and men harassers.

²²⁹ However, only 3.5% of the cases are minority-on-minority harassment. This might mean that minorities are disinclined to harass each other. Or perhaps there are intra-group pressures to maintain a solidarity that discourage minority employees from accusing their minority supervisors and minority coworkers of misconduct.

²³⁰ In all of these eight cases, the plaintiffs are Black; in five of the cases, there are multiple harassers of mixed racial backgrounds including Blacks. In the ninth case (in which the plaintiff won in part and the defendant won in part), both the plaintiff and the defendant are Asian.

This study also confirms that racial harassment is not limited to any particular industry or sector. Moreover, it appears that cases from the private sector are not meaningfully distinguishable from the public sector, at least in ways that affect outcome. The percentage of public sector employees who won their cases was similar to private sector employees. Interestingly, plaintiffs who name both their employer and the alleged harasser as defendants are slightly more likely to win than plaintiffs who only name the company. Perhaps in these cases, plaintiffs better detail the person and circumstances under which harassment allegedly occurs, thus bolstering their cases. Or possibly these cases prompt the judges to personalize the alleged harasser, thus making the harassment that much more plausible. The judges may also be less comfortable with the employer's vicarious liability than the harasser's direct liability.

C. Nature of the Harassment

One of the most striking findings in the study is that racial harassment is often a group activity involving both supervisors and coworkers of the targeted employee. In about two-thirds of the cases, plaintiffs claim that more than one person harassed them. The combination of supervisors and coworkers as alleged harassers occurs in almost one-third of the cases. This data suggests that racial harassment is a more socially accepted activity than we might have suspected and that it frequently involves multiple individuals at different organizational levels appearing to “gang-up” on the targeted individual.

Furthermore, it appears that courts also notice and disapprove of this “ganging up.” Plaintiffs are twice as likely to win when there are multiple harassers rather than an individual harasser and twice as likely to win when both the supervisor and coworkers are engaged in the harassment. These circumstances apparently strengthen the plaintiffs' burden of showing that the harassment was “pervasive or severe.”

In addition, unlike sexual harassment claims that allege that harassment sometimes moves off the work site into a more social context, plaintiffs in racial harassment cases rarely claim that harassment occurs outside the work setting. Perhaps this is because coworkers of different races tend not to socialize together outside of work. Plaintiffs' charges also often describe harassment occurring over a length of time and with multiple incidents. This may be because courts have indicated the difficulty of a single or isolated event meeting the legal standards for racial harassment. Thus, plaintiffs who have been harassed on one occasion, even though the harassment may be very egregious, probably do not bring lawsuits.

Plaintiffs allege that they are harassed in an array of ways: verbally, with physical objects, with physical conduct, or with work-related decisions. The most common form is verbal harassment, with plaintiffs in over 80% of the cases citing it. Many of the comments are blatantly racial, for instance the use of racial epithets or clear offensive references to racial groups. Harassing involving physical objects, such as nooses or Klu Klux Klan attire, also are overtly racist. Thus, in contrast to societal perceptions, blatant racist harassment apparently continues in the workplace. Plaintiffs also claim more

subtle and covert harassment that is not on its face race-linked, but which the plaintiffs perceive as racially motivated because of the context in which it occurs. Finally, in almost two-thirds of the cases, plaintiffs claim they are harassed by their supervisors' work-related decisions. These involve denial of promotions, job development opportunities, benefits, and the plaintiffs' authority.

While the existence of both blatant racism and subtle racism have been recognized by social scientists, a number of legal scholars argue that the courts do not recognize more subtle discrimination. To an extent, this study supports these scholars' contention: judges are slightly more likely to recognize blatant racial prejudice than more contextual or subtle racial prejudice. In perusing the plaintiffs' presentation of facts and particularly when evaluating whether the harassment is "because of race," judges tend to deem relevant only those allegations of harassment that are overtly race-linked. Thus, judges make reference to racial epithets such as "nigger" and to "noose" incidents, but tend not to find relevant plaintiffs' allegations of their exclusion from professional or work-related activities; social isolation; or hostile, rude, and demeaning comments that do not expressly include a racial epithet. Most judges do not know, do not find applicable, or do not find persuasive the relevant social science research on subtle and contextual racial harassment.

Hence, harassment that is blatantly racist is more likely to persuade the courts. Employees' claims of more subtle or contextual racial harassment are less likely to be successful. Plaintiffs' citing of employers' formal decisions as evidence of harassment even hurts their case. Perhaps courts assume that those decisions are management's prerogative and are evidence of a non-racial basis for what the plaintiff perceives as negative employer treatment.

Plaintiffs, however, should not be overly confident about claims based on physical and blatantly racist harassment. Recall that these success rates are relative. These plaintiffs are still likely to lose in two out of every three cases. It is just that plaintiffs without these types of overtly egregious racial harassment claims are considerably worse off.

D. Litigation Characteristics

Almost 80% of the cases in this study are district court opinions, and a very high percentage of these cases (95%) are merit-based (pretrial motions for summary judgment or dismissals, or trials on the merits). Given the nature of these proceedings, the district court judges' holdings are likely dispositive of the cases. Defendants are successful 85% of the time when they bring motions for summary judgment and 54% of the time when they bring motions for dismissal. While plaintiffs can appeal the district courts' ruling, most plaintiffs do not. Only 20% of the cases in this study are appellate cases and plaintiffs' likelihood of success is about the same at both the district court and appellate court levels. This study, therefore, confirms that district court judges, particularly through pretrial motions, act as gatekeepers in employment discrimination cases. While

plaintiffs theoretically have the right to jury trials, district court judges impose a substantial barrier to the plaintiffs' ongoing lawsuit by ruling in favor of the defendant.²³¹

This study also indicates that federal circuits vary in their volume of racial harassment cases. Over half of the cases occurred in either the Seventh or the Second Circuits, indicating the influential roles these circuits play in shaping racial harassment jurisprudence. Certain states are the most fertile ground for cases. Over 60% of the cases come from just four states (Illinois, New York, Texas, and California). It is not clear if these patterns are attributable to an increased occurrence of racial harassment in these forums, particularly active plaintiffs' lawyering, judiciaries that are more receptive to hearing these and providing opinions on these cases, or a combination of these factors.

We also considered the effect of court level and forum. The parties' success rates in the district courts and the appellate courts are fairly comparable, with plaintiffs winning 20.8% of the district court cases and 24.5% of the appellate court cases. The parties' success rates varied across federal circuits and states. While the Second, Seventh, and Eleventh Circuits, for instance, had comparable outcomes, the plaintiffs in the Fifth Circuit had a notably lower success rate. On the assumption that courts are confronted with comparable fact patterns, these variations suggest that legal standards are not uniform throughout the United States. In other words, courts in one circuit may find a particular plaintiff's claims of racial harassment persuasive while courts in another circuit may not. Outcomes across states vary considerably, although stereotyping of states is not appropriate. Given California's image as a pro-employee and ethnically diverse state which uses the reasonableness perspective of the plaintiff, one would not have predicted that it would have the worst plaintiffs' success rate. Similarly, given the Southern states' image as more pro-employer and less socially progressive, one would not have predicted that Alabama would have the best plaintiffs' success rate. On the other hand, other states in the Deep South such as Georgia and Louisiana, did have lower plaintiffs' success rates. Keep in mind again, that these comparisons are still relative. Even in Alabama, defendants win over 70% of the cases.

We also found that plaintiffs have significantly higher success rates in smaller, less ethnically diverse states than in larger, more ethnically diverse states. Perhaps racial harassment complaints (and other racial discrimination claims) have become more commonplace in the larger diverse states and judges there have become more cynical and skeptical of them. At the same time, racial harassment complaints (and other racial discrimination claims) may be more novel and therefore noteworthy in the smaller less

²³¹ Theresa Beiner proposes that a confluence of circumstances have led to increasing judicial hostility toward harassment claims and judicial inclination to use (and misuse) summary judgments, often resulting in inappropriate and premature dismissal of cases. Beiner, *supra* note 111, at 19-23, 97-118. For instance, she cites legal developments relating to summary judgments that effectively make it easier to grant these motions. Judges also appear skeptical of legal developments, such as the *Harris* case's clarification of the plaintiffs' proof of damages and Civil Rights Act of 1991's confirmation of the availability of jury trials. See also Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 557 (2001) (also observing the "general consensus" that employment discrimination cases are too easily filed and too easily won, but countering that "this picture is grossly distorted . . . these suits are far too difficult, rather than easy, to win.").

diverse states. Given their novelty, judges there may be more attentive to and consequently more sympathetic toward the complainants. Likewise, judges in smaller less diverse states may be more vigilant to protect the state's image from being branded biased or racist. An alternative explanation is that plaintiffs may simply bring stronger cases, believing that weaker fact patterns will not get a fair hearing in smaller less diverse states.

As the premier federal statute for addressing racial discrimination in the workplace, it is not surprising that almost 90% of the plaintiffs utilize Title VII of the Civil Rights Act of 1964. It was striking, however, that over a third of the plaintiffs also base their claim on Section 1981 of the Civil Rights Act of 1866. Plaintiffs' lawyers must see attributes of Section 1981 as beneficial. Some plaintiffs' attraction to Sections 1981 and 1983 proved to be statistically justified, when one considers the effect of the statutory claims on outcomes. Plaintiffs who included these post Civil War causes of action had significantly better odds of winning. While Title VII cases increased in number in recent years, the plaintiffs' win rates' became worse.²³² Meanwhile, Section 1981 and 1983 cases increased more modestly, but their plaintiffs' win rates stayed steady. Between 1992 and 2002, plaintiffs in Title VII cases won on average 20.8% of the time, in contrast to plaintiffs in Section 1981 and 1983 cases who won on average 32.5% of the time.

The concurrent claims that plaintiffs bring with their racial harassment claims are informative. Almost three-quarters of the cases include racial discrimination claims. This suggests that plaintiffs perceive that both hostile work environments and more tangible formal employer decisions occur hand-in-hand, and are racially motivated and discriminatory. It portrays a very debilitating work situation for those aggrieved. Almost half the cases include a retaliation claim, suggesting that plaintiffs believe that their complaining and the exercise of their legal rights are often met with a negative and retaliatory employer response.

A relatively small percent of the cases had a concurrent sexual harassment claim. This could be because about 60% of the plaintiffs are male, and therefore less likely to bring sexual harassment claims. It could also be that individuals who harass an individual on the basis of their race are not motivated to harass them on the basis of their sex. Finally, as we noted earlier, it may be that some women plaintiffs, who are racially and sexually targeted are folding their racial harassment claims into their sexual harassment causes of action.

What effect do these concurrent claims have on the outcome of the racial harassment claim? The data indicates that plaintiffs who bring a concurrent racial discrimination claim have a significantly lower success rate in their racial harassment

²³² The growth in racial harassment litigation since the mid-1990s is largely attributable to Title VII cases. Since 1987, the number of cases based on Section 1981 or Section 1983 has been small and steady. The exceptional year is 2002 in which there were a record number of these cases. Even in that year, however, Title VII cases easily dwarfed Section 1981 and Section 1983 cases.

case. In comparison, adding a sex discrimination claim appears to improve the plaintiffs' case but adding a sexual harassment claim does not.

Finally, the general growing disparity between the numbers of judicial opinions that are published in the Federal Reporter and those that are only electronically published is substantiated. Over 60% of the cases are not published in the Federal Reporter. Thus, a substantial portion of judicial reasoning and interpretation in racial harassment cases does not have the accessibility or the credibility of the Federal Reporter. Moreover, judges, lawyers, and scholars relying only on the Federal Reporter have a distorted view of racial harassment law, believing that the plaintiffs' probability of winning a lawsuit are higher than they actually are. On the other hand, the higher plaintiffs' win rate in the Federal Reporter offers more positive (albeit unrepresentative) precedents for plaintiffs' use as authority.

E. Future of Racial Harassment Law

Racial harassment law deserves its own jurisprudence. Although it launched workplace harassment doctrine through the *Rogers* case, the tide of legal events moved in the direction of sexual harassment. For too long, it has lived in the backwaters of sexual harassment law with neither a clear roadmap to it nor a solid harbor to dock. It has remained off the radar screen of legal scholars and consequently judges have shaped it haphazardly in different parts of the country.

This study alters that legal geography. It provides for the first time a representative summary of what actually occurs with racial harassment cases in the courts. It gives scholars a sound basis to create a new jurisprudence guided by statistically sound data. By pointing the way to the particular case characteristics that affect actual outcomes, this study can help scholars in their efforts to develop "theories" of racial harassment.

The study benefits enormously plaintiffs, defendants, their lawyers, and judges involved in racial harassment cases. All parties can use its detailed baseline to compare their case. In addition to the traditional selective case precedent method, each party can now draw upon the totality of racial harassment cases to guide their decisionmaking. For example, knowing the odds of winning or losing with particular claims, parties, or forums can help determine whether or not to use the courts. Lawyers who have tended to see "harassment law" as synonymous with sexual harassment now can explore racial harassment as a possible avenue. Judges in particular can benefit by examining their own decisionmaking against the collective judicial decisionmaking across the country. Hopefully, this study will encourage them to reflect on their own views and potential blindspots when it comes to racial harassment.

Finally, legislators can use this study to guide their own efforts to end racial harassment in the workplace. They can see how legislation has played out in the courts and decide whether their efforts are having the intended consequences. Knowing the results of prior efforts enables them to craft future laws to better achieve their desired

end. This study gives them a benchmark against which they can measure their progress, monitor the judicial branch's rendering of their laws, and modify ongoing efforts in response to racial harassment cases.