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Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements

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Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements

Minna J. Kotkin*

Abstract

Recent empirical studies on outcomes in employment discrimination litigation all reach the same conclusion: Plaintiffs have little chance of success. But these studies rely on summary judgment decisions and trial verdicts, gleaned from reported opinions, electronic docket entries, and data collected by the Administrative Office of the Courts, and they acknowledge that this is just "the tip of the iceberg." Until now, settlement outcomes, which account for 70% of case resolutions, have been rendered invisible because of confidential settlement agreements. Along with the "vanishing trial" syndrome, secret settlements have created an information vacuum, skewing the public policy discourse about employment discrimination litigation and leaving the judiciary, litigants, and attorneys without benchmarks by which to negotiate resolutions.

This Article reports on an anonymously coded dataset of 1,170 cases settled by federal magistrate judges in Chicago over a six-year period ending in 2005, and provides the first detailed analysis of settlement outcomes. These data reveals that employment discrimination claimants, who account for over 40% of the dataset, obtain a mean recovery of \$54,651. Among the factors analyzed as they relate to settlement amount are: type of discrimination, type of adverse employment action, stage of litigation, and amount of lost wages.

* Professor of Law, Brooklyn Law School. This Article could not have been written without the cooperation and support of Hon. Morton Denlow, Presiding Magistrate Judge, Federal District Court for the Northern District of Illinois, who spearheaded the effort to create the Chicago settlement database and made it available to me, and Jennifer Shack, Director of Research at the Center for Analysis of Alternative Dispute Resolution Systems, who developed and maintains the database. Rebecca Widom, Director of Research, Urban Justice Center, provided invaluable statistical analysis and assistance. I presented this Article at the Conference on Empirical Legal Studies at the University of Texas Law School, and thank Linda Krieger for her comments and participants for their feedback. Thanks also to my research assistants, Cheryl Baxter and Jennifer Williams, Brooklyn Law School, Class of 2007. I gratefully acknowledge the support of the Brooklyn Law School Summer Research Stipend Program.

These data indicates that employment discrimination litigation is neither jeopardizing American business nor resulting in undeserved windfalls for disgruntled employees. Plaintiffs are achieving a reasonable degree of success through settlements, measured against their lost wages. The Chicago project should be replicated and refined to provide an even more complete picture of settlement outcomes.

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I. Introduction

Nobody really knows what happens to employment discrimination claims in the federal courts. Of the more than 17,000 cases terminated in 2005, only 535, or 3.4%, went to trial.¹ Perhaps another 25% of these were resolved by pre-trial motions.² It is generally assumed that some 70% of these cases end in

1. Administrative Office of the U.S. Courts, "Table C-4. U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending March 31, 2005," <http://www.uscourts.gov/caseload2005/tables/C04mar05.pdf>. Laura Beth Nielson & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 692 (2005).

2. See Wendy Parker, *Lesson in Losing: Race and National Origin Employment*

settlement.³ But this is only an assumption, because employment discrimination settlements are almost uniformly governed by private contracts containing confidentiality clauses.⁴ Often, the court records merely indicate that these cases have been voluntarily dismissed, and even when there is an indication of settlement, no data reflecting the terms are available. Thus, these settlements have been invisible in the burgeoning empirical scholarship about employment discrimination outcomes—until now. This Article analyzes the outcomes of close to 500 employment discrimination cases resolved by magistrate judges in the Chicago federal district court. Beginning in 1999, what I will call the "Chicago Project" established a coded dataset of settlement terms without any identification of parties, so as to comply with confidentiality agreements.⁵

Why do settlement outcomes matter?⁶ For the same reasons that verdicts matter: They affect public perceptions and public policy. The public policy discourse about employment discrimination is highly contested, with divergent competing narratives. Are these claimants whiners and complainers, out to make a quick buck on meritless allegations? Or are they true victims of the subtle but significant forms of discrimination that still abound in the workplace, who do not receive fair and unbiased treatment in the courts?

Discrimination in Federal District Courts, 81 NOTRE DAME L. REV. 889, 899 n.49 (2006) (citing studies that show that 20–35% of employment discrimination cases settle at the pretrial stage); Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 46 (2005) (stating that most employment cases are dismissed or settled).

3. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 440 (2004) (stating that almost 70% of employment discrimination cases settle out of court).

4. See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 945 (2006) (discussing the common nature of confidentiality clauses in settlements for employment discrimination cases); Interview with Hon. Morton Denlow, Presiding Magistrate Judge, Federal District Court for the Northern District of Illinois, (June 14, 2006) [hereinafter Denlow Interview] (stating that 85 to 90% of employment discrimination settlements are governed by confidentiality agreements) (on file with author).

5. See Hon. Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, 43 JUDGES' JOURNAL 19, 21 (2004) ("To preserve the confidentiality of the parties, no party names or case numbers are included on the form, and the date of the settlement conference is entered only by month and year.").

6. David Oppenheimer poses this very question with regard to verdicts. 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, 514 (2003).

Conservative pundits assert that employers are being held hostage by the discrimination laws.⁷ They are besieged by frivolous claims and forced into nuisance settlements to avoid out-of-control legal fees. If they risk litigation, they are at the mercy of jury whims that can lead to crippling awards. Employment discrimination claims are a sub-set of the litigation explosion that is crippling American business and making us non-competitive in the global marketplace. Capitalizing upon and fueling these fears, insurance companies now offer "employment practices liability insurance," to protect against runaway expenses, with websites claiming that, for example, "settlements in [sexual harassment] cases in 2003 exceeded 50 million" dollars.⁸ The media also contribute to questionable representations of employment discrimination litigation. One study found that newspaper reports reflected an 85% win rate for plaintiffs with average recoveries of \$1.1 million, when the docket entries showed a 32% win rate, and a recovery average of \$150,000.⁹ On the other hand, some social scientists and legal scholars suggest that bias in the workplace continues at subtle levels not readily amenable to resolution through litigation as the law now stands.¹⁰

The impact of conservative ideology is readily apparent, both in Congress and in the courts. When Congress amended Title VII in 1991, it imposed the extraordinary measure of capping compensatory and punitive damages to insure against plaintiff windfalls.¹¹ Some federal judges have publicly expressed

7. Oppenheimer, *supra* note 6, at 513; PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA 133–44, 180 (1994); PHILIP K. HOWARD, THE LOST ART OF DRAWING THE LINE: HOW FAIRNESS WENT TOO FAR, at *Preface* (2001); WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 63 (1997); see Nielson & Nelson, *supra* note 1, at 667 (discussing critics' complaints that employment laws are driving up insurance costs).

8. See, e.g., www.epli.com (last visited on Oct. 22, 2006) (claiming that "[e]very employer, large or small, faces the reality that it will be the target of legal action from past, present, and prospective employees") (on file with the Washington and Lee Law Review).

9. Laura Beth Nielson & Aaron Beim, *Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation*, 15 STAN. L. & POL'Y REV. 237, 251–53 (2004) (stating that the media inflates win rates and awards).

10. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–74 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1161 (1995); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993).

11. 42 U.S.C. § 1981a(b). The damage caps were adopted as a last-minute effort to appease President George H.W. Bush, who was firmly against non-capped damages and threatened to veto the bill. See Rebecca Hollander-Blumoff & Matthew T. Bodie, *The Effects of Jury Ignorance About Damage Caps: The Case of the 1991 Civil Rights Act*, 90 IOWA L. REV. 1361, 1367–69 (2005) (describing the legislative history of the 1991 amendments to Title VII); Miller B. Brownstein, Note, *Injury Free, But Money For Me: Whether the Civil Rights Act of*

hostility to employment discrimination claims,¹² and both attorneys and litigants are under the perception that the federal judiciary does not treat the claims or claimants with the same attention and respect accorded commercial litigants.¹³

A number of empirical legal scholars have entered into this fray, some in the hope of simply providing data, and others to directly controvert the conservative viewpoint. Data sources have included reported opinions, electronic docket entries, and statistical information on trial outcomes maintained by the Administrative Office of the Courts. The conclusions have been consistent, however. The accepted wisdom derived from this body of work is that employment discrimination claims are exceedingly difficult to win, compared to other cases.¹⁴ Trial verdicts for plaintiffs are well under 50%. Substantially more than 50% of summary judgment motions are decided in defendants' favor. But these authors all bemoan the dearth of available data,¹⁵ and acknowledge that these statistical studies represent only "the tip of the iceberg,"¹⁶ given the high rate of settlement. Judith Resnik and Steven Yeazell,

1991 *Permits Punitive Damages in the Absence of Compensatory Damages*, 84 B.U.L. REV. 1049, 1052–56 (2004) (same).

12. See Donna Smith Cude & Brian M. Steger, *Does Justice Need Glasses? Unlawful Retaliation Under Title VII Following Mattern: Will Courts Know It When They See It?*, 14 LAB. LAW. 373, 413 (1998) (quoting Federal District Judge Stanley Sporkin suggesting a new standard for a *prima facie* showing in employment discrimination cases); John H. Doyle et. al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, ANN. SURV. AM. L. 117, 342 (1997) (noting that many judges dislike employment cases and do not feel they should be brought in federal courts).

13. See Cude & Steger, *supra* note 12, at 413 (noting that many federal judges feel "contempt" for "the ever-expanding field of employment discrimination law"); Doyle, *supra* note 12, at 342 (noting that one judge referred to an attorney's role as legal counsel in employment discrimination cases as "skunk work"), see also Stanley Sporkin, *Reforming the Federal Judiciary*, 46 SMU L. REV. 751, 757 (1992) (arguing that special courts should be created to deal with claims that are currently overloading the federal courts, such as Title VII claims).

14. See, e.g., Clermont & Schwab, *supra* note 3, at 429; Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557–61 (2001) (stating that employment discrimination plaintiffs "win a lower proportion of cases during pre-trial and at trial").

15. See Nielson & Nelson, *supra* note 1, at 663 ("[A]ssertions . . . are made largely without empirical data about what actually happens in the employment discrimination claiming process.").

16. 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 (1990) (stating that researchers often base their analyses on published cases, while 80–90% of employment discrimination cases filed in federal court do not result in a published opinion).

among others, have called for the collection of aggregate settlement data, in response to the vanishing trial syndrome.¹⁷

Although these studies may be intended to be reassuring from a public policy perspective for those concerned with "the litigation explosion," they also suggest something amiss with employment discrimination litigation. The well-known Priest-Klein hypothesis asserts that trials should result in a 50% win rate for plaintiffs because settlements will weed out the extremely strong and the extremely weak cases.¹⁸ The less than 50% win rate fuels the perception that plaintiffs are abusing the system. Settlement data could counteract that impression.

Outcomes also matter from an instrumental perspective. At one time, settlement and verdict reporters allowed lawyers to gauge the likely outcome of a claim, enabling them to effectively counsel clients and to negotiate with adversaries.¹⁹ Judges also need benchmarks to assist parties in settlement talks. Confidentiality clauses and "vanishing trials," however, have made these reporters all but useless. Instead, inflated media reports have created skewed expectations that hamper the settlement process for both employees and employers.

These instrumental concerns gave rise to the Chicago project. Until now, however, the data collected about these settlements have been made available to litigants only at judges' discretion, in individual settlement negotiations, and not to the public. In presenting and analyzing the Chicago data in this Article, my goals are to test the conclusions reached in prior empirical work, to inform the public policy debate about outcomes in employment discrimination litigation, and to assist litigants and judges in achieving settlements that reflect fairly and reasonably the degree of harm that has been suffered.

17. Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 534–35 (2006) (arguing that courts play an important role as visible places of public dispute resolution, and, as more and more controversies are resolved without trials, there should be some way to make settlements more public); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 966–71 (2004) (discussing the importance of settlements in modern litigation, and the need to collect and disseminate settlement data).

18. But it has also been shown that if one party is a repeat player, or if one party stands to lose more, he is more likely to prevail at trial and also more likely to settle. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 325 (1991) (noting that key components of the Priest-Klein hypothesis require that the parties have equal stakes in the dispute, and that the parties must have equivalent experience and skill).

19. Blanca Fromm, Comment, *Bringing Settlement out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 684–94 (2001).

A number of conclusions can be drawn from these data. First, there are very few settlements which are so low that it could be presumed that the case is frivolous. Second, most settlements show a reasonable degree of plaintiff success. Third, there is no substantial difference in settlement amounts for different types of discrimination, with the possible exception of lower recoveries in race claims, which may or may not be attributable to lower amounts of lost wages. Finally, settlement amounts rarely show any degree of "windfall," and are hardly jeopardizing the future of the American economy. In sum, these data suggest that the departure from the expected 50% trial success rate is explained by employers' interest in not being labeled a discriminator, not by weak plaintiff claims. Thus, cases in which the employer believes his chances of prevailing at trial are better than 50% will nevertheless be settled, perhaps not at top dollar, but providing plaintiffs with a not insignificant recovery in proportion to lost wages.

This Article proceeds in three parts. In Part II, I describe a number of important empirical studies that have attempted to shed factual light on the contested discourse about employment discrimination litigation. Part III reports in more detail on the Chicago project and presents the data. In Part IV, I analyze that data and consider the results in the context of prior empirical findings and non-empirically-based assumptions about employment discrimination litigation. Part V considers how these data can be put to work in public policy discourse and in the representation of litigants, including a regression analysis that is of some use in predicting settlement outcomes. I conclude with some recommendations about further analysis of the Chicago data and additional data collection.

II. The Empirical Landscape

Recent empirical studies attempt to draw conclusions about employment discrimination litigation outcomes by analyzing the results in cases decided by summary judgment or after trial. It is claimed that plaintiffs prevail at a substantially lower rate than other federal court claimants. Several authors have undertaken these projects explicitly to respond to conservative critics, who see employment discrimination legislation as primarily creating a new kind of lottery for protected classes, adding to the "litigation explosion," and disadvantaging American business by necessitating the expenditure of resources on frivolous employment claims. They argue that bias on the part of factfinders is the cause of the difference in success rates.

Despite the good intentions standing behind this work, discussed in detail below, I suggest that, in fact, it is likely to provide fodder for those who believe that real employment discrimination has been eradicated. The "Occam's razor" principle seems applicable: The simple and obvious explanation is most likely the correct one.²⁰ Thus, the critics to whom these studies are addressed will conclude that the authors merely demonstrate that most employment discrimination plaintiffs have weak cases and lose at trial because they cannot show that they have suffered discrimination; employers are quick to settle any case where the plaintiff has a reasonable likelihood of success. Rather than persuading judges and policymakers of bias in factfinding, these studies reinforce their already held perceptions about the prevalence of meritless claims. Moreover, the impact of these studies is vastly exaggerated because data suggesting the contrary conclusion—that employment claimants receive reasonable compensation through settlement—has not been available. Successful claims are made invisible by secret settlements. Demonstrating that most plaintiffs lose will not deter but rather will encourage critics of civil rights litigation.

In the following two sections, I look first at studies that analyze outcomes in general, and then at those considering specific kinds of discrimination.

A. Global Studies[†]

Michael Selmi sets out to disprove empirically what he views as a common misperception—fueled by conservative interest groups—that employment discrimination cases are easy to win.²¹ This perception, he argues, affects judges as well as the general public, and has led the courts to view these employment claims, particularly in the race area, as often "unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way."²² Using data from the federal Administrative Office of the Courts for the years 1995-97, Selmi compares plaintiff success rates in three categories: jobs, insurance, and personal injury. For jury trials, plaintiffs' win

20. See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1216 (Joseph P. Pickett ed., 4th ed. 2000) (defining Occam's razor).

† This section was originally published in Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 963-67 (2006).

21. Selmi, *supra* note 14, at 557 (noting examples, Selmi cites: RICHARD EPSTEIN, FORBIDDEN GROUNDS (1992); PHILIP K. HOWARD, THE DEATH OF COMMON SENSE (1994); WALTER K. OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE (1997)).

22. Selmi, *supra* note 14, at 556.

rate is 39.9% in the jobs category, 51.3% in insurance, and 40.8% in personal injury; for non-jury trials, plaintiffs' success percentages are 18.7%, 43.6%, and 41.8%, respectively.²³

Selmi suggests that the disparity between the jury and non-jury plaintiff verdicts in the jobs category supports his claim of judicial bias. He rejects the possibility that the statistics merely show that there are fewer meritorious discrimination cases. He argues that because attorneys who litigate these cases are motivated by their profit potential, they will not accept weak cases.²⁴ But attorneys often do not have access to complete information at the time of filing a complaint. If discovery disproves the plaintiff's account, Selmi suggests that there would be more voluntary dismissals than in other types of cases, which is not borne out by the data.²⁵ He does conclude that there are some number of employment discrimination cases that should never have filed, however, and he urges attorneys to engage in careful case selection. He also encourages plaintiffs to present expert testimony on the nature of unconscious or subtle discrimination, in an effort to countermand judicial bias.²⁶

A closer look at Selmi's statistics reveals data that might call into question some of his conclusions. Interestingly, the percentage of plaintiff jury verdicts in the categories of jobs and personal injury is virtually identical: 39.9% and 40.8%.²⁷ Although the insurance case percentage is higher, these claims are largely contractual and therefore should not be considered comparable. But most importantly, Selmi fails to consider the significance of the much larger percentage of case dispositions that fall into the category "other dismissals": 67% in jobs and 64% in personal injury.²⁸

Like Selmi, David Oppenheimer sets out to inform the public policy debates that rely heavily on negative outcomes by studying verdict reports in California employment law cases.²⁹ Finding evidence of substantial disadvantage to women and minorities, he also attributes disparities in positive outcomes to judge and juror bias. He suggests that the problem of bias is

23. *Id.* at 560.

24. *See id.* at 569–70 (arguing that attorneys are unlikely to represent frivolous cases that are unlikely to win).

25. *See id.* at 570 (arguing that there should be a high number of voluntary dismissals of employment discrimination cases, but that, in fact, there are not).

26. *Id.* at 573 (discussing ways for plaintiffs to counteract judicial bias).

27. Selmi, *supra* note 14, at 560.

28. *Id.* at 559.

29. Oppenheimer, *supra* note 6, at 513–14.

further exacerbated by the "false claims and heated rhetoric" about employment litigation, including claims that litigants get "enormous unwarranted benefits."³⁰

Oppenheimer's data show that in California during the two-year period 1997–98, plaintiffs won statutory discrimination claims 50% of the time, with a median verdict of \$200,000.³¹ But for certain claimants the success rate was much lower: age discrimination plaintiffs, 27%; non-white race discrimination plaintiffs, 36%; female sex discrimination non-harassment plaintiffs, 35%.³² The 50% win rate encompasses reverse discrimination actions brought by white plaintiffs, which had a 100% success rate, and sexual harassment actions, which represented one-third of the total and had a win rate of 68% for women alleging harassment by men, and 100% for men alleging harassment by other men.³³

Oppenheimer raises some questions about the reliability of the data, however, and suggests that they reflect higher success rates and verdicts than a study of court records would show. He notes that verdict services rely on lawyers to report trial results, and winning lawyers with substantial verdicts obviously are the ones most likely to submit information.³⁴ But he does not acknowledge the tremendous impact on his data of confidentiality clauses, which bar almost all reporting of settlements.

Oppenheimer rejects several possible explanations for his findings. Because of the difference in the success rate between sexual harassment claims and discriminatory discharge cases, it is difficult to attribute lower win rates in the latter type of cases to employers' advantages as repeat players, or because they have more to lose or have more resources.³⁵ He concludes that judicial or juror bias against certain classes of litigants—particularly older women and black women—accounts for the differences, citing public opinion surveys indicating that white respondents do not believe that blacks still suffer from job discrimination, and any inequality is "because blacks lack motivation."³⁶ Public opinion is further influenced by the recent assault on anti-discrimination laws in a number of popular books, which make claims that employers are being forced to use quotas, and settle meritless claims at the risk of ruinous verdicts, and by the few highly publicized instance of large verdicts.³⁷

30. *Id.* at 515, 518.

31. *Id.* at 535.

32. *Id.* at 517.

33. *Id.* at 540, 543.

34. Oppenheimer, *supra* note 6, at 550.

35. *See id.* at 553–57 (discussing possible explanations for differences in success rates).

36. *Id.* at 561.

37. *See id.* at 562–63.

Clermont and Schwab's 2004 study, *How Employment Discrimination Plaintiffs Fare in Federal Court*,³⁸ provides a more detailed, longitudinal, and up-to-date analysis of the same data that Selmi considered, but in essence it reaches the same conclusion: "[P]laintiffs have a tough row to hoe."³⁹ Unlike Selmi and Oppenheimer, they posit no explanatory theories. They do, however, suggest a trend toward more equivalent outcomes.

With little discussion, the authors make note of data demonstrating that the success of employment claims may be approaching the personal injury norm. Looking at statistics from 1979 to 2001, they find that the percentage of employment discrimination cases tried dropped from 18.2% to 3.7%.⁴⁰ The percentage of bench trials also dropped substantially: In 2000, 87% of trials went to a jury, as compared to 10% in 1979.⁴¹ They conclude that almost 70% of employment discrimination cases are resolved by settlement, simply by combining certain disposition codes used by the Administrative Office of the Courts coding system. These include the category for settlement, but also the "voluntary dismissals," and by far the largest category, "other dismissals."⁴² The gap between plaintiff win rates in employment discrimination as compared to other cases has narrowed substantially: In 1979, 16.5 % compared to 40%; in 2001, 39.5% compared to 44.3%. Looking just at jury trials, win rates are almost even, and win rates before judges show a marked upward trajectory.⁴³ One difference in employment discrimination cases is the frequency of pre-trial adjudication, most commonly summary judgment. Clermont and Schwab's appendix shows that non-trial adjudications account for similar percentages in jobs and non-jobs cases, 19.24% compared to 19.13%, but pre-trial adjudication plaintiff win rates show a large discrepancy—4.23% in employment cases, 22.23% in non-employment cases.⁴⁴ However, since plaintiffs are rarely in a position to move affirmatively for judgment, the relevant statistic would be the percentage of motions granting judgment to the employer.

Berger, Finkelstein, and Cheung look specifically at the issue of summary judgment in employment discrimination cases in an effort to provide some hard data that would be useful to litigants and mediators in settlement negotiations.⁴⁵

38. Clermont & Schwab, *supra* note 3.

39. *Id.* at 429, 455 fig.12.

40. *Id.* at 438–39 fig.6.

41. *Id.* at 439 fig.6.

42. *Id.* at 440.

43. Clermont & Schwab, *supra* note 3, at 441–42 fig.7.

44. *Id.* at 444 fig.9.

45. See Vivian Berger, Michael O. Finkelstein, & Kenneth Cheung, *Summary Judgment*

As they note, when cases are referred for mediation, negotiations often revolve around the likelihood of the case being dismissed on summary judgment: Plaintiffs may lose entirely, but if the claim survives, trial—with the attendant costs and uncertainty—becomes inevitable.⁴⁶ Analyzing summary judgment dispositions in two federal district courts in New York City through both published opinions and docket sheets available through the courts' PACER database, they find that the rate of summary judgment motions made by defendants in employment cases was 22.8%, with motions denied in 36.4% of published cases, and 30.9% of PACER cases.⁴⁷ Thus, 14.5% of all filed employment cases were disposed of by summary judgment. But when *pro se* cases (which represent 18.87% of employment filings overall and 33.3% of employment filings in the PACER data) are eliminated, denials go up 46.4% for PACER cases.⁴⁸ Given the publication bias created by the greater likelihood of a substantial opinion when the court is dismissing a case, it could be estimated that plaintiffs survive close to half of the summary judgment motions.

This study makes a small inroad into the secrecy surrounding settlement and the misperceptions of success rates for plaintiffs. In effect, the denial of a summary judgment motion results in what could be considered a plaintiff win.⁴⁹ The authors are understated in noting that a denial often results in a settlement, and raises the settlement value of the case. It is certainly fair to say that a case that survives a motion is worth substantially more than the proverbial "nuisance value."⁵⁰ Extrapolating from these data, it appears that summary judgment denials occur in 8.3% of all employment cases and in 10.5% of non *pro se* cases.⁵¹

Like the work of Selmi and Clermont and Schwab, Laura Beth Nielsen and Robert L. Nelson conducted a recent national study that relies upon data on filings and dispositions available from the Administrative Office of the

Benchmarks for Settling Employment Discrimination Lawsuits, 23 HOFSTRA LAB. & EMP. L.J. 45, 46 (2005) (describing how parties entering settlement negotiations must have a realistic valuation of their case in order to reach a settlement).

46. *See id.* at 48 ("A major part of reality testing in employment actions involves assessing the chance the defendant will succeed in getting summary judgment, in whole or in part, against the plaintiff.").

47. *Id.* at 53–55.

48. *Id.* at 56.

49. *See* Kotkin, *supra* note 4, at 966 (explaining how the value of the plaintiff's case increases when the defendant's motion for summary judgment is denied).

50. *Id.*

51. *Id.* at 967.

Courts.⁵² They provide a picture of the level of monetary relief awarded to plaintiffs after trial. Looking at the figures for 2001, the last year of their study, they show that 3.8% of cases are tried, with plaintiffs winning 38.1%.⁵³ Of those 297 cases, Nielsen and Nelson were able to determine verdict amounts in 240 cases, or 80%, and calculated the median award as \$130,500.⁵⁴ Awards of less than \$500,000 accounted for 77.9% of the verdicts.⁵⁵ They caution, however, that the verdict amount may be inflated due to coding errors: It has been shown that lawyers fail to report verdicts "in thousands" as instructed, so that an entry which should be \$9,000 (\$9 T) may be recorded as \$9,000,000.⁵⁶ Nevertheless, Nielsen and Nelson's study does much to dispel the notion of runaway trial verdicts.

B. Discrimination Type-Specific Studies

Several other scholars have engaged in studies reporting outcomes for specific types of discrimination, alone or on a comparative basis, and their results are described briefly below.

Ruth Colker analyzed trial and appellate outcomes in cases brought under the Americans with Disabilities Act, to counteract what she describes as the public perception that the statute results in plaintiff windfalls.⁵⁷ For trial

52. See Nielsen & Nelson, *supra* note 1, at 681 (describing data from the Administrative Office of the Courts). They report that of the 20,345 "employment civil rights complaints" terminated in 2001, 74% ended in dismissals: 42.5% by settlement, 13.2% by "voluntary dismissal," and 13.8%, "other." *Id.* at 694, table 2.A. Apparently unaware of the problem of invisible settlements, Nielsen & Nelson conclude that the "latter two types of dispositions more clearly benefit defendants." *Id.* at 695. Of the 26% of cases terminated by judgments, 3.8% ended by trial, and 22.2% by other judgments. *Id.* at 693.

53. *Id.* at 705.

54. *Id.* at 706.

55. *Id.* at 697 tbl.3.B (depicting plaintiff winners and awards in employment civil rights complaints terminated by trial in U.S. District Courts).

56. See *id.* at 697-98 (stating that some award amounts are inflated because attorneys filling out the case disposition forms did not report the awards in thousands). See generally Gillian Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455 (2003).

57. See Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99 (1999) (describing the popular media's portrayal of the Americans with Disabilities Act as creating a "lifelong buffet of perks, special breaks and procedural protections" for people with questionable disabilities (quoting Ruth Shalit, *Defining Disability Down*, NEW REPUBLIC, Apr. 25, 1997, at 16)).

outcomes, Colker used a dataset of 615 cases terminated between 1992 and 1998, compiled by the American Bar Association.⁵⁸ The defendant prevailed in 570 or 92.7% of the cases; of those, 238 or 38.7% were resolved by summary judgment, and 332 or 54% by a decision on the merits.⁵⁹ Colker suggests that these lopsided results are the result of conservative judges' abuse of summary judgment, in order to keep cases from runaway juries, and their failure to give deference to the EEOC's interpretation of the ADA, which they consider overly pro-plaintiff.⁶⁰

Several scholars have looked at sexual harassment outcomes. Cass Sunstein and Judy Shih analyzed seventy reported sexual harassment cases and concluded that damages awards are essentially random.⁶¹ The awards did not appear to be correlated to the degree or severity of the harassment, nor was there a correlation between compensatory and punitive damages.⁶² The only predictive factor was "quid pro quo" claims, which had a negative impact.⁶³ Ann Juliano and Stewart Schwab reviewed 502 district and 164 appellate court opinions, all sexual harassment cases with electronically reported decisions between 1986 and 1996, to determine what factors were predictive of plaintiff success.⁶⁴ They did not quantitatively evaluate outcomes, however. In a 2006 article, Catherine Sharkey extends the Sunstein and Shih study, reviewing 232 cases, all with opinions on Westlaw from 1982 to 2004 in which plaintiffs received compensatory damages.⁶⁵ She finds that severity of harassment does not correlate to amount of damages, but the addition of state law civil rights claims does result in larger verdicts.⁶⁶ For cases decided under the 1991 Civil Rights Act, allowing for compensatory and punitive damages in sexual harassment cases, she calculates the median total damages as \$217,213.⁶⁷

Finally, Wendy Parker has looked specifically at outcomes in race and national origin claims, as compared to other types of employment discrimination. Parker examined two datasets: (1) a national study of 467 federal district court

58. *Id.* at 109.

59. *Id.*

60. *Id.* at 160.

61. Cass R. Sunstein & Judy Shi, *Damages in Sexual Harassment Cases*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 324, 334 (Katherine A. MacKinnon & Reva B. Siegel eds., 2004).

62. *Id.*

63. *Id.*

64. See Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 555–60 (2001) (explaining the data and methodology of the study).

65. See Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 2–3 (2006) (explaining that the study is an expansion of the Sunstein and Shih study).

66. *Id.* at 4–5.

67. *Id.* at 36.

opinions deciding pre-trial motions issued in 2003 and reported by Westlaw; and (2) an examination of outcomes in race and national origin employment discrimination cases, filed in 2002 in two federal district courts.⁶⁸ This second dataset consisted of eighty-two cases in the Eastern District of Pennsylvania and 110 in the Northern District of Texas, as well as an additional 172 sex discrimination and 109 age discrimination cases for purposes of comparison.⁶⁹ Of the 393 motions for summary judgment in the national study, plaintiffs prevailed in 25%.⁷⁰ The second study of docket sheets showed a settlement rate of 67%—128 cases out of 192—and 39 cases decided for defendant on motion.⁷¹ Of the 125 cases in which a plaintiff either defeated a summary judgment or motion to dismiss, 54% ended in settlement, 3% resulted in trial verdicts for the plaintiff, 8% were pending, and the remainder were verdicts or motion wins by defendants.⁷² Parker concludes that race and national origin cases are harder to settle, and more likely to be dismissed on motion.⁷³ She attributes these results to "anti-plaintiff" bias: Judges both defer to employer decision-making and ideologically discount the possibility of race discrimination.⁷⁴

III. The Chicago Dataset

A. The Genesis of the Project

The increase in employment discrimination litigation during the 1990s⁷⁵ coincided with what has been termed a "paradigm shifting movement" toward alternative dispute resolution in the federal courts⁷⁶ and the entrenchment of "managerial judging."⁷⁷ That effort began modestly in 1983 with an amendment

68. See Wendy Parker, *Lesson in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 897–98 (2006) (describing methodology of the two studies presented in this Article).

69. See *id.* at 904–05 (describing data in the second study).

70. *Id.* at 910 n.98.

71. *Id.* at 912–13.

72. See *id.* at 923 tbl.2 (showing a table that depicts final court dispositions).

73. Parker, *supra* note 68, at 912–13.

74. See *id.* at 937 ("[I]n addition to deference and a commitment to employment at will, courts also have an ideology that discounts the possibility of discrimination in race and national origin cases.").

75. See Clermont & Schwab, *supra* note 3, at 433 (stating that the 1990s brought an explosion of employment discrimination cases).

76. See *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1851, 1860 (2000) (stating that the judiciary fostered the paradigm shift toward pre-trial settlement).

77. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379 (1982) (describing

to Federal Rule of Civil Procedure 16, requiring judges to address at pre-trial conferences the possibility of using ADR.⁷⁸ The 1990 Civil Justice Reform Act went further: It authorized the implementation of pilot projects setting up court-annexed ADR programs.⁷⁹ These experimental efforts led to the passage of Alternative Dispute Resolution Act, which mandated that each district court establish an ADR program, and authorized judges to require parties to participate in non-binding mediation.⁸⁰ Many district courts determined that delegating ADR functions to the growing number of magistrate judges⁸¹ was the simplest course of action.⁸² The Judicial Conference encouraged this approach to settlement.⁸³ The magistrate judges' role in presiding over settlement negotiations and engaging in formal mediation with the parties enhanced their stature with both Article III judges and the attorneys who appeared before them.⁸⁴ Today, virtually every federal district court offers or requires settlement conferences with magistrate judges.⁸⁵

the widespread enthusiasm for the judicial managerial movement); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 535 (2006) (stating that pretrial processing has "shifted the work of trial judges from courtrooms to chambers").

78. *Developments in the Law—The Paths of Civil Litigation*, *supra* note 76, at 1860. The Advisory Committee made its goals explicit: If a judge "intervenes personally at an early stage to assume judicial control over a case . . . [it will be] disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices." FED. R. CIV. P. 16 advisory committee's note (1983 amendment). The new rule also made settlement discussions part of the conference agenda because "settlement should be facilitated at as early a stage of the litigation as possible," and it explicitly suggested exploration "of procedures other than litigation to resolve the dispute." *Id.*

79. *Developments in the Law—The Paths of Civil Litigation*, *supra* note 76, at 1861.

80. *See id.* at 1861–62 (describing the Alternative Dispute Resolution Act requirements).

81. *See* Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 671 (2005) (stating that the number of federal magistrate judges totaled 28 in 1973, compared with 543 in 2003).

82. Other mediation programs include referrals to non-judicial mediation and trial judge mediation. *See generally* Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging Role for Magistrates as Mediators*, 73 NEB. L. REV. 712 (1994).

83. *See id.* at 717 (stating that the Judicial Conference approved a long-range plan in 1993 that forecasted expanded use of magistrates for alternative dispute resolution).

84. *See* R. Lawrence Dessem, *The Civil Justice Reform Act: The Role of the Federal Magistrate in Civil Justice Reform*, 67 ST. JOHN'S L. REV. 799, 838 (1993) (describing how magistrates' new roles under the expense and delay reduction plans should increase magistrates' stature).

85. *See* Peter Lanka, *The Use of Alternative Dispute Resolution in the Federal Magistrate Judge's Office: A Glimmering Light Amidst the Haze of Federal Litigation*, 36 UWLAL. REV. 71, 88 (2005) (stating that the most common role for magistrates is to serve as facilitators of settlement conferences); *see also* KENT SINCLAIR, 1–12 PRACTICE BEFORE FEDERAL MAGISTRATES 12.13 (Matthew Bender 2000) (describing magistrates use of settlement);

Cases settle more readily when the parties have convergent expectations. Negotiation theory tells us that adversaries should be able to reach agreement based upon their shared experience and understanding of case value based upon trial outcomes.⁸⁶ As Patrick Longan notes, however, with "a diminishing stock of trial results . . . [t]here are simply few cases to which the lawyer can compare his or her case."⁸⁷ In an excess of optimism, lawyers may inflate client expectations, or clients may be misled by media reports of huge verdicts. Experienced mediators serve an informational role, sharing their broad experience to modify divergent expectations. Theoretically, magistrate judges are particularly well suited to this task. But magistrate judges are faced with the same dwindling trial stock as lawyers. In employment discrimination cases, particularly, they are further hampered by the prevalence of invisible settlements. Even if a magistrate judge is privy to the settlement terms in cases over which she presides,⁸⁸ she has no access to confidential agreements that parties reach with the assistance of her colleagues on the bench. Thus the dataset upon which magistrate judges can rely in their role as mediators has largely evaporated.

This dilemma is what led to the Chicago project, an effort by the magistrate judges of the Federal District Court for the Northern District of Illinois, to create a far-reaching settlement dataset.⁸⁹ In an article describing the project, Presiding

Dessem, *supra* note 84, at 819 ("An increasingly common use of magistrate judges is to preside over settlement conferences.").

86. See Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 112 (1994) ("As long as the costs of trial are higher than the costs of settlement, and as long as both sides make an identical estimate of the likely outcome of the trial, the case should settle."); see also Longan, *supra* note 82, at 719–20 (explaining that the closer the parties' expectations, the more likely they are to reach a settlement).

87. Longan, *supra* note 82, at 719; see also Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 25 (1987) (describing the social benefit of negotiated settlements); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 769 n.53 (1984) (noting that as many as 91% of civil cases are settled out of court).

88. It is not unusual for the parties to informally notify the judge that a matter has been settled, without revealing the terms. See *Va. Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004) (criticizing a district court judge who insisted that the parties reveal the terms of a confidential settlement and then issued an opinion referring to a multi-million dollar settlement).

89. The Northern District of Illinois has one of the largest civil rights caseloads in the country. The Administrative Office of the Courts' statistics for the year ending March 31, 2005, show 1568 civil rights actions commenced, as compared to 1593 in the Southern District of California, 1526 in the Southern District of New York, and 1315 in the Eastern District of Pennsylvania. U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District During the 12-Month Period Ending March 31, 2005, http://www.uscourts.gov/case_load_2005/tables/CO3mar05.pdf. The "civil rights" category includes employment discrimination

Magistrate Judge Morton Denlow and Jennifer Shack note that given the tiny percentage of cases that go to trial, "[s]ettlements . . . represent important practical precedent for courts and litigants, providing useful information that can assist clients, lawyers, and judges in settling other cases."⁹⁰ Individual experiences of judges and lawyers are necessarily limited, however. To make data available, the judges decided to create their own settlement dataset.⁹¹ After a successful settlement conference, the judge prepares and submits a confidential settlement summary, which is compiled monthly into a report for the judges' use.⁹² The report tracks the type of case, itemized damages, initial demands and offers, stage of litigation (whether the plaintiff survived summary judgment, for example), and settlement terms and amounts.⁹³

The judges decided to collect even more details for employment discrimination and civil rights cases "because they represent the largest category of cases for which judges conduct settlement conferences."⁹⁴ They track the specific nature of the claim (whether race or sex, for example, or some combination of protected categories), specific type of adverse employment action (e.g., failure to promote or termination), and length of employment.⁹⁵ Not only are the dollar amounts of settlements recorded, but other terms—such as confidentiality clauses—are included.⁹⁶ It is estimated that the report form takes under five minutes to complete.⁹⁷ To assure confidentiality, no party names or case numbers are recorded.⁹⁸ These reports are also available to attorneys and litigants in particular cases.⁹⁹ In their 2004 article, Denlow and Shack indicated that the judges were exploring the possibility of performing further analysis of the data collected in 645 cases over three and a half years, and suggested that "[g]iven the importance of the data, courts might develop mechanisms to make this information available to the public."¹⁰⁰ Two years later, I was given access to the dataset for purposes of this Article.

matters as well as other civil rights actions.

90. Denlow & Shack, *supra* note 5, at 19.

91. *Id.*

92. *Id.* at 19–21.

93. *Id.* at 20.

94. *See id.* at 21 (describing the data and methodology of the study).

95. *See Denlow & Shack, supra* note 5, at 21 (describing methodology of the study).

96. *See id.* (stating that terms of the settlement, including confidentiality, were noted for the study).

97. *Id.*

98. *Id.*

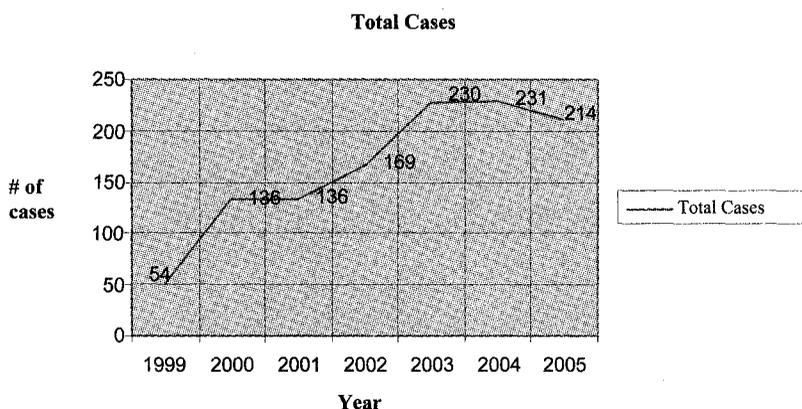
99. *Id.* at 22.

100. Denlow & Shack, *supra* note 5, at 22.

B. The Content of the Dataset

The dataset now consists of 1,170 cases settled by magistrate judges from 1999 through 2005. Eleven magistrate judges contributed to the dataset. The number of entered cases increased each year until 2003, and then leveled off, as shown in Figure 1. The increase appears to be due primarily to an expanded pool of magistrate judges reporting, with more regular participation by sitting magistrates and by new appointments. Although the program is voluntary, only one magistrate judge is not consistently reporting settlement data. But there is some variation among the magistrate judges in the completeness of reporting.

Figure 1



Eighteen categories of information are collected: name of magistrate judge; type of action; sub-type I; sub-type II; additional information; type of employment case; length of plaintiff's employment;¹⁰¹ stage of litigation; plaintiff's initial demand and additional conditions; defendant's initial offer and additional conditions; plaintiff's itemization of damages; settlement terms; other terms; settlement date; and comments.¹⁰² These categories will be discussed in detail below.

Fifteen different types of actions appear in the dataset. In the design of the project, the judges originally decided on including eight types of actions, based upon their perception that of the more than 1000 settlement conferences conducted each year, a large majority of the cases fell into these categories: employment discrimination, civil rights, personal injury under the Federal

101. I did not consider "length of plaintiff's employment" as a sub-type for analysis because entries for this category were rarely completed.

102. The data collection instrument is reproduced in the Appendix.

Employers Liability Act, other personal injury, intellectual property, truth in lending, fair debt collection, and ERISA.¹⁰³ Some types of actions, such as breach of contract claims, were specifically excluded, because the judges perceived that the characteristics of each case were so different that collection of settlement data would not serve a useful function.¹⁰⁴ In the actual dataset, several additional categories are included, but other than forty cases under the Fair Labor Standards Act, they account for only eight cases. A breakdown of the types of actions is shown in Figure 2.

Figure 2		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Civil Rights	230	19.7	19.7	19.7
	Emp Discrimination, Other	39	3.3	3.3	23.0
	Emp. Discrimination	472	40.3	40.3	63.3
	ERISA	114	9.7	9.7	73.1
	Fair Credit Reporting	7	.6	.6	73.7
	Fair Debt Collection	36	3.1	3.1	76.8
	False Claims Act	1	.1	.1	76.8
	False Odometer	2	.2	.2	77.0
	FLSA	42	3.6	3.6	80.6
	Indian Arts and Crafts Act	1	.1	.1	80.7
	Intellectual Property	69	5.9	5.9	86.6
	Jones Act	1	.1	.1	86.7
	Magnuson Moss	2	.2	.2	86.8
	Personal Injury	127	10.9	10.9	97.7
	Securities Fraud	1	.1	.1	97.8
	TILA/ECOA	26	2.2	2.2	100.0
Total	1170	100.0	100.0		

As might be expected, employment discrimination is the largest category of cases settled by the magistrate judges, by a factor of two. One problem with the dataset, however, is that it does not reflect cases in which settlement

103. See Denlow & Shack, *supra* note 5, at 20 (stating that a majority of the cases in which the nine magistrate judges of the Northern District of Illinois conduct settlement conferences fall into one of these eight categories); Denlow Interview, *supra* note 4.

104. Denlow & Shack, *supra* note 5, at 20.

conferences proved unsuccessful, so that it is impossible to tell how many cases in which settlement conferences were held did not result in settlements, and, therefore, whether employment discrimination cases settled at a higher rate than other cases.¹⁰⁵ In addition, the dataset contains no information about cases settled without judicial intervention.

Nevertheless, some perspective can be gained by examining statistics on case dispositions compiled by the Federal Judicial Center. For the twelve-month period ending October 1, 2005, 871 cases coded "civil rights jobs" were terminated in the Northern District of Illinois: 158 by motions before trial, 15 by trial (one bench, 14 jury), and 457 by dismissals that can be characterized as settlements.¹⁰⁶ For the same period, the Chicago dataset contains 97 employment discrimination settlements.

The magistrate judges determined that additional categorization would be helpful in the employment discrimination and civil rights cases and therefore allowed for two sub-levels of coding for type of action. In "subtype I" employment discrimination, there are fifteen categories. In reviewing these categories, it became apparent that "employment discrimination" was used as a code for a number of employment-related actions not typically considered discrimination. For purposes of this study, I have reclassified 39 cases as "employment discrimination, other": four cases under the Fair Labor Standards Act;¹⁰⁷ eleven cases under the Family and Medical Leave Act;¹⁰⁸

105. Presiding Magistrate Judge Denlow estimates that he settles 65 to 70% of the employment discrimination cases that he conferences. Denlow Interview, *supra* note 4.

106. This number includes cases coded as consent judgments; dismissals, voluntary; dismissals, settlement; and dismissals, other. The remainder of the terminations are largely jurisdictional dismissals, transfers, and dismissals for want of prosecution. I gratefully acknowledge the assistance of Joe Cecil, Program Director, Division of Research, and the work of Rebecca Eyre, Research Associate, Federal Judicial Center, who extracted these data for me.

107. 29 U.S.C. § 201 et seq. (2000). FLSA is the federal statute governing minimum wage and overtime payment. There is a separate category for FLSA cases in the database, but FLSA cases recorded under "employment discrimination" may be those brought under the anti-retaliation provision of the statute: for example, if an employee is terminated for complaining about failure to pay overtime.

108. 29 U.S.C. § 2601 et seq. (2000). Enacted in 1993, the Family and Medical Leave Act (FMLA) requires employers with more than fifty employees to provide unpaid leave of up to twelve weeks to employees needing time off due to their own or family members' serious medical condition. Interestingly, when the database was established in 1999, the judges apparently did not see FMLA cases as a substantial part of their caseload, because they did not include it among the check-off boxes for types of case. There has been a tremendous growth in FMLA litigation, however. See Joan C. Williams & Elizabeth S. Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Carers" In the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31, 31-32 (2006) (noting an increase in FMLA-related complaints with the U.S. Department of Labor). The fact that there are only eleven FMLA cases in the dataset may not reflect the actual number of FMLA cases settled because the statute is not

fifteen cases labeled retaliation but not related to protected classes under the discrimination statutes (such as whistleblower cases); and nine miscellaneous cases, where no protected class was indicated. This reduces the employment discrimination dataset from 511 to 472, or 40.3% of the total. In addition, I have combined several of the sub-type I categories in order to obtain a broader picture of types of discrimination, although some of these groups will be disaggregated for more in-depth analysis. For example, "ADA" and "disability" were combined, as were "sex," "pregnancy," and "sexual harassment." The eight "religion" cases were combined with the ten national origin cases because it appeared that most of these cases involved discrimination against Arabs or Muslims, as did the religion cases. With these modifications, Figure 3 shows the breakdown of types of discrimination.¹⁰⁹

Figure 3—Type of Employment Discrimination					
		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Disability (1)	89	18.9	18.9	18.9
	Age (2)	83	17.6	17.6	36.4
	Religion or National Origin (3)	18	3.8	3.8	40.3
	Sex (4)	76	16.1	16.1	56.4
	Sexual Harassment (5)	53	11.2	11.2	67.6
	Race (6)	153	32.4	32.4	100.0
	Total	472	100.0	100.0	

The "sub-type II" categories appear to reflect additional claims. For example, there are 14 cases indicating sub-type I race and sub-type II sex, and 20 age-race combinations. In all, there are some 20 different combinations, and

included in the questionnaire.

109. This break-down is more or less consistent with EEOC charge filings. See Charge Statistics FY 1992 Through FY 2005, compiled by the Office of Research, Information, and Planning from the U.S. Equal Employment Opportunity Commission's Charge Data System, <http://www.eeoc.gov/stats/charges.html> (last visited Oct. 12, 2006) (charting the number of each kind of discrimination charge from 1992 through 2005) (on file with the Washington and Lee Law Review).

cases with dual claims represent 22% of the total of 472. The distribution of dual claims is shown below in Figure 4:¹¹⁰

Figure 4		Type of Employment Discrimination—Sub-Type I						
		Disability (1)	Age (2)	Religion or National Origin (3)	Sex (4)	Sexual Harassment (5)	Race (6)	Total
Major Sub-Type II Claims	Race added	8	20	1	0	1	0	30
	Sex added	5	9	0	0	0	14	28
	Disability (without race) added	0	6	0	0	0	0	6
	Other coded (mostly similar sub-types)	5	1	2	26	4	5	43
	Blank/none coded	71	47	15	50	48	134	365
	Total	89	83	18	76	53	153	472

In the additional comments section, there are a variety of notations, most commonly: in disability cases, the type of disability; in age cases, the age of the plaintiff; in race cases, the race and gender of the plaintiff. Frequently, there is mention that retaliation is alleged; retaliation also appears as a sub-type II claim, however.¹¹¹ Although this section contains a wealth of information, it is problematic for statistical purposes because it cannot be assumed that the

110. I have not examined the impact of dual claims on outcomes. This is an area that requires further study.

111. EEOC statistics reveal that the number of retaliation claims filed under Title VII almost doubled between 1992 and 2004—from 10,499 charges in 1992 to 20,240 charges in 2004. Of all the Title VII charges filed in 2004, 25% included a retaliation claim. Charge Statistics, *supra* note 109. In *Burlington Northern v. White*, the employer and several amici relied on these statistics to argue for a restrictive interpretation of the retaliation statute, which the Supreme Court rejected. *Burlington Northern v. White*, 126 S. Ct. 2405 (2006).

eleven magistrate judges are consistent in their entries. For example, there are nine race cases in which the additional comments indicate that the plaintiff is white, but it cannot be assumed that all white plaintiffs have been identified.¹¹² The same can be said for indications of gender in race cases.

The next category of data is "type of employment case." This refers to the type of employment action about which the plaintiff complains. Although there are more than fifty types of entries, I have aggregated them into five broad categories for preliminary analysis: discharge, which includes cases entered as termination, reductions in force, and constructive discharge; failure to promote; demotion; failure to hire; and terms and conditions, which includes complaints about pay, working conditions and hostile environment. If there is more than one adverse action listed, I have used the most serious: For example, with the common pairing of failure to promote and termination, I have coded the case as a discharge. Not surprisingly, the overwhelming majority of cases involve discharge, as shown in Figure 5:

Figure 5—Summary categories for Type of Employment Case

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Discharge (1)	334	70.8	75.1	75.1
	Promotion (2)	45	9.5	10.1	85.2
	Terms and Conditions (4)	49	10.4	11.0	96.2
	Demotion (5)	6	1.3	1.3	97.5
	Hire (6)	11	2.3	2.5	100.0
	Total	445	94.3	100.0	
Missing	Missing (9)	27	5.7		
Total		472	100.0		

Under "stage of litigation," the coding form contained eight categories, ranging from "very early" with little or no discovery to trial date set. For purposes of this study, I defined five categories, the two largest of which are "early," which refers to cases with little or no discovery, and "before motion,"

112. For these reasons, I have not distinguished "reverse discrimination" cases in the data analysis. *But see* Oppenheimer, *supra* note 6, at 549 (finding a 100% plaintiff success rate in reverse discrimination cases); *see also infra* note 141 (stating that including national origin claims with race claims instead of with religion claims would not have changed the results of the study).

which includes cases settled before the making of a dispositive motion or before trial. Figure 6 shows that in 87% of the cases for which this information was available, settlement was reached prior to the making of a dispositive motion:

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Early (-1)	117	24.8	27.1	27.1
	Before Motion (0)	257	54.4	59.5	86.6
	Dispositive Motion Pending (1)	18	3.8	4.2	90.7
	Motion Denied (2)	35	7.4	8.1	98.8
	Summary Judgment Granted in Part (3)	1	.2	.2	99.1
	Trial Begun or Damages Only, Liability Determined (4)	4	.8	.9	100.0
	Total	432	91.5	100.0	
Missing	System	40	8.5		
Total		472	100.0		

The next entries reflect plaintiff's initial demand and additional conditions, and defendant's initial offer and additional conditions. Almost all of the cases in the dataset show this information. It is difficult to evaluate its significance, however, because the choice of a figure will depend to some degree on an attorney's negotiating style. Nevertheless, these figures can give some indication of the degree to which the plaintiff believes he will succeed, and the defendant's confidence in prevailing. Indeed, the range in demands by both parties is significant: for plaintiffs, from \$5000 to \$4,000,000, and for defendants, from zero to \$600,000. Additional conditions for both parties generally address injunctive relief such as reinstatement, resignation, and promotion.

Information about offers is followed by "plaintiff's itemization of damages," which is critical to the evaluation of outcomes. Here, it is necessary to understand the damages schemes under the various discrimination statutes. Prior to 1991, the available remedies in a Title VII action were based upon the notion of making the plaintiff whole through what was considered equitable relief. In the case of a discharge, a prevailing plaintiff would be entitled to back pay, which included lost

salary and benefits, and less commonly, front pay, in the event the plaintiff was still unemployed or underemployed, having made a good faith effort to secure an equivalent position. In addition, the plaintiff was entitled to reinstatement, although often neither party wished to pursue this remedy, and to have his attorney's fees paid by the defendant, which were often in excess of the lost wages. In addition and until recently, the law was clear that attorney's fees were permitted in the case of settlement.¹¹³ In 1991, Title VII was amended to include compensatory and punitive damages, up to a cap of \$300,000 for the largest employers, and to allow for jury trials.¹¹⁴ The cap could sometimes be circumvented, however, by the inclusion of state law causes of actions that contained no limitation on damages.¹¹⁵ The same scheme was applied to the 1990 Americans with Disabilities Act.¹¹⁶ On the other hand, the Age Discrimination in Employment Act,¹¹⁷ enacted in 1974, was patterned on the Fair Labor Standards Act, permitting the recovery of back pay and an equal amount in liquidated damages in the case of "willful violations."¹¹⁸ Compensatory and punitive damages are not recoverable, but front pay could be significant for an older plaintiff with little chance of re-entering the job market.

Although the 1991 amendments essentially transformed Title VII into a tort-like claim,¹¹⁹ the calculation of damages is more variable in the discrimination context. In a personal injury action, there is typically some amount of "hard" compensatory damages in addition to lost wages, generally the cost of medical treatment. And that cost, as well as expert evidence relating to future disability, serves as a guidepost for the award of "pain and suffering" damages. Indeed, some personal injury lawyers rely on a common formula: "Pain and suffering" equals double the "medicals."

Rarely are there any "medicals" in the discrimination context. Compensatory damages are awarded almost solely for emotional distress. And the testimony in that regard often is highly subjective: Most terminated plaintiffs do

113. See *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Services*, 532 U.S. 598, 602 (2001) (suggesting no fee-shifting for settlements not judicially approved).

114. See 42 U.S.C. § 1981a (2000) (giving a plaintiff in a discrimination case the ability to recover compensatory and punitive damages and to demand a jury trial, and setting maximum recovery amounts against different sizes of employers).

115. See Sharkey, *supra* note 65, at 4–5 (discussing circumvention of Title VII damage caps through state law causes of action).

116. 42 U.S.C. § 1981a(2) (2000).

117. 29 U.S.C. § 621 et seq. (2000).

118. 29 U.S.C. § 626 (2000).

119. See Kotkin, *supra* note 4, at 942 (describing the 1991 amendment of Title VII, which permits both compensatory and punitive damages).

not have the resources to seek the assistance of a mental health professional, who would be available to testify at trial, while they are unemployed. At most, the plaintiff's lawyer will rely upon an expert examination to bolster the claim of emotional distress, but frequently the jury has only the plaintiff's testimony by which to determine compensatory damages.¹²⁰

This is not to say that the amount of back pay is fixed, however; savvy plaintiff's lawyers can try to increase the "hard" damages by calculating the value of lost benefits. But lost wages are the only amount of the itemization of damages that is verifiable to any degree, and it is clearly the best measure by which to evaluate the success of a settlement. For example, a settlement of \$50,000 with lost wages of \$10,000 should be considered an excellent result, compared to the same settlement when lost wages equal \$100,000. It is questionable whether the consideration of a median or a mean settlement, or a comparison of discrimination settlements with those in personal injury actions, has any meaning without factoring in the amount of lost wages.

Unfortunately, the Chicago data collection in this regard is substantially less than perfect, although there has been an improvement more recently. For 229 cases out of the employment discrimination dataset of 472 cases—almost exactly 50%—either no information about lost wages is entered or the amounts entered cannot be reliably interpreted because the entries simply indicate a gross dollar amount without differentiating between compensatory damages and back pay.

Another consideration with regard to outcomes relates to cases in which there is no economically based adverse employment action. This is typically the case in actions alleging sexual harassment, without termination or constructive discharge. In *Meritor Savings Bank v. Vinson*,¹²¹ the Supreme Court held that harassment in itself has a negative impact on the terms and conditions of employment and is therefore actionable even in the absence of economic or other "tangible" harm.¹²² *Harris v. Forklift Systems, Inc.*, extended this holding to make clear that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."¹²³ Emotional distress damages in these cases are entirely premised upon the severity of the

120 Some courts have noted that in cases involving so called "garden variety" emotional distress, awards typically range from \$5,000 to \$30,000. *Jowers v. DME Interactive Holdings, Inc.*, 2005 U.S. Dist. LEXIS 42001, at *17 (S.D.N.Y. 2005); *Kuper v. Empire Blue Cross & Blue Shield*, 2003 U.S. Dist. LEXIS 2362, at *12 (S.D.N.Y. 2003).

121. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986).

122. *Id.* at 73.

123. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) ("A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological wellbeing, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.").

harassment, but the Chicago dataset does not include any qualitative analysis of these claims.¹²⁴

The final entries in the dataset are settlement amount, which range from zero to \$1,250,000, and "other terms," which cover a wide range of topics. Most common are terms relating to injunctive relief ("no reinstatement" or "with promotion," for example); the amount allocated to attorney's fees; and the continuing obligations of the parties, such as "neutral reference." The most common term by far is "confidentiality," which is referred to in 128 cases. However, it appears that confidentiality is so uniformly required as a condition of settlement that many judges do not consider it worthy of noting.¹²⁵

The questionnaire used by the magistrate judges also allows for the entry of additional comments, which have been included in the dataset. This section contains some notations about type of representation. In ten cases, there is an indication that the action was brought by the EEOC, and in thirty cases, there is reference to "pro se" or "appointed counsel." It cannot be said with certainty that these represent the complete universe of cases with other than private counsel, however, since there is no dedicated place in the questionnaire to include this information. Nevertheless, an analysis of the dataset provides the following information on representation:¹²⁶

Figure 7		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	Pro Se (1)	13	2.8	2.8	2.8
	Appointed Counsel (2)	17	3.6	3.6	6.4
	EEOC (3)	10	2.1	2.1	8.5
	Other (4)	432	91.5	91.5	100.0
	Total	472	100.0	100.0	

124. Denlow Interview, *supra* note 4.

125. *See id.* (stating that 85 to 90% of employment discrimination settlements are governed by confidentiality agreements). For example, one judge did not record confidentiality in any of the more than seventy employment discrimination cases that he settled.

126. The 2.1% level of EEOC involvement comports with other studies. The pro se figure, however, even including those with appointed counsel, of 6.4% is quite low in comparison to other statistical findings. *See Berger, supra* note 2, at 55 n.48 (finding that in the Southern District of New York pro se actions accounted for 18% of employment discrimination filings). The Chicago database percentage may reflect the fact that many pro se cases do not reach the settlement stage because of dismissals by motion. Denlow Interview, *supra* note 4.

IV. *The Outcomes: Measuring Success*

What is a successful outcome in an employment discrimination case? This is a question that few empirical scholars have addressed in the settlement context because of the lack of data. Theodore Eisenberg and Stewart Schwab clearly identified this difficulty in their analysis of constitutional tort litigation:

One factor hinders detecting absolute success rates: many litigated cases settle or terminate in some manner that prevents ascertaining winners or the nature of recoveries from court records. Cases settled without indicating settlement terms in the court records and other unclear dispositions introduce uncertainty in describing case outcomes.¹²⁷

Recognizing that settlements often are masked in the court records because they are entered as dismissals, they included these cases within their admittedly broad definition of success, along with trial wins and recorded settlements, and attempted to survey plaintiffs' attorneys about their outcomes.¹²⁸ Other scholars have simply concluded that there was no way in which settlements could be factored into their analysis. As Nielson and Nelson note, "Because we have virtually no information on how favorable settlements are for plaintiffs, this represents an enormous gap in our knowledge about discrimination litigation."¹²⁹ My goal here is to fill that gap by providing a more nuanced measure of success, primarily by measuring lost wages against settlement amount, and to determine which variables have an impact on success levels.

A. *Refining the Dataset: Class Action and Multiple Party Litigation*

In order to evaluate settlement outcomes, the employment discrimination dataset was further refined by eliminating class actions and multiple plaintiff cases, since those settlements might skew the results. At the same time, looking at outcomes in these cases independently and comparing them to single plaintiff cases provides some indication about whether there is strength in numbers.

Much has been written about the demise of class action employment discrimination actions;¹³⁰ these data bear out that observation. In only one of the

127. Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 681 (1987).

128. *See id.* (explaining the broad definition of success used in the study). They conducted a follow-up study, however, contacting all plaintiffs' attorneys in cases with settlement or dismissal dispositions that did not indicate amount of monetary relief and found that 86% had arguably favorable outcomes, with 64% receiving monetary relief. *Id.* at 683–84.

129. Nielson & Nelson, *supra* note 1, at 693.

130. *See id.* at 692 (noting that class actions make up only a small percentage of

472 cases was a class certified; two other cases were brought as class actions but settled on an individual basis, for ten and fifteen plaintiffs, respectively; and an additional fourteen cases were brought by multiple parties, ranging from two to five. Although they represent only 3.6% of the settled cases, these actions generally appear to result in successful outcomes. Figure 8 summarizes the data on multiple party actions:

Figure 8

Code	341	307	88
Ps	3	3	CL
Action	Sexual Harassment	Race/Retaliation/Discharge	Race/Promotion
P demand	\$200,000	\$80,000 for 3	
D offer	\$45,000	\$10,000 for 3	
Lost Wages	\$0.00	\$26,000 for 3	
Settlement	\$90,000	\$35,000	\$220,000
Per person	\$30,000	\$11,666	
% Wages		134	
Comments		Worked 2 months	Promotions and training-con. decree

CL=class action; CLD=class action denied; CLP=class action pending

employment discrimination filings); Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813, 814 (2004) (examining the hostility facing employment class certification); Donohue & Seligman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015–21 (1991) (exploring the changes in employment discrimination litigation since the passage of the 1964 Civil Rights Act, including the shift from class actions to individual suits).

Figure 8						
Code	66	4	743	722	684	
Ps	2	2	4	10 CLD	4	
Action	Pregnancy/Failure to Provide Severance	Race/African-American/Discharge	Sexual Harassment/Discharge	Race/Harassment/Promotion/Discharge	Race/African-American/Salary/Hostile Envir.	
P demand	\$180,000	\$98,000 per P	\$4 million	\$1.4 million	\$251,270	
D offer	\$13,000	\$15,000	\$100,000	\$11,000	\$28,808	
Lost Wages	\$95,000	\$31,000 \$35,000	\$0.00	\$0.00	\$51,000 for 4	
Settlement	\$150,000	\$55,000	\$790,000	\$275,000	\$155,000	
Per person	\$75,000	\$27,500	\$197,500	\$27,500	\$38,750	
% Wages	127	83			304	
Comments	Following bench trial, no decision		Against company president		Retroactive salary increase	

CL=class action; CLD=class action denied; CLP=class action pending

Figure 8		547	448	939	933	923
Code		547	448	939	933	923
Ps		5	5	11	2	15 CL
Action		Sex/Sexual Harassment/Retaliation	National Origin/Retaliation/Promotion/Discharge	Sex/Sexual Harassment/Retaliation/Discharge	Race/African-American/Hostile Envir./Retaliation	Race/Hispanic/Promotions
P demand		\$550,000	\$730,000	\$250,000	\$895,000	\$75,000 per P
D offer		\$137,000	\$125,000	\$55,000	\$50,000	\$0.00
Lost Wages		\$0.00	\$50,000 each	\$0.00	\$0.00	\$35,000 Named P
Settlement		\$250,000	\$200,000 \$50,000-3 \$25,000-2	\$140,000	\$325,000	\$450,000
Per person		\$50,000	\$40,000	\$12,720	\$162,500	\$30,000
% Wages			80			86
Comments				EEOC Consent Decree	Settled after 5 trial days	
CL=class action; CLD=class action denied; CLP=class action pending						

Figure 8

Code	905	859	1040	1006
Ps	3	2	4	4
Action	Race/African-American/Salary	Sexual Harassment/Discharge	Sex/Sexual Harassment	Race/African-American/Harassment
P demand	\$327,000 for 3	\$100,000	\$310,000	\$450,000
D offer	\$30,000 for 3	\$9,500	\$90,000	\$10,000
Lost Wages	\$24,000 for 3	\$0.00	\$0.00	\$0.00
Settlement	\$75,000	\$36,500	\$240,000	\$120,000
Per person	\$25,000	\$18,250	\$60,000	\$30,000
% Wages	312			
Comments				EEOC Consent Decree

CL=class action; CLD=class action denied; CLP=class action

The one certified class action—a race promotion claim—resulted in \$220,000 in monetary relief, along with injunctive relief in the form of promotions and training. It appears to be a highly successful outcome, although we do not know the number of employees comprising the class. With regard to the multiple plaintiff claims, five involve harassment claims (three sex, two race) without other adverse employment action, so that no lost wages were involved. Each of these cases shows a substantial recovery, with a per plaintiff mean of \$66,000 and a median of \$50,000.¹³¹ In the seven cases with lost wages data (five race, one sex, and one national origin), the

131. Although the mean is higher in the race cases, the sample is too small to be reliable.

outcomes also appear highly favorable: The per plaintiff percentage of lost wages recovered ranges from 80 to 312%, with a mean of 160% and a median of 127%. For the race cases, the figures are higher: a mean of 184% and a median of 134%. For all seventeen cases, the mean recovery was \$62,127, as compared to \$54,651 for single plaintiffs.¹³²

A few other comments about the multiple plaintiff cases are warranted. First, these cases account for two out of eleven cases with EEOC involvement, and two out of four cases settled after the commencement of trial, both factors that would presumably militate in favor of better outcomes. Aside from these factors, however, it seems reasonable to assume that when more than one party complains of discrimination, it may be difficult for a fact-finder to discount the allegations. Unfortunately, with so few multiple plaintiff cases, we cannot confirm this assumption with any statistical significance. To more accurately report on typical outcomes, the cases shown in Figure 8 have been removed from the dataset for purposes of the calculations that follow, leaving a dataset of 455 cases.¹³³

B. Gross Amounts of Recovery

With regard to gross amount of recovery, my analysis of the remaining cases suggests several conclusions. First, employment discrimination settlements are not ruining American business. Second, employment discrimination settlements are not largely "nuisance" payments. The mean settlement amount is \$54,651, with a 95% confidence interval, and the median is \$30,000.¹³⁴ I have not factored in the value or importance of injunctive relief, which can be of greater significance in some circumstances than monetary recovery. Such relief, however, is rare: Reinstatement was agreed to in only seven cases, and promotion in only six, amounting to 2.8% of the dataset cases.

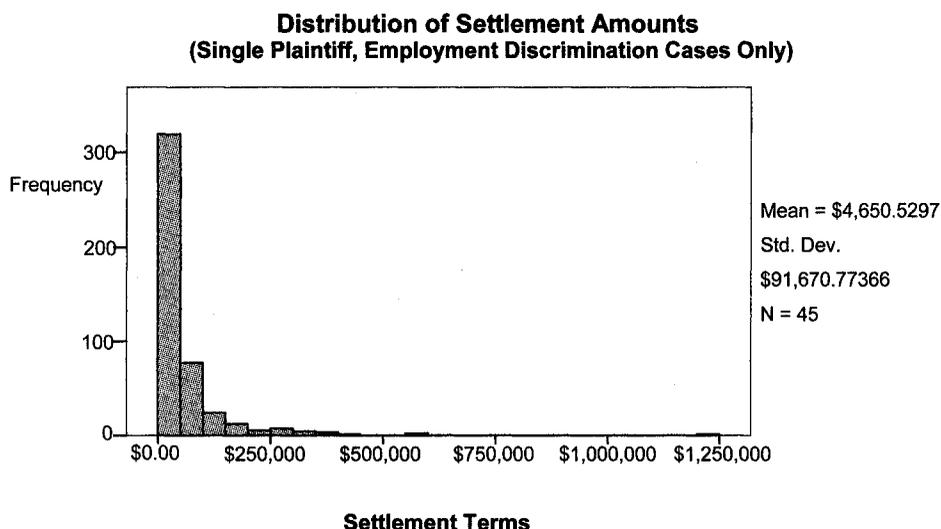
The following charts provide a graphic representation of the distribution of monetary recoveries:

132. Because of the small number of multiple plaintiff cases, the difference is not considered statistically significant.

133. In her study of trial outcomes, Wendy Parker included multiple party cases, using per plaintiff figures. Parker, *supra* note 2, at 53.

134. The median recovery in the "personal injury" category is much higher at \$181,500.

Figure 9



To provide some information about the outliers, I reviewed the nine cases with settlements over \$300,000¹³⁵ and the thirty-three cases with settlements under \$5,000. The only settlement over \$1 million involved a case of clear liability and high wages. In this age discrimination case, the plaintiff, a CEO with a salary of \$400,000, produced a letter from his employer informing him that he should retire because of his age.¹³⁶ In four of the other eight cases, the procedural posture is significant: In two cases, dispositive motions had been denied; and in two others, liability had been established and a trial on damages was pending. In addition, these were all cases involving discharge, with lost wages ranging from \$93,000 to \$184,000.

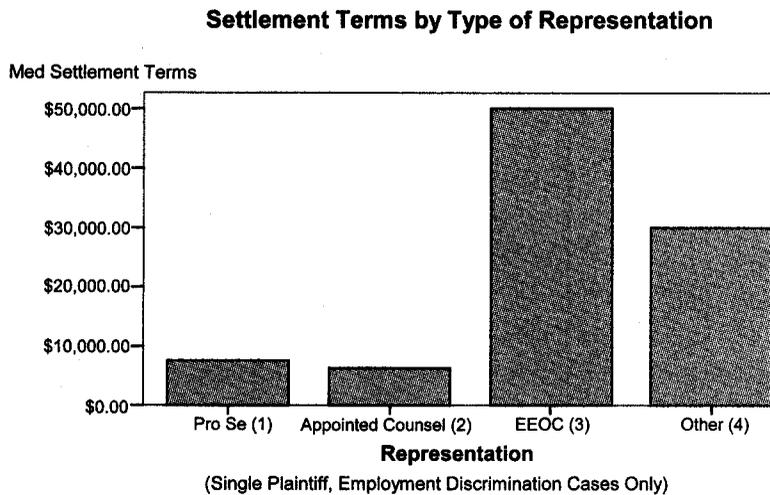
135. The Title VII cap of \$300,000 would not limit settlements because it applies only to compensatory and punitive damages. Back pay is additional. Also, although there are no references in the database to state civil rights and tort claims, they may be applied to circumvent caps on damages. Sharkey, *supra* note 65, at 4-5 ("[T]he inclusion of state law tort and anti-discrimination claims appears to drive up damages in sexual harassment cases, and parties' incentives to append such claims may be affected by the operation of the federal caps under the 1991 Act.").

136. This information was included as "additional comments."

As to the low settlements, one remarkable factor is the percentage of pro se and appointed counsel cases. Although these represent only 6.4% of the entire dataset,¹³⁷ ten of the thirty-one low settlement cases fall into this category, and in another case, plaintiff's counsel withdrew, resulting in a total of 35%. Of course, these data can be viewed in two ways: Either the market is operating efficiently because those with "bad" cases cannot obtain private counsel, or those unable to obtain private counsel are unduly prejudiced in the settlement process.

Another noteworthy variable is type of discrimination: Race claims account for twenty-three of the thirty-one cases, or 74%, as compared to 32% of the dataset as a whole. Thus, these data comport with Wendy Parker's findings about the disproportionate lack of success faced by race claimants.¹³⁸ But it should also be noted that in six of the twenty-three race cases, plaintiff was pro se or had appointed counsel. Further evidence of the significance of type of representation is shown in the following figures:

Figure 10

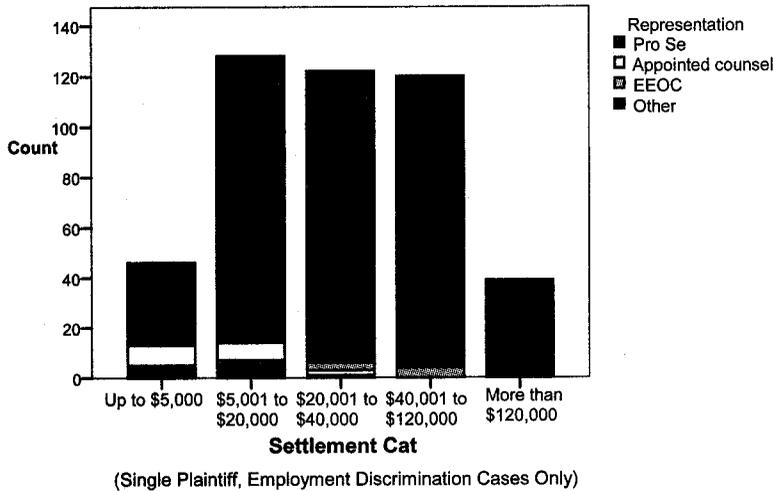


137. See *supra* Figure 7 (listing the types of representation entered by the magistrate judges in the dataset).

138. Parker, *supra* note 2, at 50.

Figure 11

Type of Representation for Settlement Amount Groups



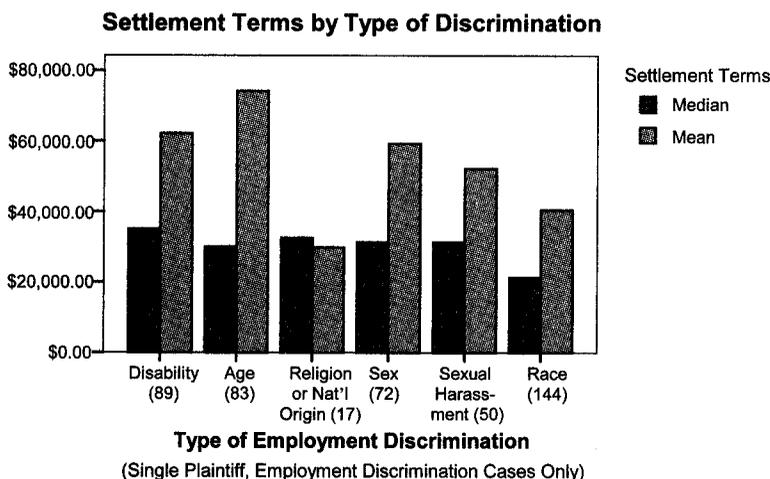
Although the EEOC participated in only eight "single plaintiff" actions, 1.8% of the total, the median recovery increased by close to 100% in those cases.

Both Wendy Parker and David Oppenheimer assert that race claims are the most difficult to win at trial.¹³⁹ Ruth Colker provides some evidence that disability claimants have an even harder time prevailing.¹⁴⁰ The Chicago dataset shows a statistically significant difference only between race and other types of discrimination, in terms of gross recovery:

139. *Id.*; Oppenheimer, *supra* note 6, at 542–45 (providing statistics which indicate that race discrimination claims brought by nonwhites succeed at a much lower rate and receive much lower awards than do other employment discrimination cases or race discrimination claims brought by whites).

140. *See* Colker, *supra* note 57, at 100 (stating that defendants win in more than 93% of ADA employment discrimination cases).

Figure 12



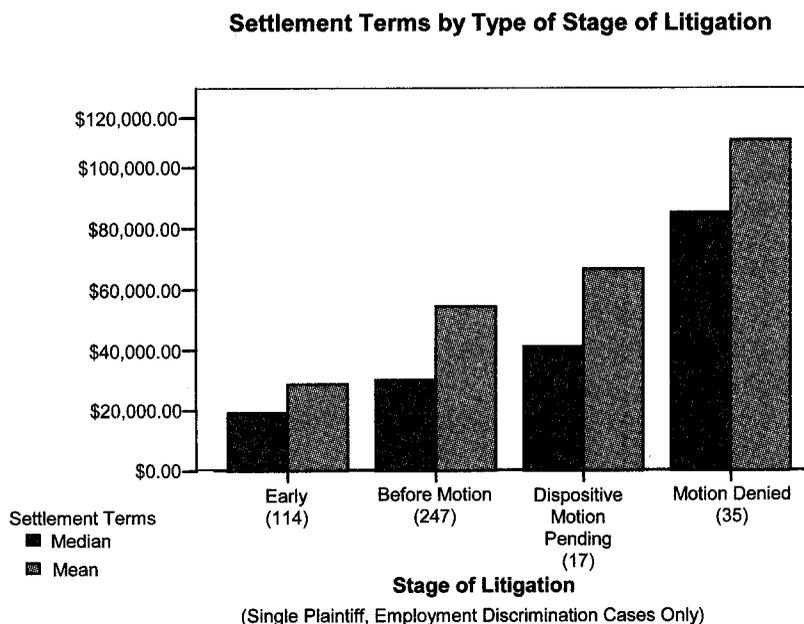
The dataset does not provide any information by which to evaluate the frequency of settlement, however. It may be that the proportion of race cases resolved by magistrate judges is less than that for other types of discrimination. But on the basis of raw dollar amounts, there were no statistically significant differences among types of discrimination, other than for race claims.¹⁴¹ It is likely that some part of this difference can be traced to the disproportionate number of low settlements discussed above, as well as a disproportionate level of pro se or appointed counsel status. In addition, as will be discussed below, the amount of lost wages sought in race cases is less than that in age or disability cases. But it should be noted that in the eight race cases for which there is a reference to the plaintiff being white, the median settlement was substantially higher: \$50,000.¹⁴²

The stage of litigation is clearly a significant variable in settlement amounts. The pendency or denial of a summary judgment motion has always been presumed to be relevant to higher settlement outcomes by both empirical scholars and litigators. These data clearly bear out that presumption, as the following chart shows. Also, not surprisingly, pre-discovery settlements result in lower recoveries.

141. Had national origin been included with race instead of religion, the results would not have been different.

142. Cf. Oppenheimer, *supra* note 6, at 549 (noting 100% plaintiff success rate in reverse discrimination cases).

Figure 13



Median settlements are more than double those of cases resolved before a motion is made. Even the pendency of a motion increases the settlement amount. However, these cases represent only approximately 12% of the dataset.¹⁴³ Given the prevalence of summary judgment motions in discrimination cases,¹⁴⁴ the small number of cases settled after the denial of summary judgment is somewhat surprising. One possible explanation is that once a motion is denied, the parties frequently will reach a settlement without the intervention of a magistrate judge. These settlements remain invisible for purposes of evaluating outcomes, although their frequency could be determined by reviewing docket sheets to identify cases in which a stipulation of dismissal is entered after the denial of a summary judgment motion.

A final consideration relating to settlement amounts is the type of employment action. As shown in Figure 14, discharge cases result in slightly

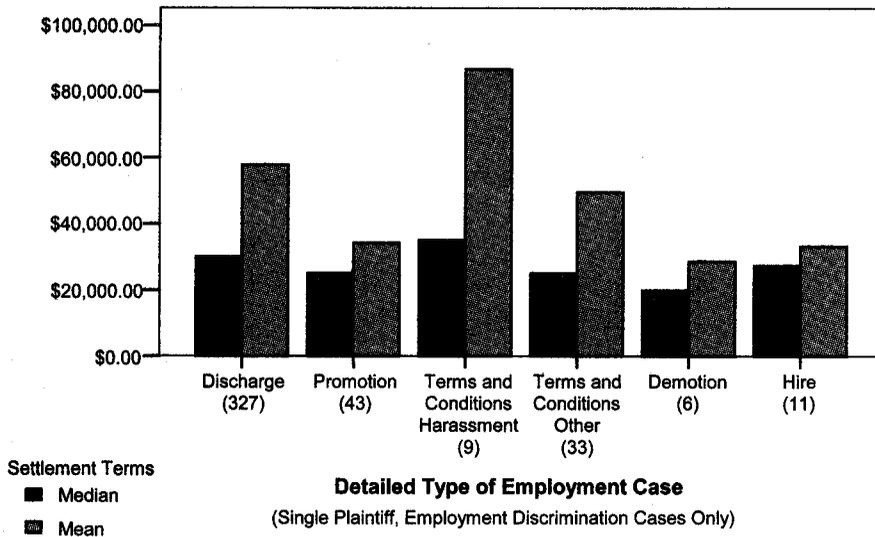
143. See Figure 6 *supra* (analyzing the rate of dispositive motions made at various stages of litigation).

144. See Berger, *supra* note 2, at 48 (stating that a large number of employers in the Southern and Eastern Districts of New York file summary judgment motions if their cases do not settle in mediation).

higher settlements than promotion cases.¹⁴⁵ For purposes of this analysis, the "terms and conditions" category was divided between harassment cases and others, which primarily relate to different pay rates and miscellaneous working conditions other than "hostile environment." One finding of some interest pertains to harassment cases: Those that do not result in discharge, and therefore do not include a claim for lost wages, settle for higher amounts than discharge cases:

Figure 14

Settlement Terms by Type of Employment Action



How do settlements compare with verdicts? The three empirical studies that contain some monetary information about verdicts are of limited utility. Oppenheimer reports the median verdict in California as \$200,000, but cautions that since this is drawn from verdict services, the figure is probably inflated.¹⁴⁶ Nielson and Nelson state that the federal court median for 2001 is \$130,000, but they note problems with the coding system that also create an inflation problem.¹⁴⁷ Sharkey gives \$217,213 as the median verdict in sexual harassment cases, but her data may suffer from the same coding problems.¹⁴⁸

145. Hiring and demotion cases were not analyzed because of the small sample.

146. Oppenheimer, *supra* note 6, at 535.

147. Nielson & Nelson, *supra* note 1, at 697 tbl.3.B.

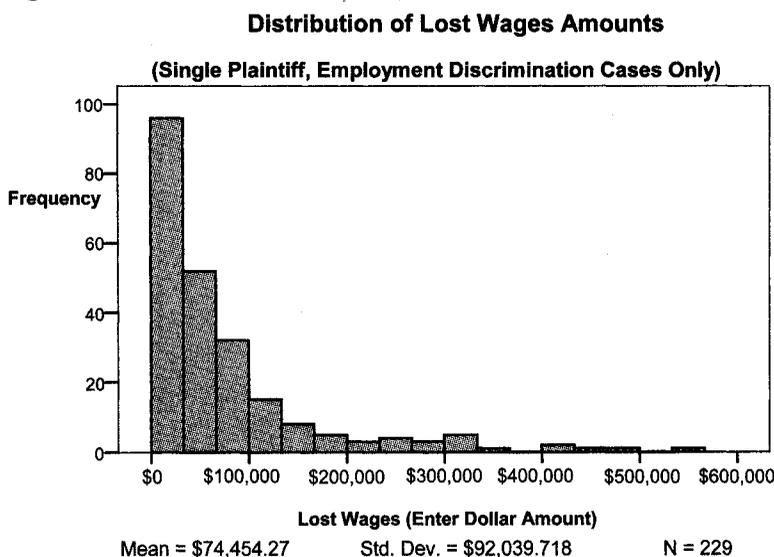
148. Sharkey, *supra* note 65, at 36.

Thus, the most that can be said is that the median settlement of approximately \$30,000 (or a bit higher if multiple plaintiff cases are included) is perhaps one-quarter of median verdicts.

C. Gross Amounts of Loss

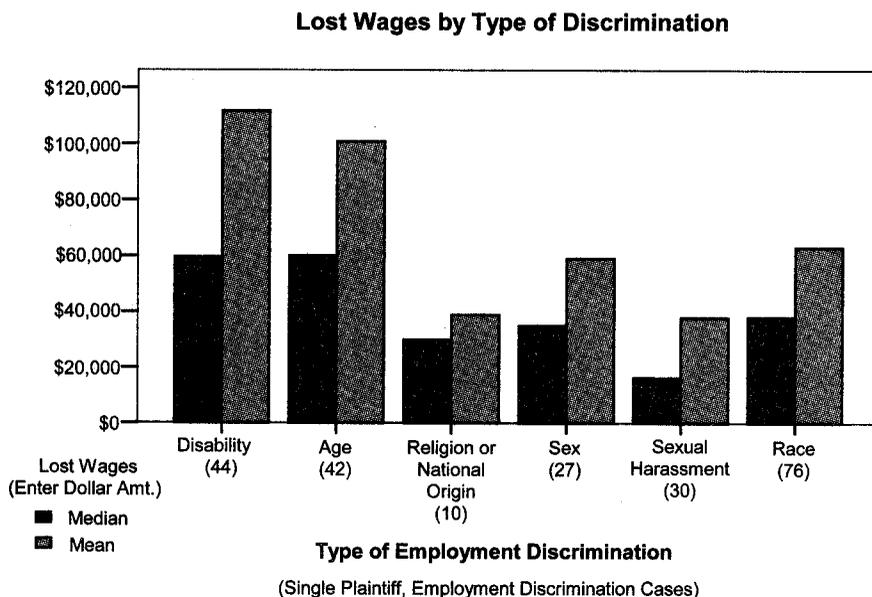
Turning to losses, I rely here only on the 50% of coded cases where there is a reliable indication of lost wages, as discussed in Part II above. For these 229 cases, the mean amount of settlement is \$53,764 with a 95% confidence interval.¹⁴⁹ Figure 15 shows the distribution of amounts of lost wages:

Figure 15



These data present an interesting picture of employment discrimination litigation. Contrary to popular assumptions, very few employment discrimination cases involve substantial "hard" losses: 40% are under \$31,200, and only 10% are over \$192,000. The breakdown of lost wages by type of discrimination sheds more light on these figures:

149. The gross losses and level of success based on cases with lost wages recorded may well be representative of the entire database; however, the means are very close—for cases with no lost wages recorded, \$55,567; with lost wages, \$53,567.

Figure 16

It appears from this analysis that lost wages in discrimination cases reflect some differences in wage distribution overall. Census data for the year 2000 show that median earnings for African-American males were 77% of white males, and females earned 74% of what males earned.¹⁵⁰ Age claims will often involve higher income workers because of their seniority.

Thus, the lower recoveries on race and sex claims may reflect differences in earnings rather than difficulties in achieving favorable resolutions. The fact that sexual harassment cases comprise the smallest category of lost wages is expected, given that in many of these cases, only damages for emotional distress are sought.

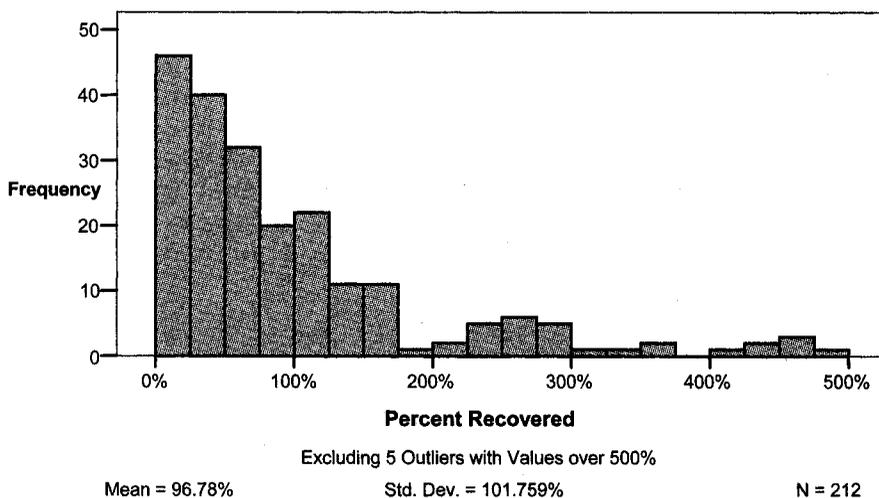
D. Level of Success

In this section, I analyze settlement outcomes in terms of percentage of lost wages, again using only the 229 cases with clear lost wage data. The following chart shows the distribution of percentages of lost wages recovered:

150. See Nielson & Nelson, *supra* note 1, at 669 (debating whether or not this disparity in wages is the result of illegal discrimination).

Figure 17

**Distribution of Percent of Lost Wages Recovered
(Single Plaintiff, Employment Discrimination Cases Only)**



Looking at the percentile distribution, it appears that 35% of claimants obtained 100% or more of their lost wages. I suggest that the 100% recovery figure represents a successful settlement on the basis of the following calculus. My anecdotal experience is that juries frequently will award compensatory damages in an amount equal to back pay.¹⁵¹ In fact, this formula is explicit in the ADEA, which allows for liquidated damages equal to back pay in lieu of compensatory damages. Thus, if maximum trial recovery is double back pay, that amount must be discounted based upon likelihood of success at trial. A 50/50 likelihood would result in a settlement equal to back pay.

Another way of thinking about percentage recoveries is to consider the statistical likelihood of success. According to a number of empirical scholars, a plaintiff's chance of prevailing at trial is approximately 40%.¹⁵² Thus, the double back pay best result should be discounted by 60%. Under this view, a

151. *But see supra* note 120 and accompanying text (discussing "garden variety" emotional distress awards).

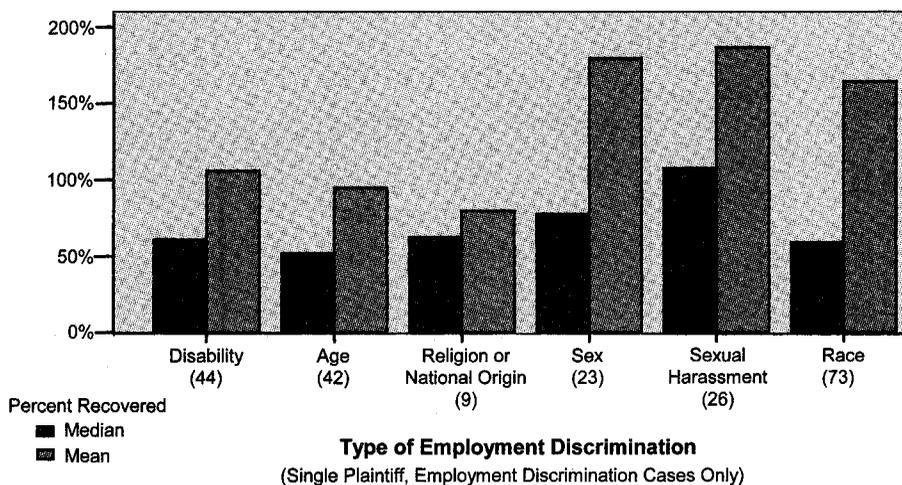
152. *See Selmi, supra* note 14, at 560 (calculating that plaintiffs have a 39.9% success rate at trial); *Clermont & Schwab, supra* note 3, at 442 (calculating that plaintiffs win 45.91% of their judge trials and 44.82% of their jury trials).

realistic settlement equals 80% of back pay. For example, assuming back pay is \$50,000, prevailing at trial would mean a likely verdict of \$100,000. Discounted by 60%, the settlement equals \$40,000, or 80% of back pay. Approximately 45% of plaintiffs achieve this level of success or better.

Although there is a substantial variation in percentage of recovery by type of discrimination, with sexual harassment exceeding other types of discrimination (as shown in Figure 18), the difference is not statistically significant:

Figure 18

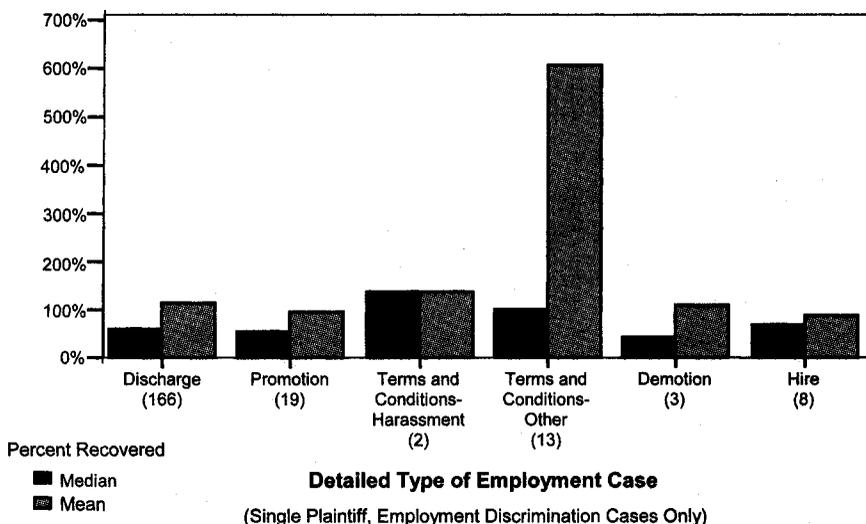
Percent of Lost Wages Recovered by Type of Discrimination



The median recovery percentages for types of discrimination other than sexual harassment range from 50% to 75%; for sexual harassment, the figure is 100%. The same pattern is apparent when looking at recovery percentages by type of employment action:

Figure 19

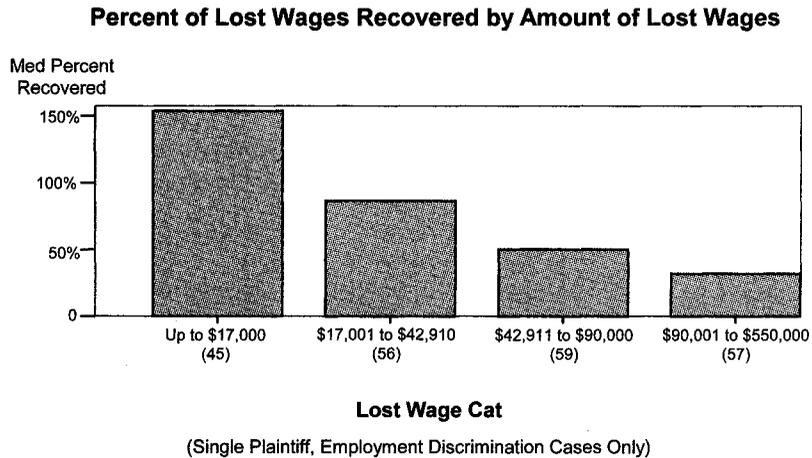
Percent of Lost Wages Recovered by Type of Action



One possible explanation for the higher success level in sexual harassment cases is that employers are more concerned about public trials and publicity in this context, on the theory that sexual harassment is more stigmatizing and more likely to be reported than "ordinary" discrimination today.

As might be expected in light of the data already presented relating to stage of litigation and type of representation, percentage recoveries are greater following denial of summary judgment (60% pre-motion, 80% following motion denial), and with private or EEOC counsel (20% pro se or appointed counsel, 65% private, 75% private counsel).

Finally, another significant factor is amount of lost wages: The lower the amount of back pay sought, the higher the percentage of recovery, as shown in Figure 20:

Figure 20

This chart suggests a somewhat different picture of "success." The percentage recoveries discussed above may be skewed by virtue of the results for high lost-wage plaintiffs. Those with losses up to \$17,000, who may be low-wage earners or persons who quickly became employed again, have a median recovery of 150%, while those with wage losses of between \$90,000 and \$550,000 have a median recovery of approximately 30%. This can be explained in several ways. First, the lost-wage figures are based on representations by counsel; they are clearly inflated, lower percentage recoveries may well result. A second possibility is that high lost-wage figures are due to several years of unemployment, which suggests that the plaintiff has not mitigated damages by engaging in a good faith effort to secure equivalent employment.¹⁵³ In settlement negotiations, defense counsel will seize upon evidence of failure to mitigate to reduce potential back pay liability.

153. See 42 U.S.C. § 2000e-5(g)(1) (2000) ("Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.").

V. Lessons from the Data

In her article entitled *Lessons in Losing: Race and National Origin Employment Discrimination in Federal District Courts*, Wendy Parker begins with a story:

Imagine a lawyer—let's call her Zoe—meeting a new client. Austin, the new client, tells Zoe a familiar story. He believes he wasn't promoted at work because he is African-American. Of course, his boss didn't say Austin wouldn't get promoted because of his race; but Austin believes he was qualified, and a white person got the job instead.

Zoe sympathizes, but isn't that hopeful. . . . In fact, empirical studies amply demonstrate a plaintiff's slim chances of winning an employment discrimination suit. Unless she can settle the claim, Zoe warns Austin, he shouldn't expect any sort of redress.¹⁵⁴

Parker goes on to show how very slim Austin's chances of prevailing at trial actually are. But does not Austin deserve to know more? What about the "unless she can settle the claim" part?

On the basis of the Chicago data, Zoe can tell Austin something more. First, the relatively good news is that median settlement recovery in employment discrimination cases is \$54,651. Does Austin know any other employees that have run into the same problem? Joining another plaintiff might well up the recovery. But the gross median is somewhat deceiving. Race cases show a median recovery of approximately \$20,000, but this includes a number of pro se cases, settled very early in the litigation. If Austin gets to the stage where a summary judgment motion is pending, his median recovery increases substantially.

But there is more news, both good and bad, that relates to Austin's claim for lost wages. Let's say that Austin has calculated that he would have earned an additional \$15,000 had he been promoted. In that case, even though promotion claims yield the smallest percentage of back wages recovered—approximately 45%—those with lost wages of under \$17,000 recover 150%, or in Austin's case \$22,500. If Austin's lost wages are \$40,000, the recovery percentage is 90%, yielding him \$38,000. But the bottom line for Austin is, regardless of media reports of huge verdicts in employment discrimination cases and the availability of punitive damages and damages for emotional distress, he should not anticipate recovering more than what he has lost in wages.

154. Parker, *supra* note 2, at 2–4.

Regression analysis was used primarily to confirm the descriptive findings above. However, a model including (1) the amount of lost wages, (2) whether or not discrimination was primarily race based, (3) whether or not the plaintiff was pro se or represented by appointed counsel, and (4) the stage of litigation explained approximately 40% of the variation in settlement amounts. Although a great deal remains unexplained, we can use the results of the model to suggest relative outcomes for some sample clients. For example, according to this analysis, in a non-race case settled early in the litigation by private counsel, with lost wages of \$50,000, the settlement amount equals \$37,126; if pro se or represented by appointed counsel, \$29,722. The same case, with private counsel, settled when a summary judgment motion is pending or later, would result in a \$50,137 recovery. The same posture in a race case would result in a \$41,687 settlement.

Assuming Zoe is an experienced employment discrimination litigator, she would not be the first lawyer to convey depressing predictions about recovery, although not at this level of detail. But the self-serving bias holds strong sway in these cases.¹⁵⁵ Many clients do not put much stock in a lawyer's anecdotal assessments, particularly when they perceive that they were the victims of discrimination. And not all lawyers are as willing to deliver bad news as Zoe; many suffer from self-serving bias as well. Thus, in the settlement process, judges are often faced with difficulties arising from unrealistic expectations, a major impetus for the development of the Chicago project. A judge's evaluation of settlement outcomes, certainly when based upon empirical data in addition to qualitative judgment, can do much to bring the parties toward convergence, as is evidenced by the settlement rate of the Chicago magistrate judges.¹⁵⁶

Moreover, these data may also assist Zoe with her negotiation strategy. A detailed analysis of the information contained in the dataset relating to plaintiffs' demands and defendants' offers is beyond the scope of this piece. The following two figures show some very preliminary findings, however:

155. See Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 594 (2003) ("What we know about self-serving biases thus suggests that laws forbidding employment discrimination are likely to generate unusually high numbers of spurious claims and defenses, and that it will be relatively difficult to find a view of the matter on which the parties can agree."); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 158 (1993) (arguing that "even with perfectly shared information and a complete absence of disputed legal issues, self-serving biases can cause inefficient impasses" in settlement negotiations).

156. Denlow Interview, *supra* note 4.

Figure 21

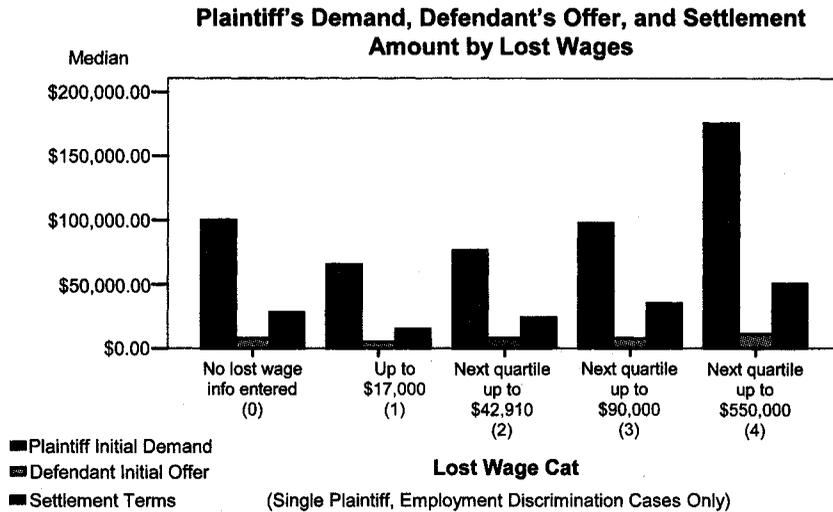
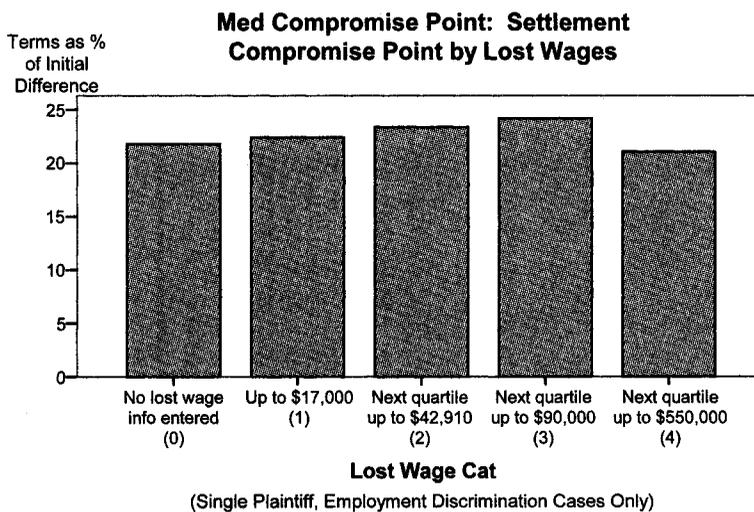


Figure 21 shows that, as might be expected, plaintiffs' demands increase in proportion to the amount of lost wages, as do defendants' offers. But these data also suggest that contrary to popular belief, plaintiffs are not seeking astronomical sums, and defendants are not making "nuisance" offers. Figure 22 shows that the compromise point is approximately 20% of the difference between demand and offer, regardless of amount of lost wages.

Figure 22



The Chicago data can also inform the public policy discourse about employment discrimination litigation. First, it appears that damages caps are largely irrelevant to the typical individual discrimination action premised upon a discharge, since settlement amounts are highly correlated to amount of lost wages, without additional compensatory or punitive damages. Second, since most cases settle early in the litigation—before the completion of discovery—both employers and employees should consider taking the EEOC administrative process more seriously, thereby avoiding the need to expend attorneys' fees on bringing and defending an action in federal court. Third, these data should put to rest the claims that employees are receiving windfall recoveries. Finally, the settlement data demonstrate that the low plaintiff success rates at trial reported by empirical scholars are misleading, since they do not reflect the level of arguably meritorious claims being brought and settled in the federal courts.

VI. Conclusion

The Chicago project is a simple, unique, and inspired effort to address the serious ramifications of "vanishing trials" and confidential settlements. It provides hard data that shed light on the mysteries of employment discrimination outcomes, to the benefit of attorneys, litigants, and the general public. The data collection can easily be improved upon, however, and the project should be replicated in other judicial districts, perhaps under the auspices of the Federal Judicial Center.¹⁵⁷ A comparative look at settlement amounts and frequency among districts would also provide information about the efficacy and efficiency of mediation efforts in the federal courts.

At the outset, it is obvious that the data collection could be made more efficient and consistent by a computerized entry system using "pull-down" menus. New variables should include the gender, race, and age of all plaintiffs, so that potential bias against certain classes of litigants could be more closely examined. In addition, menus should be provided for representational status: pro se, appointed counsel, EEOC, and class or multiple parties. Whether or not a

157. The Federal Judicial Center has already evidenced an interest in the problem of secret outcomes. It recently undertook a study examining the prevalence of sealed settlements. It examined docket sheets in 288,846 civil cases, a random sample from 52 districts, and found only 1,270 sealed settlement agreements, or one in 227 cases, representing less than .5% of civil cases. Employment discrimination cases accounted for 27% of the cases with sealed settlement agreements; another 10% were other civil rights cases. ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1-8 (2004); see also Robert Timothy Reagan, *The Hunt for Sealed Settlement Agreements*, 81 CHI.-KENT L. REV. 439, 462 (2006) (describing the methodology used by the Federal Judicial Center in its study on sealed settlement agreements).

retaliation claim or a state civil rights or tort claim is included should be indicated for every case.¹⁵⁸ Most importantly, the itemization of damages should include for each case: back pay (including period of unemployment), lost benefits, front pay, liquidated damages for age cases, compensatory and punitive damages, and attorneys' fees.¹⁵⁹ Other terms such as confidentiality and injunctive relief should be specified uniformly when applicable. With this information, settlement outcomes could be more accurately evaluated. Finally, one additional category should be considered. A shortcoming of the Chicago project is that it does not allow for any qualitative analysis of case merit, although in the "comments" section, there are occasional references, such as "strong case" or "frivolous." While admittedly subjective, a standardized measure of merit—perhaps on a scale of one to five—would add critical information to the evaluation of outcomes.

These recommendations simply require tinkering with the system in place. An even more ambitious effort would address two additional situations: cases in which settlement conferences proved unsuccessful and cases settled without intervention by the court. For unsuccessful conferences, the same information could be entered, absent settlement amount, and the cases could be tracked to determine their ultimate resolution: for example, later settlement or trial outcome. A later settlement or a settlement without court intervention can fairly be assumed if a stipulation of dismissal is filed with the court. Presumably, by local rule, the court could require that the same information collected by the Chicago magistrate judges be submitted to the clerk's office, on an anonymously coded basis.

Secrecy in litigation, and more particularly, secret settlements, have recently become the subject of much debate.¹⁶⁰ I have argued that secret settlements in employment discrimination litigation vitiate the deterrence function of civil rights laws.¹⁶¹ But absent legislation or regulation by the EEOC¹⁶²—an admittedly

158. Recent studies indicate that retaliation claims are asserted in over 50% of employment discrimination actions. See Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 19 n.1 (2005).

159. In fact, an itemization of damages is required as part of mandatory disclosure under Federal Rule of Civil Procedure 26(a)(1)(C).

160. Symposium, *Secrecy in Litigation*, 81 CHI.-KENT L. REV. 301, 306 (2006). This symposium challenges "the dichotomy that public discourse throughout the litigation process is always good and that secrecy is always bad." *Id.*

161. See Kotkin, *supra* note 4, at 19 ("[T]he EEOC will not enter into confidential settlements because they detract from the deterrence function of civil rights enforcement.").

162. With regard to the settlement of actions that it commences, the agency prohibits confidentiality agreements and requires that "resolutions . . . must contain all settlement terms and be filed in the public court record." U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N OFFICE OF GEN. COUNSEL, *Settlement Standards and Procedures*, in REGIONAL ATTORNEYS' MANUAL (2005), available at http://www.eeoc.gov/litigation/manual/3-4-a_settlement_standards.html. The agency considers its policy is mandated both by the right of the public to "have access to the results of the agency's litigation activities," and because "one of the principal

unlikely prospect—confidentiality will continue to be the rule. A full and complete collection of aggregate data, made publicly available, will ameliorate at least some of the harm engendered by secrecy.

Appendix

Settlement Report

TYPE OF ACTION (Check all applicable boxes): SETTLEMENT DATE _____

EMPLOYMENT

Discrimination	Civil Rights	Other Actions
<input type="checkbox"/> Age: _____ years old	<input type="checkbox"/> Deliberate Indifference	<input type="checkbox"/> P.I. (FELA)-Describe Injury _____
<input type="checkbox"/> Disability: _____	<input type="checkbox"/> Excessive Force	_____
Describe condition: _____	Describe Injury: _____	<input type="checkbox"/> P.I. (Other)-Describe Injury: _____
<input type="checkbox"/> Race: Identify	<input type="checkbox"/> False Arrest	<input type="checkbox"/> Intell. Prop.: _____
<input type="checkbox"/> Sex: <input type="checkbox"/> Female <input type="checkbox"/> Male	<input type="checkbox"/> False Imprisonment:	<input type="checkbox"/> Truth in Lending:
<input type="checkbox"/> Sex Harassment: _____	<input type="checkbox"/> How Long: _____	<input type="checkbox"/> Fair Debt Collection
<input type="checkbox"/> Retaliation: _____	<input type="checkbox"/> Malicious Prosecution	<input type="checkbox"/> ERISA:
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Union Benefits/Contrib.	<input type="checkbox"/> Insurance Policy
	<input type="checkbox"/> Other: _____	

TYPE OF ADVERSE EMPLOYMENT ACTION ALLEGED (Check all applicable boxes):

- | | | |
|---|---|---|
| <input type="checkbox"/> Failure to Hire | <input type="checkbox"/> Failure to Promote | <input type="checkbox"/> Wrongful Discharge |
| <input type="checkbox"/> Reduction in Force | <input type="checkbox"/> Other: _____ | |

Length of Employment with defendant: _____

SETTLEMENT TERMS:\$ _____

Other: _____

purposes of enforcement actions . . . is to deter violations by the party being sued and by other entities subject to the laws." *Id.*

PLAINTIFF'S ITEMIZATION OF DAMAGES: Total

\$ _____

BREAKDOWN OF DAMAGES

SOUGHT: _____

PLAINTIFF'S INITIAL DEMAND:

DEFENDANT'S INITIAL

OFFER: _____

STAGE OF LITIGATION (check all applicable boxes):

- | | |
|---|--|
| <input type="checkbox"/> Failure to Hire | <input type="checkbox"/> Discovery cut-off date set |
| <input type="checkbox"/> Discovery in progress | <input type="checkbox"/> Final pretrial order date set |
| <input type="checkbox"/> Discovery completed | <input type="checkbox"/> Final pretrial order filed |
| <input type="checkbox"/> Dispositive motion pending | <input type="checkbox"/> Trial date set |
| <input type="checkbox"/> Dispositive motion denied | |
| <input type="checkbox"/> Other _____ | |

JUDGE'S COMMENTS: _____

SUBMITTED BY JUDGE: _____

