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Why are Employment Discrimination Cases So Hard to Win?

Michael Selmi*

I. INTRODUCTION

When the United States Supreme Court reverses a lower court and renders a unanimous verdict for the plaintiff in an employment discrimination case, as it did in *Reeves v. Sanderson Plumbing*,¹ you know that something is seriously amiss. *Reeves* was not the first case in which the Court unanimously reversed a lower court in order to correct an obviously flawed decision; indeed, in the previous three years it had done so on four prior occasions.² Surely no one would accuse the current Supreme Court of being plaintiff-oriented in discrimination cases, and the question I want to address in this essay is why have employment discrimination cases become so hard to win? Why is it that courts continually impose roadblocks for employment discrimination plaintiffs that do not exist for other civil plaintiffs? The Civil Rights Act of 1991 was intended to address judicial hostility to discrimination cases by expanding the statute's protection in a number of areas and by substantially improving the remedies available under Title VII. Yet, in the very first case the Supreme Court decided under the Act, it sharply restricted the reach of the statute effectively delaying its introduction for a number of years.³ In many ways, judicial hostility has gone unabated, though much of that hostility is now felt in the lower courts rather than in the Supreme Court, which today often acts as a surprising taming force on appellate courts.

As indicated by the Court's unanimity, *Reeves*, was not a difficult case. Although several courts had found ambiguity in the Court's prior decision in *St. Mary's Honor Center v. Hicks*,⁴ the Supreme Court clearly believed that its prior

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* Professor of Law, George Washington University Law Center. An earlier version of this paper was presented at the Symposium on Employment Discrimination and the Problems of Proof held at Louisiana State University Law Center. I am grateful for the opportunity to participate in the symposium and for the comments I received at that time, particularly those of the respondent Vice Chancellor Gregory Vincent.

1. 530 U.S. 133, 120 S. Ct. 2097 (2000) (unanimously reversing Fifth Circuit Court of Appeals).

2. See *Cleveland v. Policy Sys. Corp.*, 526 U.S. 795, 119 S. Ct. 1597 (1999) (reversing Fifth Circuit Court of Appeals by holding that accepting disability payments does not automatically preclude a claim under the Americans With Disabilities Act); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S. Ct. 843 (1997) (reversing Fourth Circuit Court of Appeals by holding that applicants for employment are covered by Title VII); *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 117 S. Ct. 660 (1997) (reversing Seventh Circuit Court of Appeals regarding the method by which employees are counted for purposes of Title VII jurisdiction); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 116 S. Ct. 1307 (1996) (reversing Fourth Circuit Court of Appeals by holding that an age discrimination plaintiff can proceed with a claim even where the plaintiff was replaced by someone who is over 40 years old).

3. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483 (1994) (holding that the damage provisions of the 1991 Civil Rights Act could not be applied retroactively).

4. 509 U.S. 502, 113 S. Ct. 2743 (1993). For cases interpreting *Hicks* to require some proof

decision answered the question posed in *Reeves*, namely whether a plaintiff need present evidence beyond pretext in order to prevail on a discrimination claim. Quoting extensively from its decision in *Hicks*, the Court found that once a plaintiff provides sufficient evidence to raise a credible question of pretext, the issue becomes one for the jury and is not to be disturbed by a court except in the extraordinary case. As the Court stated in *Hicks*, the factfinder "may, together with the elements of the prima facie case, suffice to show intentional discrimination," and that "no additional proof of discrimination is required."⁵ That said, the Fifth Circuit was not alone in requiring some direct evidence of discrimination in order for a plaintiff to survive a summary judgment motion prior to the Court's clarification in *Reeves*.⁶

Several reasons help explain why employment discrimination cases are so difficult to win. First, a general misperception, one that has been fueled by the popular anti-employment discrimination rhetoric often financed by conservative interest groups, strongly influences courts' perception of the cases. This general misperception is that employment cases are easy—not difficult—to win, and the volume of employment discrimination cases is said to reflect an excessive amount of costly nuisance suits. This perception is reflected in one of the more ironic statements ever to be uttered by a federal judge, when Judge Frank Easterbrook of the Seventh Circuit Court of Appeals wryly noted that plaintiffs cannot win all close cases.⁷ Fair enough, but one might respond, how about just a few? As I will discuss below, employment discrimination cases are notoriously difficult—not easy—to win.

In addition to the general misperception regarding the success of discrimination claims, courts are also affected by various biases that help explain their treatment of employment discrimination cases. As discussed below, those biases differ depending on the nature of the claim; for example, with respect to the Americans with Disabilities Act ("ADA"), courts seem quite concerned about the potential breadth of the statute—not a totally unfounded concern—and have, therefore, trimmed its scope as a way of ferreting out some of the more extravagant claims, but in the process have excluded many claims that were clearly intended to fall within the statute's ambit. When it comes to race cases, which are generally the most difficult claim for a plaintiff to succeed on, courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way. These biases, as well as others, inevitably influence courts' treatment

beyond pretext for a plaintiff to succeed on a claim see *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc); *Hidalgo v. Overseas Condado Ins. Agencies*, 120 F.3d 328 (1st Cir. 1997); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc).

5. 509 U.S. at 511, 113 S. Ct. at 2749 (emphasis in original and citations omitted).

6. *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc); *Hidalgo v. Overseas Condado Ins. Agencies*, 120 F.3d 328 (1st Cir. 1997); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc).

7. *Lever v. Northwestern Univ.*, 979 F.2d 552, 554 (7th Cir. 1992) ("No rule of law says that employees win all close cases.").

of discrimination cases, and help explain why the cases are so difficult to win. Furthermore, as discussed below, these biases can be extremely difficult to overcome.

This essay will proceed in three parts. First, I will establish that employment discrimination cases are unusually difficult to prove, and then I will discuss how judicial bias influences courts' treatment of discrimination claims. In the last part, I will explore whether this bias can be contermined or whether it might be an entrenched part of our judicial system. I should note that in this essay I am going to make some rather broad claims that will not necessarily be supported by the bevy of citations that are often typical of law review writing, but it is my hope here to ask and explore questions rather than to resolve them in any definitive way.

II. THE REAL STATISTICAL STORY

There is it seems a general consensus that employment discrimination cases are too easy to file, and all too easy to win. This sentiment is doubtlessly, at least in part, fueled by the spate of popular books decrying the damage done by employment suits, as well as the relentless efforts by well-financed lobbying and philanthropical groups with a conscious aim to limit the reach of the antidiscrimination laws.⁸ But this picture is grossly distorted, and while there are large numbers of employment discrimination suits—and I have suggested that such claims are generally too easy to file with the Equal Employment Opportunity Commission⁹—these suits are far too difficult, rather than easy, to win.

Each year about 100,000 employment discrimination claims are filed with the Equal Employment Opportunity Commission and about 20,000 cases are filed in

8. See, e.g., 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). There have also been a large number of books challenging the notion that discrimination remains an important part of contemporary society that have sold remarkably well and which were often financed by private conservative research groups. The best known of these is Richard J. Herrnstein & Charles Murray's *The Bell Curve: Intelligence and Class Structure in American Life* (1994) a book that became a best-seller despite its obvious and exposed flaws. Shelby Steele, then an English Professor at the relatively unknown San Jose State University, gained national attention and best-seller status with his book *The Content of Our Character: A New Vision of Race in America* (1991), and linguist John McWhorter has likewise achieved much acclaim for his book *Losing the Race: Self-Sabotage in Black America* (2000). Ironically, despite their message, the primary credential Professors Steele and McWhorter brought to their work was their race; although both are African Americans, neither had previously written on race, and neither concentrated on race in their professional disciplines. All of these books, however, have sold much better than their liberal counterparts, with the possible exception of Andrew Hacker's book entitled *Two Nations*, published in 1991. The role of conservative philanthropical groups is evident in these works: Shelby Steele is now a Professor at the conservative Hoover Institution, Walter Olson works out of the conservative Manhattan Institute, as does Abigail Thernstrom who published along with her husband Stephan Thernstrom the influential *America in Black & White: One Nation, Indivisible* (1997), which is a rosy-colored portrait of race relations in America wrapped around an anti-affirmative action message.

9. See Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 Ohio St. L.J. 1 (1996).

federal court. These numbers have increased significantly during the last decade due to expansion of important antidiscrimination laws. Passed in 1990, the Americans with Disabilities Act now accounts for nearly a quarter of discrimination claims filed in any given year, and the 1991 Amendments to Title VII created additional incentives for plaintiffs to bring claims. These changes have resulted in a three-fold increase in federal court filings during the last decade,¹⁰ and employment discrimination cases now account for just under ten percent of the cases filed in federal court.¹¹ One interesting and perhaps noteworthy aspect of the filings is that they have increased during the late 1990s despite an extremely strong economy with the lowest post-World War II level of unemployment on record.

As has been well documented, plaintiffs in employment discrimination suits generally fare worse than most other kinds of civil plaintiffs. Only about fifteen percent of the claims filed with the Equal Employment Opportunity Commission result in some relief being provided to plaintiffs, a percentage that tends to fall below other administrative claims.¹² In federal courts, plaintiffs have long suffered success rates that fall below other civil plaintiffs, and it does not appear that this trend has been reversed or even modified by the infusion of judges appointed by President Clinton, most of whom had little background in employment discrimination and those who did were more likely to have represented corporate defendants than individual plaintiffs.¹³ Indeed, the Clinton Administration's record on enforcement of employment discrimination statutes generally compares unfavorably to his Republican predecessors, indicated, in part, by the decline in case filings—by nearly one-third—from those instituted by the Administration of George Bush, Sr.¹⁴

10. In 1990, for example, 6,936 employment discrimination cases were filed in federal court, whereas by 1998 the numbers had increased to 21,540, roughly equivalent to the number of cases filed in the two previous years. See Bureau of Justice Statistics, *Civil Rights Complaints in U.S. District Courts, 1990-98*, at 4 Table 3 (Jan. 2000).

11. In 1998, there were 256,787 cases filed in federal court. *Id.* at 2, Table 1.

12. See Selmi, *supra* note 9, at 13. The numbers vary by year, ranging during the period 1992-99 from a high of 16.5 percent of claimants obtained some relief from the process in 1999, to a low of 9.1 percent in 1996. See U.S. Equal Employment Opportunity Comm'n, *Charge Data on All Statutes, FY 1992-FY 1999*.

13. In its 1998 Annual Report on Judicial Selection, the Alliance for Justice commented, "In an effort to nominate 'safe' individuals who would be easily confirmed by the partisan Senate, President Clinton appointed moderate judges and few nominees with any public interest background." Alliance for Justice, *Judicial Selection Project Annual Report 1998*, at 3. For example, "only one judge confirmed in 1998 had experience working full-time in a public interest law organization." *Id.* at 8.

14. In 1990 and 1991, there were more than 600 cases filed in which the United States was a plaintiff, whereas during the rest of the 90s the case filings tended to hover around 400 cases, with a high of 497 in 1993 and a low of 289 in 1996. See Bureau of Justice Statistics, *supra* note 10, at 4, Table 4. See also Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 *UCLA L. Rev.* 1401, 1427-35 (1998).

Table One

Case Dispositions 1995-1997

	Jobs		Insurance		Personal Injury	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Pretrial Motions	8,241	.1585	3,011	.1298	2,504	.0944
Other Dismis.	34,708	.6677	15,285	.6591	16,941	.6387
Jury Verd.	2,074	.0398	435	.0187	1,301	.0490
Non-Jury V.	655	.0126	268	.0115	84	.0031
Other	4,017	.0772	3,456	.1490	4,493	.1694
Total	49,695	.9558	22,455	.9681	25,323	.9546

Source: Administrative Office of the Courts

The difficulty plaintiffs have in federal court can perhaps best be measured by their success rates, particularly when compared to other cases. Tables One and Two are derived from data compiled by the Administrative Office of the Courts and maintained in an accessible database by Cornell Law School.¹⁵ Table One provides a summary of the various ways in which cases are disposed of in federal court for three different claims as classified by the Administrative Office of the Courts: jobs (the category for employment cases), insurance claims and personal injury claims.¹⁶ There are more than two times as many employment claims as either insurance or personal injury. However, the most noteworthy statistic is that the methods of case dispositions are roughly the same across categories, with a slightly higher percentage (15.85 percent) of employment cases being resolved through pretrial motions than is true for either insurance (12.98 percent) or personal injury cases (9.4 percent).¹⁷

15. The database can be accessed at <http://teddy.law.cornell.edu:8090/questata.htm>.

16. These categories were chosen primarily because they included sizable numbers of cases and were roughly comparable in their substance to provide a reasonable basis for comparison. I also sought to compare medical malpractice cases, which have a trial success rate that is more comparable to employment discrimination cases, but the database included relatively few medical malpractice cases since most are filed in state court. For employment discrimination cases, I included only those cases where the jurisdiction was based on a federal question, to screen out employment cases premised on a diversity basis that may not involve discrimination issues, whereas for insurance and personal injury cases I relied on the jurisdictional category "all bases."

17. There are also fewer cases defined as "other" among the employment cases, which suggests that the employment cases offer a more complete picture of the set of cases disposed of in federal court.

Table Two

Plaintiff Success Rates 1995-1997

	Jobs		Insurance		Personal Injury	
	N	%	N	%	N	%
Pretrial Motions	18,133	.021	2,896	.340	2,457	.051
Jury Verd.	11,992	.399	423	.513	1,268	.408
Non-Jury V.	10,637	.187	250	.436	328	.418
Directed V.	1,163	.043	27	.259	84	.107
Total	12,229	.089	3,596	.367	4,137	.191

Source: Administrative Office of the Courts

Table Two provides the plaintiff's success rates based on the total number of cases disposed of, and here some interesting differences appear. Of the cases disposed of by pretrial motion, nearly ninety-eight percent of them were decided in favor of defendants, compared to ninety-five percent of personal injury cases and sixty-six percent of insurance cases. These statistics do not measure the number of motions that were denied, but it is striking that such a large number of cases are summarily disposed of in favor of defendants. Plaintiffs also have a slightly lower success rate at trial during this period (39.9 percent), certainly when measured against the success rates of insurance cases (51.3 percent) which closely relates to the prevailing success rates for other civil claims, where studies indicate that defendants tend to succeed in approximately fifty percent of the claims that are resolved.¹⁸

More significantly, both as a point of comparison and for the purposes of my argument, is the success rate for cases tried before a judge. Plaintiffs in employment cases succeeded on only 18.7 percent of the cases tried before a judge, whereas the success rates for plaintiffs in judge-tried insurance cases was 43.6 percent and 41.8 percent for personal injury cases. Plaintiffs are thus half as successful when their cases are tried before a judge than a jury, and success rates

18. See, e.g., Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties, 1996* at 1 (Sept. 1999) ("Overall, plaintiffs won in 52 percent of trial cases."); Bureau of Justice Statistics, *Civil Jury Cases and Verdicts in Large Counties: Civil Justice Survey of State Courts 1992* (plaintiffs won 52 percent of cases surveyed). The 50 percent success rate is consistent with what is known as the Priest-Klien hypothesis, which predicted that close cases are most likely to go to trial and because of that selection the cases were likely to split evenly among defendants and plaintiffs. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984). It should be noted that success rates vary by the nature of the case. For two recent discussions of success rates and surveys of some of the past studies see Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 *Case W. Res.* 315, 322-24 (1999); Daniel Kessler et al., *Explaining Deviations from the Fifty Percent Rule: A Multimodel Approach to the Selection of Cases for Litigation*, 25 *J. Legal Stud.* 233, 236-42 (1996).

are more than fifty percent below the rate of other claims.¹⁹ As Ted Eisenberg has documented, employment discrimination plaintiffs have long had difficulty with trials before a judge; indeed, only claims filed by prisoners tend to have a lower success rate.²⁰

Two recent studies have likewise documented the extreme difficulty plaintiffs have had in prevailing on disability claims. Based on a review of reported decisions published between 1992-98, Ruth Colker found that defendants prevailed in more than ninety-three percent of the cases decided on the merits at the trial court level, and in eighty-four percent of the cases that were subsequently appealed.²¹ Professor Colker also found some evidence to suggest a higher reversal rate on plaintiff victories. While defendants' sustained eighty-four percent of their trial victories, plaintiffs' victories were affirmed in only fifty-two percent of the cases.²² In a study of 760 cases that involved a prevailing party, the American Bar Association found that the defendants prevailed in ninety-two percent of the claims.²³

Accordingly, the statistical picture diverges from the common wisdom. In fact, there is very little evidence to suggest that employment cases provide a windfall for plaintiffs. It seems clear that courts are hostile to employment discrimination cases, and I think the reason has to do not just with the perception that the cases are too easy to bring but also that most are lacking merit. Indeed, the bias courts bring to their adjudicative process likely influences the general misperception that cases are easy to win, and these two issues are inevitably closely linked.

III. THE BIAS COURTS BRING TO CASES

The primary reason discrimination cases are so hard to prove has to do with the bias courts bring to their analyses. By the term bias I do not mean that courts hold or express animus toward discrimination cases, though some courts undoubtedly do, but instead I mean that courts approach cases from a particular perspective that reflects a bias against the claims. I should be clear that here I am treating courts not as anonymous or reasoned institutions but as the people they are, and as people, they are unlikely to always be able to shed themselves of their biases. In the last few years, an extensive literature has developed regarding the ways in which bias may stem from unconscious forces to explain how discrimination continues to affect the workplace and why employers might be affected by these biases despite their

19. I have not sought to determine whether these differences are statistically significant since I have not had direct access to the database and do not want to imply greater confidence in the results than might be warranted by providing a measure of confidence, and have opted instead to focus on the relative percentages.

20. See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 Geo. L.J. 1567 (1989).

21. See Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. Rev. 99, 100 (1999).

22. *Id.* at 108.

23. See *Study Finds Employers Win Most ADA Title I Judicial and Administrative Complaints*, 22 Mental & Physical Disabling L. Rep. 403 (1998).

best efforts.²⁴ This literature, however, has focused almost exclusively on employers and individual actors. In this essay I want to extend that analysis to the courts, for although some courts are able to separate themselves from their own personal perspectives, most courts are not, and those biases strongly influence how courts decide particular cases especially in the discrimination context.²⁵ At the same time, it is important to note that not all the bias I will discuss stems from unconscious forces, but rather although it may be manifested in subtle ways, it often arises from conscious beliefs—the kind of beliefs someone might admit at a party after having one too many drinks but that is otherwise suppressed because it falls outside what is seen as the mainstream even though it, in fact, may mirror the norm.

The bias the courts bring to the cases varies by the type of case. It is now liberal gospel to deride all discrimination in equal terms, to suggest that no discrimination is permissible, and all reprehensible, and with some exceptions the various federal statutes tend to treat most discrimination in like terms. This has also been true of federal enforcement agencies, which have generally declined to prioritize discrimination claims but instead treat all claims as equally worthy. This is, of course, not true with respect to the Constitution. The Supreme Court has long adhered to tiers of scrutiny to distinguish kinds of discrimination based on their origin. Indeed, rather than treating all discrimination alike, it seems significantly more helpful to distinguish among kinds of discrimination, stressing in particular that the bias courts bring to the cases can vary by the nature of the case.

A. Race Discrimination Claims

Race discrimination claims are generally thought to be the most difficult employment claim to succeed on, and when it comes to race, the courts' bias tends toward our common definition of bias. Much has been written about the way in which subtle and unconscious beliefs can influence one's interpretation when race is involved, and it seems that courts tend to view the claims of race plaintiffs skeptically, in a way that lends credence to some of the contentions of affirmative action critics who argue that affirmative action can broadly taint the actions of the affected group. To be sure, affirmative action has negative side effects and whether those side effects are worth the benefits is an issue well beyond the scope of this essay. But the point I want to make here is that courts often analyze race cases from an anti-affirmative action mindset, one that views both the persistence of discrimination and the merits of the underlying claims with deep skepticism. Indeed, this was true even of Justice Powell's famous opinion in *Regents of*

24. On the nature of unconscious discrimination in the employment setting see, for example, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination in Equal Employment Opportunity*, 47 *Stan. L. Rev.* 1161 (1995); Amy L. Wax, *Discrimination as Accident*, 74 *Ind. L.J.* 1129 (1999); Virginia Valian, *Why So Slow? The Advancement of Women* (1999).

25. This has long been the message of the legal realists and critical legal studies scholars. For a recent work along these lines that concludes that we should remove many constitutional issues from the courts' jurisdiction see Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

California v. Bakke, which appears to have been influenced by a number of scholarly critiques of affirmative action programs,²⁶ and is likewise true of Justice O'Connor's influential opinions on race discrimination which are steeped in a belief that many observed racial disparities represent the natural order of things.²⁷

This bias is, more than anything else, a way of seeing things, a way of analyzing evidence, drawing inferences and conclusions based on ambiguous or contested evidence. As I have argued previously, our assumptions about the world—about the prevalence of discrimination and its role in explaining events—deeply influences the way in which we identify the causation that is central to establishing a discrimination claim.²⁸ Moreover, it seems that the general consensus today is that the role discrimination plays in contemporary America has been sharply diminished, and those who take this view are reluctant to find discrimination absent compelling evidence. As a result, courts appear hesitant to draw inferences of racial discrimination based on circumstantial evidence, even though courts have long recognized that race discrimination is generally subtle in form and dependent on circumstantial evidence.²⁹

This mindset was evident in the various legal interpretations entwined in *St. Mary's Honor Center v. Hicks*, a case that required drawing inferences from circumstantial evidence that necessitated interpretation.³⁰ In that case, Melvin Hicks, who was the only African American supervisor on staff, was disciplined and ultimately fired after several confrontations with his boss, who was white. As the trial court found, Hicks was disciplined for infractions of his subordinates contrary to common practice, and Hicks was also singled out following a change in management. The new management wanted to reassert control of the prison facility in response to a report suggesting that having too many African-American supervisors might have had a deleterious effect on discipline among the inmates, a majority of whom were African-American.³¹ Despite its finding that the

26. In particular, Justice Powell seems to have been influenced by the work of now Judge Richard Posner and William Van Alstyne, two prominent early critics of affirmative action. I discuss these themes in Michael Selmi, *Remedying Societal Discrimination Through the Government's Spending Power* (2001) (unpublished manuscript on file with the author). For an interesting explanation of the influence of Judge Posner and interest group political theory on Justice Powell, see Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 *Law & Soc'y Rev.* 263 (2000).

27. See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 *Geo. L.J.* 279, 281-82 (1997).

28. See *id.*

29. The Supreme Court noted the importance of eradicating subtle discrimination as early as 1969, in an important voting rights case interpreting the mandate of the Voting Rights Act of 1965. See *Allen v. Board of Elections*, 393 U.S. 544, 565, 89 S. Ct. 817, 831 (1969) (noting that section 5 of the Voting Rights Act was "aimed at subtle, as well as the obvious, state regulations. . .").

30. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2743 (1993).

31. This latter fact, which seems potentially quite relevant, was never mentioned in the Supreme Court opinions, but was noted in a footnote by the Court of Appeals. See *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 490 n.6 (8th Cir. 1992). The Court of Appeals explained:

Plaintiff also introduced evidence at trial of a study performed in 1980 and 1981 of two honor centers in St. Louis and Kansas City. According to the district court's findings,

employer's proffered reasons were pretextual, the district court found that the underlying rationale was personal animus between Hicks and his supervisors, rather than racial animus. Surely the evidence could have been interpreted to find that the source of the personal bias was racial animosity, conscious or otherwise, though this possibility never seems to have been explored by the district court.³² It was, however, expressly mentioned by Justice Souter in dissent, suggesting that a different judge, working through a different mindset, one where discrimination may be more readily accepted as an explanation, would have interpreted the evidence differently.³³

B. Age Discrimination Claims

Age discrimination cases present an interesting but quite different puzzle. They tend to fare the best in court,³⁴ particularly before juries that can sympathize with the plaintiffs given that all jurors are likely to become old. Depending on the circumstances, age discrimination plaintiffs might also be sympathetic due to their employment successes, as many plaintiffs have established themselves, were making healthy salaries, and were terminated in part to rid the company of the high salary.³⁵ Not only are jurors likely to get old, but they may also aspire to the success these plaintiffs have achieved and feel particularly disgruntled when the plaintiff has been coldly turned out after many years of success. Given the age of many judges, and their life-tenure, one might expect courts to sympathize with the plaintiffs in a similar manner, though a number of other factors work to counter this potential sympathy.

One important factor explaining the courts' reluctance to offer broad protections is the very breadth of the statute, which applies to anyone who is forty years old or over, a wide swath and many would argue that what we might define as discrimination based on age is not likely to be particularly prominent until a later age, perhaps at age fifty. There are a surprising number of plaintiffs who have recently celebrated their fortieth birthday and courts are quite skeptical of their

this study concluded that "too many blacks were in positions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real." However, none of the witnesses for the defense admitted to being aware of the study at the time of the 1984 personnel changes at St. Mary's.

Id. (citation omitted).

32. See *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1251-52 (E.D. Mo. 1991). Indeed, the District Court Judge, who incidentally was Rush Limbaugh's uncle, went to great lengths to dispute all of the evidence Hicks had introduced.

33. See *Hicks*, 509 U.S. at 542, 113 S. Ct. at 2766 (Souter, J., dissenting) (noting that in identifying personal animosity as a possible explanation, the district court "failed to recognize [that it] might be racially motivated").

34. See George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. Legal Stud. 491 (1995).

35. *Id.* at 493 (documenting that among discrimination plaintiffs, age discrimination plaintiffs had incomes nearly twice as high as others).

claims, presumably based on the assumption that a forty-year-old is not likely to be the subject of discrimination. Moreover, given the breadth of the statute, it is quite easy to establish a prima facie case that will enable the plaintiff to proceed on her claim, and yet it is a prima facie case that does not hold the same evidentiary value as a case premised on race or gender. Indeed, this is one area where treating all discrimination cases equally can lead to a doctrinal mismatch; age cases have largely borrowed the proof structure from Title VII, even though the prima facie case in an age discrimination case is likely to offer less probative value than is true in a race discrimination case because of the different histories our country has experienced with respect to race and age discrimination.

As is too often overlooked, the prima facie case in employment discrimination cases makes sense only to the extent that a reasonable inference can be drawn from the established facts. In the case of race discrimination, it seems reasonable to draw an inference of discrimination based solely on the prima facie case because the most common neutral reasons for employment decisions have been introduced into the deliberation—qualifications, availability and race.³⁶ Establishing a prima facie case effectively eliminates two neutral reasons, the plaintiff's qualifications and the availability of a position, while introducing a discriminatory reason into the legal equation as a third possibility. This presumption, however, turns on the prevalence of race discrimination as a common explanation for an employer's decisions, something on which at the time the test was developed there seemed to exist a national consensus.³⁷

But there has never been the same kind of consensus with respect to age discrimination. While employers undoubtedly take age into account, many contend that age-based decisions are often rational and relevant in a manner that would not be true for race. As has been well documented and widely accepted in the field of economics, an individual's productivity declines over time while his salary tends to increase in a disproportionate manner largely because of the entrenched seniority-based salary system that continues to dominate most sectors of our economy, as well as underpayment in the early years of a career while employees settle into more permanent positions.³⁸ Unlike decisions based on race, age-based decisions are not always discriminatory in nature. The lack of a consensus with respect to age discrimination is reflected in the continuing debate over mandatory retirement, as well as the reluctance by several courts to permit adverse impact claims under the ADEA even though they are specifically permitted under both Title VII and the ADA.³⁹

36. I discuss this rationale for the prima facie case in Selmi, *supra* note 27, at 324-28.

37. *Id.* at 326-28.

38. The argument was originally articulated by Professor Edward Lazear, and is typically discussed in standard labor economics textbooks. See, e.g., Ronald G. Ehrenberg & Robert S. Smith, *Modern Labor Economics* 398-402 (6th ed. 1997); Edward Lazear, *Why Is There Mandatory Retirement?*, 87 J. Pol. Econ. 1261 (1979). Two works of legal scholars discussing the nature of age discrimination are Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 Mich. L. Rev. 8 (1993) and Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination? The ADEA's Unnatural Solution*, 72 N.Y.U. L. Rev. 780 (1997).

39. Compare *Katz v. Regents of the Univ.*, 229 F.3d 831 (9th Cir. 2000) (allowing disparate

As a result, age discrimination cases present a difficult scenario for courts, as they represent a class to which juries are likely to be sympathetic despite the often tenuous theory that underlies the cause of action. Courts have thus been inclined to craft rules that facilitate granting summary judgment against age discrimination plaintiffs, for example, requiring direct evidence in some cases as a way of keeping cases away from juries. Indeed, this is how many of the pretext-plus cases arose, and, in this respect, it is worth noting that *Reeves* itself was an age discrimination claim.

C. *The Americans with Disabilities Act*

Courts' concerns regarding the Americans with Disabilities Act parallel in many important ways the age discrimination cases. Here, though, the problem is largely with the scope of the statute, which has engendered a large number of claims that could not have been contemplated by its legislative advocates. The ADA, which passed with overwhelming congressional support, defined the critical term "disabled" in a purposefully vague manner. As a result, many individuals who would not be classified as disabled but for the potentially broad statutory reach have pursued claims under the statute. This includes, as a partial and almost random list: smokers, nonsmokers,⁴⁰ those who have reactions to various chemicals including perfume,⁴¹ those who are afraid of snakes⁴² or who are rude,⁴³ and individuals who wear glasses.⁴⁴ Although these claims are not always frivolous—and some severe cases may present difficulties that could rise to the level of a disability—they are almost all destined for defeat. Indeed, for the most part, none of the claims that has

impact cause of action) *with* *Mullin v. Raytheon Co.*, 164 F.3d 696, 703 (1st Cir. 1999) (holding that ADEA does not provide cause of action for disparate impact).

40. *Leonard v. Rolette County*, No. 99-2130, 1999 U.S. App. LEXIS 29732 (8th Cir. Nov. 12, 1999) (per curiam); *Charla Keck v. New York State Office of Alcoholism & Substance Abuse Servs.*, 10 F. Supp.2d 194 (N.D.N.Y. 1998) (alleging allergies to tobacco and perfume); *Patricia Homeyer v. Stanley Tulchin Assocs.*, No. 95 C 4439, 1995 U.S. Dist. LEXIS 17114 (N.D. Ill. Nov. 17, 1995) (alleging sensitivity to smoking).

41. *See Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555 (N.D. Ga. 1995) (alleging environmental sensitivity including to perfume); *Boren v. Wolverine Tube, Inc.*, 966 F. Supp. 457 (N.D. Miss. 1997) (allergic reaction to a chemical in the workplace); *Comber v. Prologue, Inc.*, No. JFM-99-2637, 2000 U.S. Dist. LEXIS 16331 (D. Md. Sept. 28, 2000) (among other ailments, alleged chemical sensitivity).

42. *See Anderson v. North Dakota State Hosp.*, 232 F.3d 634 (8th Cir. 2000).

43. *See Crandall v. Paralyzed Veterans of America*, 146 F.3d 894 (D.C. Cir. 1998).

44. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (1999).

arisen on the outer perimeter of the statute has succeeded,⁴⁵ yet in trimming the perimeter, courts are reaching the core.

This is nowhere more apparent than in the Supreme Court's recent trilogy of cases involving whether mitigating measures should be taken into account when assessing whether a person is disabled under the terms of the statute.⁴⁶ In the leading case, *Sutton v. United Airlines, Inc.*, the plaintiffs were twin sisters who wore corrective lenses, a fact that prevented them from becoming commercial airline pilots, relegating them instead to flying with regional air carriers.⁴⁷ Although the plaintiffs' vision was seriously deficient and far worse than most people who wear glasses, this case was a certain loser in the Supreme Court. To my mind, it is inconceivable that the Supreme Court would find that those who wear glasses are disabled, even with the possibility of some limiting principle based on the severity of the vision loss.⁴⁸ The Court's ruling, however, threatens what most would consider core ADA claims—claims nearly everyone would classify as involving disabilities. Following *Sutton*, a number of courts have found that individuals with epilepsy or diabetes do not qualify as disabled, as well as plaintiffs who suffer from depression that is susceptible to drug treatment.⁴⁹

It may be that these claims on the statute's outer perimeter represent a natural evolution of a new and innovative statute that left much room for interpretation. At the same time, one has to wonder what good has arisen from the pursuit of claims where courts are unlikely to be sympathetic, such as the chemical sensitivity claims which have no scientific or medical support and lend themselves to malingering and disgruntled employees. Rather, in their predictable effort to rid the judicial system

45. For example, the chemical sensitivity claims, which originated under the Fair Housing Act Amendments of 1988, have been uniformly unsuccessful. *See Comber v. Prologue, Inc.*, No. JFM-99-2637, 2000 U.S. Dist. LEXIS 16331 (D. Md. Sept. 28, 2000) (granting summary judgment for defendant on disability claims including chemical sensitivity syndrome); *Keck v. New York State Office of Alcoholism and Substance Abuse Servs.*, 10 F. Supp.2d 194 (N.D.N.Y. 1998) (finding that plaintiff had stated a claim with respect to perfume allergy but granting defendant's motion for summary judgment); *Boren v. Wolverine Tube, Inc.*, 966 F. Supp. 457 (N.D. Miss. 1997) (granting summary judgment for defendant on plaintiff's claim to allergic chemical reaction); *Whillock v. Delta Air Lines, Inc.*, 926 F. Supp. 1555 (N.D. Ga. 1995) (granting defendant's summary judgment motion on environmental chemical sensitivity claim).

46. *See* *Murphy v. United Parcel Service*, 527 U.S. 516, 119 S. Ct. 2133 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139 (1999); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999).

47. *Sutton*, 527 U.S. at 471, 119 S. Ct. at 2139.

48. The Court's decision, which relies on prefatory information in the legislative history and ranks as one of their more unpersuasive employment decisions, supports the notion that the Court was destined to rule against the plaintiffs.

49. *See, e.g.*, *Krocka v. City of Chicago*, 203 F.3d 507 (7th Cir. 2000) (finding that police officer who suffered from severe depression treatable through medication was not disabled); *Epstein v. Kalvin-Miller Int'l Inc.*, 100 F. Supp.2d 222 (S.D.N.Y. 2000) (diabetes not a covered disability because treatable); *Arnold v. City of Appleton*, 97 F. Supp.2d 937 (E.D. Wis. 2000) (epilepsy not covered disability); *Eibest v. Planned Parenthood*, 94 F. Supp.2d 873 (N.D. Ohio 2000) (Epstein-Barr disease did not cause substantial limitation in light of *Sutton*).

of fringe claims, courts have just as predictably signed a death warrant for claims that soundly deserve judicial recognition.

Each of these three statutes present different circumstances for the courts. When it comes to race discrimination, courts appear skeptical of the legitimacy of the claim, which also influences their determinations on age discrimination though in a different light, whereas on disabilities claims the courts' primary concern has to do with the volume of cases, a volume that includes a large number of claims for nontraditional disabilities. In some ways the skepticism the courts bring to these cases reflect overlapping issues: in each the court is often reluctant to see discrimination as the underlying cause either because of a belief that the plaintiff is not truly disabled and therefore not subject to discrimination or because the plaintiff has not truly suffered discrimination, as seems true in both the context of race and age cases.

D. Gender Discrimination Cases

Gender cases present a more complicated picture, one that is strongly influenced by reigning stereotypes that seem to die all too hard. Despite the fact that two-income families now comprise the majority of American families, as a society we remain ambivalent over the role of working women. While there is a begrudging acceptance of the economic need for women to work, there remains a strong desire to return to the days when women were predominantly occupied with their work in the home, a fact that is repeatedly reflected in public opinion polls.⁵⁰ Although I have not done an empirical inquiry to verify the fact, it is quite possible that a majority of judges have nonworking wives, given their age and status both of which would likely lead to a disproportionate number of nonworking spouses.⁵¹

The influence of these stereotypes and mindsets will work in subtle ways, and have likely precluded various litigation strategies aimed at challenging the structure of the traditional workplace, where women have sought to work part-time, or sought time to breastfeed their children at work, or complained of a glass ceiling or who advocated for comparable worth, all claims that have generally failed to obtain redress in the courts.⁵² Courts are also often influenced by what they might consider the proper roles for women regarding the evidence they admit, or how the evidence might be interpreted, often viewing as unproblematic employer explanations that may be steeped in women's interests in particular positions.⁵³

50. A 1998 poll conducted by the Washington Post found that 40 percent of respondents would like to return to the gender roles of the 1950s. See Richard Morin & Megan Rosenfeld, *With More Equity, More Sweat*, The Washington Post, Mar. 22, 1998, at A1.

51. At the end of 1999, 80 percent of the federal judges were men. See Alliance for Justice, *Judicial Selection Process Annual Report 1999*, at 15.

52. See Joan Williams, *Unbending Gender: Why Family and Work Conflict and What To Do About It* (2000) (discussing the limitations of existing doctrine).

53. The most famous case along these lines is the failed litigation against Sears Roebuck, where very few women found their way into commission jobs. See *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302 (7th Cir. 1988). A more recent example was found in the District Court opinion exonerating the venerable restaurant Joe's Stone Crab which did not hire women to work on the dining room waitstaff.

Courts, including the Supreme Court, vary considerably in how receptive they have been to women's claims of sexual harassment. After unanimously creating a fairly protective standard for establishing hostile environment claims,⁵⁴ the Supreme Court recently crafted an affirmative defense that provides employers some immunity from liability in cases where the plaintiff's workplace conditions are not tangibly affected by the harassment.⁵⁵ It is noteworthy that the Supreme Court created the affirmative defense out of whole cloth, as there was very little precedent for the defense, and the Court appeared to do so as a way of offering employers some protection from liability. It is too early to tell what the effect of these decisions will be. It is indeed possible that their effect will be fairly limited given that they only apply in circumstances where the employer has instituted an effective policy intended to address sexual harassment and where the plaintiff's workplace conditions were not adversely affected.⁵⁶ At the same time, the cases may signal a shift in judicial attitudes that portends more difficulty for plaintiffs to recover in cases of sexual harassment, contrary to the explicit intent of the 1991 amendments to Title VII, which were in large measure intended to rectify the lack of remedies available to many victims of sexual harassment under prior law.

E. A Neutral Explanation

I have been concentrating on the bias courts bring to cases as a way of explaining why discrimination cases are so difficult to win, but there may be a less pernicious cause at work. It may be that employment discrimination cases have low success rates because there are many frivolous or marginal claims among the thousands of claims filed in any given year. As noted earlier, it is indeed a bit curious that the number of cases filed has not significantly decreased over the course of the last five years even though the labor market has been exceptionally tight and the economy strong, two facts that should restrain employers' discriminatory impulses.

Yet, upon reflection, it appears that there is very little reason to believe that employment discrimination cases are any less meritorious as a class than other types of civil claims. Although it is relatively easy to file a claim, and this ease likely explains a substantial portion of the cases that are filed with the EEOC, there is no obvious reason why employment cases would be singled out for an unusually high volume of weak claims. The vast majority of employment discrimination cases are filed by an attorney, rather than by a pro se plaintiff, and attorneys are generally motivated by the profit potential of their cases. Some attorneys are undoubtedly more interested in cause litigation than they are in the financial aspects of the cases, but these attorneys comprise a small subgroup and among them there is again no

The decision was reversed on appeal. See *EEOC v. Joe's Stone Crab*, 220 F.3d 1263 (11th Cir. 2000).

54. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367 (1993).

55. See *Faragher v. Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998).

56. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270.

particular reason why they would tend to select frivolous cases. They may, on the other hand, pursue difficult but important cases, and it is certainly possible, though unlikely, that these cases contribute to the excessive volume.

For those attorneys who are in the pursuit of profit, employment discrimination cases seem an especially poor choice to emphasize, since the claims are exceedingly difficult to win and offer the potential for limited damages, two factors that should suppress rather than encourage filings. Employment discrimination cases remain one of the few classes of cases where the damages are capped, with a maximum recovery of \$300,000 available to each plaintiff, although the average recovery tends to fall well short of the cap.⁵⁷ Moreover, as noted previously, there are few kinds of cases that are more difficult to win than employment discrimination claims, and the combination of relatively low damages and a low success rate should restrain rather than encourage profit-seeking attorneys. It may be that the prospect of securing attorney's fees adds an attractive inducement to bring claims, but this should only be true for the strong rather than weak claims given that fees are only available to a successful plaintiff. Moreover, attorney's fees have always been available for discrimination plaintiffs and the surge in cases that has occurred in the 1990s after the passage of the ADA and the amendments to Title VII suggests that the availability of fees is not the cause of the dramatic increase in case filings. Another possibility is that the prospect of damage recovery has made these cases easier to settle, a fact that by itself may encourage claims. However, the data do not indicate a significant increase in settlements after the statutory changes that took effect in the early 1990s.⁵⁸

Another possibility that may offer some explanation is that attorneys bring employment discrimination cases based on less information than they might have for other kinds of claims. The investigative files of the EEOC are not available to plaintiffs, and in many cases, the attorney will only have the word of the plaintiff prior to filing a claim. Employers often do not provide reasons for their employment decisions, and even when reasons are given, the particular employee may not have access to the comparative information that would enable the attorney to accurately assess the merits of the claim. As a result, informational asymmetries may result in excessive filings because the attorneys may require discovery before being able to fully evaluate the case. These asymmetries may distinguish employment discrimination claims from other kinds of civil cases where witnesses or documents may be more readily available to the plaintiffs prior to discovery. However, if this were the case, there should be a higher number of voluntary dismissals among employment discrimination cases, and based on the data collected in Table One, there is no significant difference among the voluntary dismissal rates for the three categories of cases.

57. For example, according to the Administrative Office of the Courts data, the median jury award in an employment discrimination suit during 1997 was \$160,000.

58. The increased prospect of damages creates competing incentives for attorneys. Now that cases are worth more, employers may be more apt to spend money litigating them, which may also be true for plaintiffs' attorneys who are more willing to invest in the cases. Alternately, the higher damage possibility may also lead to more settlements as defendants may seek to limit their damages exposure. See Selmi, *supra* note 9, at 35-37.

Nevertheless, it does seem, for whatever reason, that there are a fair number—how many is much harder to say—of employment discrimination cases that should never have been filed, not only because they are weak cases factually but also because of their extraordinarily low chance of success. Indeed, the pretext-plus approach had its origin in a Seventh Circuit case that was premised on a misunderstanding of the concept of pretext, an argument that unfortunately prevailed at trial only to be reversed on appeal.⁵⁹ These cases almost always lead to harmful and restrictive interpretations and will almost never lead to a sustained judgment for the plaintiff. That said, I should also note that these cases do not appear sufficiently numerous to explain the overall low success rates for employment cases.

IV. OVERCOMING THE BIAS

Accepting that what I have defined as judicial bias helps explain the difficulty discrimination plaintiffs face in federal court, a question remains as to how one might try to overcome that bias. Unconscious or subtle bias is difficult to counter under any circumstance; indeed, Professor Amy Wax has recently argued that the difficulty employers have in alleviating subtle discrimination within their firms justifies great caution before deciding to impose liability for such discrimination.⁶⁰ There are, however, a number of tactics employers can implement to reduce the effect of subtle bias on the employment process, including instituting various monitoring devices or affirmative action as a way to counter the bias.⁶¹ Employers might adopt affirmative action programs as a way of overcoming the bias of their managers, and they might also adopt various review procedures to ensure that discrimination does not seep into the process at any stage. Yet, it is considerably more difficult to find ways to counter the bias held by courts.

In one sense, various monitoring devices are already in place: the availability of appellate review, the fact that appellate courts operate in panels, and the need for courts to justify their determinations through written decisions. These judicial practices may offer some restraint on bias, but these processes only provide limited restraint. Most cases are not appealed; many opinions are not published and, even when they are, judges are sufficiently adept at concealing their motives. This is one reason the composition of courts matters. Having judges who have experienced discrimination and understand its subtle operation is likely to influence the decisionmaking process.⁶² Courts have also occasionally sought to educate themselves

59. See *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) ("Because the district court confused mistake with 'pretext,' its decision may not stand.").

60. See Wax, *supra* note 24.

61. I have discussed some of these issues previously. See Michael Selmi, *Discrimination as Accident: Old Whine, New Bottle*, 74 Ind. L.J. 1233 (1999) (responding to Professor Wax), and Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. Rev. 1251 (1995).

62. This is obviously a broad statement for which there are many exceptions and caveats. However, some of the more interesting decisions on the subtlety of discrimination have been authored by Timothy Lewis, a Republican African-American appointee to the Third Circuit, who seems to bring a distinct perspective to his opinions. See, e.g., *Aman v. Cort Furniture*, 85 F.3d 1074, 1081-84 (3rd

in bias with task forces that publish reports regarding gender bias in the courts.⁶³ It is difficult to know whether these reports have had any effect, and too often such education projects end up preaching to the converted, given that in the area of antidiscrimination law ideological commitments seem to hold more sway than education or facts.

One example of how the facts seem to be largely irrelevant to influencing opinions arises from the recent spate of record-setting class action employment discrimination settlements. In the last five years major class action cases often resulting in settlements worth more than \$100 million have been filed and resolved against Texaco, Denny's, Coca-Cola, Shoney's, Publix Markets, and Mitsubishi, and yet, these cases have not been seen as an indication that discrimination remains a problem in the labor market. It is difficult to know what other lesson to draw from these cases. Surely the settlement amounts are too large to be considered nuisance settlements; yet, beyond the initial press stories, these cases have largely gone unnoticed.

This is, I think, part of a larger problem, which is that those who believe discrimination remains firmly entrenched in the labor market have largely failed to make a persuasive public case for their position. I must confess I am not sure why this is, but opinion polls continue to demonstrate that whites believe African Americans generally have an equal chance in life, and the polls likewise show a deep chasm between the beliefs of African Americans and whites on how far the nation has moved toward equality.⁶⁴ One possibility, though it is little more than that, is that the debate over affirmative action has largely displaced the debate over the persistence and cause of inequality in America. As I have noted previously, the debate over affirmative action early diverged from a link to past and present discrimination as the underlying justification to a focus on diversity, even though the strongest justification both as a matter of law and policy has always been as a remedy for past and present discrimination.⁶⁵ During the affirmative action debate, far too little attention has been paid to the continued persistence of discrimination as well as to deriving new ways to remedy some of the disparities that continue to define our racial divisions.

In addition to focusing too much attention on affirmative action, the proliferation of rights as an aspect of identity politics has likewise diluted the force of discrimination claims. The reach of both the ADA and the ADEA extends well beyond what our nation would likely agree warrants attention, and the judiciary has

Cir. 1996).

63. See, e.g., Todd D. Peterson, *Studying the Impact of Race and Ethnicity in the Federal Courts*, 64 Geo. Wash. L. Rev. 173 (1996).

64. See, e.g., Keith Reeves, *Voting Hopes or Fears? White Voters, Black Candidates and Racial Politics in America* 4 (1997) ("[A]n overwhelming majority of white Americans believe that blacks in fact have an equal chance to succeed in life."); see generally Jennifer L. Hochschild, *Facing Up to the American Dream* (1995) (discussing the many differences among whites and black on matters of race).

65. See Michael Selmi, *The Facts of Affirmative Action, Reviewing The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions*, 85 Va. L. Rev. 697, 738-39 (1999).

largely acted to bring the statutes within more acceptable limits, even though in their efforts the courts have invariably gone too far. It is difficult to know whether the ADEA would be interpreted more expansively if it only applied to persons fifty and over, or whether the *Sutton* line of cases might have come out differently if the ADA had been written more narrowly or concretely, but there is certainly the prospect that narrower or more focussed statutes would have produced different results. There may be a lesson here for legislative drafting or the influence of interest groups. Although the interest groups were quite effective in enacting the ADA and the ADEA—largely because of their power and the fact that these two areas represent politically unobjectionable legislative targets—they have been far less effective at influencing the judiciary, and their influence on the latter may have been greater had the statutes been drawn more narrowly.

This leads to two ways in which plaintiffs might be able to countermand judicial bias, at least to some limited extent. First, plaintiffs should present evidence to explain the nature of the discrimination at issue, and in presenting the evidence should generally assume the court is hostile to the claim. This may necessitate expert testimony on the nature of unconscious or subtle discrimination, which currently is used only rarely but which can be quite influential as a means of providing the necessary causation to establish a claim.⁶⁶ Even where evidence is not available, either because of its cost or admissibility, the plaintiff's attorney can likely explain the nature of discrimination rather than leaving the jury or the judge to make the links. This, of course, will not always be effective, and much of the judicial bias I have discussed is especially difficult to counter in that it is covert rather than open, and court decorum often precludes open confrontation with a judge, though occasionally some level of confrontation or awareness may be necessary.

Given the problems plaintiffs face, it is also incumbent upon their attorneys to engage in careful case selection and refrain from pursuing cases that have little chance of success. Even where those cases succeed in the lower court, they will still have a substantial chance of being reversed on appeal, and the difficulty of winning cases should also counsel in favor of settling cases wherever a reasonable settlement is within reach.

Courts can also enact their own prophylactic rules as a way of preventing their biases from influencing their decisionmaking process. This was why the Court's decision in *St. Mary's Honor Center v. Hicks* was so critical. The question at issue in *Hicks* was whether a finding of pretext should result in a mandatory or a permissive inference of discrimination. The Eighth Circuit Court of Appeals had chosen a mandatory inference, whereas the Supreme Court held that a permissive inference was the appropriate rule. While one can argue about which standard was

66. Expert testimony by social psychologist Susan Fiske was an essential part of the famous case of *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). More recently, testimony has been used to document how discrimination can be decoded from events where direct evidence is lacking. See Erin Teixeira, *The Subtle Clues of Racism*, Los Angeles Times, Jan. 11, 2001, at A-1 (describing testimony of David Wellman).

more or less consistent with past precedent,⁶⁷ a mandatory inference was clearly the most effective means of restraining discriminatory judicial impulses for a permissive inference allowed the trier of fact to exercise too much discretion—discretion that can be used to further bias—to determine whether discrimination provided the underlying explanation for the challenged decision. But it would take a more aware Court to impose such restrictions on the judiciary than we currently have, though it is conceivable that *Reeves* might tip the balance somewhat.

Yet, I believe it is not likely that *Reeves* will offer significant help to plaintiffs other than in a few isolated cases. Indeed, it appears that an unusually large number of courts are seizing on the statement in *Reeves* that in some cases proof of pretext may not be enough to prove discrimination as in when the ““plaintiff create[s] a weak issue of fact as to whether the employer’s reason was untrue and there [is] abundant and uncontroverted independent evidence that no discrimination has occurred.””⁶⁸ This helps illustrate the fact that doctrine is rarely sufficiently restraining to limit the bias of courts, and where the Supreme Court leaves room for discretion it invariably leaves room for bias. The hope is that some courts will read *Reeves* as reemphasizing that once the plaintiff provides sufficient evidence of pretext, the ultimate question of discrimination is then the province of the jury. But, as noted earlier, *Reeves* largely reiterated the Court’s decision in *Hicks*, which suggests that fulfilling that hope will require more than doctrinal tinkering, it will require a greater shift in attitudes, in particular with respect to the judiciary’s belief that discrimination remains a persistent part of contemporary life. Without such a belief, courts are likely to continue to treat employment discrimination cases as a docket nuisance rather than as vehicles for justice.

V. CONCLUSION

In this short essay, I hope to have demonstrated that employment discrimination cases are unusually difficult to win, contrary to the reigning perspective, and that the various biases courts bring to the cases deeply affect how courts analyze and decide

67. See Selmi, *supra* note 27, at 330 (discussing Court’s past precedent). I worked on an amicus brief in the *Hicks* case and in my research concluded that the Court’s doctrine was, in fact, ambiguous on the appropriate inference that should be drawn based on proof of pretext. As the Court noted in *Hicks*, the most significant case was probably the little-known and little-cited *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1983). But what was most clear based on the Court’s precedent is that “the Court had never paid close attention to the distinction between pretext and pretext for discrimination.” Selmi, *supra* note 27, at 330.

68. *Connell v. Consolidated Edison*, No. 98 Civ. 5717 (DC), 2000 U.S. Dist. LEXIS 11857, at *16 (S.D.N.Y. Aug. 16, 2000) (quoting *Reeves*); *Cumbow v. Exxon Corp.*, No. 97-2797 Section “T” (5), 2000 U.S. Dist. LEXIS 14153 (E.D. La. Sept. 20, 2000) (same); *Mercer v. City of Cedar Rapids*, 104 F. Supp.2d 1130, 1161 (N.D. Iowa 2000) (same). See also *Williams v. Dictaphone Corp.*, 112 F. Supp.2d 267, 281 (W.D.N.Y. 2000) (suggesting *Reeves* did not add anything to the doctrine); *Sacavage v. Jefferson Univ. Physicians*, No. 99-3870, 2000 U.S. Dist. LEXIS 9917 (E.D. Pa. July 17, 2000) (finding that *Reeves* did not alter pretext analysis). Professor Zimmer’s contribution to this symposium presents a far more comprehensive review of the existing case law and explores the latest cases more thoroughly. See Michael Zimmer, *The Slicing and Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 575 (2001).

cases. It is, of course, somewhat ironic that in 1964 when Title VII was passed, plaintiffs preferred bench to jury trials, but by 1991, the presumption was entirely reversed, as courts grew increasingly hostile to employment discrimination claims. Unfortunately, providing the right to a jury trial for all discrimination plaintiffs who bring claims of intentional discrimination has not removed that hostility. The good news is that some of the hostility can be occasionally reversed or remedied by a higher authority, as occurred in *Reeves*, while the bad news is that all too much remains, creating barriers to success that continue to render employment discrimination cases among the most difficult of all cases to win.

