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# Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence

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# PRAGMATISM OVER POLITICS: RECENT TRENDS IN LOWER COURT EMPLOYMENT DISCRIMINATION JURISPRUDENCE

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## INTRODUCTION

Employment discrimination plaintiffs have it rough in federal court today. Overtly discriminatory employment practices are largely a relic of the past, and direct evidence of discrimination is rarely available. While employment discrimination undoubtedly continues to some extent, the vestiges of Jim Crow have faded from view. The disappearance of the most obvious forms of discrimination has ushered in new challenges for employment discrimination plaintiffs. Plaintiffs today typically face the daunting prospect of ferreting out discrimination where, at least at first glance, none seemingly exists. In order to prevail, then, plaintiffs in most cases must expose as pretextual an employer's seemingly innocuous explanation for taking a contested adverse employment action. For their part, judges have been increasingly reluctant to wade into this he-said, she-said quagmire: Over the last twenty-five years, federal district and appellate judges have interposed a variety of substantive and procedural obstacles making it more difficult for plaintiffs to prevail in employment discrimination cases. Why they have done so is a matter of considerable debate.

Many scholars have argued that the judiciary's decreasing receptivity to employment discrimination claims is attributable either entirely or predominantly to the fact that the judiciary has become more ideologically conservative.<sup>1</sup> Proponents of this position note that the Republican Party has

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1. See, e.g., Michael J. Songer, Note, Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges, 11 MICH. J. RACE & L. 247, 272 (2005) ("The erosion of disparate impact doctrine is significantly attributable to conservative judges exploiting the ambiguous legal standards to decide cases in accordance with their ideological proclivities."); John V. White, *The Activist Insecurity and the Demise of Civil Rights Law*, 63 LA. L. REV. 785, 788 (2003) ("One easy explanation of the demise of civil rights law focuses on changes in the political temperament of judges in the federal judiciary since the election of President Reagan in 1980. This argument holds that conservative judges, hostile to civil rights, have simply undercut civil rights law. This is surely an accurate and compelling explanation. . . ." (internal footnotes omitted)); Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1028-29 (2002) (arguing that "overall the [Supreme] Court continues to be more conservative than Congress on civil rights, and applies statutory construction as a tool for combating Congress's civil rights agenda"); Michael A. Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 630-31 (2002) (claiming that "a very strong case has been (convincingly) made that the current conservative majority is hostile to antidiscrimination provisions and is engaged in an agenda to roll back civil rights"); Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Violence and Reconstruction*, 31 CUMB. L. REV. 523, 525, 526 (2001) (asserting the existence of a "twenty-year conservative assault on civil rights" and an "ongoing conservative legal political effort to dismantle civil rights [that is] being achieved piecemeal through the federal courts"); Stephen E. Gottlieb, *The Philosophical Gulf on the Rehnquist Court*, 29 RUTGERS L. J. 1, 7 (1997) (arguing that

won seven of the ten presidential elections since Title VII's inception, and therefore conclude that the judiciary's recent skepticism of employment discrimination claims is a function of the fact that the federal bench has become increasingly composed of persons who are, on the whole, inclined to take a dim view of employment discrimination claims. I seek to dispute that hypothesis as incomplete at best, and to offer a competing theory. Specifically, I argue (i) that employment discrimination jurisprudence is properly viewed not as a holistic entity, but rather as a series of circuit-specific creations; and (ii) that each circuit's employment discrimination jurisprudence is correlated with two factors, total workload per capita judge and employment discrimination filings per capita judge. At the very least, then, ends-oriented, ideological considerations are insufficient to explain the broader body of lower court employment discrimination jurisprudence over the past twenty-five years.

This Article has five parts. After considering empirical evidence, Part I concludes that judges' political ideology plays only a limited role in their decisionmaking. Part II identifies the increase in case filings over the last two decades as a likely non-ideological cause of the increased judicial skepticism towards claims of employment discrimination. This Part begins by examining aggregate trends in the district and appellate caseload, and then translates caseload into the more meaningful metric of workload. Part II concludes with a discussion of why employment discrimination claims are particularly taxing on the lower federal courts.

Part III identifies two factors that appear to be correlated with how

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the conservative agenda includes "reversing the advances of the Warren Court in the area of civil rights"); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1483 (1996) (arguing that the 1989 decisions "signaled a shift away from an aggressive policy to achieve racial and sexual equality"); William B. Rubenstein, *The Myth of Superiority*, 1999 CONSTITUTIONAL COMMENTARY 599, 599 ("[D]uring much of the succeeding two decades, the federal courts have been largely dominated by conservative Republican appointees."); Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 B.Y.U. L. REV. 1257, 1269 (1993) (arguing that a conservative Supreme Court's "restrictive reading" of civil rights law culminated in the "disastrous" decisions of the 1988 Term); Ann C. McGinley, *Credulous Courts and the Tortured Trilogist: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 203 (1993) ("Civil rights are under siege."); Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before A Hostile Federal Judiciary: Extracting Benefit from Peril*, 27 HARV. C.R.- C.L. L. REV. 555, 559 (1992) (arguing that Presidents Reagan and George H.W. Bush had created a federal bench "that is unsympathetic and often openly hostile" to civil rights and sexual orientation discrimination claims); Julie Mertus, [No title], 19 N.Y.U. REV. L. & SOC. CHANGE 135, 135 (1991/1992) ("[I]n civil rights cases today, a conservative and even hostile federal judiciary often has not played by the rules: judges have been unwilling or unable to listen to the facts. Many judges treat facts as mere distractions, acknowledging them only selectively to serve their own agendas."); Linda Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1, 3, 59 (1990) (noting the existence of a "controlling conservative coalition" on the Supreme Court in the late 1980s and characterizing the 1988 Term as a "tragedy" and "an unfortunate step backward" from the attainment of equal employment).

receptive a given circuit is towards claims of employment discrimination: Overall workload and the number of employment filings. This Part then examines the relative workload of the courts of appeals and the district courts within a given circuit, as well as the number of employment discrimination filings across the circuits. Part III concludes that there are vast differences between the circuits in terms of both of these factors.

Parts IV and V compare the various approaches that the circuits have taken to some of the issues that commonly arise in employment discrimination cases. Together, these parts conclude that a circuit's interpretation of relevant statutory and procedural provisions is correlated with its workload and the number of employment filings it handles, and demonstrate that, on balance, the circuits that have heavier workloads and greater numbers of employment discrimination filings have interpreted substantive law and procedural rules in a manner that is less receptive to employment discrimination claimants than have their counterparts in circuits with lower workloads and fewer employment discrimination filings. The Article concludes with a few brief observations about the significance of the recent volume of employment discrimination claims as well as the prospect of reform.

#### I. THE LIMITS OF POLITICAL AFFILIATION AS AN EXPLANATORY VARIABLE IN EMPLOYMENT DISCRIMINATION CASES

During its 1988 Term, the Supreme Court issued five decisions that sharply curtailed the ability of plaintiffs to prevail in their claims of employment discrimination.<sup>2</sup> These decisions collectively capped a decade-long repudiation of pro-plaintiff doctrine developed during the early days of Title VII.<sup>3</sup> First adopted in the 1960s and 1970s by Fourth and Fifth<sup>4</sup> Circuits, this so-called

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2. *See* *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989) (holding that the statute of limitations in cases challenging discriminatory seniority systems began to run when the seniority system was adopted or changed, not when the claimant was subjected to the seniority system or when the claimant suffered injury as a result of the system); *Martin v. Wilks*, 490 U.S. 755 (1989) (holding that parties who were not a party to an underlying action had no obligation to intervene to object to a consent decree and permitting such third parties to attack the agreement collaterally); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (holding that claims of discrimination under 42 U.S.C. § 1981 covered only discrimination in the making and enforcement of contracts, but not in the performance of contracts); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that a defendant could escape liability for discrimination in "mixed motive" cases if it could show that a discriminatory motive was not the "but for" cause of the adverse action suffered by the employee); *Wards Cove Packing v. Antonio*, 490 U.S. 642 (1989) (requiring that an employment practice that has a disparate impact on a protected group under Title VII be supported by a "legitimate business justification," rather than the more demanding test of "business necessity").

3. *See generally*, Alfred Blumrosen, *The Law Transmission System and the Southern Jurisprudence of Employment Discrimination*, 6 *INDUS. REL. L.J.* 313 (1984) [hereinafter Blumrosen, *Southern Jurisprudence*].

4. The Fifth Circuit refers to what are now the Fifth and Eleventh Circuits, which were

“southern jurisprudence” referred to courts’ practice of construing procedural rules—most notably summary judgment—liberally in employment discrimination cases to give plaintiffs a better chance to prevail.<sup>5</sup> In delivering the *coup de grace* to this line of cases, the Supreme Court implicitly made clear that it was no longer valid to presume that an adverse employment action resulted from unlawful discrimination.

Because several of these opinions were sharply divided along perceived conservative-liberal fault lines, many commentators concluded that these decisions were part of the federal judiciary’s larger ideologically-motivated campaign to roll back anti-discrimination laws (at least in the employment context).<sup>6</sup>

Congress’ reaction to the Supreme Court’s 1989 decisions was swift and decisive, and did nothing to dispel the notion that the battle over employment discrimination was political in nature. In the two years that followed, Congress twice passed bills to nullify the Supreme Court’s employment discrimination decisions.<sup>7</sup> The latter of these two bills—the Civil Rights Act of 1991—was signed into law by President George H.W. Bush. The political undertones of this interbranch tussle were not lost on observers: In each case, a slim majority of the Supreme Court, composed largely of justices appointed by Republican presidents, had issued in quick succession a spate of decisions uniformly unfavorable to employment discrimination plaintiffs over the dissent of the other four justices, most of whom were appointed by Democratic presidents. Thereafter, a Democratically-controlled Congress legislatively overruled these decisions, restoring various protections that the Supreme Court’s decisions had stripped away.

Given the political dynamics that appeared to be at work in this back and forth between a Republican-controlled Supreme Court and a Democratically-controlled Congress, it was a short analytical leap for many commentators to conclude that the federal judiciary’s increasing skepticism of employment discrimination claims was ideologically motivated. The argument has two parts: As a general matter, Democrats are liberals, and liberals are in favor of a broad construction of employment discrimination laws. Conversely, Republicans are conservatives, and conservatives generally favor a more

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divided by Congress on October 1, 1981.

5. While originally developed in the Fourth and old Fifth Circuits, many circuits outside the South quickly followed suit. See Blumrosen, *Southern Jurisprudence*, *supra* note 3, at 342 (noting that “judges in the other circuits seemed to defer informally to their counterparts in the south who had intimately experienced the relationship between racial prejudice and employment practices”).

6. See sources cited *supra*, note 1.

7. President George H.W. Bush vetoed Congress’ first attempt, calling the Civil Rights Act of 1990 a “quota bill.” However, Bush subsequently signed into law a substantially similar proposal a year later, the Civil Rights Act of 1991. Congress’ stated purpose of the 1991 amendments was to overturn the recent decisions of the Supreme Court, which Congress viewed as improperly diluting important protections guaranteed by Title VII.

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narrow or literal interpretation of employment discrimination laws. As the ratio of Republican to Democratic-appointed judges has risen in recent years, the judiciary as a whole has become increasingly skeptical of employment discrimination claims. Under this theory of “partisan entrenchment”:

When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate. They will serve for long periods of time because judges enjoy life tenure. . . . They are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution.<sup>8</sup>

This argument is premised on three assumptions, two of which are somewhat shaky. First, the argument presumes that, as a prerequisite for nomination, a judge must share, or at least be perceived to share, the ideology of the appointing president. Yet there are some examples where this was not the case. Dwight Eisenhower nominated William Brennan to the Supreme Court largely for political reasons, notwithstanding Eisenhower’s reservations about Brennan’s political ideology.<sup>9</sup> In other cases, a president may choose a nominee solely because of superior credentials, as was the case with Herbert Hoover’s nomination of Benjamin Cardozo to the federal bench.<sup>10</sup> Truth be told, however, Brennan, and Cardozo are exceptions to the rule. In the overwhelming majority of cases, presidents nominate judges whom they believe share their ideological views. This is unsurprising, because life-tenured judges (a president hopes) will continue to adhere to these mutually-shared values throughout their careers on the bench, thereby crafting by extension a legacy that will endure long beyond the president’s tenure in office.

The second assumption on which the political entrenchment argument is predicated is that all Democratic and Republican appointees are equally ideological, as that term is used here. This assumption is problematic. To begin with, the use of the political affiliation of the nominating president as a proxy for each judge’s ideology is undoubtedly crude, as many nominees of both parties undoubtedly have views that do not toe the party line, so to speak.<sup>11</sup> Moreover, the party line itself may change. That is, even to the extent that a judge’s views do conform to the political ideology of the nominating

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8. Jack M. Balkin & Stanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1067 (2001).

9. See Lee Epstein, et. al, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, Northwestern L. Rev. (forthcoming 2007) (noting that Eisenhower nominated the Catholic Brennan in an effort to curry favor with Catholic voters) (pages 12-13 from manuscript online from howappealing.com, Feb. 26, 2007).

10. See *id.* at 12-13 (noting that Herbert Hoover nominated Benjamin Cardozo to the Supreme Court “not because of his ideology, but because of his stellar credentials”).

11. See Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship: The Rules of Inference*, 69 Chi. L. Rev. 1 (2002) (criticizing as imprecise the use of party affiliation as a metric for a judge’s political ideology); Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 228 (1999) (observing that “not all Republicans share the same level of conservatism and not all Democrats share the same level of liberalism”).

president, the ideology of a given president may differ from other presidents from the same party.<sup>12</sup> For these reasons, it is not at all clear that the political affiliation of a judge is a reliable predictor of how that judge will vote in every case.

The third assumption is that a judge's ideology does not change over time. Many judges, when asked if their views had changed during their tenure on the bench in light of a perceived shift in his or her jurisprudence, insisted that it was others who had changed, not they.<sup>13</sup> Empirical evidence supports a different conclusion. In a recent study of the twenty-six justices who have served on the Supreme Court for ten or more terms since 1937, all but four exhibited some degree of ideological drift during their tenure. Nor is there any consistent pattern of change: Twelve justices became more liberal, seven became more conservative, and three moved "in more exotic ways."<sup>14</sup> At the appellate level, one commentator has similarly found empirical evidence of ideological drift, but has concluded that, on balance, judicial appointees of every president from John F. Kennedy to George W. Bush have become increasingly conservative over time.<sup>15</sup> For all of these reasons, any argument based on the partisan entrenchment of the judiciary must be taken with a grain of salt, if not a barrel.

These caveats aside, it cannot seriously be disputed that at some level, Democratic presidents do nominate more ideologically liberal judges than Republican presidents, and vice versa. And for all of the limits of political affiliation as a predictor of judicial ideology, it is not clear that any better litmus test exists. At the very least, then, political affiliation is an objective, observable metric that provides a useful starting point for our discussion.

Proponents of the political entrenchment theory argue that the judiciary has become increasingly hostile to employment claims as the judiciary has become increasingly populated by Republican appointees.<sup>16</sup> Although there is some evidence to support this theory, empirical research suggests that ideology is, at best, only a partial explanation for the change in the case law.

The evidence does reveal that the lower federal courts have indeed become

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12. See, e.g., SUNSTEIN, et al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* 123 (2006) ("As we have seen, some Republican presidents will appoint more conservative judges than others; and Clinton appointees are widely thought to be more conservative than Carter and Johnson appointees.").

13. See, e.g., Jan Crawford Greenburg interview with Justice John Paul Stevens, as reported at <http://www.confirmthem.com> (February 28, 2007). In response to Greenburg's question whether his views had remained consistent over his tenure on the Supreme Court, Justice Stevens insisted that he was still the same conservative that President Ford nominated in 1975, stating, "I don't really think I've changed [but] I think there have been a lot of changes in the Court."

14. See Lee Epstein, et. al, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, *Northwestern L. Rev.* (forthcoming 2007) (page 17)

15. See SUNSTEIN, et al., *Are Judges Political?*, *supra* note 12, at 121 (2006)

16. See articles cited *supra*, note 1.

more conservative, as measured by the ratio of Republican to Democratic appointees on the bench. In 1965, the year Title VII became effective, Democratic appointees accounted for slightly over 60% of the federal district and appellate judges.<sup>17</sup> That percentage increased over the next three years under President Johnson, who by the end of his administration had appointed a total of 41 appellate and 125 district judges during his five years in office.<sup>18</sup> The next twelve years were more or less a wash in terms of net appointments for either party, as the Republican gains under the Nixon<sup>19</sup> and Ford<sup>20</sup> administrations were negated (and then some) by explosive growth of the federal judiciary under President Carter, who appointed 56 appellate judges and 206 district court judges during his four years in office.<sup>21</sup> By the end of the twelve years of the Reagan and Bush I administrations, however, the Republicans controlled a solid majority of the judiciary. The growth of the Republican cohort was fueled largely by the Judgeships Act of 1990, which created 11 new appellate and 74 new district judgeships.<sup>22</sup> In his only term, President George H.W. Bush was able to appoint a total of 37 appellate judges and 150 district judges.<sup>23</sup> President Clinton appointed 61 judges to the appellate bench and 306 judges to the district court bench. After Clinton's eight years in office, the numerical conservative advantage had been eliminated altogether at the district court level and mostly at the appellate level: By 2001, Democratic presidential appointees accounted for over 50% of the judges in the federal district courts and 44% in the courts of appeals.<sup>24</sup> Although the current

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17. See History of the Federal Judiciary, available at <http://www.uscourts.gov/history/table1.pdf>. These percentages stated in this section are only approximations, as the Federal Judicial Center does not maintain historical data of the number of sitting federal judges by party affiliation. Thus, the percentages stated here reflect only total judicial appointments by president, and do not account for judges who have either assumed senior status or left the bench altogether.

18. See *id.*

19. The lower federal judiciary grew by 17% under Nixon, as Congress created 58 new district court judgeships and 12 new appellate judgeships. See Federal Judicial Center, Authorized Judgeships, available at, <http://www.uscourts.gov/history/tablek.pdf>. During his five years in office, President Nixon appointed 45 appellate judges and 182 district judges. See Federal Judicial Center, Judgeship Appointments by President, available at, <http://www.uscourts.gov/history/table1.pdf>.

20. Congress did not authorize any new judgeships during the Ford administration. President Ford appointed 12 appellate judges and 52 district court judges.

21. Congress authorized 152 new district judgeships and 25 new appellate judgeships during the Carter administration. See Federal Judicial Center, Authorized Judgeships, available at, <http://www.uscourts.gov/history/tablek.pdf>.

22. See Federal Judicial Center, Additional Authorized U.S. District Court Judgeships, available at, <http://www.uscourts.gov/history/tableh.pdf> and Federal Judicial Center, Additional Authorized U.S. Appellate Court Judgeships, available at, <http://www.uscourts.gov/history/tablec.pdf>.

23. See Federal Judicial Center, Judgeship Appointments by President, available at, <http://www.uscourts.gov/history/table1.pdf>.

24. Sheldon Goldman et al., *Make-Up of the Federal Bench*, 84 JUDICATURE 253, 253 (2001).

administration has appointed over 200 judges to the lower federal courts, most of these judges have not been on the bench for a sufficient length of time to influence the relevant body of case law very much. For our purposes then, President George W. Bush's appointees largely come too late to be part of any conservative attack on civil rights during any significant period of time this Article examines.

The end result of these past forty years is that, from a numerical standpoint, Republican appointees have indeed gained ground relative to Democratic appointees in the judiciary. Yet, the two parties have remained close to parity with each other at each level of the lower courts for most of this time. Empirically, then, it is hard to see how an assault on employment discrimination laws motivated solely or largely by ideological considerations could have succeeded given that there has been a roughly equal number of judges of an opposing ideology at every point in time.

This is not to say that political ideology has no role in judicial decisionmaking. Both anecdotal and empirical evidence suggests that it does. The much more difficult issue is to determine how much political ideology influences judicial outcomes. In this regard, two recent empirical studies are particularly noteworthy.

The most comprehensive study of the degree to which political ideology affects judicial decisionmaking is a meta-analysis by Daniel Pinello.<sup>25</sup> Pinello analyzed 60,861 instances in which judges either supported or rejected "civil rights and liberties" claims in cases between 1959 and 1998.<sup>26</sup> Pinello concluded that political ideology was responsible for 35% of the variance in judicial opinions in those cases.<sup>27</sup> While this number is concededly significant, it should be noted at the outset that the explanatory power of political affiliation is only marginally greater in employment discrimination cases than in cases generally: According to Pinello, political affiliation accounts for 27% of the variance in all federal cases, many of which present issues that have no political valence whatsoever.<sup>28</sup> Furthermore, assuming that judicial voting patterns in "civil rights and liberties cases" can be extended to the subset of employment discrimination cases, political affiliation does not appear to explain the variance in judicial voting patterns in almost two-thirds of the

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25. See generally Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-analysis*, 20 JUST. SYS. J. 219, 220-22 (1999) [hereinafter Pinello, *Judicial Ideology*].

26. *Id.* at 234. This does not mean that Pinello studied 60,861 discrete cases. Some of these cases he included in his studies are from courts of appeals, and a typical case before a three-judge panel might yield three different "votes," so to speak.

Pinello's meta-analysis includes both state and federal cases. Although Pinello does separate out federal and state cases, he does not separate out federal and state cases by category of cases. Rather, he aggregates state and federal cases and then segments by case type.

27. See *id.*

28. *Id.* at 235.

cases. As an empirical matter, the partisan entrenchment argument therefore seems at best incomplete, at least with respect to employment discrimination jurisprudence.

A recent empirical study by Cass Sunstein concludes that while political affiliation is somewhat of a predictor of how a judge will vote in employment discrimination cases, it is far from dispositive.<sup>29</sup> Sunstein's study is especially helpful, as it examines empirical data at a level of particularity that Pinello's does not. In particular, Sunstein's study parses employment discrimination claims into various subcategories, so that it is possible to differentiate claims of race discrimination from claims of sex discrimination from claims of disability discrimination, the results of which are shown in the figure below.<sup>30</sup>

**FIGURE 1: PERCENTAGE OF "LIBERAL" VOTES IN EMPLOYMENT DISCRIMINATION CASES BY PARTY AFFILIATION<sup>31</sup>**

	<b>Democratic Appointees</b>	<b>Republican Appointees</b>
Race Discrimination	43%	34%
Sex Discrimination	52%	35%
Disability Discrimination	43%	27%
<b>All Discrimination Cases</b>	47%	32%

Figure 1 suggests that, across the board, Democratic appointees are more likely to vote in favor of plaintiffs in employment discrimination cases than their Republican counterparts. Taking the weighted average of these figures, Figure 1 shows that Democratic appointees are likely to vote in favor of an employment discrimination plaintiff in just under half of all cases, while Republican judges do so in slightly less than one-third of cases. The difference

<sup>29</sup> See CASS SUNSTEIN, et al., *Are Judges Political?*, *supra* note 12, at 30-31, 35-36.

<sup>30</sup> Sunstein's study also provides limited evidence to show that neither Republican appointees nor Democratic appointees are fungible (i.e., that there are intra-party differences in voting patterns between nominees of different presidents). Sunstein's study shows that, across the board, Democratic appointees are more likely to vote in a pro-plaintiff manner than their Republican counterparts. The study also suggests that significant disparities exist between the appointees of a given president relative to appointees of many other Presidents, including Presidents of the same political party. At the same time, however, the limited sample size of judicial votes in employment discrimination cases makes it impossible to obtain statistically significant results regarding the extent to which there are intra-party differences in voting patterns. See SUNSTEIN, et al., *Are Judges Political?*, *supra* note 12, at 114-15.

<sup>31</sup> SUNSTEIN, et al., *Are Judges Political?*, *supra* note 12, at 20-21. In every category, Sunstein defines a "liberal" vote as one in which a judge voted to afford the plaintiff "any relief." See *id.* at 157-59 nn. 4, 9, 10, and 12.

between these two figures suggests that overall, a typical Democratic appointee is fifteen percent more likely to vote to grant an employment discrimination plaintiff relief than his or her Republican counterpart.

Yet there is reason to believe this bottom-line average is misleading. Although disability claims account for barely ten percent of discrimination lawsuits, they represent more than a third of the cases in Sunstein's employment discrimination survey.<sup>32</sup> In other words, disability cases are overrepresented by more than a factor of three. By contrast, race discrimination are substantially underrepresented. Race discrimination claims account for just 17% of cases in Sunstein's study, whereas they constitute roughly 35% to 40% of discrimination claims overall.<sup>33</sup> Given that the pro-plaintiff disparity in disability cases is almost twice that which Sunstein observes in race discrimination cases (16% versus 9%), there is reason to believe that the overall disparity figure overstates the degree to which Democratic and Republican appointees differ in discrimination cases.

It is somewhat unfair to quibble with overall figures, as Sunstein has divided the data into various component subcategories. In any event, there are other significant vulnerabilities in the data (many of which Sunstein is careful to acknowledge) which collectively caution against drawing overly sweeping conclusions based on his study. Perhaps the most significant methodological problem is Sunstein's exclusion of unpublished cases from his study. In this respect, Sunstein states that "[i]n some courts of appeals, unpublished opinions are widely believed to be simple and straightforward and not to involve difficult or complex issued of law."<sup>34</sup> He therefore concludes that, "[i]n such courts, it is harmless to ignore unpublished opinions simply because they are easy."<sup>35</sup> But this hardly follows; indeed, for both our purposes and his, this exclusion is anything but harmless.

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32. Compare Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 JOURNAL OF EMP. L. STUD. 429, 433-34 (2004) (noting that "barely one in nine employment discrimination cases arise under the ADA or the FMLA) with SUNSTEIN, et al., *Are Judges Political?*, *supra* note 12, at 157-59 nn. 4, 9, and 10 (sample size of 2,195 employment discrimination cases includes 751 disability discrimination cases).

<sup>33</sup> See <http://www.eeoc.gov/stats/charges.html> (tracking types of discrimination alleged in EEOC charges filed between 1997 and 2005, and identifying race discrimination as the most frequently asserted type of discrimination); see also Gina J. Chirichigno, *Crying Wolf? What We Can Learn From "Misconceptions" about Discrimination: A Transformational Approach to Anti-Discrimination Law*, 49 HOWARD L.J. 553, 558, n.158 (concluding, based on EEOC charge statistics between 1992 and 2004, that "racial discrimination is, or is perceived to be, the most common type of discrimination faced by modern employees," and observing that in 1992, 41% of all EEOC charges included allegations of race discrimination).

34. SUNSTEIN, et al., *Are Judges Political?*, *supra* note 12, at 18.

35. See *id.* See also Cass Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, — n.36 (2004) (expressing similar rationale for excluding non-published cases [CLR: add in quote]).

As Sunstein correctly suggests, courts of appeals are most likely to issue an unpublished opinion in cases where the applicable law is settled and straightforward. Employment discrimination is certainly one such area, as the substantive law as well as the relevant procedural standards involved have, with some notable exceptions, remained largely stable over the years. The great majority of discrimination cases turn not on any complex question of law, but instead on questions of fact—most frequently, why the employer took a particular course of action. It would therefore seem from this that, at least relative to other, more fluid areas of law, employment discrimination cases would be particularly amenable to resolution by unpublished opinion. Empirical evidence confirms this: One commentator has observed that “80 to 90 percent of employment discrimination cases filed in federal court do not produce a published opinion.”<sup>36</sup> Indeed, recent Westlaw searches confirm the underinclusiveness of Sunstein’s sample: More than a third of employment discrimination cases are resolved by unpublished opinions.<sup>37</sup> As one commentator has aptly put it, Sunstein’s methodology (at least with respect to employment discrimination cases) is akin to “studying the iceberg from its tip.”<sup>38</sup>

Given that Sunstein seeks to determine the extent to which political affiliation predicts judicial voting in employment discrimination cases, and to report how often ideology appears to be outcome determinative of judicial votes, it is difficult to overstate the significance of his excluding the “easy” cases from the calculus—i.e., those cases in which the applicable law is clear

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<sup>36</sup> Peter Siegelman & John J. Donohue, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC. R. 1133, 1133 (1990) [hereinafter *Studying the Iceberg*]. To be fair, many of the cases Siegelman and Donohue include in their survey generated no opinion at all, because they were settled prior to verdict. The search described in note 37, *infra*, attempts to account for this. Nonetheless, the fundamental point about selection bias remains. See *id.* at 1165 (concluding that “[i]n the context of employment discrimination litigation, the occupational distribution of plaintiffs, the kinds of discrimination being complained about, the laws allegedly being violated, **and the outcome of litigation all differ significantly between published and unpublished cases.**”) (emphasis added).

<sup>37</sup> A Westlaw search in the database of reported appellate cases for the terms “Title VII” and “African-American” or “black” /s discriminat! revealed 2,514 cases. The same search in the database of unreported appellate cases yielded 1,141 cases. A Westlaw search for “Title VII” and “sex discrimination” or “sexual harassment” yielded 3,681 reported appellate cases, and 1,866 unreported ones. Finally, a search for “Americans with Disabilities Act” /s discriminat! revealed 1,135 reported appellate decisions, and 1,036 unreported ones. Thus, these searches collectively revealed 7,330 reported appellate decisions, and 4,043 unreported ones. These figures likely overstate the total number of cases, as these categories are not mutually exclusive. Taking these figures as they are, though, Sunstein excluded 36% of appellate decisions dealing with discrimination.

<sup>38</sup> Peter Siegelman & John J. Donohue, *Studying the Iceberg From Its Tip*, *supra* note 36, at 1133.

and the application to the facts of the case in issue is straightforward.<sup>39</sup> Inasmuch as Sunstein's study purports to look at judicial voting patterns broadly, it makes little sense to focus exclusively on the subset of difficult cases in which disagreement is the most likely. To do so is like using the abortion issue as a barometer for how often Americans agree on public policy issues. Accordingly, there is substantial reason to believe that, at least in the employment discrimination context, Sunstein's results significantly exaggerate the extent to which judges' ideological differences explain their voting differences.

Second, Sunstein focuses only on decisions issued by federal appellate courts. Consequently, his study does not afford insight into the extent to which party affiliation is a predictor of judicial voting in any employment discrimination case resolved without a decision from a court of appeals. This exclusive focus on extremely late-stage litigation almost surely biased Sunstein's sample pool. Employers have a particularly strong incentive to settle discrimination claims, given the operative fee-shifting provisions. Assuming that employers are risk-averse, rational actors, they would want to settle meritorious claims (and perhaps some not-so-meritorious ones) as quickly as possible. While the cost-benefit analysis necessarily varies from employer to employer and claim to claim, the point here is simply that the exclusion of all discrimination claims that were resolved before trial, at trial, or post-trial while an appeal was pending, likely omits a great number of cases about which there would be broad agreement across ideological lines.<sup>40</sup>

Third, as Sunstein notes, insofar as one judge simply joins an opinion written by another, it is not necessarily correct to assume that the joining judge agreed with every aspect of the opinion. There are any number of reasons why a judge might not write separately even in cases in which the panel opinion did not truly reflect his or her views.<sup>41</sup> As Judge Richard Posner has observed, "In a three judge panel, provided that at least one judge has a strong opinion on the proper outcome of the case . . . the other judges, if not terribly interested in the case, may simply cast their vote with the 'opinionated' judge."<sup>42</sup> These so-

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<sup>39</sup> See *id.* at 1154 (concluding based on empirical study of employment discrimination cases that "the degree of complexity and novelty tends to be greater in published cases than in unpublished ones").

<sup>40</sup> Of course, one of the factors relevant to this balancing calculus is the expected litigation outcome. To the extent that an employer believes that they will prevail on appeal because of a favorable bench, this will affect the settlement dynamic. Dynamics aside, approximately 69% of employment discrimination cases do settle. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, *supra* note 32, at 440.

<sup>41</sup> A discussion of the myriad and complex motivations that impact appellate decisionmaking is beyond the scope of this Article. For an excellent and comprehensive discussion of the subject, see Virginia A. Hettinger et al., *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* 111 (2006).

<sup>42</sup> Richard A. Posner, *THE FEDERAL COURTS: CRISIS AND REFORM* 123 (1985).

called “collegial concurrences” reflect that to write separately, a judge’s disagreement with another panel member’s opinion must exceed some unquantifiable, individualized threshold unique to each judge.

Moreover, the authoring judge may modify his or her opinion to accommodate suggestions from other panel members, such that ultimate opinion reflects a compromise between its members, whether in reasoning, outcome, or both. The cost of speaking with one voice is that the final opinion may not fully reflect the views of any one judge, even the authoring judge. In such cases, the most that can be said about the panel opinion is that it is an approximation of each panel member’s views that each finds sufficiently palatable so that writing separately is unnecessary. For all of these reasons, one should be exceedingly cautious in drawing conclusions about the usefulness of political affiliation as predictor of judicial decisionmaking based on Sunstein’s study.<sup>43</sup>

All of these concerns aside, it cannot seriously be contended that a judge’s ideological orientation (for which political affiliation is a proxy) plays no role in his or her decisionmaking. At the same time, ideology appears to be only a weak predictor of the outcome in any given employment discrimination case. Methodological concerns notwithstanding, the average Democratic and Republican appointee in Sunstein’s study disagree, at most, in less than one out of five employment discrimination cases, and in some of the most common types of discrimination cases (i.e., race discrimination), they disagree less than ten percent of the time. This evidence of inter-party hegemony belies the argument that ideology can explain—either by itself or in substantial part—the reversal of fortune that employment discrimination plaintiffs have suffered in recent years in federal court.

This is not to say, however, that those who allege that the federal judiciary has become more unreceptive to claims of employment discrimination are wrong. On the whole, federal judges have indeed made it increasingly difficult for employment discrimination plaintiffs to prevail. Relative to plaintiffs in other civil cases, employment discrimination claimants fare worse at every phase of litigation. They win fewer cases both during pretrial<sup>44</sup> and at trial.<sup>45</sup>

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<sup>43</sup> In fairness to Sunstein, he does acknowledge the limited role that ideology plays in judicial decisionmaking. See Cass Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, — (2004) (“It would be possible to see our data as suggesting that most of the time, law is what matters, not ideology. Note here that even when party effects are significant, they are not overwhelmingly large. . . . More often than not, Republican and Democratic appointees agree with each other, even in the most controversial cases.”).

<sup>44</sup> Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 JOURNAL OF EMP. L. STUD. 429, 444 (2004) (noting that, between 1979 and 2001, employment discrimination plaintiffs obtained a favorable “pretrial adjudication” roughly three times less often than other civil plaintiffs)

<sup>45</sup> *Id.* at 442, 457 (observing that employment discrimination plaintiffs won 38% of jury trials and 19% of judge trials, compared to plaintiffs in other civil cases, who prevailed

And on appeal, they are relatively less successful in preserving favorable outcomes<sup>46</sup> and reversing unfavorable ones.<sup>47</sup> But these commentators are right for the wrong reason. As Parts II and III will show, this skepticism is largely non-ideological in nature—it has relatively less to do with any rightward drift in the political median of the judiciary than with judges’ need to get through all of the cases on their dockets, and, concomitantly, the extent to which employment discrimination cases stand in the way of this goal. In other words, how receptive a given court is to employment discrimination claims is correlated with two factors: (i) how busy a court is, as measured by its workload; and (ii) the number of employment discrimination cases a court hears.

## II. TOWARD A PRAGMATIC THEORY OF EMPLOYMENT DISCRIMINATION JURISPRUDENCE: AGGREGATE TRENDS IN WORKLOAD AND EMPLOYMENT DISCRIMINATION FILINGS

### A. *Aggregate Trends in District Court*

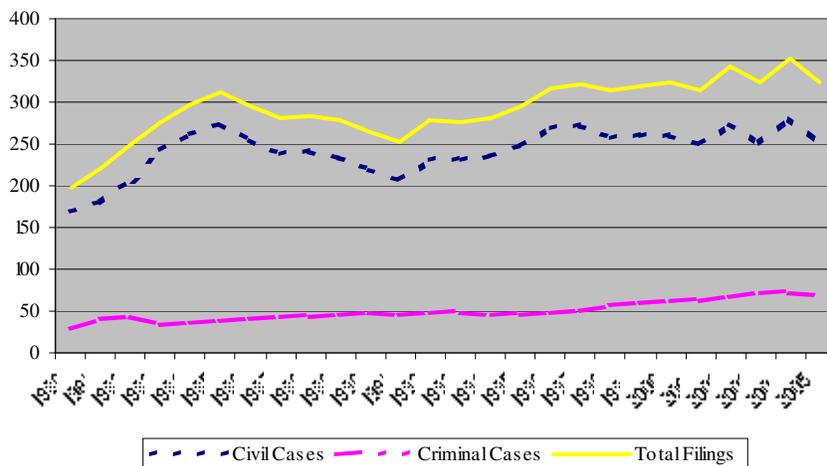
By any objective metric, judicial workload for the lower federal courts has increased substantially over the last twenty-five years. As Figure 2 indicates, the number of district court filings increased 64% between 1980 and 2005.

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in 46% of bench trials and 45% of jury trials).

46. *Id.* at 449-50 (noting that defendants appeal outcomes favoring plaintiffs 10% of the time, but obtain reversals in 43% of appeals).

47. *Id.* (noting that plaintiffs appeal outcomes favoring defendants 20% of the time, and obtain reversals in 10% of appeals).

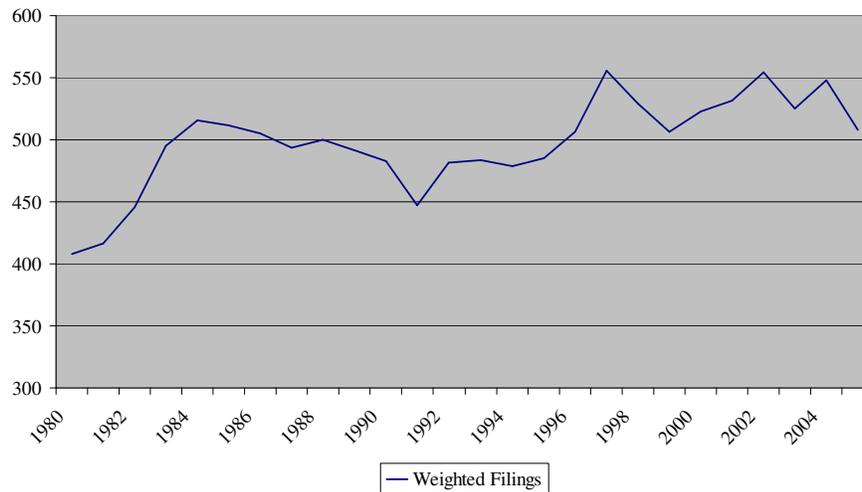
**FIGURE 2: DISTRICT COURT FILINGS, IN THOUSANDS, 1980-2005**

Source: Annual Director's Reports, Administrative Office of the United States Courts

Of course, caseload does not tell the whole story. Not only has the size of the federal judiciary grown over time, not all filings require equal amounts of time to resolve. Even taking these variables into account, however, the number of weighted filings per capita district judge<sup>48</sup> has risen 25% since 1980.

48. By estimating the complexity of various causes of actions, the Administrative Office assigns a "weight" to each claim corresponding to the expected amount of judicial effort required to resolve the claim. By doing so, the Administrative Office has calculated a weighted number of filings per judgeship. I have translated this data into per judge figures by factoring in judicial vacancies, i.e., the number of months during a given year that a judgeship was not occupied. So for instance, if a given district had 10 judgeships in a given year, and there was a total of 18 months of vacancies total, the net number of active judges for this year would be 8.5.

These statistics exclude criminal misdemeanor filings, and do not account for cases handled by senior judges, magistrate judges, or special masters. While senior judges do handle significant portions of the docket, the caseload varies widely from senior judge to senior judge. Some senior judges continue to carry a full caseload; others carry just 20 percent of their former caseload. What is more, senior judges have the opportunity to opt out of certain types of cases entirely, including employment discrimination cases. Because the available data does not account for these variables, I have excluded senior judges from the calculations to ensure an apples-to-apples comparison.

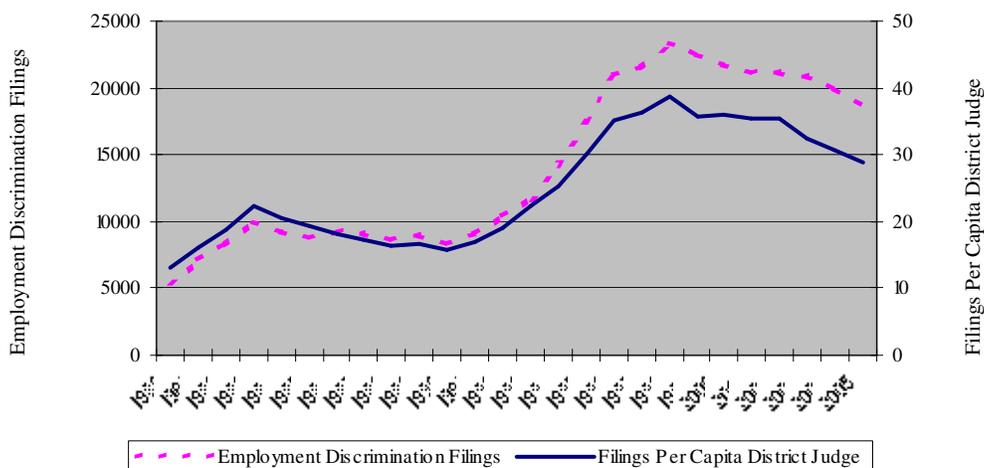
**FIGURE 3: WEIGHTED FILINGS PER DISTRICT JUDGE, 1980-2005**

Source: Federal Court Management Statistics

Employment discrimination filings<sup>49</sup> have substantially outpaced the increase in filings generally. Employment discrimination claims have grown in excess of 260% between 1980 and 2005, while filings overall have grown just 64%. In other words, employment discrimination filings have increased more than four times faster than filings generally in the last quarter century. As a result, the average federal district judge in 2005 heard more than twice as many employment discrimination cases than did his or her counterpart in 1980.

49. Unlike the data it maintains for the courts of appeals, the Administrative Office does not track the number of employment filings in district court either in the aggregate or by circuit. Rather, it maintains data only for “Civil Rights” filings for each district, which is broader than employment discrimination filings. In order to derive the latter from the former, I have multiplied the civil rights filings for a given district court by the overall nationwide ratio of employment discrimination filings to civil rights filings.

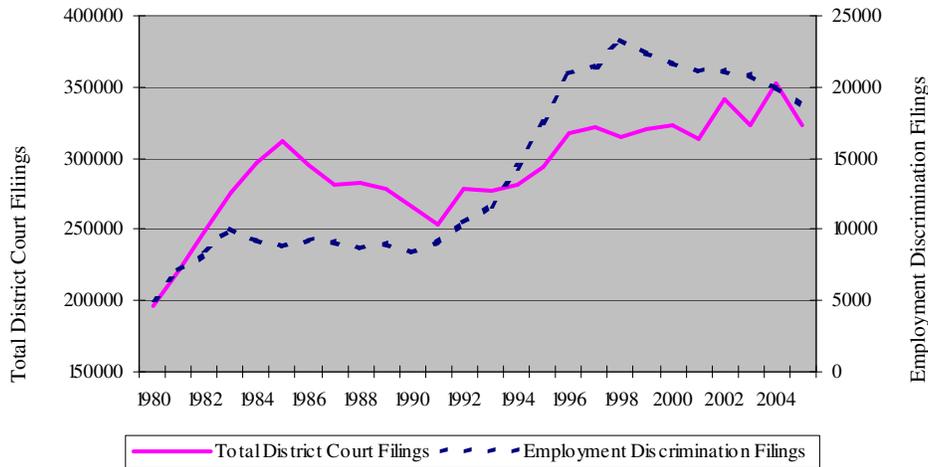
**FIGURE 4: TOTAL DISTRICT COURT EMPLOYMENT DISCRIMINATION FILINGS AND EMPLOYMENT DISCRIMINATION FILINGS PER CAPITA DISTRICT JUDGE, 1980-2005**



Source: Annual Director's Reports, Administrative Office of the United States Courts

These increases become all the more striking when one realizes that, in large measure, they have come since 1990. In the early 1980s, filings in federal district court increased sharply, owing primarily to three factors: (i) the rising number of diversity cases; (ii) Congress' 1984 amendment to the Social Security Act making it easier for claimants to obtain relief for back pain, arthritis, and mental illness; and (iii) the Reagan administration's aggressive pursuit of claims relating to overpayment of veterans' benefits and student loan defaults. By 1990, these gains had substantially dissipated. Diversity filings dropped after Congress raised the amount in controversy threshold from \$10,000 to \$50,000 in 1988, and President George H.W. Bush scaled back the Reagan administration's aggressive use of courts to recover overpayment of veterans' benefits and defaulted student loans. Although overall filing levels in 1990 were 35% higher than they had been a decade before, they dropped substantially between 1985 and 1990. By contrast, the growth in employment discrimination filings was markedly greater between 1980 and 1990, increasing 61%.

**FIGURE 5: TOTAL DISTRICT COURT FILINGS AND EMPLOYMENT DISCRIMINATION FILINGS, 1980-2005**



Source: Annual Director's Reports, Administrative Office of the United States Courts

The real action has come since 1990. Between 1990 and 2005, overall filings in district court increased by 22%. But over this same time, employment discrimination filings have skyrocketed by 125%. In other words, the growth in employment discrimination filings has outpaced the increase in filings generally almost six times over. This is no accident, of course, as Congress passed the Americans with Disabilities Act in 1990, Civil Rights Act of 1991 the following year, and the Family Medical Leave Act two years after that.<sup>50</sup>

As Figure 6 indicates, the growth in employment discrimination filings per capita judge between 1980 and 1990 mirrored that of the caseload overall—rising quickly during the early 1980s, but, by 1990 receding almost to the level of a decade before. In the fifteen years that followed, however, employment discrimination filings per capita judge rose sharply, more than doubling between in just six years, where they remained before tapering off slightly in the last few years.

<sup>50</sup>The impact of the ADA and the FMLA should not be overstated, however. See *infra* note 58.

**FIGURE 6: EMPLOYMENT DISCRIMINATION FILINGS PER DISTRICT JUDGE, 1980-2005**



Source: Annual Director's Reports, Administrative Office of the United States Courts

The upshot of this recent surge in employment discrimination filings is that, on average, a district judge in 2005 heard almost twice as many such cases than did a district judge in 1990.

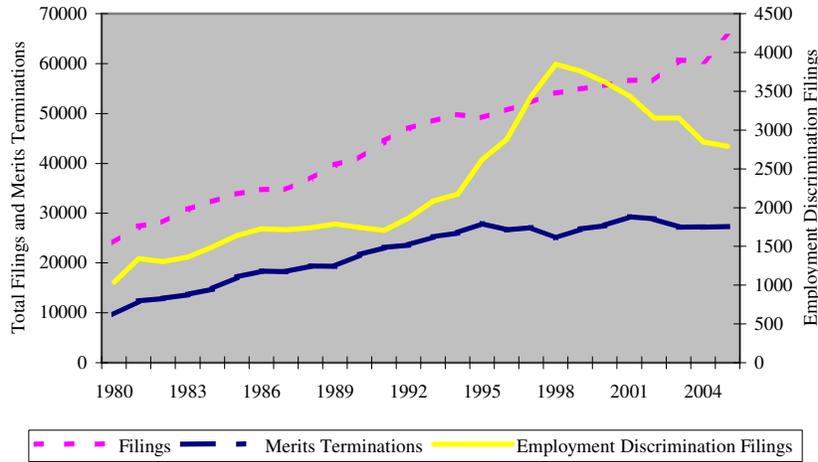
#### B. *Aggregate Trends in the Courts of Appeals*

The story is somewhat similar in the courts of appeals. Between 1980 and 2005, the number of appellate filings<sup>51</sup> grew by 195%, while merits terminations increased by 149%.<sup>52</sup> The growth in employment discrimination appeals lagged behind that of appellate filings overall, rising 169%.

51. "Appellate filings" and "merits terminations" are broader than "appeals" and "appeals terminated on the merits," respectively, as they include various motions, such as requests for rehearing, requests to proceed *in forma pauperis*, etc.

52. The Administrative Office distinguishes between merits and procedural terminations. The latter involve dispositions on jurisdictional grounds, settlement, or consolidation, among other things.

**FIGURE 7: APPELLATE FILINGS, MERITS TERMINATIONS, AND EMPLOYMENT DISCRIMINATION APPEALS, 1980-2005**

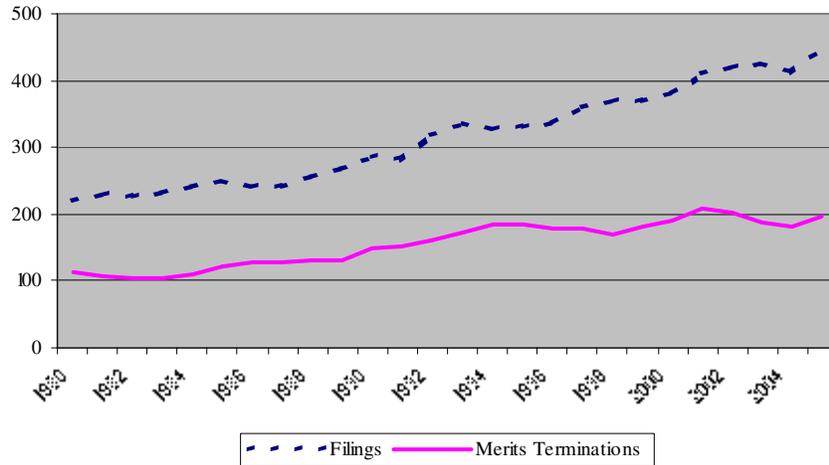


Source: Annual Director's Reports, Administrative Office of the United States Courts

As Figure 7 indicates, the raw growth in appellate filings generally and employment discrimination appeals in particular has been much more steady than the growth in district court filings. Figure 8 shows that between 1980 and 1990, overall appellate filings grew by 76%, while between 1990 and 2005 they grew 63%. Employment discrimination appeals rose by 68% between 1980 and 1990, and by 63% over the next fifteen years.

The trend is the same on a per capita judge basis. Between 1980 and 1990, filings and merits terminations per capita appellate judge both increased 30%. In the next fifteen years, appellate filings per capita judge grew 59%, while merits terminations per capita judge grew 28%.

**FIGURE 8: APPEALS FILED AND MERITS TERMINATIONS PER CAPITA APPELLATE JUDGE, 1980-2005<sup>53</sup>**



Source: Annual Director's Reports, Administrative Office of the United States Courts

A similar pattern of increase exists with respect to employment discrimination appeals.

Figure 9 illustrates that in 1980, an average appellate judge (not panel) was responsible for less than nine employment discrimination appeals. By 1990, that number had risen somewhat, to twelve. In the next decade, the number of employment discrimination appeals per capita judge more than doubled, before declining to the present level of eighteen appeals annually.

<sup>53</sup> For a discussion of the methodology used to arrive at the per capita judge figures, *see supra* note 48.

**FIGURE 9: EMPLOYMENT DISCRIMINATION APPEALS FILED PER CAPITA APPELLATE JUDGE, 1980-2005**



*C. The Particular Relevance of Employment Discrimination Claims to Judicial Workload*

At first glance, it is not apparent why employment discrimination cases should merit special attention, given that filings have risen across the board over the last twenty-five years. For all their growth, employment discrimination claims have always occupied a relatively modest share of the overall docket at both the district level, reaching a high water mark of around 10% in the late 1990s before declining slightly as of late.<sup>54</sup> Their share of the appellate caseload is even more modest, consistently hovering around 5%. Moreover, employment discrimination cases rarely present novel or difficult issues of law: In the vast majority of cases, courts apply well-settled precedent. So why should we care about employment discrimination cases as they pertain to judicial workload?

The short answer to this is that, in the aggregate, employment discrimination cases have become increasingly time-consuming to resolve. As noted previously, all but a very few employment discrimination claims today involve individual plaintiffs alleging disparate treatment.<sup>55</sup> The practices and

54. In 1980, employment discrimination cases accounted for 2.5% of all district court filings; by 2005, they accounted for 7% of total filings.

55. Never particularly common, disparate impact claims have become even more rare in recent years. See Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1205 (2000) (“Plaintiffs still bring the vast majority of Title VII cases under a disparate treatment theory, while disparate impact cases have become exceedingly rare.”); Ian Ayers & Peter Siegelman, *The Q-Word As Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 Tex. L. Rev.

patterns of discrimination that were both widespread and obvious in the 1960s and 1970s are now neither. As a result, class actions have largely disappeared; employment discrimination cases have become increasingly individualized, fact-specific inquiries.<sup>56</sup> Thus, to render a decision (either at trial or on an earlier dispositive motion), a judge must wade through a voluminous morass of tedious, conflicting evidence, frequently without the assistance of counsel.<sup>57</sup> Accordingly, the process of ferreting out the true motivation that underlay any given employment action has become more complex and time consuming even for the most astute judge. And, because class claims have all but disappeared from the legal landscape, the impact of one case on the next is likely to be nil. Having rolled the stone up the hill in one case, the Sisyphian task begins anew for the next.

The Civil Rights Act of 1991 greatly exacerbated the workload problem.<sup>58</sup> By authorizing prevailing plaintiffs to recover damages, Congress gave plaintiffs (and the attorneys that represent them on a contingent-fee basis) unprecedented incentive to file employment discrimination claims.<sup>59</sup> The result has been a perfect storm for district judges: Filings not only skyrocketed

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1487, 1494-95 (1996) (commenting on rarity of disparate impact litigation, and observing that just 294 disparate impact employment discrimination cases were filed in federal court between 1971 and 1995). *See also id.* at —, n.27 (discussing empirical methodology).

56. *See* John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination*, 43 STAN. L. REV. 983, 984, 989, 1019 (noting that “class actions have virtually vanished from the landscape of employment discrimination” and that requests for class certifications in employment discrimination cases declined 96% between 1975 and 1989); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 750-51 (2005) (“The great majority of employment discrimination suits in federal courts . . . are brought by individual plaintiffs asserting disparate treatment claims.”).

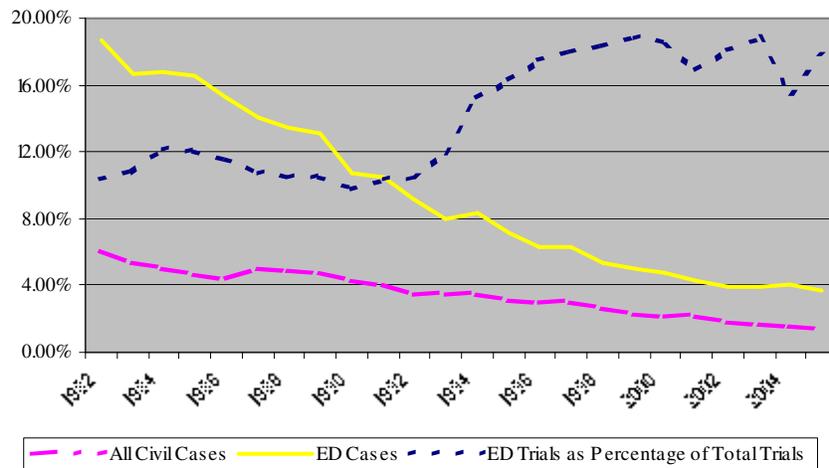
57. *Compare* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, *supra* note 32, at 434 (noting that historically 17% of employment discrimination cases were brought *pro se*) with 2005 Annual Director’s Report, Table S-24 (noting that less than 11% of non-prisoner filings in district court are *pro se*).

58. While Congress has also passed other employment discrimination statutes in recent years, including the Americans with Disabilities Act of 1990 and the Family Medical Leave Act of 1993, those statutes are, from a statistical standpoint, relatively insignificant in comparison to Title VII. *See* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, *supra* note 32, at 433-34 (noting that “barely one in nine employment discrimination cases arise under the ADA or the FMLA”). By contrast, Title VII accounts for almost 70% of all employment discrimination filings. *Id.* Accordingly, it is clear that Title VII has been and remains the bell cow of federal antidiscrimination laws.

<sup>59</sup> Following the 1991 amendments, prevailing plaintiffs in employment discrimination cases won almost triple the amount they had previously. *See* Clermont & Stewart J. Schwab, *supra* note 32 (median award to prevailing plaintiff “pre-1992” was \$25,000, while median award to prevailing plaintiff “post-1991” \$70,000). *See also* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 111 (2007) (concluding, based on empirical study of confidential settlements filed between 1999 and 2005, the mean recovery amount per employment discrimination plaintiff was \$54,651).

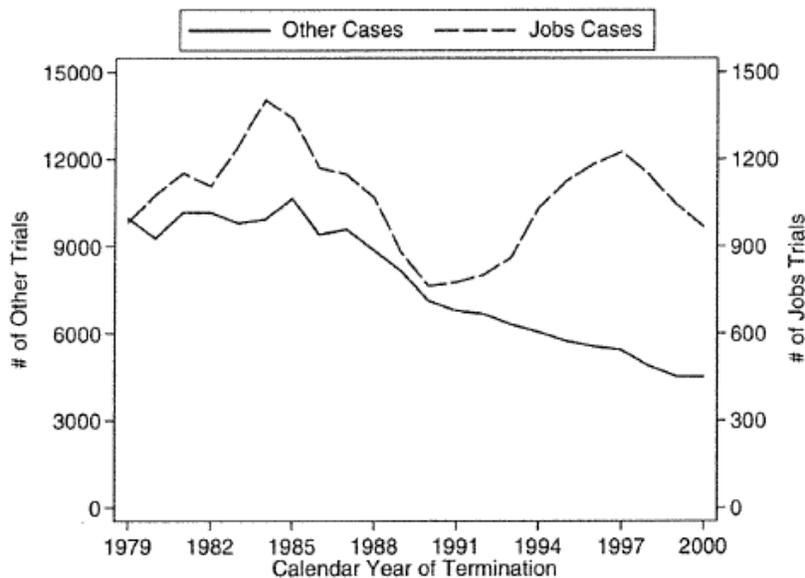
virtually overnight, but claimants began to request jury trials in the overwhelming majority of filings, which had never before been available under Title VII. Given that virtually every employment discrimination case turns on the resolution of disputed facts (typically who did what to whom and why), it is perhaps unsurprising that employment cases go disproportionately deep into the litigation process. As Figures 10 and 11 demonstrate, employment discrimination cases go to trial between two and three times more frequently than civil cases generally, and have accordingly assumed ever-increasing prominence on the trial docket due to the increase in discrimination filings.

**FIGURE 10: PERCENTAGE OF ALL CIVIL AND EMPLOYMENT DISCRIMINATION CASES RESULTING IN TRIALS AND EMPLOYMENT DISCRIMINATION TRIALS AS PERCENTAGE OF TOTAL TRIALS, 1982-2005**



Source: Annual Director's Reports, Administrative Office of the United States Courts. Data prior to 1982 is not available.

**FIGURE 11: NUMBER OF TRIALS IN EMPLOYMENT DISCRIMINATION AND OTHER CASES IN U.S. DISTRICT COURTS, 1979-2000**



Source: Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 JOURNAL OF EMP. L. STUD. 429, 435 (2004) (as reprinted).

Between 1979 and 2000, non-employment discrimination civil trials have declined more than 50%, while the number of employment discrimination trials has held firm. In 1979, employment discrimination claims accounted for less than ten percent of all trials; by 2000, they accounted for almost twenty percent.<sup>60</sup> Most of the action has taken place over the last 15 years: In the decade following the passage of the Civil Rights Act of 1991, the number of employment discrimination trials jumped 26%, while other civil trial declined by a roughly equivalent percentage. Indeed, no other statute or set of statutes has given rise to as many civil federal trials in recent years as have employment discrimination laws.

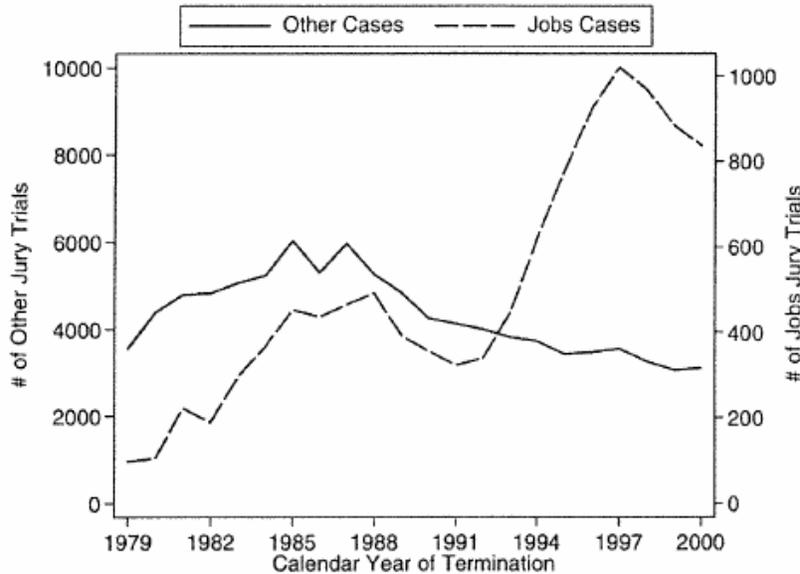
To say that employment cases go to trial does not tell the whole story; it is more accurate to say that they go to trial *before a jury*, because in the overwhelming majority of cases, at least one party (typically the plaintiff) requests a jury trial.<sup>61</sup> Figure 12 demonstrates that while other jury trials have

60. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, *supra* note 32, at 435 (noting that the ratio of other civil trials to employment discrimination trials fell from 10:1 in 1979 to 4.66:1 in 2000).

61. For instance, of the 692 employment discrimination cases that were litigated to

declined since 1990, the number of employment discrimination jury trials tripled in the decade following the 1991 amendments.

**FIGURE 12: NUMBER OF JURY TRIALS IN EMPLOYMENT DISCRIMINATION AND OTHER CASES IN U.S. DISTRICT COURTS, 1979-2000**



Source: Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 JOURNAL OF EMP. L. STUD. 429, 437 (2004) (as reprinted).

Jury trials are particularly taxing on district courts, largely because the finder of fact in a jury trial is composed of non-lawyers who are presumed not to know the applicable law or rules of evidence. To remedy these deficiencies, a judge must take any number of measures that would be unnecessary in a bench trial. Consequently, while an average bench trial takes a little over two days, jury trials typically last more than a week.<sup>62</sup> This is particularly significant given that employment discrimination cases go to trial more often than almost any other type of civil claim.

Employment discrimination cases are also disproportionately taxing on appellate courts. To begin with, employment discrimination verdicts are

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verdict in 2005, more than 85% were tried before a jury.

62. POSNER, CHALLENGE AND REFORM, *supra* note 42, at 193 (noting that the average federal jury trial lasts 5.19 days, while an average non-jury trial lasts only 2.19 days). This data is generalized for all trials; no data is available that is specific to employment discrimination cases.

appealed at a higher rate than other civil cases, regardless of whether the plaintiff or defendant won in district court.<sup>63</sup> The overwhelming majority of these appeals are filed by plaintiffs following an adverse pretrial ruling; most commonly a grant of summary judgment.<sup>64</sup> Given the plenary scope of appellate review, an appellate judge typically finds herself in the same position as did the district judge—scouring the record to determine if the plaintiff presented enough evidence to get to trial.

For all of these reasons, the modest share of lower court dockets occupied by employment discrimination cases would seem to understate substantially their impact on judicial workload.

### III. WORKLOAD AND EMPLOYMENT DISCRIMINATION FILINGS ACROSS THE CIRCUITS

The data makes clear that the lower federal courts have become increasingly busy over the past twenty five years, and particularly so since 1990. It is also clear that judges hear many more employment discrimination cases than they did just fifteen years ago, let alone twenty-five. Both the data and the academic literature support the theory that judges, straining to meet increasing demands on their time, have used whatever tools they have at their disposal to resolve matters as expeditiously as possible.<sup>65</sup> On the civil side, district judges have trended away from focusing on cases that were either approaching trial or were already in trial, and now “spend considerable effort on cases that terminate at early procedural stages.”<sup>66</sup>

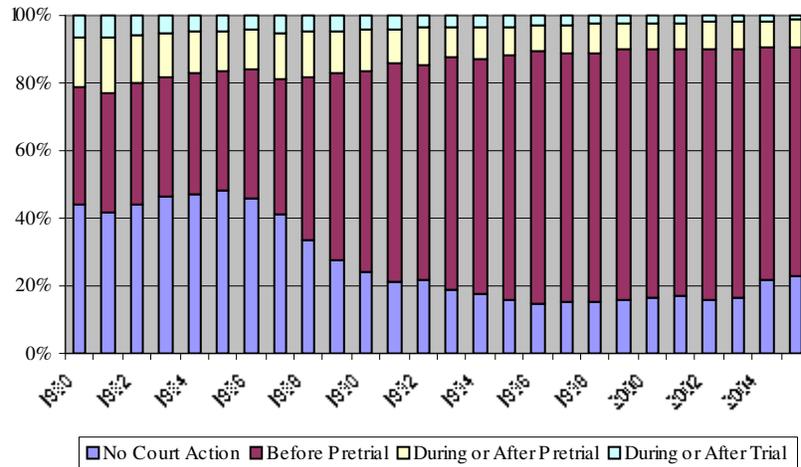
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63. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, *supra* note 32 at 448 (comparing historical appeal rates in employment discrimination cases to appeal rates in other civil cases).

64. See *id.* at 450 (noting that 77% (6,248 of 8,123) of appeals between 1988 and 2000 were filed by plaintiffs following a final adjudication at the pretrial stage).

65. See, e.g., Patrick E. Higginbotham, *Judge Robert A. Ainsworth, Jr. Memorial Lecture, Loyola University School of Law: So Why Do We Call Them Trial Courts?*, 55 S.M.U. L. REV. 1405, 1405, 1409 (2002) (observing sharp decline in trials despite the rise in the number of district court filings between 1960 and 2000).

66. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1265 (2005) (tracing the pattern of civil dispositions in federal district court over time).

**FIGURE 13: METHOD OF TERMINATION OF CIVIL CASES IN DISTRICT COURT, 1980-2005**

Source: Annual Director's Report, Administrative Office of the United States Courts

Several commentators have attributed this shift towards pretrial adjudication to the *Celotex-Liberty Lobby-Matsushita* trilogy, in which the Supreme Court “significantly expanded the applicability of summary judgment.”<sup>67</sup> Indeed, grants of summary judgment—which were until that time substantially less common than trials—now outnumber trials “several times” over.<sup>68</sup> Nor does this reflect a reallocation of judicial resources towards criminal trials. The number of criminal defendants going to trial dropped by almost half between 1985 and 2002,<sup>69</sup> as the amount of criminal proceedings terminated by plea bargains rose.<sup>70</sup> Consequently, as Figure 13 shows, the number of trials in federal court has dropped by more than 60% overall since 1985.<sup>71</sup>

67. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 118 (1990); see also John E. Kennedy, *Federal Summary Judgment*, 6 REV. LITIG. 227, 230 (1987) (stating that the trilogy “signal[s] a significant change in attitude toward grants of summary judgment”); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1334 (2005) (concluding that the trilogy “effectively made summary judgment more available than it otherwise would have been”).

68. Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1266 (2005).

69. *Id.* at 1264 n.28.

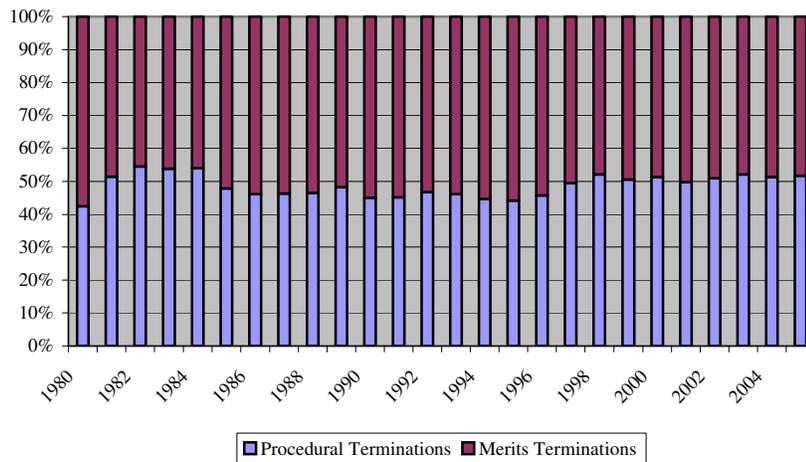
70. See GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH* 205-30 (2003) (noting rise in plea bargaining since advent of federal Sentencing Guidelines).

71. See also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 JOURNAL EMPIRICAL LEGAL STUD. 459, 461

The reason for these trends is simple—district judges simply do not have enough hours in the day to let a substantial percentage of their cases go deep into the litigation process.

The same is true at the appellate level. As Figures 14 and 15 show, procedural terminations<sup>72</sup> have risen both as a percentage of total appellate terminations, and in terms of the number of terminations per capita judge.

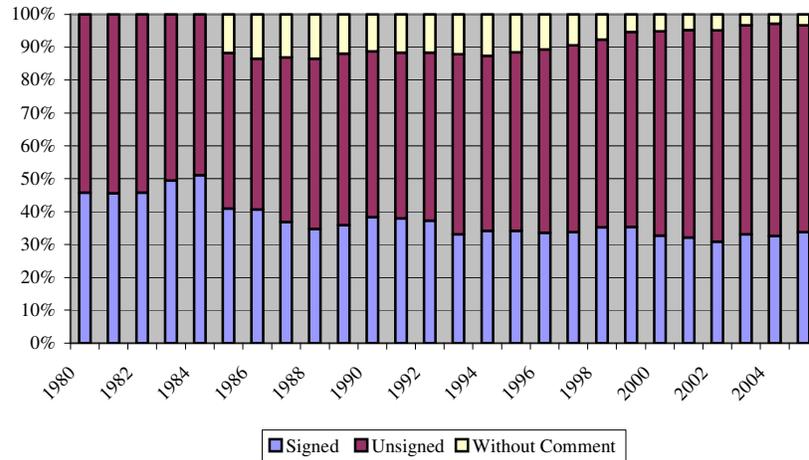
**FIGURE 14: NATURE OF DISPOSITION OF APPELLATE FILINGS, 1980-2005**



Source: Annual Director’s Report, Administrative Office of the United States Courts

(2004); Federal Court Management Statistics (stating that the number of trials per capita judgeship has dropped from 38 in 1980 to 19 in 2005). The figures reported by the Administrative Office do not include only trials in the conventional sense; rather, they also count any “contested proceeding in which evidence is introduced.”

72. This includes all non-merits terminations, including what the Administrative Office defines as “procedural terminations” and “consolidation or cross-appeals”.

**FIGURE 15: OPINIONS PER CAPITA APPELLATE JUDGE, BY TYPE, 1980-2005**

Source: Federal Court Management Statistics

Of those appeals that are decided on the merits, the sheer volume of the caseload has forced judges to employ memorandum dispositions with greater and greater frequency.<sup>73</sup> In 1981, just 11% of appellate merits decisions were unpublished; today, 82% of decisions are.<sup>74</sup> This is certainly due to the fact that judges are under substantially more pressure to churn out opinions: The number of opinions per capita judge has more than doubled between 1980 and 2005.<sup>75</sup> At both the district and the appellate level therefore, it seems likely that this trend towards efficient disposition reflects judges' collective efforts to manage increasingly unwieldy dockets.

73. See, e.g., Alex Kozinski & Stephen Reinhardt, *Please Don't Cite This!: Why We Don't Allow Citation to Unpublished Dispositions*, Cal. Law. 43, 43-44 (2000) (arguing that non-published opinions are essential to managing high judicial workloads); David C. Valdeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate Over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1667, 1668 (2005) (citing use of unpublished opinions as a way to meet "burgeoning caseloads"); Bruce H. Kobayashi, Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733, 742 (2004) (observing that "[h]igh caseloads have led appellate courts to economize court resources, which includes, for example, disposing of more appellate cases without publication").

74. Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 202-04 (2001) (tracing frequency of unpublished opinions over time); 2005 Annual Director's Report, Table S-3.

<sup>75</sup> In 1980, each judgeship issued 32 signed and 38 unsigned opinions, for a total of 70 opinions. When these figures are adjusted to a per active judge basis, the total number of opinions per capita judge rises slightly, to 76. In 2005, the average active appellate judge issued 52 signed opinions, 97 unsigned opinions, and 5 opinions "without comment," for a total of 154 opinions. All numbers are drawn from the Federal Court Management Statistics.

What this aggregate data obscures, however, is that workloads are not (and never have been) uniform across courts. The same is true of employment discrimination filings. To the contrary, there are substantial disparities with respect to both overall workloads as well as the number of employment discrimination filings, which, for the reasons previously stated, contribute disproportionately to a court's overall workload. Thus far, I have endeavored to show that the workload of the lower federal judiciary has increased substantially over the last twenty five years, and that employment discrimination claims, because of both their increased number as well as the nature of the analysis they require, are disproportionately responsible for this increased burden.

Because Congress has federalized an ever-increasing number of causes of action for employment discrimination, more and more people fall within at least one protected class. Compounding the workload problem is the perception among many plaintiffs that they can litigate their claim to judgment faster in federal court than in state court due to the delays in many state courts.<sup>76</sup> Although judges can rarely keep out plaintiffs who are determined to pursue their claim at any cost, federal judges can engage in "prophylactic jurisprudence" to dampen the incentive of plaintiffs who are more ambivalent, primarily by elevating the substantive and procedural thresholds that frequently arise in employment cases. As we will see in Parts IV and V, a circuit's permissiveness of employment claims appears strongly correlated with its workload and the number of employment cases it sees. Because the rise in employment claims is part and parcel of the overall workload, it seems plausible to expect less judicial receptiveness of employment discrimination claims in circuits where such claims are more common.

If my theory of prophylactic jurisprudence is correct, we would expect to see those judges in busier circuits adopting statutory and procedural interpretations that place greater burdens on plaintiffs relative to their counterparts in less burdened circuits. Moreover, this theory, if proven, would tend to undermine a purely ideological theory of judging, because there are circuits that are ideologically liberal as well as conservative (or at least perceived to be)<sup>77</sup> at the top and the bottom of the workload rankings.

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76. See, e.g., Jeffrey M. Hirsch, Can Congress Use its War Powers to Protect Military Employers From State Sovereign Immunity?, 34 SETON HALL L. REV. 999, 1042 (2004) (noting the perception that litigation in state court is more susceptible to delay than litigation in federal court).

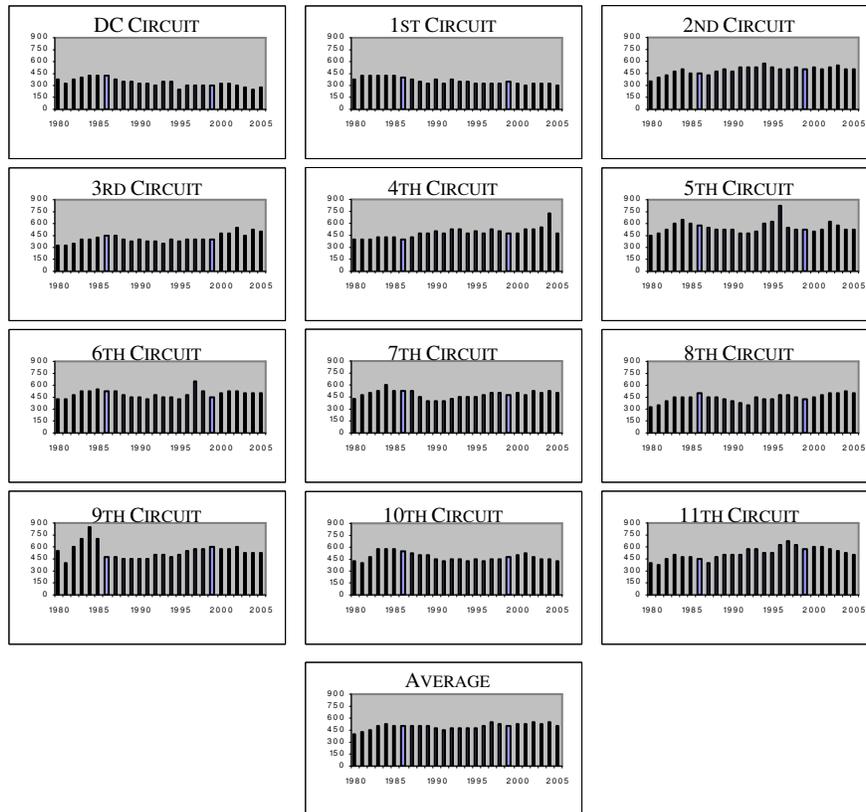
<sup>77</sup> It is worth noting at the outset that there is no consensus among commentators regarding which circuits are the most conservative. See, e.g., Thomas M. McDonnell, *The Death Penalty -- An Obstacle to the "War on Terrorism"?*, 37 VAND. J. TRANSNAT'L L. 353, 408 (2004) (asserting that the Fourth Circuit is "the most conservative and pro-prosecution of all the federal circuit courts of appeals"); David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1800 n.58 (2004) (characterizing the Fourth Circuit as "the most conservative court of appeals in the country"); Barry Tarlow, *RICO Report*, 28-NOV Champion 55, 57 (2004) (referring to the "notoriously conservative Fifth

A. *Relative Workload Across Circuits*

Figure 16 shows the workload borne by district judges in each circuit over time.

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Circuit”); Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205, 248 n.16 (2001) (asserting that the D.C. and the Eighth Circuits were “home to some of the country’s most conservative jurists”); Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 280 n.61 (2002) (opining that the Fifth and District of Columbia Circuits . . . are among the most conservative appellate courts in the country”); Carlos J. Cuevas, *The Consumer Credit Industry, The Consumer Bankruptcy System, Bankruptcy Code Section 707(B), And Justice: A Critical Analysis of The Consumer Bankruptcy System*, 103 COM. L.J. 359, 410 n.155 (1998) (asserting that the Fifth and Eleventh Circuits “are probably the most conservative circuits”); SUNSTEIN, et al., *Are Judges Political?*, supra note 12, at 110 (characterizing the Seventh, Eighth, and First Circuits to be the most conservative circuits (in that order), and the D.C. Circuit to be the third most liberal circuit). Given the apparent casualness with which many commentators have bestowed the label of “most conservative circuit,” this divergence of opinion is not surprising. In many cases, such assertions seem to signify nothing more than the author’s disagreement with one or more decisions of the circuit in question. Yet even those commentators who have performed statistical research and inter-circuit comparisons of judicial voting patterns have reached disparate results. Compare Cass Sunstein, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 307 (2004) (identifying the Fifth and Seventh Circuits as “the most conservative” circuits) with SUNSTEIN, et al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* 13, 110 (characterizing the Seventh, Eighth, and First Circuits to be the most conservative circuits (in that order), and the Fifth Circuit as the fifth most *liberal* circuit).

**FIGURE 16: WORKLOAD PER CAPITA DISTRICT JUDGE, BY CIRCUIT**

Source: Federal Court Management Statistics, Annual Director's Report, Administrative Office of the United States Courts

Although the relative rankings are not static over time, some general trends emerge from the data. District judges in the District of Columbia, First, and Third Circuits on average have a lighter workload than their counterparts in other circuits. Moreover, the workloads of the latter two have either stayed constant or declined in absolute terms. At the other extreme, the relative workloads of district judges in the Fifth, Ninth, and Eleventh Circuits have been consistently high and, in most years, increasing.

As previously noted, appellate workload data is hard to come by except in aggregate form. The best source for appellate workload is data compiled by Judge Posner. As of the mid-1990s, ordering the circuits from greatest to least by workload index yields the following ordering:

**FIGURE 17: WORKLOAD PER CAPITA CIRCUIT JUDGE, BY CIRCUIT<sup>78</sup>**

<b>Circuit</b>	<b>Workload</b>
11	483
5	426
2	367
9	337
6	299
4	291
7	287
1	286
3	278
8	277
10	228
DC	148

The data indicates that appellate judges in the First, Third, and District of Columbia Circuits, like their district court counterparts, have lighter workloads than judges on most other circuits. And, similar to district judges in their circuit, circuit judges in the Fifth and Eleventh Circuits have substantially greater workloads than do judges in other circuits.

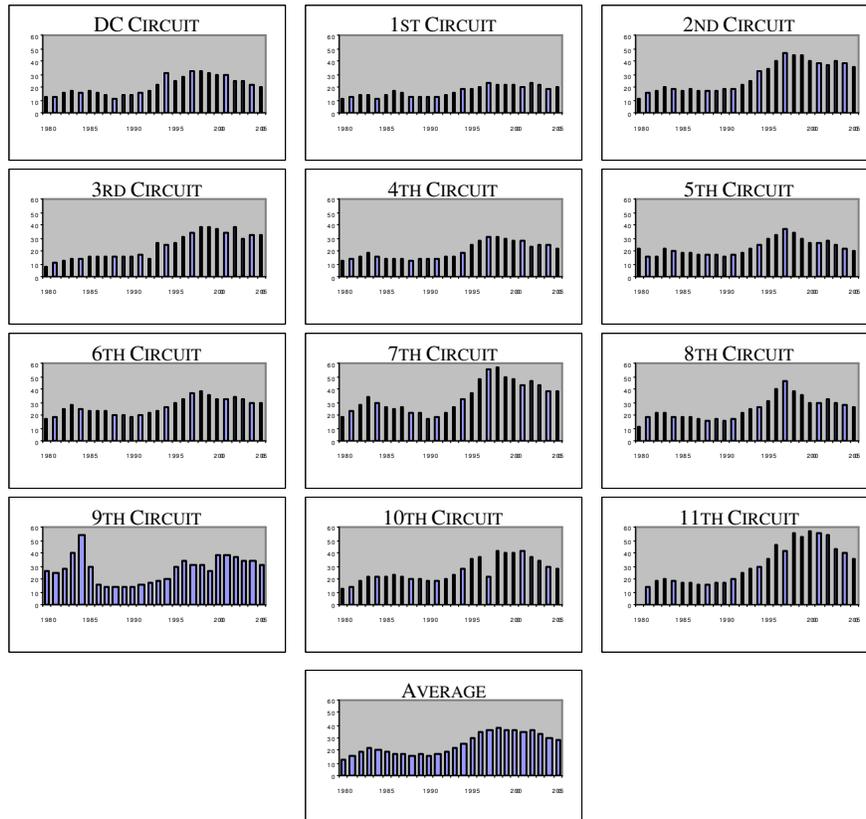
#### B. *Employment Filings Across Circuits*

Just as workloads are distributed unevenly across the circuits, so are employment discrimination filings.

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78. See POSNER, CHALLENGE AND REFORM, *supra* note 42, at 231-32. Judge Posner arrived at his workload rankings by comparing the active number of judges in each circuit with the weighted average difficulty of the cases handled judges within each circuit. It appears that Judge Posner has used a similar sort of weighted caseload methodology that the FJC uses to calculate district workload to create his relative workload index. Judge Posner considers the number of termination on the merits (as opposed to procedural terminations), as well as the number of total appeals filed that result in signed opinions. The result of all of this are the relative rankings of each circuit by workload shown above. It is not clear whether Judge Posner took into account judicial vacancies when calculating his workload data.

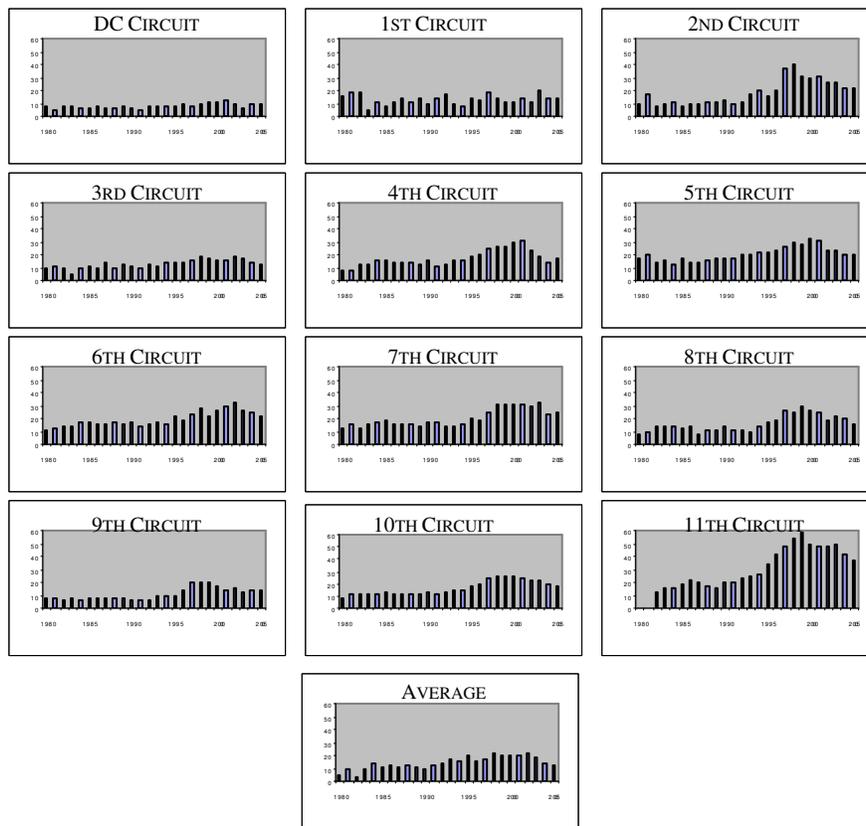
**FIGURE 18: EMPLOYMENT DISCRIMINATION FILINGS PER CAPITA DISTRICT JUDGE, BY CIRCUIT, 1980-2005**



Source: Federal Court Management Statistics, Annual Director's Report, Administrative Office of the United States Courts

Although district courts in virtually every circuit experienced a sharp increase in employment discrimination filings following the passage of the 1991 Civil Rights Act, Figure 18 shows that substantial disparities in discrimination filings remained. District courts in the First, Fourth, and District of Columbia Circuits encountered relatively few discrimination filings, while their counterparts in the Second, Seventh, and Eleventh Circuits saw their already-high number of discrimination cases almost double within a few years.

**FIGURE 19: EMPLOYMENT DISCRIMINATION FILINGS PER CAPITA APPELLATE JUDGE, BY CIRCUIT, 1980-2005**



Source: Federal Court Management Statistics, Annual Director's Report, Administrative Office of the United States Courts

With respect to employment discrimination appeals, there are two groups: The Eleventh Circuit, and everyone else. As Figure 19 shows, judges in the Eleventh Circuit have handled the greatest number of employment discrimination appeals of any circuit by a wide margin—two to five times the per capita amount of discrimination appeals handled by judges in the District of Columbia, First, Third, Ninth, and Tenth Circuits. After the Eleventh Circuit, the Second and Seventh Circuits have handled more discrimination appeals per capita judge than any other.

The significance of a high volume of employment discrimination filings is twofold. First, employment discrimination cases are relevant to workload inquiries because, for the reasons stated previously, they have the potential to

be particularly time consuming. Second, and perhaps of equal or greater importance, judges who see high volumes of employment discrimination claims are more likely to become jaded to such claims than judges who only occasionally hear them.

Several studies indicate that, whether due to increased enforcement of civil rights laws or wholesale attitudinal changes on the part of society or both, discrimination has in fact steadily decreased since the passage of Title VII.<sup>79</sup> Notwithstanding this progress, the volume of employment discrimination claims has skyrocketed in recent years, substantially outstripping the population growth over this period. Given these apparently contradictory trends, it stands to reason that even the most fair-minded judge will come to believe over time that, on balance, an ever-increasing percentage of discrimination claims lack merit.<sup>80</sup> The thrust of the theory is that judges become intellectually “numbed” by dealing with the same types of claims repeatedly, especially to the extent that judges question the claims’ validity generally.<sup>81</sup>

One such judge is Sam Pointer, who served for over thirty years as a

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79. See generally, Paul Burstein, *DISCRIMINATION, JOBS, AND POLITICS* (1985); HOWARD SCHUMAN, ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1985); Richard H. Sander, Individual Rights and Realities: The Problem of Fair Housing, 82 NW. U.L. REV. 874 (1988) (both noting the decline of racist beliefs over time); John J. Donohue, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337, 1338-41 (1989); Charlotte Decker Sutton & Kris K. Moore, *Executive Women-20 Years Later*, 1985 HARV. BUS. REV. 42, 48 (both noting the decline of sexism in the workplace over time).

<sup>80</sup> Numerous commentators have lamented that an increasing share of employment discrimination cases appear to be more about obtaining attorney’s fees than remedying discrimination. See, e.g., David Sherwyn, *Because it Takes Two: Why Post-Dispute Voluntary Arbitration Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, BERKELEY J. EMPL. & LABOR L. 1, 17 (2003) (contending that the current system for resolving discrimination claims provides perverse incentives for employees . . . [which results in] a system of litigation extortion that we euphemistically refer to as ‘de facto severance’); James Forman, Jr., *Victory by Surrender: The Voting Rights Amendments of 1982 and the Civil Rights Act of 1991*, YALE L. & PUB. POL. REV. 133, 156 (“[E]mployment discrimination litigation has become driven by the plaintiffs’ lawyers who are in turn driven by hopes of a large jury verdict, and a contingent fee coming into their pocket.”); Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J. LAW REFORM 137, 139-40 (2002) (“The ADA has turned disabilities into prized legal assets, something to be cultivated and flourished in courtrooms to receive financial windfalls. . . . [Consequently, ADA claimants] are cast as underserved, frivolous and motivated by their fee-driven attorneys.”).

<sup>81</sup> Another good example of this “victim fatigue” phenomenon can be found in the immigration context. See, e.g., “Immigration Judges Face Increased Scrutiny,” MIAMI HERALD (June 28, 2006) (“[Immigration] judges can become jaded and desensitized by the blur of tragic tales: rape, torture, murder. Everybody is saying to you, ‘My country is a horrible place.’ . . . There are judges who are sitting there day after day hearing those claims, and they get tired and burned out and they stop believing the stories.”) (internal quotations omitted).

federal district judge for the Northern District of Alabama. With the arguable exception of Frank Johnson, no judge has done more to eliminate racial discrimination in Alabama than Judge Pointer (who, it should be noted, was appointed by a Republican president).<sup>82</sup> Judge Pointer described the increasingly difficult task of differentiating legitimate claims from illegitimate ones this way:

The early cases involved systemic problems. It was obvious that large groups of individuals were clearly foreclosed from certain opportunities. In the 1980s and 1990s, I began to see more and more individual complaints, and it became difficult to determine the motivations of the decisionmakers. As an individual judge, I found it increasingly difficult to continue to deal with each new case fairly and impartially without taking into account the facts of the [previous cases] that I had seen, many of which I believed were illegitimate. Over time, a larger portion of [the employment discrimination claims I saw] were without merit, and my docket was overwhelmed with Title VII cases. [All of these factors were] considerations in my decision to leave the bench.<sup>83</sup>

It is hard to imagine more powerful evidence for the proposition that judges (even those, such as Judge Pointer, whose civil rights bona fides cannot seriously be disputed) can become jaded when they come to believe that the discrimination claims they encounter are increasingly meritless.<sup>84</sup> James Spencer, now-Chief Judge for the Eastern District of Virginia, expressed similar thoughts. A frustrated Judge Spencer fired this parting shot in an opinion granting an employer's motion for summary judgment in a Title VII lawsuit:

To the case brought before the Court this day, it is enough to say that the plaintiff's claims fail entirely, and that the case will be dismissed. To the genre of cases to which it belongs, however, there is something more. This case is yet another entrant in a tiresome parade of meritless discrimination cases. Again and again, the Court's resources are sapped by such matters, instigated by implacable parties and prosecuted with questionable judgment by their counsel. It is high time for this to stop. . . . Without sufficient

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82. Judge Pointer's ruling in *United States v. U.S. Steel* was the impetus for a consent decree between the steel industry and the government in which the Alabama steel industry agreed to a wholesale overhaul of its seniority systems, which had grossly disadvantaged African-Americans. See 371 F.Supp. 1045 (N.D. Ala. 1973). Judge Pointer also served as the trial judge in the case that would after consolidation become *Martin v. Wilks*, in which he ruled that white firefighters could not collaterally attack a consent decree entered into by the City of Birmingham to remedy past racial discrimination. *In re Birmingham Reverse Discrimination Employment Litigation*, 1985 WL 56690 (N.D. Ala. 1985).

83. Interview with Hon. Sam C. Pointer, March 22, 2004.

84. See POSNER, CHALLENGE AND REFORM, *supra* note 42, 182 ("When a class of suits is dominated by suits that lack merit, judges form an expectation, often unconsciously, that the next suit in the class will lack merit. This expectation will color their reaction to new suits. This expectation is . . . one of the factors in the increased willingness of district judges to grant summary judgment and to dismiss cases on the pleadings."); see generally, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (stating that cognitive bias and stereotypes are frequently unintentional and unconscious)..

evidence of discrimination, that is, an adverse employment decision made *because of* a protected characteristic (and not simply one that concerns a person exhibiting a protected characteristic), a case under Title VII must fail.

Personality conflicts are a fact of life, occurring in the work-place with the frequency of overly-demanding supervisors and crushed employee expectations. And yes, discrimination is also alive and well in America today. But one will not unearth invidious distinctions lurking beneath every act of discipline or every denial of advancement. Any attempt to argue otherwise trivializes the laws enacted to eradicate the bigotry that still blocks the path to individual achievement and inhibits our collective advancement.

It also fosters a culture of victims. This Court does not have the power to prevent the rain from falling into anyone's life, and is not about to intercede in every work-place squabble. Where, as here, the law offers no remedy, the responsibility for recovering from the occasional affronts of office life falls at the feet of the complainant. . . .

To those souls who still labor under the heavy hand of illegal workplace discrimination, the doors of this Court will remain ever open. The pretenders, though, must learn to wrest control of their own lives from deleterious circumstances without seeking recourse from the courts.<sup>85</sup>

For any number of reasons, many judges may choose not to be as forthright with their opinions about employment discrimination cases generally. To the extent this is the case, Judges Pointer and Spencer are only the vocal contingent of a larger, more reticent cohort of like-minded judges.

This is not to say, however, that judges who harbor such beliefs are necessarily conscious of their skepticism; presumably many may not be.<sup>86</sup> Consciousness of such views aside, to the extent that the views expressed by Judges Pointer and Spencer are commonly held,<sup>87</sup> and assuming that

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<sup>85</sup> Keegan v. Dalton, 899 F.Supp. 1503, 1514-15 (E.D. Va. 1995)

<sup>86</sup> See *supra*, note 83.

<sup>87</sup> There is reason to believe that Judges Pointer and Spencer are not alone in their skepticism of claims of discrimination. See *Tschappat v. Reich*, 957 F.Supp. 297 (D.D.C. 1997). Judge Stanley Sporkin stated:

This case shows once again the need to adjust our anti-discrimination laws. The evidence needed to make a prima facie case is much too low. It seems that almost anyone not selected for a job can maintain a court action. It is for this reason that the federal courts are flooded with employment cases. We are becoming personnel czars of virtually every one of this nation's public and private institutions. The drafters of the original legislation could never have intended the resulting consequences from what they deemed to be necessary, progressive legislation. It is obvious that amendatory legislation is required.

What is needed is a better screening mechanism as a pre-requisite for gaining access to this nation's federal court system. If an appropriate screening mechanism cannot be devised, then at a minimum a new Article I court should be created to hear this flood of cases. The point is some change is urgently needed.

discrimination is declining at an equal rate across jurisdictions, we would expect to see jurisdictions with more employment discrimination filings to be less receptive to claims of employment discrimination relative to those with lower volumes. It is to this that we now turn.

#### IV. MANIPULATION OF PROCEDURAL RULES

##### A. Heightened Pleading Standards Under Rule 8

Since the enactment of the Federal Rules of Civil Procedure in 1938, a complaint need only include “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>88</sup> Under Rule 8, simplicity and brevity are the order of the day. Notice pleading thus represents a sharp departure from the byzantine, hypertechnical pleading standards synonymous with both the Field Code and the common-law regime before it.

With the narrow exception of claims predicated on fraud or mistake,<sup>89</sup> a plaintiff may “sue now and discover later.”<sup>90</sup> The theory underlying Rule 8 is simple: The dual purposes of the complaint are (i) to put the opposing party on notice that they have been sued and (ii) to provide a general understanding of the nature of the claim(s) being asserted. Other details can be fleshed out later through the discovery process.

But old standards died hard. Many lower courts continued to require heightened pleading to a greater or lesser degree even after the enactment of Rule 8. The Supreme Court’s first look at pleading practice under Rule 8 came in 1957 in *Conley v. Gibson*.<sup>91</sup> *Conley* involved a class action lawsuit filed on behalf of African-American workers, alleging that their union had discriminated against them in violation of its duty of fair representation. The

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*Id.* at 299. See also Christine G. Cooper, *Where Are We Going With Gilmer?-Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 203 (1992) (quoting then-sitting District Judge James McMillan as stating, “There’s no form of litigation I would more gladly forego than employment discrimination suits.”); Roger J. Gregory, *The Use of After-Acquired Evidence in Employment Discrimination Cases: Should the Guilty Employer Go Free?*, 9 Lab. Law. 43, 68 (Winter, 1993) (commenting on “the changing views of federal judges concerning civil rights enforcement” and opining that “[m]any judges may feel that too many discrimination suits are brought and that too many lack a substantial evidentiary foundation”) (internal footnotes omitted); *Palucki v. Sears, Roebuck, & Co.*, 879 F.2d 1568, 1572 (7<sup>th</sup> Cir. 1989) (noting that plaintiffs use Title VII “more than occasionally” to seek “principles of job protection that do not yet exist in American law”); *Harris v. Marsh*, 679 F.Supp. 1204, 1383 n.272 (E.D.N.C. 1987) (noting that pro se plaintiffs often file “meritless” claims of employment discrimination).

88. Fed. R. Civ. P. 8.

89. See Fed. R. Civ. P. 9 (articulating heightened pleading standard).

90. *Elliott v. Perez*, 751 F.2d 1472, 1482-83 (5<sup>th</sup> Cir. 1985) (Higginbotham, J. concurring).

91. 355 U.S. 41 (1957)

union moved to dismiss the lawsuit, arguing that the complaint failed to set forth specific facts supporting the discrimination allegations pled in the complaint. The District Court granted the motion, and the dismissal was affirmed on appeal.

The Supreme Court reversed. The Court began by noting that a motion to dismiss filed pursuant to Rule 12(b)(6) “should not be granted . . . unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>92</sup> Nor, the Court held, did it matter that plaintiffs had failed to set out specific facts supporting each allegation of discrimination. To the union’s argument that the plaintiffs had failed to allege the facts that would support their claim, the Court responded that “[t]he decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”<sup>93</sup> Rather, “all that is required is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>94</sup> In the Court’s view, this “simplified notice pleading” was enabled by the “liberal opportunity for discovery and the other pretrial procedures established by the Rules” that would ensure that, in due course, the parties would have to exchange fully information pertaining to their claims and defenses.

Notwithstanding *Conley*’s unequivocal endorsement of notice pleading, in the years that followed, the circuits uniformly adopted heightened pleading requirements in cases arising under the Civil Rights Act of 1871,<sup>95</sup> chiefly cases arising under § 1983.<sup>96</sup> Several commentators have opined that this departure from notice pleading reflected judges’ collective belief that such suits were generally frivolous.<sup>97</sup> In 1993, the Supreme Court attempted to put a stop to this practice of heightened pleading in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, which involved a § 1983 lawsuit against a municipal entity.<sup>98</sup> A unanimous Supreme Court struck down the

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92. *Id.* at 45-46.

93. *Id.* at 47.

94. *Id.*

95. 42 U.S.C. §§ 1981 *et. seq.*

96. Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 297 (1989) (noting that by 1989, “every circuit ha[d] articulated a requirement of particularity in pleading for civil rights complaints”) (internal quotations omitted).

97. *See, e.g.*, Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 995 (2003) (arguing that “judicial concern over the rise in frivolous civil rights litigation led the federal courts to require heightened pleading”); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, *supra* note 95, at — (also citing skepticism of meritless claims as impetus for judicial adoption of heightened pleading standard).

98. 507 U.S. 163 (1993)

Fifth Circuit's requirement that so-called *Monell* actions<sup>99</sup> be pled with factual specificity. Citing both Rule 8 and its prior decision in *Conley*, the Supreme Court again reminded lower courts that heightened pleading requirements were inconsistent with the text of Rule 8 as well as the policy aims that underlay it.<sup>100</sup> The Court was not without sympathy for judges' need to dispose expeditiously of frivolous cases, but observed that heightened pleading was not the proper method to cull dead weight from the docket. "In the absence [of a Congressional amendment to Rule 8]," the Supreme Court noted that "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."<sup>101</sup>

Although heightened pleading requirements persisted to some degree in other substantive areas following *Leatherman*,<sup>102</sup> the circuits, with one exception, faithfully applied Rule 8 in the employment discrimination context. The sole holdout was the Second Circuit. Unlike the D.C.,<sup>103</sup> Third,<sup>104</sup> Fourth,<sup>105</sup> Seventh,<sup>106</sup> Eighth,<sup>107</sup> and Ninth<sup>108</sup> Circuits, all of which rejected a heightened pleading standard in employment discrimination cases following *Leatherman*, the Second Circuit required the plaintiff proceeding under the *McDonnell Douglas* framework to plead each of the requisite four elements to

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99. *Monell* actions refer to the species of § 1983 litigation in which a municipality is a defendant, after *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).

100. 507 U.S. at 168 ("We think that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules.").

101. 507 U.S. at 168-69.

102. See Christopher M. Fairman, *The Myth of Notice Pleading*, *supra* note 96, at 995 (canvassing resilience of heightened pleading in numerous substantive areas post-*Leatherman*).

103. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000) ("Sparrow did not have to make out a prima facie case of discrimination in his complaint").

104. *Weston v. Pennsylvania*, 251 F.3d 420, 423 (3d Cir. 2001) (reversing in part district court's dismissal of complaint pursuant to 12(b)(6) motion "in light of the liberal notice pleading requirements").

105. *Onuoha v. Grafton School, Inc.*, 182 F.Supp.2d 473 (D. Md. 2002) (declining to dismiss "inartfully" drafted complaint alleging a hostile work environment because it was sufficient to give the defendant "a fair idea of the basis of [p]laintiff's complaint"); *Oladokun v. Grafton School, Inc.*, 182 F.Supp.2d 483, 491 (D. Md. 2002) (same).

106. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7<sup>th</sup> Cir. 1998) ("I was turned down for a job because of my race" is all a complaint has to say.).

107. *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 926 (8<sup>th</sup> Cir. 1993) ("[T]he prima facie case . . . analysis is an evidentiary standard—it defines the question of *proof* plaintiff must present to create a rebuttable presumption of discrimination . . . . Under the Federal Rules of Civil Procedure, an evidentiary standard is not a proper measure of whether a complaint fails to state a claim") (emphasis in original).

108. *Ortez v. Washington County*, 88 F.3d 804, 808 (9<sup>th</sup> Cir. 1996) ("A plaintiff need not make a prima facie showing to survive a motion to dismiss provided he otherwise sets forth a short and plain statement of his claim showing he is entitled to relief.").

survive a 12(b)(6) motion.<sup>109</sup>

The Supreme Court granted certiorari in *Swierkiewicz v. Sorema, N.A.*<sup>110</sup> to resolve this conflict, and unanimously reversed the Second Circuit. Just as it had in *Conley* and *Leatherman*, the Supreme Court began by noting that Rule 8 meant what it said: All that the rule required, the Supreme Court held, was “‘a short and plain statement of the claim showing that the pleader is entitled to relief.’”<sup>111</sup> And, perhaps in an effort to clear up any vestige of doubt that may have remained after *Conley* and *Leatherman*, the Court stated that Rule 8’s “simplified pleading standard” governed “all civil actions,” with the exception of those causes of action—and only those causes of action—specifically enumerated in Rule 9.<sup>112</sup> Citing *Leatherman*, the Court again signaled that summary judgment, not a motion to dismiss, was the appropriate procedural vehicle to dispose of meritless complaints.<sup>113</sup>

With scattered exceptions,<sup>114</sup> the Second Circuit has generally fallen into line with the other circuits regarding notice pleading in the employment discrimination context following *Swierkiewicz*.<sup>115</sup> Commentators have expressed amazement at lower courts’ defiance of the Supreme Court’s repeated admonitions that heightened pleading is inconsistent the text and purpose of Rule 8.<sup>116</sup> Strictly from a jurisprudential standpoint, this

109. *Swierkiewicz v. Sorema, N.A.*, 5 Fed. Appx. 63 (2d Cir. 2001) (affirming dismissal of complaint for failure to state a claim); *Austin v. Ford Models, Inc.*, 149 F.3d 148 (2d Cir. 1998) (applying heightened pleading standard to employment discrimination claims).

110. 534 U.S. 506 (2002)

111. *Id.* at 512 (quoting Fed. R. Civ. P. 8).

112. *Id.* at 513 (“Just as Rule 9(b) makes no mention of municipal liability under . . . § 1983, neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).”).

113. *Id.* at 512-13. (“The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.”).

114. *See, e.g., Madera v. Metropolitan Life Ins. Co.*, 2002 WL 1453827 (—) (requiring, post-*Swierkiewicz*, that a complaint “detail the events alleged to be adverse”); *Marshall v. Nat’l Ass’n of Letter Carriers Branch 36*, 2003 WL 223563, \*8 (S.D.N.Y. 2003) (“While [p]laintiff alleges that he is Black, describes Defendant’s actions, and asserts that he was subject to harassment in connection with the 1995 notice of suspension incident, [p]laintiff fails to tie the alleged discrimination surrounding the notice of suspension to his race. Nowhere in the complaint does [p]laintiff allege that this discipline was a result of discrimination against him on the basis of race. Plaintiff’s complaint therefore does not allege sufficient facts to give rise to an inference of discrimination.”).

115. *See, e.g., Burch v. Beth Israel Med. Ctr.*, 2003 WL 253177, \*5 (S.D.N.Y. 2003) (holding that ADA claim alleging that “I was not accommodated for this position” could survive a motion to dismiss); *Jowers v. DME Interactive Holdings, Inc.*, 2003 WL 230739, \*4 (S.D.N.Y.) (S.D.N.Y. 2003) (denying motion to dismiss in light of lower pleading standard set out in *Swierkiewicz*).

116. *See, e.g., Christopher M. Fairman, The Myth of Notice Pleading, supra* note 96, at 1031 n.276 (“The resistance to notice pleading by some circuits—even in the face of

intransigence is surely amazing, given the clarity and the unanimity of *Conley* and its progeny. Viewed pragmatically, however, the Second Circuit's heightened pleading requirement is anything but amazing, at least insofar as employment discrimination claims are concerned. Figures 17 and 19 show that in the years leading up to *Swierkiewicz*, judges in the Second Circuit not only had some of the highest workloads, but also some of the highest employment discrimination filings per capita judge—a combination rivaled by few other circuits during that period. It is therefore unsurprising to see the Second Circuit— notwithstanding its liberal reputation—construing Rule 8 to require more in the employment discrimination context relative to many of its more conservative, less burdened brethren elsewhere.<sup>117</sup>

### B. *Relaxed Standards for Summary Judgment*

Prior to the *Celotex* trilogy, grants of summary judgment were rare, particularly so in employment discrimination cases. Since then, however, summary judgment has become much more common across the board, and employment discrimination cases are no exception to this trend. Both before and after the trilogy, however, most discrimination cases turn on disputed questions of intent—why the employer took the action it did. Because these are factual determinations properly reserved for the factfinder, numerous commentators have decried judges' increasing use of summary judgment in the discrimination context.<sup>118</sup>

Whatever the merits of these criticisms, many judges have either strongly implied or stated outright their belief that summary judgment is a valuable procedural device that allows them to winnow marginal cases from the docket. The Seventh Circuit has repeatedly eschewed a literal application of the summary judgment standard in discrimination cases, instead applying a more pragmatic interpretation of Rule 56 whereby a summary judgment will obtain

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Supreme Court authority is amazing.”); *see also id.* at 995 (“Given *Conley*'s clear endorsement of notice pleading, it is surprising that the Court was forced to return to the question.”).

<sup>117</sup> Last Term in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the Supreme Court held that an allegation of a Sherman Act conspiracy that was devoid of specific factual allegations that would establish such an agreement could not survive a motion to dismiss. While it remains an open question whether *Twombly* will be limited to the antitrust context, or will have a broader impact on pleading requirements in other areas, it is virtually certain that *Twombly* will have no impact on pleading standards in employment discrimination cases in view of the effort the majority opinion made to distinguish *Twombly* from *Swierkiewicz*. *See id.* at —.

<sup>118</sup> Numerous commentators have criticized the increased use of summary judgment in employment discrimination cases. *See, e.g.,* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993); Michael J. Zimmer, *Slicing and Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561-69 (2001).

when, in the court's opinion, the plaintiff does not have "a reasonable possibility" of winning at trial,<sup>119</sup> or in which the plaintiff failed to bring disputed facts to the district judge's attention.<sup>120</sup> The Seventh Circuit has made no secret of the fact that its application of a "summary judgment plus" standard in the discrimination context stems from its view that a great number of discrimination claims are frivolous, and allowing them to go to trial would further strain an already overburdened judiciary. In this respect, it observed in *Palucki v. Sears, Roebuck, & Co.*:

The workload crisis of the federal courts, and realization that Title VII is occasionally or perhaps more than occasionally used by plaintiffs as a substitute for principles of job protection that do not yet exist in American law, have led the courts to take a critical look at efforts to withstand defendants' motions for summary judgment.<sup>121</sup>

These increased pressures, the Seventh Circuit noted, impelled its pragmatic view of summary judgment:

But we would not want to rest our decision on a technicality about the admissibility of evidence. A more important principle is at stake. Rule 56 is a practical tool of governance. Its purpose is to head off a trial, with all the private and public expenses that a trial entails, if the opponent (usually although not always the plaintiff) of summary judgment does not have a reasonable prospect of prevailing before a reasonable jury—that is, a jury that will base its decision on the facts and the law, rather than on sympathy or antipathy or private notions of justice.<sup>122</sup>

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119. See *Laird v. Craigin Bank*, 41 F.3d 1510 at \*4 (7<sup>th</sup> Cir. 1994) ("As a practical matter, the test is whether the non-movant has a fighting chance at trial.") (internal quotations omitted); *Mason v. Continental Illinois Nat'l Bank*, 704 F.2d 361, 367 (7<sup>th</sup> Cir. 1983) (dismissing plaintiff's claim on motion for summary judgment because "[i]t is a gratuitous cruelty to parties and their witnesses to put them through the emotional ordeal of a trial when the outcome is foreordained."); *Haeger v. General Motors Corp.*, 1994 WL 63053 at \*3 (N.D. Ill. 1994) ("[T]he non-movant must cast more than some metaphysical doubt as to the material facts. As a practical matter, the test is whether the non-movant has a fighting chance at trial.") (internal citations and quotations omitted).

120. See *Johnson v. Cambridge Indus. Inc.*, 325 F.3d 892, 898 (7<sup>th</sup> Cir. 2003) ("While it may seem unfair to hold [the plaintiff] to the evidence he cited to the district court, it is not. Discovery is notorious for producing far more material than the parties will ultimately use. We have repeatedly assured the district courts that they are not required to scour every inch of the record for evidence that is potentially relevant to the summary judgment motion before them."); *Greer v. Board of Educ. of City of Chicago*, 267 F.3d 723, 727 (7<sup>th</sup> Cir. 2001) ("[A] lawsuit is not a game of hunt the peanut. Employment discrimination cases are extremely fact-intensive, and neither appellate courts nor district courts are obliged in our adversary system to scour the record looking for factual disputes. . . .") (internal quotations omitted).

121. 879 F.2d 1568, 1572-73 (7<sup>th</sup> Cir. 1989).

122. *Id.* See also *Krist v. Eli Lilly & Co.*, 897 F.2d 293 (7<sup>th</sup> Cir. 1990) (rejecting "the orthodox view that treats the issue on summary judgment as whether the moving party would be entitled to directed verdict if the proceeding were a trial rather than a summary judgment proceeding" in favor of "the realist view that treats the issue on summary judgment as whether the nonmovant has a prayer of winning at trial"). Although *Krist* was a products liability case, it has been predominantly cited for a relaxed summary judgment

Even in cases where it reversed a grant of summary judgment, the Seventh Circuit expressed its skepticism about the merits not only about the claim in issue, but about certain aspects of the antidiscrimination regime generally, stating:

So we must reverse. We are not entirely happy in doing so, being perplexed that the middle-aged should be thought an oppressed minority requiring the protection of federal law. But that is none of our business as judges. We also are sympathetic to the argument that if [the employer discriminated, it would] pay a price in the competitive marketplace, and that the threat of such market sanctions deters age discrimination at lower cost than the law can do with its cumbersome and expensive machinery, its gross delays, its frequent errors, and its potential for rigidifying the labor market. But this sanguine view of the power of the marketplace was not shared by the framers and supporters of the Age Discrimination in Employment Act, and we shall not subvert the Act by upholding precipitate grants of summary judgment to defendants.<sup>123</sup>

It should come as little surprise that the Seventh Circuit has been among the most vocal skeptics of employment discrimination claims, given that, at both the district and the circuit level, it hears more employment discrimination claims than most of its sister circuits.

Yet the Seventh Circuit is hardly alone in applying a more robust summary judgment standard in discrimination cases. Judges in both the First,<sup>124</sup> Sixth,<sup>125</sup> and Eleventh<sup>126</sup> Circuits have signaled their acceptance of a “no reasonable

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standard in employment discrimination cases. See *Trowbridge v. AT & T, Indiana, Inc.*, 1990 WL 258386 at \*3, (N.D. Ind. 1990) (citing *Krist* in granting employer’s motion for summary judgment on sex discrimination claim); *Burkely v. Martin’s Super Markets, Inc.*, 741 F.Supp. 161, 163 (N.D. Ind. 1990) (citing *Krist* in parallel with the Supreme Court’s decision in *Anderson v. Liberty Lobby*).

123. *Shager v. Upjohn Co.*, 913 F.2d 398, 406-07 (7<sup>th</sup> Cir. 1990).

124. See *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1026 (1<sup>st</sup> Cir. 1988) (conceding record evidence probative of discrimination, but affirming summary judgment because “there was more than chopped liver in the other pan of the scales,” and noting that relaxed summary judgment standard is “crucial . . . in order to insure that Title VII does not become a cloak which is nonchalantly spread across the record in every instance where one employee (or prospective employee) loses out to a rival of contrary race or gender”) (internal quotations omitted); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1<sup>st</sup> Cir. 1990) (“Because courts should not encourage long, expensive trials merely to discover whether any evidence exists to support a claim, we decline to disturb the entry of summary judgment.”). But see *Rossy v. Roche Prods.*, 880 F.2d 621, 626 (1<sup>st</sup> Cir. 1990) (reserving question of defendant’s intent for ultimate trier of fact).

125. See *Canitia v. Yellow Freight Sys.*, 903 F.2d 1064, 1068 (6<sup>th</sup> Cir. 1990) (Nelson, J., concurring) (upholding a grant of summary judgment in a case that the majority termed a “close case,” stating that “given the demands now being made on the time of most district courts, it seems to me that a full-scale trial in a case as lopsided as this one would probably be a misallocation of judicial resources”); *EEOC v. Luckmarr Plastics, Inc.*, 884 F.2d 579 (6<sup>th</sup> Cir. 1989) (affirming summary judgment in a case the district court characterized as a “a close call” and in which it had “resolved many disputed facts” because “the [plaintiff’s] evidence was merely colorable”).

126. Judge Sam C. Pointer, who served as United States District Judge for the Northern District of Alabama between 1970 and 2000, had this to say about summary judgment in

chance” summary judgment standard for employment discrimination cases. Conversely, the Third<sup>127</sup> and D.C.<sup>128</sup> Circuits, both of which have relatively light workloads and appellate discrimination filings, both declined to lessen the summary judgment standard in employment discrimination cases.

While the data is too impressionistic to support particularly strong assertions, it does support our theory of prophylactic jurisprudence. Of the four circuits that have explicitly declined to apply Rule 56 literally in employment discrimination cases, the Sixth, Seventh, and Eleventh Circuits are among the busiest circuits. Appellate judges in the Eleventh Circuit have both the highest workload and number of employment discrimination filings of any circuit, and the same is largely true of district judges within the Circuit. Both district and appellate judges in the Sixth and Seventh Circuits have workloads at or above the average, and their respective volume of employment discrimination filings puts them near the top of the circuits.

By the same token, the Third and District of Columbia Circuits—both of which have relatively light workloads and, in the case of the District of Columbia Circuit, few discrimination claims—have continued to have applied Rule 56 more strictly. Taken together, this evidence suggests that some of the more burdened circuits view summary judgment as an opportunity to cull the weaker cases from the docket, while less burdened circuits remain more vigilant about preserving the role of the factfinder.

#### V. MANIPULATION OF SUBSTANTIVE LAW

A few words are in order before we begin our discussion of the varied approaches the circuits have taken in interpreting federal antidiscrimination

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marginal cases, including those in the employment discrimination context:

There mere fact that there is some conflict in the evidence shouldn't be the determinative factor [in deciding whether to grant summary judgment.] Where the evidence is overwhelming and no reasonable, impartial jury [that had been] properly instructed on the law could find for the plaintiff, there is no point in going to trial. In cases where a reasonable jury that had fairly reviewed the evidence could only reach one result (i.e. a verdict for the employer), some squabble over a few minor points should not preclude summary judgment. A judge that granted summary judgment on this basis would probably be affirmed on appeal.

Interview with Hon. Sam C. Pointer, March 22, 2004.

Judge Pointer's views are offered here as evidence of the summary judgment standard in the Eleventh Circuit.

127. *See e.g.*, *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200, 205 (3d Cir. 1987) (reversing grant of summary judgment that improperly addressed credibility of proffered evidence); *Jackson v. Univ. of Pittsburgh*, 826 F.2d 230, 233 (3<sup>rd</sup> Cir. 1987) (holding that a disputed material fact precluded the court from granting summary judgment).

128. *See, e.g.*, *Breen v. Dept. of Transportation*, 282 F.3d 839 (D.C. Cir. 2002) (reversing grant summary judgment where plaintiff had raised disputed material fact pertaining to her claim of employment discrimination).

statutes. In the discrimination arena, as in many other contexts, a voluminous number of circuit splits exist, and a discussion of all (or even many) of them is more suited to a treatise than an article. As noted, approximately 70% of discrimination allegations arise under Title VII. A survey of these cases moreover reveals that Title VII claims overwhelmingly involve claims of racial and/or sex discrimination. From a statistical standpoint, then, when we talk about employment discrimination jurisprudence writ large, we are essentially talking about the law of race and sex discrimination.<sup>129</sup> This Article therefore focuses primarily on this subset of employment discrimination cases.

Yet even within this subset of cases, not all inter-circuit divides are equally important. On some issues virtually all of the circuits have weighed in; on others only a handful or less have. Because the depth of a circuit split is an indicator of how often the issue in question arises—in addition to permitting more robust analysis for our purposes here—this Article is further restricted to some of the most pervasive employment discrimination issues that have divided courts over the last quarter century.

A. *Defining Discrimination: What constitutes an “adverse employment action” for purposes of retaliation?*

To prevail on a claim of disparate treatment (as distinguished for the moment from a claim for retaliation or harassment), a plaintiff must show, among other things, that he or she suffered an “adverse employment action.” Loathe to insert themselves as the arbiter of all workplace-related disputes, federal courts have uniformly concluded that minor slights and indignations suffered in the workplace are not actionable.<sup>130</sup> And, with few exceptions,

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<sup>129</sup> See *supra*, note 58.

130. See, e.g., *Broderick v. Donaldson*, 437 F.3d 1226, 1233 (D.C. Cir. 2006) (“Not everything that makes an employee unhappy is an adverse employment action. Minor and even trivial actions that an irritable, chip-on-the-shoulder employee did not like would otherwise form the basis of a discrimination suit. While being ‘aggrieved’ is necessary to state a claim for retaliation, it is not sufficient to demonstrate that a particular employment action was adverse.”) (internal citations omitted); *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (noting that without some threshold test of substantiality, “every trivial personnel action that an irritable . . . employee did not like would form the basis of a discrimination suit”); *Richardson v. New York State Dept. of Correctional Service*, 180 F.3d 426, 446 (2d Cir. 1999) (“[N]ot every unpleasant matter short of discharge or demotion creates a cause of action . . .”) (internal citations omitted); *Jensen v. Potter*, 435 F.3d 444, 451 (3d Cir. 2006) (Title VII “does not does not mandate a happy workplace.”); *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 379 (4th Cir. 2004) ([Title VII’s] wording “makes clear that Congress did not want the specter of liability to hang over every personnel decision.”); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir.1999) (“Title VII is not a general civility code for the American workplace.”); *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (“An adverse employment action must be more disruptive than a mere inconvenience or an alteration of job responsibilities.”); *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 745 (7th Cir. 2002) (minor or trivial changes in working conditions do not constitute an adverse employment action); *Sallis v. Univ. of Minn.*, 408 F.3d 470, 476

purely lateral transfers,<sup>131</sup> changes in job duties,<sup>132</sup> oral and written reprimands,<sup>133</sup> threats of termination or demotion,<sup>134</sup> or other actions that make an employee's job more difficult also do not give rise to a cause of action for

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(8th Cir. 2005) ("Mere inconvenience . . . that results only in minor changes in working conditions does not meet this standard."); *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir.2000) ("[M]ere ostracism in the workplace is not enough to show an adverse employment decision"); *Sanchez v. Denver Public Schools*, 164 F.3d 527, 532 (10th Cir. 1998) ("We will not consider a mere inconvenience or an alteration of job responsibilities to be an adverse employment action.") (internal quotations omitted); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) ("[W]e do not doubt that there is some threshold level of substantiality that must be met for unlawful discrimination to be cognizable. . .").

131. See, e.g., *Kessler v. Westchester County Dept. of Social Services*, 461 F.3d 199, 204 (2d Cir. 2006) (purely lateral transfers not actionable); *Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 23 (1st Cir. 2002) (noting "clear trend of authority" across circuits regarding purely lateral transfers); *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996) (all holding that lateral transfers not actionable).

132. See, e.g., *White v. Burlington N. & Santa Fe Ry.*, 310 F.3d 443, 451 (6th Cir. 2002) (transfer to more physically demanding job not adverse employment action); *Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1245 (11th Cir. 2001) ("In the vast majority of instances, however, we think an employee alleging a loss of prestige on account of a change in work assignments, without any tangible harm, will be outside the protection afforded by Congress in Title VII's anti-discrimination clause."); *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999) (rejecting claim based on transfer to more stressful job); *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1557 (D.C. Cir. 1997) (rejecting Title VII claim based on change in job assignment, recognizing that a contrary result would lead to "judicial micromanagement of business practices"); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996) (denying Title VII claim based on lateral transfer).

133. See, e.g., *Lucas v. Chicago Transit Authority*, 367 F.3d 714, 731 (7th Cir. 2004) ("There must be some tangible job consequence accompanying the reprimand to rise to the level of a material adverse employment action; otherwise every reprimand or attempt to counsel an employee could form the basis of a federal suit."); *Vasquez v. County of Los Angeles*, 307 F.3d 884, 892 (9th Cir. 2002) (letter of warning that would remain in employee's file only temporarily did not constitute adverse employment action); *Primes v. Reno*, 190 F.3d 765, 767 (6th Cir. 1999) ("If every low evaluation or other action by an employer that makes an employee unhappy or resentful were considered an adverse action, Title VII would be triggered by supervisor criticism or even facial expressions indicating displeasure. Paranoia in the workplace would replace the prima facie case as the basis for a Title VII cause of action."); *Koschoff v. Runyon*, 1999 WL 907546 (E.D. Pa. 1999) (letters of reprimand and suspension notice not adverse employment actions after employer promised never to use them against employee).

134. See, e.g., *Mowbray v. American General Life Companies*, 162 Fed.Appx. 369, 374 (5th Cir. 2006) ("Neither verbal threats of termination nor merely being at risk of termination constitutes an adverse employment action."); *Russell v. Principi*, 257 F.3d 815, 819-820 (D.C. Cir. 2001) ("To the extent, however, that [plaintiff] relies on her temporary exposure to a higher risk of [termination], we hold that such an unrealized risk of a future adverse action, even if formalized, is too ephemeral to constitute an adverse employment action."); *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (threat to discharge not actionable); *Mitchell v. Vanderbilt University*, 389 F.3d 177, 182 (6th Cir. 2004) (threat by employer to reduce employee's pay, alter his employment status, and reassign him were never implemented and therefore not adverse employment actions).

discrimination, as long as the challenged action does not lead to a decrease in salary or a loss of tangible job benefits.<sup>135</sup> Moreover, even disparate treatment that results only in temporary<sup>136</sup> or, in some cases, even *de minimus* economic harm is also not actionable.<sup>137</sup> By the same token, the circuits also agree that adverse “ultimate employment decisions” such as termination, non-promotion, and those affecting leave and compensation do give rise to a cause of action.<sup>138</sup>

This consensus with respect to disparate treatment adverse employment actions fractures substantially in the retaliation context. This divergence is significant, because claims of retaliation frequently go hand-in-hand with allegations of disparate treatment and harassment. As such, a lower standard for retaliation claims would allow a plaintiff to get to a jury on a retaliation claim even if the disparate treatment claim or harassment claim did not survive summary judgment. Prior to the Supreme Court’s recent opinion in *Burlington Northern & Santa Fe Railway Co., v. White*,<sup>139</sup> the circuits were badly divided over the extent to which Title VII and other federal anti-discrimination laws protected against retaliation.

The Fifth<sup>140</sup> and Eighth<sup>141</sup> Circuits both took a narrow view of what constituted actionable retaliation. And, notwithstanding the Seventh Circuit’s contention that it applied a “more generous”<sup>142</sup> definition of adverse employment action in the retaliation context, the Seventh Circuit standard

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135. See, e.g., *Fane v. Locke Reynolds, LLP* (7th Cir. 2007) (“[H]arder work assignments do not constitute an adverse employment action.”); *Broska v. Henderson*, 70 Fed.Appx. 262 at \*\*4 (6th Cir. 2003) (changes that make job “significantly more difficult” not actionable); *Jacob-Mua v. Veneman*, 289 F.3d 517, 522 (8th Cir. 2002) (“[Plaintiff] claims that because of her race she was given work assignments not commensurate with her skills, abilities, and job functions, given inferior equipment by her supervisors, denied attendance at a writing workshop, and denied a timely promotion. None of these allegations rise to the level of an adverse employment action.”).

136. See, e.g., *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir. 1999) (postponement of one day’s pay not actionable); *Green v. Illinois Dept. of Children and Family Services*, 439 F.Supp.2d 841, 850 (N.D. Ill. 2006) (suggesting that three-day paid suspension not actionable).

137. See *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 505 (7th Cir.2004) (holding that a plaintiff in a sex discrimination suit did not suffer an adverse employment action where her employer withheld one day’s pay and it was not reinstated).

138. See, e.g., *Breaux v. City of Garland*, 205 F.3d 150, 157 (5th Cir. 2000) (articulating actionable “adverse employment actions”).

139. 126 S.Ct. 2405 (2006)

140. See *Dollis v. Rubin*, 77 F.3d 777, 782 (5th Cir. 1995) (applying “ultimate employment decision” standard to Title VII retaliation claims); *Mattern v. Eastman, Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (entering judgment for employer on retaliation claim because “[h]ostility from fellow employees, having tools stolen, and resulting anxiety, without more, do not constitute ultimate employment decisions, and therefore are not the required adverse employment actions.”).

141. See *Cross v. Cleaver*, 142 F.3d 1059, 1073 (8th Cir. 1998) (adopting ultimate employment decision standard for retaliation claims); *Munday v. Stangler*, 126 F.3d 239, 243 (8th Cir. 1997) (same).

142. *Johnson v. Cambridge Industries, Inc.*, 325 F.3d 892, 902 (7th Cir. 2003)

governing retaliation claims relative to claims alleging disparate treatment, it is not clear that this was the case.<sup>143</sup> In some instances, the Seventh Circuit appears to have applied the more restrictive disparate treatment standard for “adverse employment action” to claims for retaliation, effectively equalizing the evidentiary requirements between the two types of claims.<sup>144</sup>

Other circuits take a somewhat more permissive approach. The Second,<sup>145</sup> Third,<sup>146</sup> Fourth,<sup>147</sup> Sixth,<sup>148</sup> and Eleventh<sup>149</sup> Circuits all reject the “ultimate employment decision” standard, but still require a showing that the retaliation be “materially adverse” to the terms and conditions of employment.

A third group of circuits took a much broader view of conduct that could constitute actionable retaliation. The District of Columbia Circuit made clear that anti-retaliation laws applied to *any* conduct that could dissuade a reasonable employee from filing a charge of retaliation.<sup>150</sup> The First,<sup>151</sup> Ninth,<sup>152</sup>

143. *See id.* (citing sex discrimination case to excuse employer’s “troublesome” decision “to put a laundry list of complaints aired about Johnson’s work into writing” and evidence that employer denied safety equipment to plaintiff); *see also Bell v. EPA*, 232 F.3d 546, 554-55 (7th Cir. 2000) (granting summary judgment on plaintiff’s retaliation claim despite evidence that included “demeaning assignments, verbal abuse, surveillance, diminished responsibilities, refusal to cooperate on job assignments, and placements in situations designed to result in failure,” notwithstanding its “broad[]” definition of “adverse action”). *But see Ray v. Henderson*, 217 F.3d 1234, 1241 (9th Cir. 2000) (opining that the Seventh Circuit had taken an “expansive view” of the type of actions that can constitute retaliation); *Washington v. Illinois Dept. of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005) (conduct would have “dissuaded a reasonable worker from making or supporting a charge of discrimination”).

144. *See Johnson v. Cambridge Industries, Inc.*, 325 F.3d at 902.

145. *Torres v. Pisano*, 116 F.3d 625, 640 (2nd Cir. 1997) (plaintiff must show “a materially adverse change in the terms and conditions of employment”); *McKenney v. New York City Off-Track Betting Corp.*, 903 F.Supp. 619, 623 (S.D.N.Y. 1995) (same).

146. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997) (“retaliatory conduct must be serious and tangible enough to alter an employee’s compensation, terms, conditions, or privileges of employment . . . to constitute [an] ‘adverse employment action’”).

147. *See Von Gunten v. Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) (stating that “‘ultimate employment decision’ is not the standard in this circuit” and expressly rejecting *Mattern*); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985) (noting that “conformity between the provisions of Title VII is to be preferred”).

<sup>148</sup> *See Burlington Northern & Santa Fe Ry. v. White*, 364 F.3d 789, 795 (6<sup>th</sup> Cir. 2004) (holding that a plaintiff must show a “materially adverse change in the terms and conditions” of employment).

149. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (holding that “Title VII’s protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions,” but cautioning that “some threshold level of substantiality that must be met for unlawful discrimination to be cognizable under the anti-retaliation clause”); *Bass v. Board of County Comm’rs, Orange County, Fla.*, 256 F.3d 1095, 1118 (11th Cir. 2001) (suggesting that Title VII’s anti-retaliation provision only protect against “conduct that alters an employee’s compensation, terms, conditions, or privileges of employment”).

150. *See Rochon v. Gonzales*, 438 F.3d 1211, 1217-18 (D.C. Cir. 2006) (holding that any action that would dissuade a reasonable employee from making or supporting a

and Tenth<sup>153</sup> Circuits have adopted similarly expansive views of what actions could constitute unlawful retaliation.

In *Burlington*, the Supreme Court adopted the broadest view of actionable retaliation. Writing for a unanimous court, Justice Breyer stated that “any action that could well dissuade a reasonable worker from making or supporting a charge of discrimination” could support a retaliation claim. For our purposes, however, the most interesting thing is the circuit split prior to *Burlington*.

This divide supports our theory that workload, not ideology, is more important to judicial outcomes in the discrimination context. Of the seven circuits with the highest district and appellate workloads—the Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh—only the Ninth Circuit—which had one of the lowest numbers of employment discrimination appeals per capita—declined to adopt the most expansive view of retaliation. Of the eight circuits which adopted either the strict or the moderate view of actionable retaliation, six circuits—the Second, Fourth, Fifth, Sixth, Seventh, and Eleventh—each handled higher than average numbers of discrimination filings at either the district or the appellate level (or both in most cases).

Conversely, of the four circuits that adopted the broadest view of retaliation—the First, Ninth, Tenth, and District of Columbia Circuits—only the Ninth has a district or appellate workload that exceeds their respective averages. And with scattered exceptions, each of these four circuits had a relatively fewer discrimination cases at both the district and appellate levels.

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discrimination claim constitutes actionable retaliation); *Passer v. Am. Chem. Soc’y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (finding “illegal retaliation in employer postponement of symposium for former employee, notwithstanding court’s concession that the activity “could not be described strictly as ‘employment action’”).

151. See *Wyatt v. City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that Title VII’s anti-retaliation provision governs, “employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.”) (internal citation omitted).

152. See *Yartzoﬀ v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that such non-ultimate employment decisions as “[t]ransfers of job duties and undeserved performance ratings” could constitute adverse employment actions cognizable under Title VII’s anti-retaliation provision); *Ray v. Henderson*, 217 F.3d 1234, 1242 (9th Cir. 2000) (explicitly rejecting “adverse employment action” definition applied by Second and Third Circuits in retaliation context as unduly narrow).

153. See *Hillig v. Rumsfeld*, 381 F.3d 1028, 1032 (10<sup>th</sup> Cir. 2004) (“The longstanding rule in our circuit has been to liberally define the phrase adverse employment action and not limit the term to simply “monetary losses in the form of wages or benefits. . . A major underpinning of this rule has been the “remedial nature of Title VII,” reasoning that a liberal definition of Title VII is necessary to best carry out its anti-discrimination and anti-retaliation purpose.”); *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 984-86 (10<sup>th</sup> Cir. 1996) (construing Title VII’s prohibition on retaliation to extend to malicious prosecution action brought by former employer); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10<sup>th</sup> Cir. 1998) (noting that Tenth Circuit had “liberally define[d] adverse employment action”).

B. *Proving Discrimination: The Direct/Circumstantial Evidence Divide*

The manner in which a plaintiff must prove discrimination turned, until recently, on the nature of the evidence he or she put forth. In most cases, the plaintiff could not offer direct evidence that conclusively demonstrated that the employer had acted unlawfully. Absent such “smoking gun” evidence, the plaintiff would have to prove discrimination under the inferential proof scheme set out in *McDonnell Douglas*. In those cases where a plaintiff did have direct evidence of discrimination, however, the *McDonnell Douglas* framework was unnecessary, since the plaintiff could already show that the employer took an unlawful consideration into account in making the challenged employment decision. In such “mixed motive” cases, the only way for an employer to avoid liability was to prove that it would have made the same decision even in the absence of a discriminatory motive.

Prior to the 1991 Civil Rights Act, courts posed this question in the liability phase. Consequently, a defendant could avoid liability altogether by proving that it would have made the same decision even in the absence of a discriminatory motive.<sup>154</sup> Congress legislatively overruled this aspect of *Price Waterhouse*, so that evidence that the employer would have made the same decision is relevant only in the remedy phase. If the defendant carries its burden under the same-decision test, it is relieved of compensatory relief, but it remains liable for declaratory and injunctive relief and—perhaps most importantly—attorneys’ fees, by virtue of the fact that it considered an illegal motive.<sup>155</sup>

This was very bad news for employers. After 1991, a plaintiff who could show direct evidence of discrimination was in the driver’s seat in negotiations, as defendants would be liable for the plaintiff’s attorney’s fees irrespective of whether the plaintiff recovered damages.<sup>156</sup> Given that attorney’s fees frequently dwarf the size of the plaintiff’s damages, defendants would be none too eager to pursue litigation knowing they would ultimately foot the bill for

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154. This decision flows from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989) (“At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves . . . that the employer’s stated reason for its decision is pretextual.”).

155. § 703(m), codified as 42 U.S.C. § 2000e-2(m) (1994).

156. Employers had good reason to worry. Following the 1991 amendments, prevailing plaintiffs in employment discrimination cases won almost triple the amount they had prior to the 1991 amendments. See Clermont, *supra* note 32 (median award to prevailing plaintiff “pre-1992” was \$25,000, while median award to prevailing plaintiff “post-1991” \$70,000). See also Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 111 (2007) (concluding, based on empirical study of confidential settlements filed between 1999 and 2005, employment discrimination plaintiffs the mean recovery amount per plaintiff was \$54,651).

not one but two sets of lawyers. Apart from attorney's fees, the employer in such cases would be stuck in the uncomfortable position of arguing to the jury that it made its decision for legitimate, non-discriminatory reasons in spite of the evidence clearly suggesting it did not. For these reasons, a court's decision to classify plaintiff's claim as a mixed-motive as opposed to a single-motive case has massive consequences. This classification decision itself hinged on the court's determination whether the plaintiff had adduced direct evidence of discrimination. Accordingly, how direct direct evidence had to be was critically important.

The circuits took three different approaches to defining direct evidence. The most narrow version defined direct evidence as "evidence, which, if believed proves the fact [of discrimination] without inference or presumption."<sup>157</sup> This view was adopted by the Fifth,<sup>158</sup> Seventh,<sup>159</sup> and Eleventh<sup>160</sup> circuits, all of which have either heavy overall workloads or large numbers of employment filings, or both.

A second, somewhat broader view known as the "animus-plus" perspective was adopted by the Second,<sup>161</sup> Third,<sup>162</sup> Fourth,<sup>163</sup> and Ninth<sup>164</sup> Circuits. Under

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157. *Brown v. East Mississippi Electric Power Ass'n.*, 989 F.2d 858, 861 (5<sup>th</sup> Cir. 1993).

158. *See, e.g., Fierros v. Texas Dept. of Health*, 274 F.3d 187, 195-96 (5<sup>th</sup> Cir. 2001); *Haas v. ADVO Sys., Inc.*, 168 F.3d 732, 734 n.2 (5<sup>th</sup> Cir. 1999); *Nicholas v. Loral Cought Sys. Corp.*, 81 F.3d 38, 40 (5<sup>th</sup> Cir. 1999); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1085 (5<sup>th</sup> Cir. 1994); *Brown v. East Mississippi Electric Power Ass'n.*, 989 F.2d 858, 861 (5<sup>th</sup> Cir. 1993) (all defining direct evidence narrowly).

159. *See, e.g., Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 599-600 (7<sup>th</sup> Cir. 2003); *Indurante v. Local 705, Int'l. Brotherhood of Teamsters*, 160 F.3d 572, 582-83 (7<sup>th</sup> Cir. 1998) (affirming grant of summary judgment in national origin discrimination case for defendant despite plaintiff's affidavits detailing various ethnic slurs made by defendant during plaintiff's discharge because evidence was not direct); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7<sup>th</sup> Cir. 1994).

160. *See, e.g., Wascura v. City of South Miami*, 257 F.3d 1238, 1242 fn.2 (11<sup>th</sup> Cir. 2001) ("Only the most blatant remarks, whose intent could be nothing other than to discriminate . . . will constitute direct evidence of discrimination."); *Damon v. Fleming Supermarkets Of Florida, Inc.*, 196 F.3d 1354, 1356 (11<sup>th</sup> Cir. 1999); *Carter v. Three Springs Resid'l Treatment*, 132 F.3d 635, 641 (11<sup>th</sup> Cir. 1998); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189 (11<sup>th</sup> Cir. 1997); *Rollins v. TechSouth Inc.*, 833 F.2d 1525, 1528 n.6 (11<sup>th</sup> Cir. 1987) (all defining direct evidence as "evidence, which if believed, proves existence of fact in issue without inference or presumption."); *Harris v. Shelby County Bd. of Educ.*, 99 F.3d 1078, 1080 (11<sup>th</sup> Cir. 1996) (concluding that statement of school superintendent that "[the school] did not need to employ a black [as principal] at Thompson High School" was not direct evidence because the statement "could have more than one possible meaning").

161. *Fields v. New York State Office of Mental Retardation and Developmental Disabilities*, 115 F.3d 116, 122-23 (2d Cir. 1997); *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992) (all employing this more lenient definition of evidence required to trigger a mixed motive inquiry).

162. *See, e.g., Hankins v. City of Philadelphia*, 189 F.3d 353, 364 (3d Cir. 1999); *Walden v. Georgia Pacific Corp.*, 126 F.3d 506, 513 (3d Cir. 1997); *Miller v. CIGNA Corp.*, 47 F.3d 586, 601 (3d Cir. 1995) (en banc); *Griffiths v. CIGNA Corp.*, 988 F.2d 457,

this view, direct evidence for the purpose of classification purposes is defined as evidence, both direct and circumstantial, that (1) reflects directly the animus of the employer and (2) bears squarely on the contested employment decision.

The third and most broad view of direct evidence has been adopted by the District of Columbia<sup>165</sup> and Eighth Circuits.<sup>166</sup> This line of cases holds that as long as the evidence (whether direct or circumstantial) is related to the alleged discriminatory animus, it is irrelevant whether the animus is linked closely to the employment decision at issue. In short, discriminatory animus alone will suffice; no plus factor is needed.

Here again, our theory is confirmed. Of the three circuits that adopted either the strictest view of direct evidence, the Eleventh and Fifth Circuits have (by a wide margin) the highest workloads of any appellate courts, as well as high numbers of discrimination claims. And while the Seventh Circuit's workload hovers close to the median for both district and appellate judges, it hears more discrimination claims than almost any other circuit.

Of the two circuits that adopted the most lenient definition of direct evidence—the Eighth and District of Columbia Circuits—both had workloads at or below the district average, and two of the three lowest appellate workloads.

With respect to the circuits that adopted the moderate view of direct evidence, the Fourth and Ninth Circuits, at least in the context of civil rights jurisprudence, are rarely perceived to be ideological bedfellows. Their ideological reputations notwithstanding, this moderate definition of direct evidence is consistent with the workload and employment discrimination filings of each circuit: The Ninth Circuit has one of the highest workloads, but a only a modest level of employment discrimination filings, particularly at the appellate level. The Fourth Circuit has a workload that registers slightly above the average, and a per capita volume of discrimination claims that also falls near the median. The Third Circuit is similar; below average workloads, but above average discrimination filings.

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470 (3d Cir. 1993) (all employing an animus-plus standard for direct evidence).

163. See, e.g., *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 606-07 (4th Cir. 1999); *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) (all employing this more lenient definition of evidence required to trigger a mixed motive inquiry).

164. See, e.g., *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1030 fn.4 (9th Cir. 2003); *Bachelor v. America West Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001); *Lambert v. Ackerley*, 180 F.3d 997, 1008-09 (9th Cir. 1999) (en banc) (all employing this more lenient definition of evidence required to trigger a mixed motive inquiry).

165. *Thomas v. National Football League Players Ass'n.*, 131 F.3d 198, 204 (describing direct evidence as evidence that "relate[s] to the question of discrimination in the particular employment decision") (citing *Radabaugh*).

166. See, e.g., *Kerns v. Capital Graphics, Inc.*, 178 F.3d 1011, 1017-18 (8th Cir. 1999); *Deneen v. Northwest Airlines*, 132 F.3d 431, 436 (8th Cir. 1998); *Radabaugh v. Zip Feed Mills, Inc.*, 997 F.2d 444, 449 (8th Cir. 1993) (all adopting the view that discriminatory animus qualifies as direct evidence for classification purposes).

Overall, we see that where circuits have high workloads and high volumes of employment discrimination claims they adopted the least plaintiff-friendly rule, but where workloads and discrimination claims were both low, plaintiffs fared the best. Where these two factors cut in opposite directions, or where these factors both hover around the circuit averages, such as in the Third, Fourth, and Ninth Circuits, we see courts charting a middle course.

In its 2003 decision in *Desert Palace v. Costa*,<sup>167</sup> the Supreme Court abrogated the direct/circumstantial evidence distinction in mixed-motive cases. Justice Thomas, writing for a unanimous Court, noted that the text of the 1991 amendments unambiguously “states that a plaintiff need only demonstrate that an employer used a forbidden consideration with respect to any employment practice.”<sup>168</sup> In the Court’s mind, Congress’ failure to specify what sort of evidence the plaintiff must offer in support of her claim that the employer had an illegal motive was significant. The Court inferred from this silence that Congress intended to overrule legislatively the direct/circumstantial distinction, holding that the 1991 Civil Rights Act “does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.”<sup>169</sup> Although the Court explicitly declined to address the continued vitality of the direct/circumstantial evidence distinction outside of the mixed-motive context,<sup>170</sup> some scholars have speculated that, with the removal of the direct evidence hurdle, single-motive cases will become a thing of the past.<sup>171</sup> The rulings of a few courts confirm this speculation,<sup>172</sup> but, to the extent that this interpretation is not widely followed, it remains an open question what methodology courts will use to classify employment cases.

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167. 123 S.Ct. 2148 (2003).

168. *Id.* at 2153.

169. *Id.* at 2153-54 (“Congress explicitly defined the term ‘demonstrates’ in the 1991 Act, leaving little doubt that no special evidentiary showing is required. Title VII defines the term ‘demonstrates’ as to ‘meet the burdens of production and persuasion.’ If Congress intended the term ‘demonstrates’ to require that the ‘burdens of production and persuasion’ be met by direct evidence or some other heightened showing, it could have made that intent clear by including language to that effect in § 2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42.”).

170. *Id.* at 2151 n.1.

171. See generally, Jeffrey A. Van Detta, *Le Roi Est Mort, Vive Le Roi!: An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a “Mixed-Motives” Case*, 52 DRAKE L. REV. 71 (2003).

172. See, e.g., *Dare v. Wal-Mart Stores, Inc.* 267 F.Supp.2d 987, 992-83 (D. Minn. 2003) (“The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made solely on basis of one rationale to the exclusion of all others. Instead, most employment decisions are the result of the interaction of various factors, legitimate and at times illegitimate, objective and subjective, rational and irrational. The Court does not see the efficacy in perpetuating this legal fiction implicitly exposed by the Supreme Court’s ruling in *Desert Palace*.”)

C. *Proving Discrimination: Pretext v. Pretext-Plus*

Following the *Celotex* trilogy, summary judgment has become the marquee event in pretrial litigation. *Leatherman* and *Swierkiewicz* further cemented summary judgment's prominence by noting that it, not Rule 12 motions, was the primary procedural vehicle for weeding out meritless claims. Unsurprisingly, then, employment discrimination litigants (and the courts that decided their cases) clashed frequently and bitterly on what quantum of evidence a plaintiff must offer to survive summary judgment. And, for reasons that will become clear shortly, nowhere did the summary judgment battle rage more fiercely than in the area of pretext.

Except in the unusual case where a plaintiff has direct evidence of discrimination, a plaintiff must proceed under the familiar burden-shifting framework first articulated by the Supreme Court in *McDonnell Douglas v. Green*.<sup>173</sup> The *McDonnell Douglas* analysis has three parts. In the first step, the plaintiff must come forth with evidence from which a reasonable jury could conclude that the plaintiff had suffered unlawful discrimination, although the precise contours of the *prima facie* case the plaintiff must make vary depending on the nature of the discrimination alleged. If the plaintiff succeeds in establishing a *prima facie* case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."<sup>174</sup> This burden of production is a light one, and even a dubious reason will suffice.<sup>175</sup> Should the defendant carry this burden of production, the presumption of discrimination dissolves and analysis proceeds to the third and final step. In step three, the plaintiff must offer evidence to prove by a preponderance that the legitimate reasons proffered by the defendant were not its true reasons, but were a pretext for discrimination.<sup>176</sup> While the burden of production shifts to the defendant in step two, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."<sup>177</sup>

Because plaintiffs rarely have direct evidence of discrimination, and because cases proceeding under the *McDonnell Douglas* inferential proof scheme are rarely resolved in the first two steps, whether a plaintiff can offer sufficient evidence of pretext is typically dispositive at the summary judgment stage.<sup>178</sup> Unsurprisingly, then, there has been no small amount of disagreement

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173. 411 U.S. 792 (1973)

174. *Id.* at 802.

175. *See, e.g., Purkett v. Elem*, 514 U.S. 765 (1995) (holding that even "implausible," "silly," "fantastic," or "superstitious" reasons would satisfy the burden of production). Of course, the less believable the defendant's articulated reason, the more likely it will be determined to be pretextual.

176. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

177. *Id.*

178. *See, e.g., Shaner v. Synthes*, 204 F.3d 494, 501 (3d Cir. 2000) ("Our experience is that most cases turn on the third stage, i.e., can the plaintiff establish pretext."); *Miles v.*

between the circuits regarding the quantum and nature of evidence a plaintiff must adduce to make a sufficient showing of pretext.

In *Texas Department of Community Affairs v. Burdine*, the Supreme Court sought to clarify how a plaintiff might carry her burden to show pretext under the *McDonnell Douglas* rubric, stating:

The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence.<sup>179</sup>

Given the Court's use of the disjunctive, it would appear that a plaintiff could survive summary judgment by offering evidence from which a reasonable factfinder could conclude that the defendant's proffered reason for taking the contested employment action was false. Nonetheless, in the decade or so following *Burdine*, a deep split emerged between the circuits regarding whether such evidence, standing alone, was sufficient to survive summary judgment.

Although conflicting authority existed within in some circuits, the courts more or less divided into two camps. The District of Columbia,<sup>180</sup> Second,<sup>181</sup>

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*M.N.C. Corp.*, 750 F.2d 867, 870 (11<sup>th</sup> Cir. 1985) ("Because of the employee's easy burden of establishing a prima facie case and the employer's normal ability to articulate some legitimate nondiscriminatory reasons for its actions, most disparate treatment cases turn on the plaintiff's ability to demonstrate that the nondiscriminatory reason offered by the employer was a pretext for discrimination.").

179. 450 U.S. at 256 (emphasis added).

180. *King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985) ("*Burdine* makes it absolutely clear that a plaintiff who establishes a prima facie case of intentional discrimination and who discredits the defendant's rebuttal should prevail, even if he or she has offered no direct evidence of discrimination."); *Lanphear v. Prokop*, 703 F.2d 1311, 1317 (D.C. Cir. 1983) ("If, however, [the plaintiff] shows [the defendant's legitimate, non-discriminatory] reason to be specious, then in conjunction with his prima facie case [plaintiff] has carried his burden of proving discrimination by a preponderance of the evidence."); *Townsend v. Washington Metropolitan Area Transit Authority*, 746 F.Supp. 178, 184 (D.D.C. 1990) (holding that the record "contains so many unexplained inconsistencies, irregularities, and holes that the Court simply cannot believe WMATA's proffered legitimate, nondiscriminatory reasons.")

181. *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161 (2d Cir. 1991) (holding that, with respect to pretext, "[i]t is enough for the plaintiff to show that the articulated reasons were not the true reasons for the defendant's actions"); *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 465 (2d Cir. 1989) ("A showing that a proffered justification is pretextual is itself sufficient to support an inference that the employer intentionally discriminated."); *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1113 (2d Cir. 1988) ("*Burdine* made it plain that in addition to directly proving a discriminatory motive for firing, a plaintiff may prevail upon a showing that the employer's given legitimate reason is unworthy of credence, that is, that the reason supplied was not the true reason for the unfavorable employment decision."). *But see Zahorik v. Cornell University*, 729 F.2d 85, 94 (2d Cir. 1984) (granting summary judgment on Title VII claim arising out of denial of tenure

Third,<sup>182</sup> Eighth,<sup>183</sup> Ninth,<sup>184</sup> and Tenth<sup>185</sup> Circuits each adopted the so-called

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because the record was devoid of evidence that decision was actually motivated by “forbidden considerations such as sex or race”); *Graham v. Renbrook School*, 692 F.Supp. 102, 107 (D. Conn. 1988) (“Disbelief of testimony, however, does not alone establish that the opposite of that testimony is in fact the truth. . . . Furthermore, even if, as an abstract proposition, it were permissible to infer the opposite merely because proffered testimony were disbelieved, it would still be an illogical leap in an age discrimination case to infer a discriminatory motive simply because the employer’s own explanation of its conduct is disbelieved.”).

182. *Roebuck v. Drexel University* 852 F.2d 715, 726-27 (3d Cir. 1988) (“[I]f the plaintiff presents enough evidence for a jury to find that the asserted reasons for the tenure denial were not the actual reasons, then the jury may infer that the employer actually was motivated in its decision by race; plaintiff is not required to provide independent, direct evidence of racial discrimination.”); *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3d Cir. 1987) (“If the plaintiff [demonstrates] that it is more likely than not that the employer did not act for its proffered reason, then the employer’s decision remains unexplained and the inferences from the evidence produced by the plaintiff may be sufficient to prove the ultimate fact of discriminatory intent.”); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1396 (3d Cir. 1984) (stating that “a showing that a proffered justification is pretextual is itself *equivalent* to a finding that the employer intentionally discriminated”) (emphasis in original).

183. *MacDissi v. Valmont Industries, Inc.*, 856 F.2d 1054, 1059 (8<sup>th</sup> Cir. 1988) (“As a matter of both common sense and federal law, an employer’s submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.”); *Washburn v. Kansas City Life Ins. Co.*, 831 F.2d 1404, 1408 (8<sup>th</sup> Cir. 1987) (“[A] plaintiff is not required to present rebuttal testimony following the defendant’s showing of nondiscriminatory reasons for termination. . . . The jury in its consideration of all the evidence could still find that the plaintiff’s evidence established that the reasons articulated were pretextual. . . . Indeed, there may be some cases where the plaintiff’s initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant’s explanation.”) (internal citations and quotations omitted); *Dace v. ACF Industries, Inc.*, 722 F.2d 374, 379 (8<sup>th</sup> Cir. 1983) (noting that the pretext inquiry “is not one of weighing the quality and quantity of the defendant’s evidence against that of the plaintiff, but of determining whether the plaintiff’s evidence supports a reasonable inference that Dace was not demoted for the reasons given”). *But see Gray v. Univ. of Arkansas*, 883 F.2d 1394, 1402 (8<sup>th</sup> Cir. 1989) (affirming entry of judgment on sex discrimination claim notwithstanding the fact that defendant’s proffered reasons for terminating plaintiff were “less than weighty, if not almost laughable,” because court’s inquiry is limited to whether discrimination was but for cause of termination).

184. *Perez v. Curcio*, 841 F.2d 255, 257 (9<sup>th</sup> Cir. 1988) (“Pretext is established by showing either that a discriminatory reason more likely than not motivated the employer or that the employer’s explanation is unworthy of credence.”); *Williams v. Edward Apffels Coffee Co.*, 792 F.2d 1482, 1486 (9<sup>th</sup> Cir. 1986) (noting that a plaintiff “is not required to offer additional evidence, beyond that offered to establish his prima facie case, in order to meet his burden at [the summary judgment] stage”); *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9<sup>th</sup> Cir. 1985) (“[W]hen a plaintiff has established a prima facie inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer’s articulated reason for its employment decision.”). *But see Lindahl v. Air France*, 930 F.2d 1434, 1437-38 (9<sup>th</sup> Cir. 1991) (“We have made clear that a plaintiff cannot defeat summary judgment simply by making out a prima facie case. . . . The plaintiff cannot carry [her burden on summary judgment to show pretext] simply by restating

“pretext only” rule, a plaintiff may survive summary judgment by offering evidence that calls into question the defendant’s proffered reason for making the contested decision. By contrast, the First,<sup>186</sup> Fourth,<sup>187</sup> Fifth<sup>188</sup>, Seventh,<sup>189</sup>

the prima facie case and expressing an intent to challenge the credibility of the employer’s witnesses on cross-examination. She must produce specific facts either directly evidencing a discriminatory motive or showing that the employer’s explanation is not credible.”).

185. *Drake v. City of Fort Collins*, 927 F.2d 1156, 1160 (10<sup>th</sup> Cir. 1991) (suggesting that a plaintiff can show pretext by showing that “the [defendant’s] proffered reasons were not the true reasons for the hiring decision.”); *Beck v. QuikTrip Corp.*, 708 F.2d 532, 535 (10<sup>th</sup> Cir. 1983) (affirming finding of discrimination where reasons defendant gave for termination were “insubstantial and unreasonable”).

186. *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1<sup>st</sup> Cir. 1990) (“In the final round of shifting burdens, it is up to plaintiff, unassisted by the original presumption, to show that the employer’s stated reason was but a pretext for age discrimination. To achieve this plateau, an ADEA plaintiff must do more than simply refute or cast doubt on the company’s rationale for the adverse action. The plaintiff must also show a discriminatory animus based on age.”) (internal citations and quotations omitted); *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1026 (1<sup>st</sup> Cir. 1988) (noting that it was “plaintiff’s burden not only to show that the defendants’ proffered reasons for hiring someone else were apocryphal, but that those reasons were pretexts aimed at masking sex or race discrimination”); *Freeman v. Package Machinery Co.*, 865 F.2d 1331, 1336 (1<sup>st</sup> Cir. 1988) (quoting pretext-plus standard from *Keyes*); *White v. Vathally* 732 F.2d 1037, 1043 (1<sup>st</sup> Cir. 1984) (“Merely casting doubt on the employer’s articulated reason does not suffice to meet the plaintiff’s burden of demonstrating discriminatory intent. . .”).

187. *Duke v. Uniroyal Inc.*, 928 F.2d 1413, 1417 (4<sup>th</sup> Cir. 1991) (“If the defendant articulates a legitimate nondiscriminatory reason for the employment action, the plaintiff must then prove that the reason given was a mere pretext for discrimination and that age was a more likely reason for the employment action.”); *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 849 (4<sup>th</sup> Cir. 1988) (holding that the plaintiff “cannot avoid summary judgment in this case simply by refuting [his employer’s] non-age-related reasons for firing him.”); *Gries v. Zimmer, Inc.*, 742 F.Supp. 1309, 1315 (W.D.N.C. 1990) (“To successfully prove pretext, the plaintiff must establish, first, that the stated reason for the employment action was not the true reason and, second, that the real reason for the employment action was discrimination.”).

188. *Bienkowski v. American Airlines, Inc.* 851 F.2d 1503, 1508 (5<sup>th</sup> Cir. 1988) (explicitly rejecting “pretext-only standard” adopted by Third Circuit in *Chipollini*, noting that “[e]ven if the trier of fact chose to believe an employee’s assessment of his performance rather than the employer’s, that choice alone would not lead to a conclusion that the employer’s version is a pretext for age discrimination); *Reeves v. General Foods Corp.*, 682 F.2d 515, 523-24 (5<sup>th</sup> Cir. 1982) (“It was incumbent upon Reeves to introduce substantial evidence to show that General Foods’ articulated reasons were pretextual and that he had been discriminated against because of age.”). *But see Thornbrough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 647 (5<sup>th</sup> Cir. 1985) (“[The plaintiff] is not required to prove that the Railroad was motivated by bad reasons; he need only persuade the factfinder that the Railroad’s purported good reasons were untrue.”).

189. *North v. Madison Area Ass’n for Retarded Citizens-Developmental Centers Corp.*, 844 F.2d 401, 406 (7<sup>th</sup> Cir. 1988) (holding that a plaintiff “does not meet [his burden in the third step of *McDonnell Douglas* analysis] simply by showing that [his employer’s] stated reasons were pretextual; he must also show a causal chain in which race played a dispositive role”); *Beard v. Whitley County REMC*, 840 F.2d 405, 411 (7<sup>th</sup> Cir. 1988) (“We have held previously that pretext in this context means ‘pretext for discrimination.’”); *Pollard v. Rea Magnet Wire Co., Inc.*, 824 F.2d 557, 559 (7<sup>th</sup> Cir. 1987) (distinguishing between pretext and pretext for discrimination); *Friedel v. City of Madison*, 832 F.2d 965,

and Eleventh<sup>190</sup> Circuits all adhered to a “pretext-plus” standard. Under this rule, a plaintiff cannot demonstrate pretext simply by showing that the defendant’s articulated reason was false. Rather, a plaintiff must make the further showing that the defendant’s actual reason for doing what it did was impermissible animus. This is so because, in these courts’ view, pretext does not simply mean “false”; rather, it is shorthand for “pretext for discrimination.”<sup>191</sup> Therefore, summary judgment was appropriate unless the plaintiff offered evidence to show that the adverse employment action would not have occurred but for discrimination.

As before, we observe trends consistent with our theory. On balance, the circuits that adopted a “pretext-only” standard have had comparatively low workloads and employment discrimination filings, and the reverse is true of those courts that required a greater showing to establish pretext.

In 1993, the Supreme Court granted certiorari in *St. Mary’s Honor Center v. Hicks*<sup>192</sup> to resolve this divide. Melvin Hicks, an African-American who was formerly employed as a correctional officer by St. Mary’s Honor Center, brought a Title VII suit alleging that his termination was based on race. After a bench trial, the District Court determined that the reasons proffered by St. Mary’s for terminating Hicks were pretextual, but that Hicks had failed to show

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975 (7<sup>th</sup> Cir. 1987) ([P]laintiffs must allege and support not only pretext, but also that the Department’s actions were pretext for discrimination based on a prohibited characteristic. . . .”). But see *Visser v. Packer Eng’g Co.*, 924 F.2d 655, 657 (7<sup>th</sup> Cir. 1991) (“If the employer offers a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age.”); *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (similarly holding that where plaintiff has offered evidence to show that where employer’s proffered reason is false, inference of discrimination is permissible, but not mandatory).

190. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 981 n.3 (11<sup>th</sup> Cir. 1989) (“Of course, merely establishing pretext, without more, is insufficient to support a finding of racial discrimination. The plaintiff must show he suffered intentional discrimination because of his race.”) (internal citations omitted); *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181, 1184 (11<sup>th</sup> Cir. 1984) (“The ultimate question in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but whether the defendant intentionally discriminated against the plaintiff.”) (internal quotations omitted); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11<sup>th</sup> Cir. 1983) (“The court thus may not circumvent the intent requirement of the plaintiff’s ultimate burden of persuasion by couching its conclusion in terms of pretext; a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability.”). *But see Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1564 (11<sup>th</sup> Cir. 1987) (“The implausibility of the alleged justification is sufficient to create a genuine issue of material fact as to whether Pilot Freight’s articulated reason is pretextual.”) (citing *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 900 (3d Cir. 1987) (pretext-only standard)).

191. A representative case is *Grabb v. Bendix Corp.*, 666 F.Supp. 1223, 1244 (N.D. Ind. 1986) (“[I]t is not enough to show that the employer’s reasons were not the real reasons, were false, or were merely a pretext. The plaintiff must show that they were a pretext for discrimination.”).

192. 509 U.S. 502 (1993)

that St. Mary's demoted and then terminated him on the basis of race.<sup>193</sup> Accordingly, the District Court entered judgment in St. Mary's favor. The Eighth Circuit reversed and entered judgment in Hicks' favor, holding that "once [Hicks] proved all of [St. Mary's] proffered reasons for the adverse employment actions were pretextual, [Hicks] was entitled to judgment as a matter of law."<sup>194</sup>

A closely divided Supreme Court reversed the Eighth Circuit. Writing for a five-justice majority, Justice Scalia unequivocally rejected the Eighth Circuit's rule that a plaintiff who demonstrates pretext is necessarily entitled to judgment as a matter of law.<sup>195</sup> Such a finding was certainly permissible, the majority observed, but could only obtain upon a determination that unlawful discrimination did in fact occur.<sup>196</sup> Because the District Court found that Hicks had failed to carry his burden in this regard, his claim failed. While the majority conceded that *Burdine's* discussion of pretext could be read to reach a contrary result (and one which the dissent urged), the majority concluded that, taken in context, these statements refer to "pretext for discrimination."<sup>197</sup> Lastly, the majority dismissed as "dictum [which] contradicts or renders inexplicable numerous other statements, both in *Burdine* itself and in our later case law" *Burdine's* statement that a plaintiff could demonstrate pretext "by showing that the employer's proffered explanation is unworthy of credence."<sup>198</sup> In the end, *Hicks* stands for the proposition that when a plaintiff exposes an employer's proffered reasons for taking the action that it did, a factfinder may, but need not, conclude that discrimination was actual motivation even absent further evidence of unlawful discrimination.<sup>199</sup>

But a quizzical comment that immediately preceded the holding would soon take center stage. The majority observed that:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.<sup>200</sup>

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193. *Id.* at 507-08.

194. *Id.* (quoting *Hicks v. St. Mary's Honor Ctr.*, 970 F.2d 487, 492 (8<sup>th</sup> Cir. 1992)).

195. *Id.* at 515.

196. *Id.* at 514 ("We have no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, that the employer has unlawfully discriminated.") (emphasis in original).

197. *Id.* at 515-16 ("But a reason cannot be proved to be a 'pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason. *Burdine's* later allusions to proving or demonstrating simply 'pretext' are reasonably understood to refer to the previously described pretext, i.e., 'pretext for discrimination.'") (emphasis in original) (internal citations omitted).

198. *Id.* at 517.

199. *Id.* at 511.

200. *Id.*

Thus, while the Supreme Court buried “pretext-plus” with the one hand, it simultaneously resurrected it with the other under a new name, “suspicion of mendacity.” Moreover, the Court reiterated that disbelief of the employer’s proffered reasons, standing alone, was insufficient to compel judgment as a matter of law. Rather, a plaintiff must show the plaintiff must show “both that the reason was false, *and* that discrimination was the real reason.”<sup>201</sup> Although this language can be explained by the procedural posture of the case, this apparent conflict within *Hicks* led one commentator to lament that “[i]t did not require great prescience to predict the result of [this] uncharacteristically permissive language.<sup>202</sup> Indeed it did not.

In the years that followed, the split that the Supreme Court endeavored to resolve in *Hicks* reemerged largely along the same lines. Now recast as “suspicion of mendacity,” several circuits continued to embrace the old “pretext plus” jurisprudence, while others adhered to a “pretext only” understanding of *Hicks*. The First,<sup>203</sup> Second,<sup>204</sup> Fourth,<sup>205</sup> Fifth,<sup>206</sup> and

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201. *Id.* at 512 n.4 (emphasis in original).

202. Catherine Lanctot, *Secrets and Lies: The Need for A Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 543 (2001); *see also Hicks*, 512 U.S. at 535-36 (criticizing majority for giving credence to “pretext plus” analysis) (Souter, J., dissenting).

203. *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260 (1st Cir. 1994) (stating the Supreme Court in *Hicks* did not mean prima facie case plus proof of pretext was always sufficient to present a jury question).

204. *Fisher v. Vassar College*, 114 F.3d 1332, 1337 (2d Cir. 1997) (en banc) (“[D]iscrimination cases differ from many areas of law in that under the *McDonnell Douglas* burden-shifting framework a plaintiff’s satisfaction of the minimal requirements of the prima facie case does not necessarily mean, even if the elements of the prima facie case go unchallenged, that plaintiff will ultimately have sufficient evidence to support a verdict on each element that plaintiff ultimately must prove to win the case. It can be readily seen, furthermore, that the essential elements of this diminished, minimal prima facie case do not necessarily support a reasonable inference of illegal discrimination. . . . The point we make here is that evidence sufficient to satisfy the scaled-down requirements of the prima facie case under *McDonnell Douglas* does not necessarily tell much about whether discrimination played a role in the employment decision. The fact that a plaintiff is judged to have satisfied these minimal requirements is no indication that, at the end of the case, plaintiff will have enough evidence of discrimination to support a verdict in his favor.”); *Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 142 (2d Cir. 1993) ([W]e believe it important to emphasize that a Title VII plaintiff does not necessarily meet its burden of persuasion by convincing the factfinder that the employer’s non-discriminatory explanation is not credible; rather, the trier of fact must find that the plaintiff has proven its explanation of discriminatory intent by a fair preponderance of the evidence.”).

205. *Vaughan v. Metrahealth Companies, Inc.*, 145 F.3d 197, 201 (4<sup>th</sup> Cir. 1998) (rejecting “a rule that all discrimination plaintiffs are summary judgment-proof as soon as they raise a jury question about the veracity of their employer’s explanation for the challenged employment action”); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4<sup>th</sup> Cir. 1995) (stating to avoid summary judgment, plaintiff had to prove not only that the reason the employer presented was false, but also that discrimination was the real reason).

206. *Reeves v. Sanderson Plumbing*, 197 F.3d 688 (5<sup>th</sup> Cir. 1999) (disproving employer’s proffered reason for adverse employment action not necessarily sufficient to show discrimination); *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5<sup>th</sup> Cir. 1999) (same);

Eleventh<sup>207</sup> circuits all accepted the Court's invitation to ratchet up the evidentiary burden on plaintiffs. By contrast, Third,<sup>208</sup> Sixth,<sup>209</sup> Seventh,<sup>210</sup> Eighth,<sup>211</sup> Ninth,<sup>212</sup> Tenth,<sup>213</sup> and District of Columbia<sup>214</sup> Circuits all declined to

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Walton v. Bisco Indust., Inc., 119 F.3d 368, 370 (5th Cir. 1997) (stating a reason cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason); Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) (en banc) (same).

207. Isenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 444 (11th Cir. 1996) (criticizing earlier post-*Hicks* decision in *Howard*, and stating that employer would still be entitled to judgment as a matter of law even if the plaintiff "provid[ed] a basis to doubt the employer's justification" because plaintiff had failed to adduce "significantly probative" evidence that employer's proffered reasons were pretextual); Walker v. NationsBank of Florida, 53 F.3d 1548, 1558 (11th Cir. 1995) (affirming grant of judgment as a matter of law in favor of the employer in an age and sex discrimination case, even though the plaintiff had established a prima facie case and had put on evidence sufficient to permit the factfinder to disbelieve all of the employer's proffered reasons for the adverse employment action, because plaintiff "did not produce evidence that raised a suspicion of mendacity sufficient to permit us to find on this record that the bank intentionally discriminated against her on the basis of age and/or sex"). *But see* Combs v. Plantation Patterns, 106 F.3d 1519, 1532 (11th Cir. 1997) (characterizing *Walker* as a "mistake," and dismissing *Isenbergh* as "dicta"); Howard v. BP Oil Co., 32 F.3d 520 (11th Cir. 1994) (applying pretext-only standard).

208. Sheridan v. E.I. DuPont De Nemours & Co., 100 F.3d 1061, 1066-67 (3d Cir. 1996) (en banc) ("[T]he elements of the prima facie case and disbelief of the defendant's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.").

209. Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1083 (6th Cir. 1994) ("[T]he only effect of the employer's nondiscriminatory explanation is to convert the inference of discrimination based upon the plaintiff's prima facie case from a mandatory one which the jury *must* draw, to a permissive one the jury *may* draw, *provided* that the jury finds the employer's explanation unworthy of belief.") (emphasis in original) (internal quotations omitted).

210. Wohl v. Spectrum Mfg., Inc., 94 F.3d 353, 355 (7th Cir. 1996) ("A plaintiff in an age discrimination case may defeat a summary judgment motion brought by the employer if the plaintiff produces evidence that the employer proffered a phony reason for firing the employee."); Perdomo v. Browner, 67 F.3d 140, 146 (7th Cir. 1995) ("The district court found Perdomo's [direct] evidence of racial discrimination unpersuasive, but . . . such evidence is not required: the trier of fact is permitted to infer discrimination from a finding that the employer's proffered reason was spurious.").

211. Ryther v. KARE 11, 108 F.3d 832, 836 (8th Cir. 1997) (en banc) ("[R]ejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, no additional proof of discrimination is required. . . .") (internal citations and quotations omitted); Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1110 (8th Cir. 1994) ("The elements of the plaintiff's prima facie case are thus present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations. The ultimate question of discrimination must therefore be left to the trier of fact to decide.") (internal quotations omitted). *But see* Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018, 1022-23 (8th Cir. 1998) ("[T]o survive a motion for summary judgment, a plaintiff must: (1) present evidence creating a fact issue as to whether the employer's proffered reasons are pretextual; *and* (2) present evidence that supports a reasonable inference of unlawful discrimination) (emphasis added).

raise the evidentiary standard. As before, this post-*Hicks* divide is largely consistent with our prophylactic jurisprudence. The circuits with the three highest workloads during the years following *Hicks*—the Eleventh, Fifth, and Second Circuits—all embraced heightened pretext standards. Notably, these circuits were also among the leaders in employment discrimination filings during this time. By contrast, the four circuits with the lowest appellate workloads at that time (as well as low district workloads and appellate employment discrimination filings)—the Third, Eighth, Tenth, and District of Columbia Circuits—all adopted a more permissive standard. The remaining five circuits—which had roughly average workloads and/or numbers of employment discrimination filings—divided evenly between “pretext only” and “pretext plus” standards.

The Supreme Court again intervened in 2000 to clear up the fray. In *Reeves v. Sanderson Plumbing*,<sup>215</sup> a unanimous Court reversed the Fifth Circuit, which had granted summary judgment to an employer in an age discrimination case. The *Reeves* Court chastised the Fifth Circuit for infringing on the jury’s role as finder of fact, observing that the Fifth Circuit had “disregarded critical evidence favorable to [the plaintiff],” and that it had similarly “failed to draw all reasonable inferences in [plaintiff’s] favor.”<sup>216</sup> The Court also admonished the Fifth Circuit for the piecemeal manner in which it weighed plaintiff’s evidence of discrimination, reminding that the proper approach was to consider the evidence in its entirety.<sup>217</sup>

Regarding the proper standard for determining pretext, the Court affirmed *Hicks*’ core holding, ruling that “a plaintiff’s prima facie case, combined with

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212. *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (“If a plaintiff succeeds in raising a genuine factual issue regarding the authenticity of the employer’s stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed.”).

213. *Beaird v. Seagate Tech.*, 145 F.3d 1159 (10<sup>th</sup> Cir. 1998) (“The plaintiff may then resist summary judgment if she can present evidence that that proffered reason was pretextual, i.e. unworthy of belief. . . .”) (internal quotations omitted); *Randle v. City of Aurora*, 69 F.3d 441, 451 (10<sup>th</sup> Cir. 1995) (If the plaintiff succeeds in showing a prima facie case and presents evidence that the defendant’s proffered reason for the employment decision was pretextual-i.e. unworthy of belief, the plaintiff can withstand a summary judgment motion and is entitled to go to trial.”).

214. *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1290 (D.C. Cir. 1998) (“Under *Hicks* and other applicable law, however, a plaintiff’s discrediting of an employer’s stated reason for its employment decision is entitled to considerable weight. . . . [W]e therefore reject any reading of *Hicks* under which employment discrimination plaintiffs would be routinely required to submit evidence over and above rebutting the employer’s stated explanation in order to avoid summary judgment.”); *Barbour v. Merrill*, 48 F.3d 1270, 1277 (D.C. Cir. 1995) (“According to *Hicks*, a plaintiff need only establish a prima facie case and introduce evidence sufficient to discredit the defendant’s proffered nondiscriminatory reasons; at that point, the factfinder, if so persuaded, may infer discrimination.”).

215. 530 U.S. 133 (2000).

216. *Id.* at 153.

217. *Id.* at 152-53

sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."<sup>218</sup> In so holding, the Supreme Court made clear that a plaintiff need not offer independent and specific evidence of discrimination above and beyond the *prima facie* case to survive summary judgment.

Somewhat strangely, however, the Court went on to note that this rule would not apply in every case, adding that:

This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a *prima facie* case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.<sup>219</sup>

Such instances, the Court observed, would include cases in which "the record conclusively revealed some other, nondiscriminatory reason for the employer's decision" as well as those in which "the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and [in which] there was abundant and uncontroverted independent evidence that no discrimination had occurred."<sup>220</sup>

In her concurrence, Justice Ginsburg emphasized the narrow scope of this loophole, noting that a plaintiff who made the requisite evidentiary showing described above would lose on summary judgment only in "atypical" cases, but provided no further elaboration on what might constitute an atypical case.<sup>221</sup>

Following *Reeves*, some of the more burdened circuits—the Second,<sup>222</sup> Fifth,<sup>223</sup> and Seventh<sup>224</sup> Circuits—appeared to receive *Reeves* coolly. This

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218. *Id.* at 148

219. *Id.*

220. *Id.* at 148.

221. *Id.* at 155.

222. *Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 382 (2d Cir. 2001) ("The Supreme Court has indicated that only occasionally will a *prima facie* case plus pretext fall short of the burden a plaintiff carries to reach a jury on the ultimate question of discrimination, [but] such occasions do exist.").

223. *See Rubenstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392 (5th Cir. 2000) (affirming summary judgment for defendant on plaintiff's discrimination claim, and continuing to apply the Fifth Circuit's prior law that stray remarks offered by plaintiff were not sufficiently probative of discrimination so as to withstand a motion for summary judgment); *Vadie v. Mississippi State University*, 218 F.3d 365, 373 (5th Cir. 2000) (reversing trial court's denial of defendant's motion for judgment as a matter of law by district court after jury verdict for plaintiff because, other than proof of plaintiff's Iranian ancestry, "there is nothing probative anywhere in the record of the ultimate question of national origin discrimination."). *But see Russell v. McKinney Hospital Venture*, 235 F.3d 219, 223 n.4 (5th Cir. 2000) ("[W]e simply comply with the Supreme Court's mandate in *Reeves* not to substitute our judgment for that of the jury and not to unduly restrict a plaintiff's circumstantial case of discrimination. We therefore underscore that *Reeves* is the authoritative statement regarding the standard for judgment as a matter of law in discrimination cases. *Reeves* guides our decisions, and insofar as *Rhodes* is inconsistent with *Reeves*, we follow *Reeves*.").

initial reaction should not be overstated, however, as these circuits now uniformly appear to have fallen in line with their sister circuits in following *Reeves*.

With its opinion in *Reeves*, the Supreme Court effectively settled the debate among the circuits about the extent of the burden that the plaintiff must carry at summary judgment to show pretext. As evidenced by the divide between the circuits both before and after *Hicks* and *Reeves*, however, courts' willingness to require heightened pretext showings appears to correlate with their respective workloads and numbers of employment discrimination filings.

#### CONCLUSION

Having taken two steps forward toward a non-ideological explanation of recent trends in employment discrimination jurisprudence, it would be disingenuous not to take at least one moderate step back. It bears repeating that ideology surely plays some role in judicial decisionmaking, and there is no reason to believe that a different result obtains in discrimination cases. To argue that it did not, and that workload is dispositive, would be no less overbroad and simplistic than the claims of those who allege that judges simply vote their ideological preferences.

Yet even those who subscribe to believe that, given the opportunity, judges simply vote their ideological preference must concede that judges who may fundamentally disagree in many respects agree on the proper outcome much more often than they disagree, at least in the employment discrimination context. This consensus undoubtedly reflects the great progress that our nation has made in terms of recognizing, confronting, and eliminating unlawful discrimination in the workplace.

It is at this juncture that the public policy debate breaks down. The predominant issue in politics today vis á vis judges and employment discrimination is whether the federal bench is sufficiently sensitive to allegations of discrimination. On this score, conservatives and liberals (labeled as such for ease of characterizing their respective positions) quickly pass over their limited agreement that *some* employment discrimination claims are frivolous, and begin bleating familiar refrains about lack of personal responsibility and indifference to injustice and bigotry, respectively. Battle lines drawn, anecdotes are the weapon of choice. Conservatives point to some meritless discrimination suit brought by an almost unfathomably bad employee; liberals counter with the latest court decision sniffily rejecting claims of a seemingly deserving victim. These vignettes reassure

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224. *Kulumani v. Blue Cross Blue Shield Ass'n.*, 221 F.3d 681 (7<sup>th</sup> Cir. 2000) (upholding a grant of summary judgment post-*Reeves* in which the trial court appeared to draw inferences in favor of the moving party and considered plaintiff's evidence of discrimination in a piecemeal fashion). *But see* *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (7<sup>th</sup> Cir. 2002) (embracing *Reeves*).

sympathetically inclined listeners that theirs is the virtuous position, while doing little to persuade skeptics, who reflexively dismiss such stories as one-offs unrepresentative of the big picture. Worse still, skeptics may turn on the speaker. For many, the topic of discrimination implicates deeply held beliefs, and blasphemy against these convictions cannot be abided. Those that do dare to cast such aspersions are consequently reviled as either a sympathizer for professional victims and con artists, or as closet bigots, depending on the listener's perspective. It belabors the obvious to say that this is hardly the stuff of productive discourse.

But so it goes. A sort of intellectual junk food, anecdotes soothe consciences and inflame passions, while affording virtually no insight into broader trends. They thus obscure what is a critical threshold question facing policymakers concerned about the trends discussed in this Article.

The question is not whether employment discrimination continues (surely it does), or whether judges must remain vigilant to guard against new manifestations of animus (surely they must); it is whether recent volume of employment discrimination claims bears a reasonable relationship to estimates of the discrimination that remains. In view of the explosive growth in employment discrimination filings in recent years, and in view of the substantial progress our nation has made in eliminating discrimination over the last forty years, it is hard to see how the answer could be yes, even under the most generous assumptions about residual discrimination. Put another way, the consistently high volume of employment discrimination claims outstrips even the most aggressive estimations of residual discrimination. Under any analysis, then, it necessarily follows that some number of employment discrimination claims are frivolous. While the precise percentage of frivolous discrimination claims is almost certainly unknowable, the hegemony across ideological lines Sunstein observed in his study of judicial decisionmaking in employment discrimination cases suggests that a substantial portion are invalid.

And assuming that the proportion of meritless claims is normally distributed across the circuits, the variations we have observed in terms of judicial receptiveness toward employment discrimination claims suggest that the wages of crying wolf are very real. To the extent that judges come to believe that discrimination claims have become unmoored from actual occurrences of discrimination, it is perhaps inevitable that they would begin to view all such claims in a jaundiced light. Accordingly, it will become increasingly difficult for plaintiffs with valid discrimination claims to prevail, and the baby may well be thrown out with the proverbial bathwater. This appears to be especially true if the judge maintains a strenuous workload, as he or she will likely come to resent spending time on cases that are frivolous to the detriment of other, more deserving cases.

It should by now be clear that the extent to which discrimination remains is only part of the story. Of considerable importance is the degree to which discrimination is alleged where none exists (or, at least, is not substantiated), as

well as the other demands on judges' time. So what now?

As it happens, the debate sparked by the quintet of decisions from the 1988 Term has been recently rekindled. This past Term, the Supreme Court held in *Ledbetter v. Goodyear* that a plaintiff asserting a disparate pay claim under Title VII must file suit within 180 days of the allegedly discriminatory action.<sup>225</sup> Lilly Ledbetter, a retired Goodyear employee, alleged that her former supervisors discriminated against her on the basis of her sex in setting her pay rate in the early 1990s.<sup>226</sup> Because this initial decision impacted her each time she received a paycheck between 1979 and her retirement in 1998, Ledbetter argued that her disparate pay claim re-accrued upon the issuance of each paycheck. Writing for a five-justice majority, Justice Alito rejected Ledbetter's argument that the statute of limitations for filing a discrimination claim reset each time Goodyear issued a paycheck to Ledbetter that carried forward the effects of Goodyear's past discrimination, absent a showing of an intent to discriminate within these future pay periods. "Current effects alone," Justice Alito wrote, "cannot breathe life into prior, uncharged discrimination."<sup>227</sup> In the majority's view, the "paycheck accrual" rule Ledbetter urged would improperly contravene Congress' "strong preference for the prompt resolution of employment discrimination allegations" embodied in the 180-day deadline for filing an administrative grievance with the EEOC.<sup>228</sup> Because Ledbetter had not filed her claim within 180 days of Goodyear's discriminatory pay decision, the majority held that her claim was time barred.

Writing for the four dissenting justices, Justice Ginsburg chided the majority for its "parsimonious" reading of Title VII, asserting that the majority "does not comprehend, or is indifferent to, the insidious way in which women are victims of pay discrimination."<sup>229</sup> In a dissent littered with references to the Civil Rights Act of 1991 and the events that animated its passage, Justice Ginsburg expressly called on Congress to overrule *Ledbetter*, observing that "[o]nce again, the ball is in Congress' court."<sup>230</sup>

The reaction to *Ledbetter* was nothing if not predictable. Many conservatives were thrilled with *Ledbetter*, while liberals decried the decision as a disaster. For its part, a Democratically-controlled Congress wasted no time moving on Justice Ginsburg's suggestion. Within hours of the Supreme Court's decision, Democratic members of both the Senate and House of Representatives promised to introduce legislation to amend Title VII to undo *Ledbetter*. Two months later, in July 2007, the House of Representatives

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<sup>225</sup> 127 S. Ct. 2162 (2007)

<sup>226</sup> See *Ledbetter v. Goodyear Tire and Rubber Co.*, 421 F.3d 1196, 1172-73 (11th Cir. 2005).

<sup>227</sup> *Ledbetter*, 127 S. Ct. at 2170.

<sup>228</sup> *Id.* at 2170-71.

<sup>229</sup> *Id.* at 2188 (Ginsburg, J., dissenting).

<sup>230</sup> *Id.*

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passed one such bill, which currently awaits Senate consideration.<sup>231</sup>

It remains an open question what will come of Congress' efforts to overrule *Ledbetter* legislatively. What is clear, however, is that both parties have (at least so far) largely squandered the opportunity *Ledbetter* provided to have a broader, meaningful policy debate about employment discrimination: In all of the partisan bickering following *Ledbetter*, no one appears to have considered how well, at the aggregate level, the current legal apparatus accords with the realities of employment discrimination and employment discrimination litigation today. This presumes, of course, that Congress recognizes that there may be fundamental problems with the employment discrimination regime, because one does not endeavor fix something they do not view as broken.

Then again, Congress may realize full well that the problems with the employment discrimination regime might extend beyond the narrow issue *Ledbetter* raised. If that is the case, and Congress has simply ducked the issue, this avoidance should come as no particular surprise, since any discussion about reforming employment discrimination laws would necessarily implicate some of the most sensitive and divisive issues of our times. Given that the current discourse about civil rights is rarely burdened by an overabundance of nuance, any politician who dared broach any reform proposal that was not uniformly pro-plaintiff would almost certainly be tarred as hostile to civil rights. There are few quicker ways for a politician to become an ex-politician than to acquire such an albatross. So no one asks the hard questions. Better to let sleeping dogs lie, so the thinking goes, even if they do have fleas.

Determining how to deter the filing of frivolous discrimination claims while simultaneously permitting meritorious ones is admittedly a tall order, if not an impossible one. These caveats notwithstanding, unless and until conservatives and liberals are willing to have a frank and unsentimental discussion about the degree to which employment discrimination still exists on the one hand, and the degree to which the current legal regime encourages frivolous lawsuits on the other, employers, employees, and the judges who resolve their disputes will all limp along unhappily under the status quo.

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<sup>231</sup> H.R. 2831 (legislatively overruling *Ledbetter* and amending Title VII to include a "paycheck accrual" rule for disparate pay claims).