

Contesting Workplace Discrimination in Court

CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987-2003



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American Bar Foundation

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EXECUTIVE SUMMARY

Analysis of 1788 randomly selected federal employment discrimination cases reveal several core findings and patterns:

- After a relative lull in the late 1980s, the overall number of employment discrimination claims filed began to rise sharply in the early 1990s, reached a high point around 1996, and steadily declined throughout the late 1990s before leveling off in the early 2000s.
- The highest percentage of cases claim racial discrimination, followed by claims of sex, age, and disability discrimination.
- Discrimination in firing and employer retaliation are by wide margins the most frequently challenged employer practices.
- Settlement is the most frequent outcome of an employment discrimination case, whereas trials are extremely rare.
- The overwhelming majority of employment discrimination cases consist of a solitary plaintiff. Cases involving multiple plaintiffs, class actions, and representation by the EEOC or a public interest law firm are extremely rare but plaintiffs in these cases have more favorable outcomes.
- Dismissal is the most likely outcome when the complainant files *pro se*, accounting for an enormous 40 percent of all such cases (compared to an 11 percent dismissal rate when the plaintiff has representation).
- Just 20 (well under 1 percent) cases in our entire sample were certified class actions.
- Trials—invariably the least common EDL outcome—become increasingly infrequent throughout the entire 1987-2003 period.

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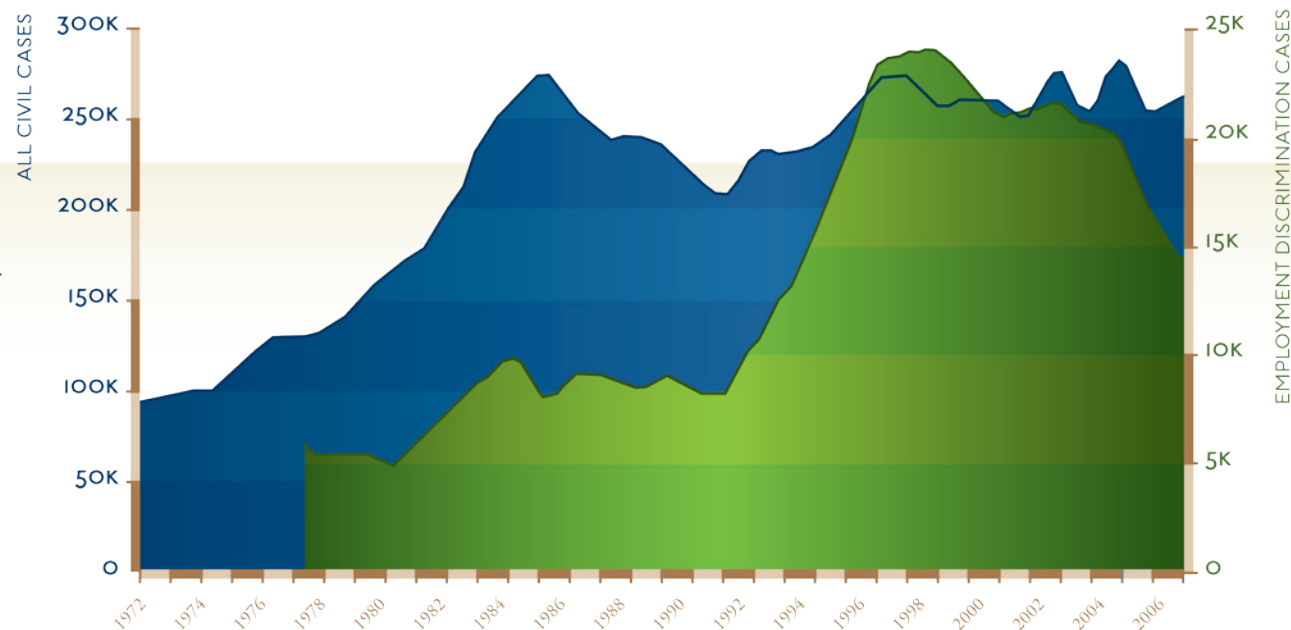
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Part 1 | Introduction

Since the early 1970s, employment discrimination litigation has steadily occupied a commanding presence in U.S. civil law (see Figure 1) and is the largest single category of claims in federal courts. Then and now, the individual right to equal employment opportunity—and access to the federal courts to enforce that right—has become a crucial resource in U.S. society’s ongoing struggle to end employment bias on the basis of race, sex, ethnicity, age, disability, and other protected characteristics. In pursuit of that objective, Congress has enacted multiple statutes since the 1960s including the Equal Pay Act (EPA, 1963), Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act (ADEA, 1968), the Pregnancy Discrimination Act (PDA, 1978), the Rehabilitation Act (1973), the Americans with Disabilities Act (ADA, 1990), and the Family Medical Leave Act (FMLA, 1993). Claims of racial discrimination may also be brought under two Reconstruction-era statutes, §1981 and §1983 of the Civil Rights Act of 1871.*

FIGURE 1 :
TOTAL NUMBER OF CIVIL
CASES AND EMPLOYMENT
DISCRIMINATION CASES
FILED IN FEDERAL COURT,
1972-2006



* A plaintiff may also bring a constitutional claim in cases alleging discrimination by the state.

“The individual right to equal employment opportunity—and access to the federal courts to enforce that right—has become a crucial resource in U.S. society’s ongoing struggle to end employment bias.”

This report summarizes the basic characteristics of these cases based on a comprehensive, in-depth analysis of employment discrimination litigation (hereafter EDL) for the time period 1987-2003. We explored the patterns, characteristics, trends, and outcomes of 1788 randomly selected cases from seven federal judicial districts.**

We considered a wide range of case characteristics and variables, including:

- Type of discrimination claimed (race, sex, age, national origin, disability, etc.)
- Alleged discriminatory issues or practices (hiring, firing, promotion, sexual harassment, etc.)
- Case comparisons across judicial districts
- Plaintiff characteristics (race, sex, age, etc.)
- Plaintiff representation (single or multiple plaintiffs, class-actions, public interest litigation support, etc.)
- Case outcomes (settlement, trial, etc.)
- Over-time trends in EDL case characteristics and outcomes

Each of the nearly 2,000 cases has been coded for hundreds of variables, but this report summarizes and presents the data in the most straightforward and understandable terms possible. Our findings are generally depicted as simple graphics or figures rather than tables loaded with raw numbers and percentages. Also consistent with the purpose of the report to describe the caseload simply, we leave formal tests of statistical significance for future analysis. Our large sample size (n=1788) often would find statistically significant differences, but in ways that would likely obscure and needlessly complicate the broader contours of EDL cases that we want to convey in this report.

The remainder of the report is organized as follows. Part II explores the general characteristics of all EDL cases, including (but not limited to) those listed in the above bullet points. Part III compares many of these characteristics across the seven judicial districts from which our sample was drawn. Part IV takes a closer look at *plaintiff* characteristics, both in general, and with respect to particular *case* characteristics. Part V turns our attention to case outcomes—and the case characteristics that influence those outcomes—ranging from early case dismissal to trials and appeals. Part VI examines whether and to what extent the broader characteristics and outcomes of EDL cases have changed over the course of the study’s time horizon (1987-2003). Finally, Part VII summarizes our key findings and suggests some cautious conclusions about the nature, reach, and impact of EDL in the last decade and a half, and where this crucial dimension of U.S. civil rights policy might be headed in the near-future.

** Northern District of Illinois (NDIL); Southern District of New York (SDNY); Northern District of Georgia (NDGA); Northern District of California (NDCA); Northern District of Texas (NDTX); Eastern District of Louisiana (EDLA); Eastern District of Pennsylvania (EDPA).

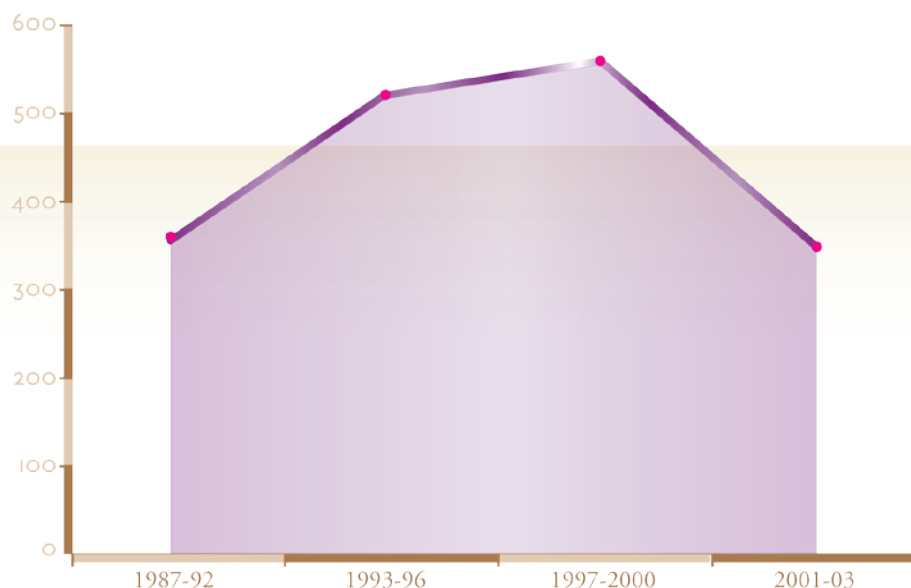
Part 2 | Employment Discrimination Case Characteristics

VOLUME OF COMPLAINTS 1987-2003

We begin our analysis by noting trends in the frequency of complaints for the 1987-2003 period. We broke down this seventeen-year period into four discrete time blocks: 1987-1992; 1993-96; 1997-2000; and 2001-2003. Each time block roughly corresponds to prior presidential administrations, but two exceptions should be kept in mind. First, we included complaints from 1987 and 1988 (Reagan administration) to the first time-period covering the tenure of the first President Bush (1989-1992). Second, since our data base ends with 2003 cases, the final time block (2001-03) covers just the first three years of the second President Bush's first term. Such considerations notwithstanding, Figure 2.1 shows a clear pattern in the volume of EDL complaints over time. In the four years between 1993-96 (the first Clinton administration), the number of complaints increased significantly from the prior six-year (1987-1992) period. The volume of complaints then rose even higher and peaked during Clinton's second administration. This trend was then reversed during George W. Bush's first term, as the volume of complaints shot down to roughly 1987-1992 levels (keeping in mind that this excludes complaints from 2004, the final year of Bush's first term).

FIGURE 2.1 :
NUMBER OF EDL COMPLAINTS
(SAMPLE FREQUENCIES) 1987-2003

(n=1788)

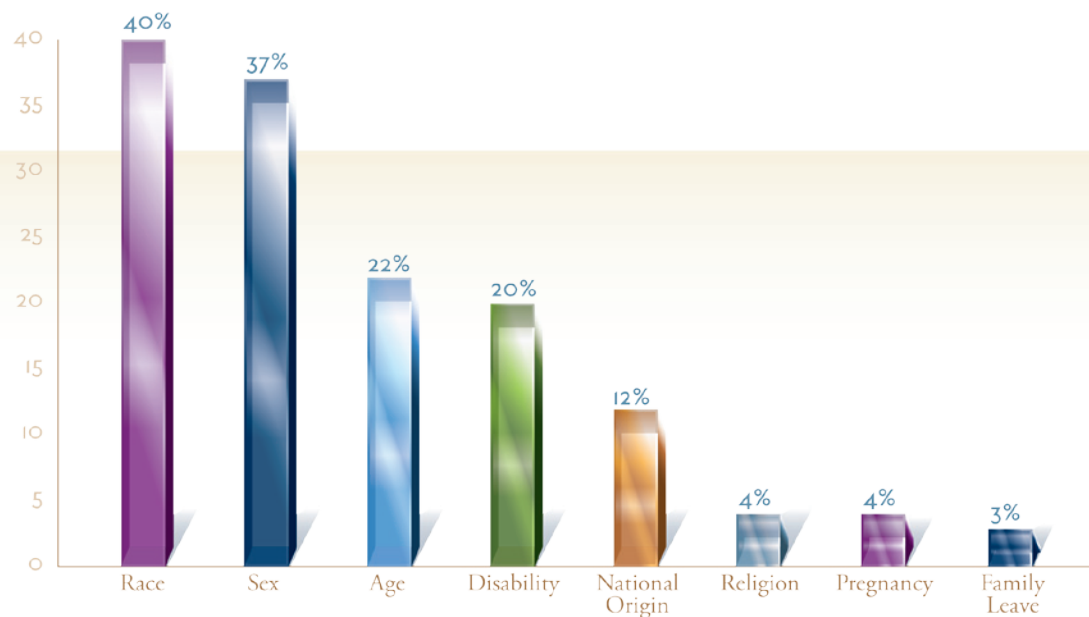


TYPES OF DISCRIMINATION

Federal law prohibits employment discrimination on the basis of various employee characteristics, including race, sex, national origin, religion, age and disability. It also bans discrimination because of pregnancy and against those taking authorized family leave. As depicted in Figure 2.2, race and sex claims are the most common types of EDL cases. About 40 percent of cases involve a race claim, while 37 percent of all cases involve a sex claim. Claims based on age and disability are the next most common, making up about 22 and 20 percent, respectively, of all EDL cases. A third tier of claims involve discrimination because of national origin, accounting for about 12 percent of all cases. The remaining types of discrimination, because of religion (four percent), pregnancy (four percent), and family leave (three percent) are considerably more rare.

FIGURE 2.2 :
PERCENT OF CASES
BY DISCRIMINATION TYPE *

(n=1788)



*Percentages add to >100% due to multiple claims in a single case.

MULTIPLE TYPE CLAIMS

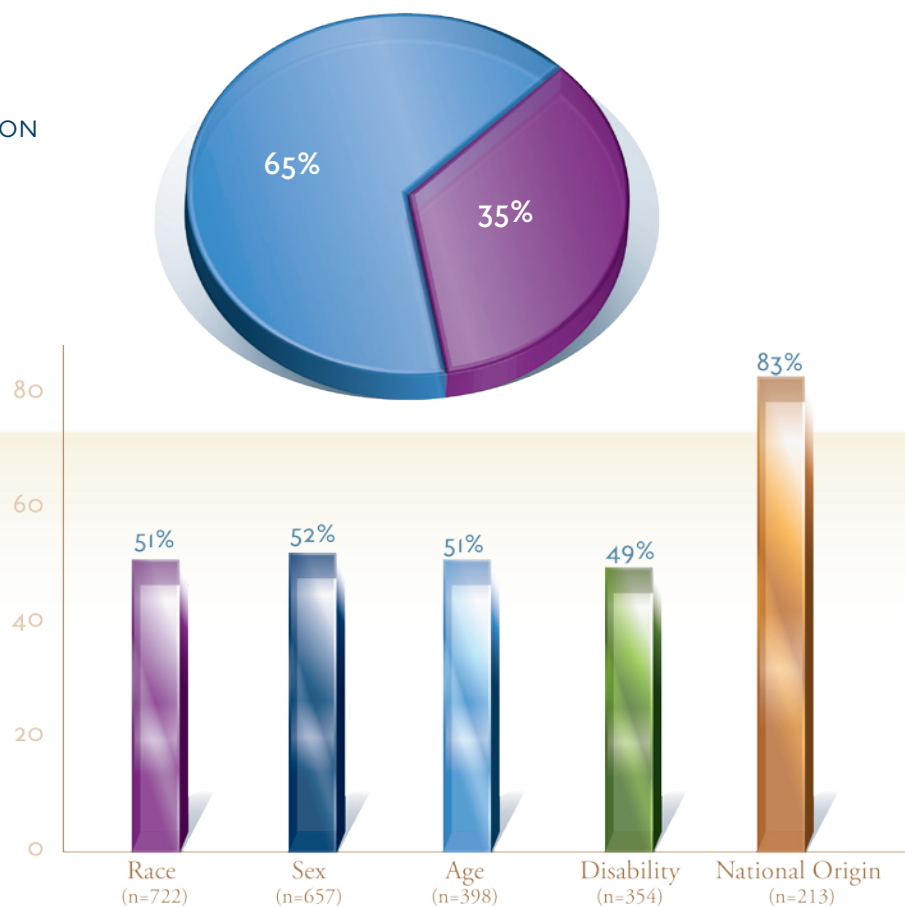
Complainants may make claims based on more than one characteristic. For example, a plaintiff may claim that she was discriminated against because of her race *and* sex or on account of his age *and* disability. Just over one-third of all EDL cases (35 percent) involve more than one type of discrimination claim (see Figure 2.3). We also looked to see if particular types of claims were likely to include additional claims. The data illustrated in Figure 2.4 show that claims based on race, sex, age, and disability each have about a 50/50 likelihood of including at least one other type of claim. National origin appears to be an outlier in this regard; over 80 percent of national origin cases include at least one additional type claim.

FIGURE 2.3 :
PERCENT OF CASES ALLEGING
MORE THAN ONE TYPE OF DISCRIMINATION



(n=1788)

FIGURE 2.4 :
PERCENT OF RACE, SEX, AGE,
DISABILITY, AND NATIONAL ORIGIN
CASES THAT INCLUDE AT LEAST ONE
ADDITIONAL TYPE CLAIM

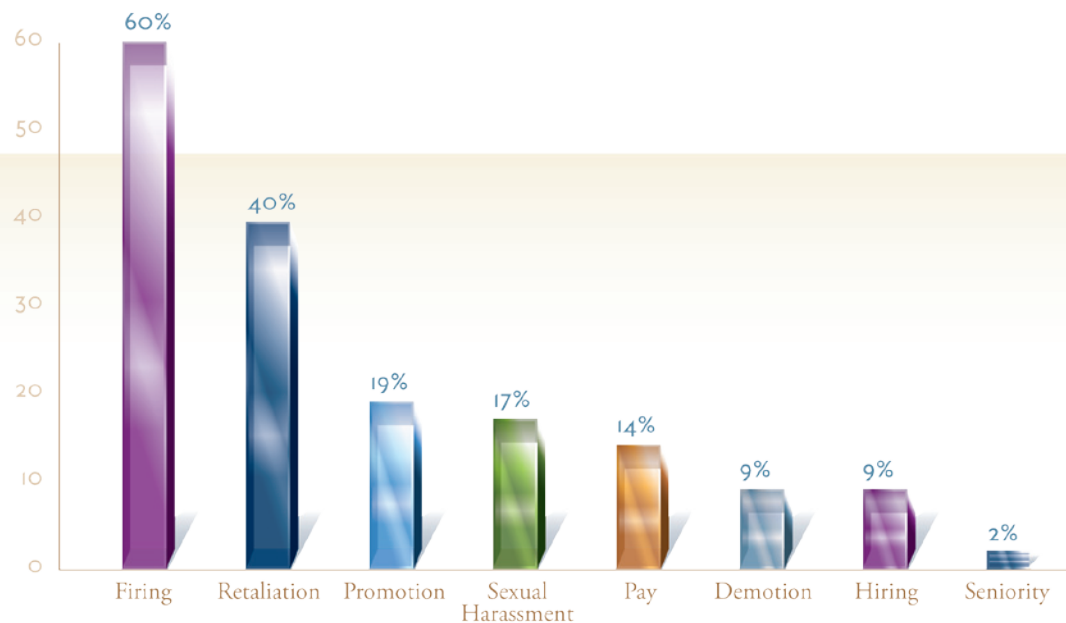


DISCRIMINATION ISSUES

The data on discriminatory issues tell a straightforward story (see Figure 2.5). Discriminatory firing is far and away the most prevalent claim made in EDL cases, followed by claims of unlawful retaliation. Fully 60 percent of all cases involve a claim of unlawful termination, and 40 percent charge the employer with retaliation. Claims of discrimination in promotion (19 percent), sexual harassment (17 percent), and pay (14 percent) are the next most common challenged issues. Somewhat less common are claims of discriminatory hiring and demotion (nine percent each). Claims of unlawful seniority practices are extremely rare (two percent of all cases). Also, as is the case of protected employee characteristics, a complainant may make claims based on more than one issue (pay *and* promotion, for example). And indeed, a majority of all sampled cases (55 percent) include multiple issue claims (Figure 2.6). Furthermore, Figure 2.7 reveals that complainants are more likely to make multiple issue claims in cases involving promotion (82 percent), pay (89 percent), and sexual harassment (83 percent), than in cases involving hiring or firing, although the latter two issues each have about a 50/50 likelihood of including at least one additional issue claim (48 and 54 percent, respectively).

FIGURE 2.5 :
PERCENT OF CASES BY
DISCRIMINATION ISSUE *

(n=1785)



*Percentages add to >100 due to multiple issue claims in a single case.

FIGURE 2.6 :
PERCENT OF CASES WITH
ONE OR MORE ISSUES CLAIMED

ONE ISSUE
MORE THAN ONE ISSUE

(n=1785)

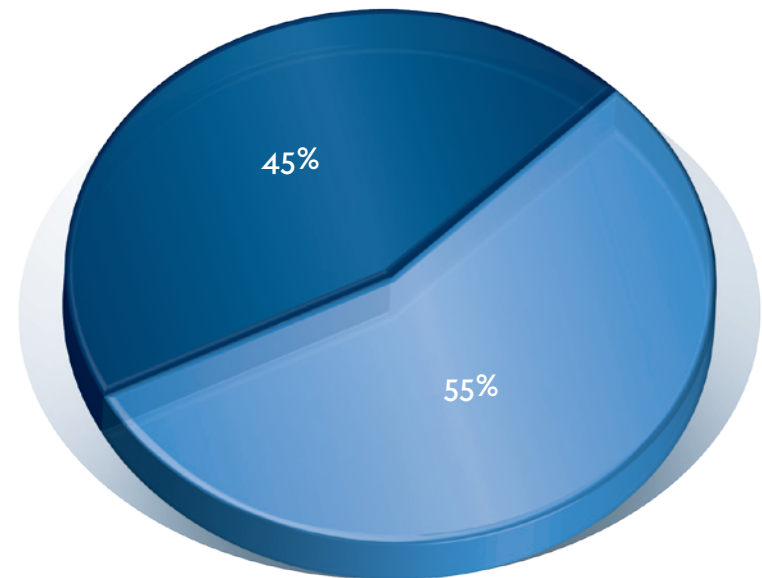
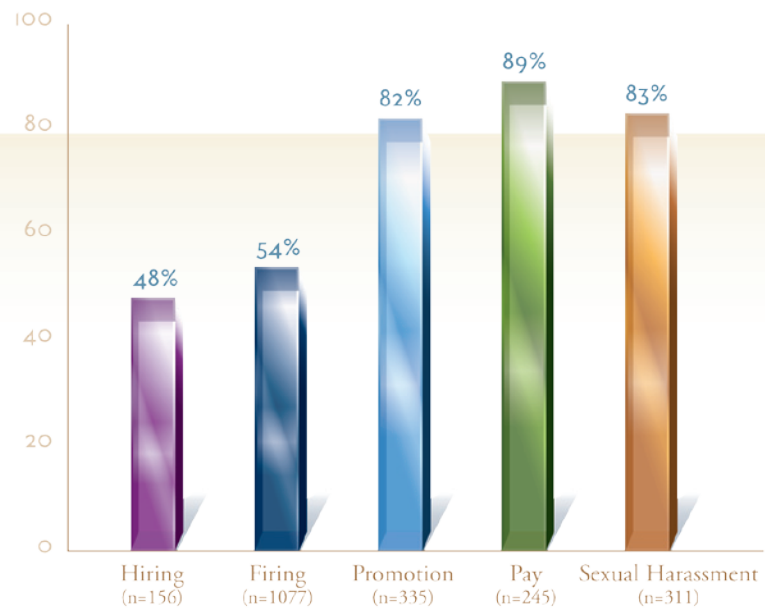


FIGURE 2.7 :
PERCENT OF CASES
WITH AT LEAST ONE
ADDITIONAL ISSUE CLAIM



TYPE-ISSUE COMBINATIONS

An important question in EDL cases is whether discrimination based on particular employee characteristics tends to align with particular issue claims. For example, is unlawful firing more of a problem in race, as opposed to sex or age cases? Are claims of discriminatory promotion more prevalent in sex cases than in disability cases? Although formal tests of statistical significance are necessary to answer such questions, the data nonetheless reveal—in a general sense—substantial uniformity in the breakdown of cases by type and issue. With just two exceptions, race, sex, age, disability, and national origin cases follow a strikingly similar pattern in the proportion of issue claims: unlawful firing is the most prevalent, followed (in order) by claims of discriminatory retaliation, promotion, pay, and hiring. Figure 2.8 shows that the one major exception to this pattern is sex cases, in which the proportion of retaliation claims (54 percent of all sex cases) is slightly higher than that for firing claims (50 percent). In broad terms, this suggests that there exists a consistent hierarchy in the frequency of claims about unlawful employer practices. Moreover, discriminatory firing and employer retaliation are, by substantial margins, the two greatest concerns of *all* plaintiffs, *regardless* of their race, sex, age, disability, or national origin.

FIGURE 2.8 :
PERCENT OF CASES BY SELECTED
TYPE-ISSUE COMBINATIONS

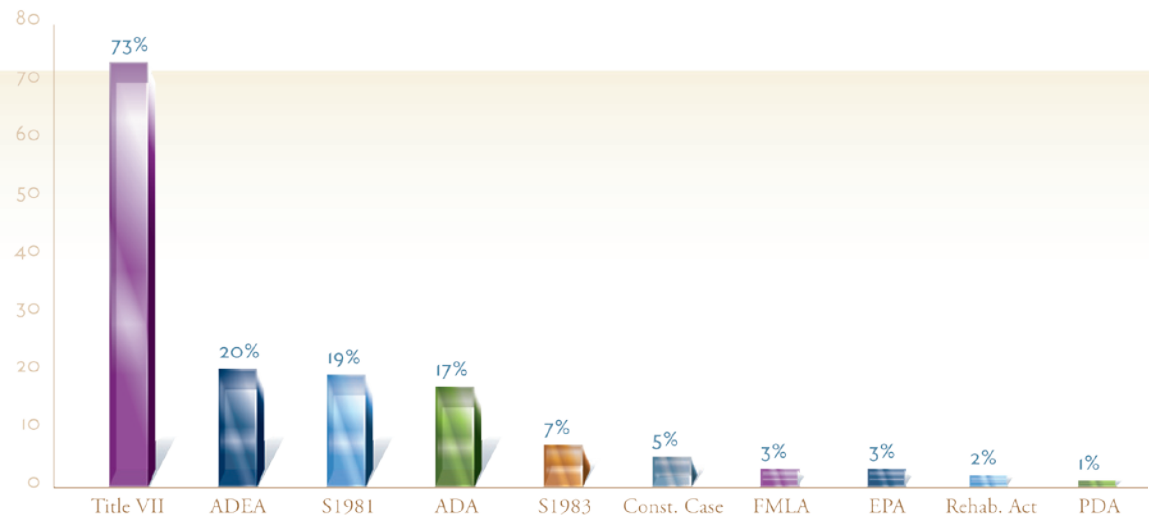


STATUTES

Figure 2.9 displays the percentage of cases filed under the various EDL statutes. Not surprisingly, the vast majority of EDL cases (73 percent) invoke Title VII of the 1964 Civil Rights Act. Age cases brought under the ADEA are the next most common (20 percent) followed by §1981 (19 percent) and disability cases under the ADA (17 percent). Claims based on the remaining statutes are considerably less common; §1983 claims make up about 7 percent of cases, followed by claims with a constitutional dimension (five percent), family leave (FMLA) and equal pay cases (EPA) (about three percent each), the Rehabilitation Act (two percent), and pregnancy cases (PDA) (one percent).

FIGURE 2.9 :
PERCENT OF CASES
BY STATUTORY CLAIM *

(n=1785)



*Percentages add to >100 due to multiple statutory claims in a single case.

MULTIPLE STATUTORY CLAIMS

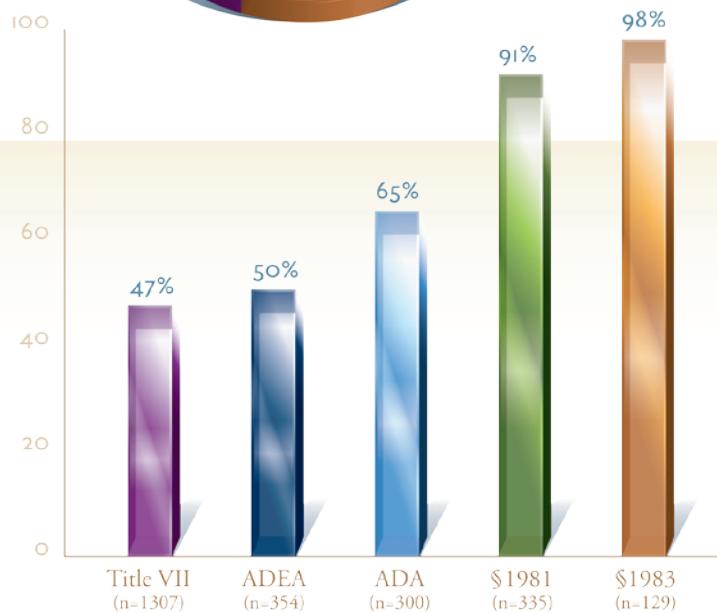
As with discriminatory types and issues discussed above, a complainant is permitted to bring multiple statutory claims in a single case. About 43 percent of cases involved multiple statutory claims (Figure 2.10). Also, as Figure 2.11 shows, certain statutory cases are more likely than others to include additional claims. For example, both §1983 and §1981 cases virtually always include additional statutory claims (98 and 91 percent, respectively). ADA cases are also quite likely to include additional claims (65 percent), while ADEA cases have an exactly 50/50 likelihood of doing so. Finally, about 47 percent of Title VII cases include at least one additional statutory claim.

FIGURE 2.10 :
PERCENT OF CASES WITH
MULTIPLE STATUTORY CLAIMS



(n=1785)

FIGURE 2.11 :
PERCENT OF SELECTED
CASES WITH AT LEAST ONE
ADDITIONAL STATUTORY CLAIM

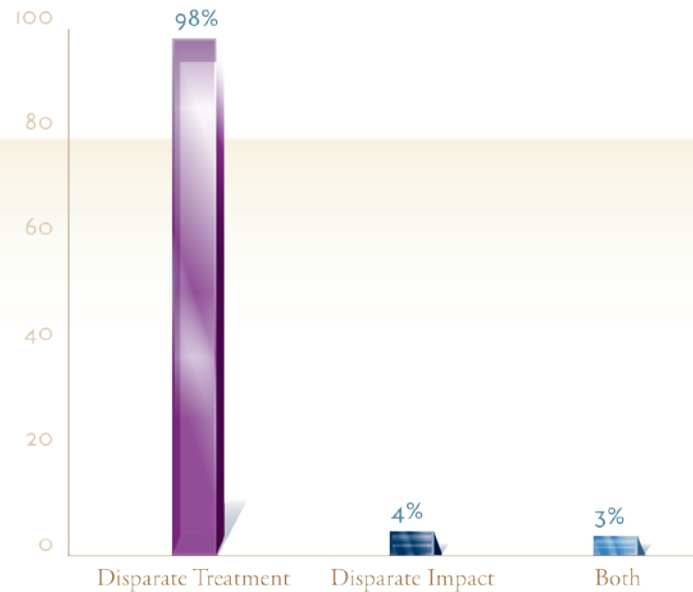


THEORY OF THE CASE

There are two theories of discrimination available to EDL complainants: disparate treatment and disparate impact. Disparate treatment cases require a showing of discriminatory *intent*; disparate impact cases, by contrast, involve facially neutral employment practices that have a *statistically disproportionate effect* on a protected group. The employer's motivation or intent is irrelevant in disparate impact cases. EDL almost universally involves disparate treatment claims. Over 98 percent of cases were such cases, whereas just four percent of cases brought a disparate impact cause of action (Figure 2.12). And although EDL law permits a plaintiff to invoke both causes of action, complainants do so in less than three percent of all cases. In short, it appears as though employees mobilize EDL law more or less exclusively in response to an employer's specific and intentional acts. They do not challenge the broader structural disadvantages embedded in routinized employment practices.

FIGURE 2.12 :
PERCENT OF CASES
BY CAUSE OF ACTION

(n=1779)



*Percentages add to >100 because of multiple causes of action in a single case.

PLAINTIFFS AND PLAINTIFF REPRESENTATION

EDL complaints may involve a single individual, multiple individuals, or a class action. Furthermore, plaintiffs may file a complaint *pro se* while some seek representation from a Public Interest Law Firm (PILF). Despite these options, the data strongly suggest that EDL complaints almost exclusively involve a single complainant/plaintiff acting alone. As Figure 2.13 illustrates, over 93 percent of all sampled cases are brought by a sole individual. Only about six percent of cases include between two and ten plaintiffs, and a scant .05 percent of all cases have more than ten plaintiffs. A sizeable proportion (23 percent) of cases are filed *pro se* (Figure 2.14), whereas PILFs represent plaintiffs in under one percent of cases (Figure 2.15). Finally, class actions are extremely rare. In about 97% of cases, plaintiffs do not seek class action certification, and overall, a class action is certified in just one percent of all EDL cases (Figure 2.16).

FIGURE 2.13 :
PERCENT OF CASES
BY NUMBER OF PLAINTIFFS

(n=1788)

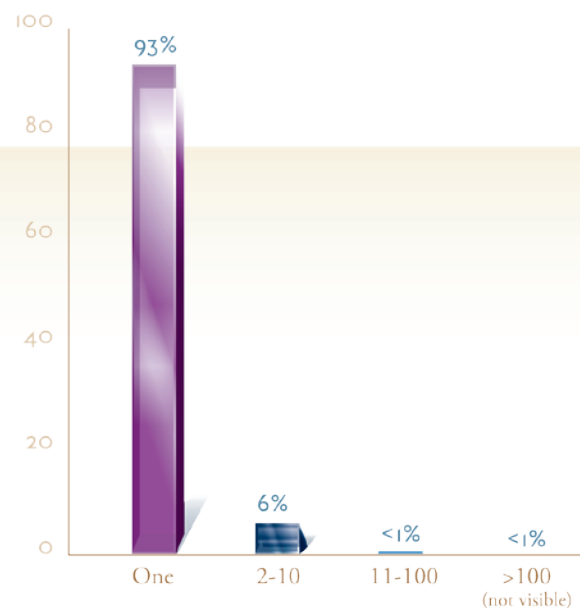


FIGURE 2.14 :
PERCENT OF CASES IN
WHICH PLAINTIFF FILED *PRO SE*

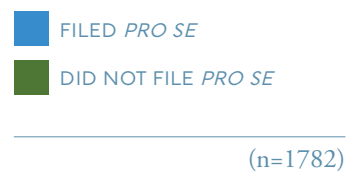
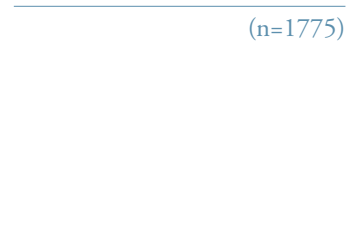


FIGURE 2.15 :
PERCENT OF CASES IN WHICH
PLAINTIFF WAS REPRESENTED BY
PUBLIC INTEREST LAW FIRM



FIGURE 2.16 :
PERCENT OF CASES BY
CLASS ACTION STATUS



THE EEOC

The Equal Employment Opportunity Commission administers and partly enforces most EDL statutes including Title VII, the ADEA, and the ADA. EDL procedures normally require that a formal complaint first be submitted to the EEOC for processing. The EEOC then has 180 days in which to investigate the complaint, make a finding or non finding of reasonable cause, and, if cause is found, to secure a voluntary agreement with the employer. After 180 days, and regardless of the outcome, plaintiffs are authorized to file a private lawsuit in district court. All that said, the EEOC does not typically get very far through the administrative process, and only rarely does the EEOC side with the complainant. As shown in Figures 2.17 and 2.18, respectively, the EEOC fails to make a finding one way or the other in nearly 77 percent of all filed complaints. Of the 23% of claims in which a finding was made, the EEOC found that just one in five had merit.

FIGURE 2.17 :
PERCENT OF CASES IN
WHICH EEOC MADE FINDING



(n=1523)

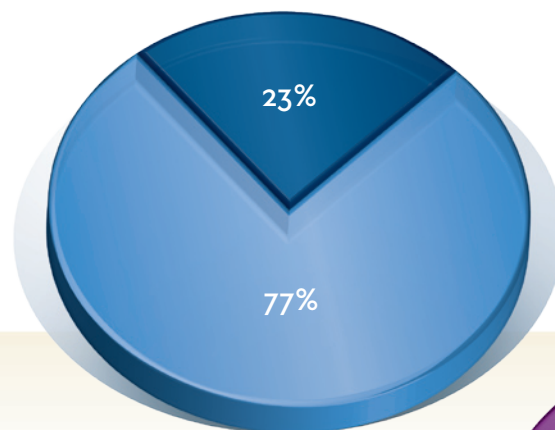
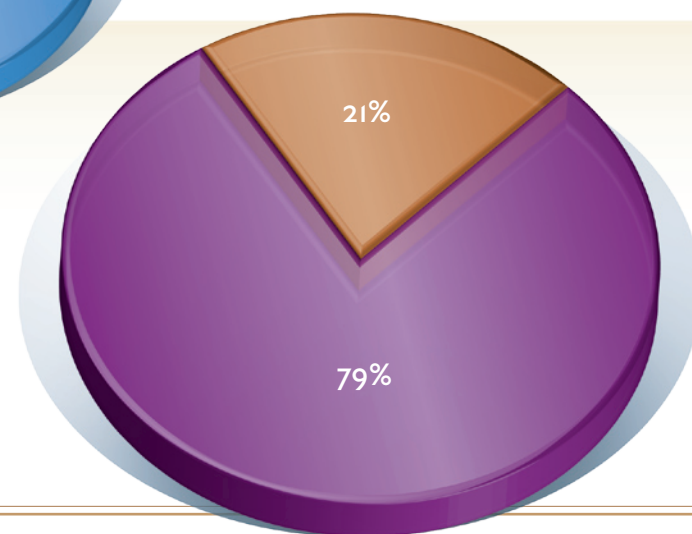


FIGURE 2.18 :
PERCENT OF CASES
BY EEOC FINDING



(n=342)



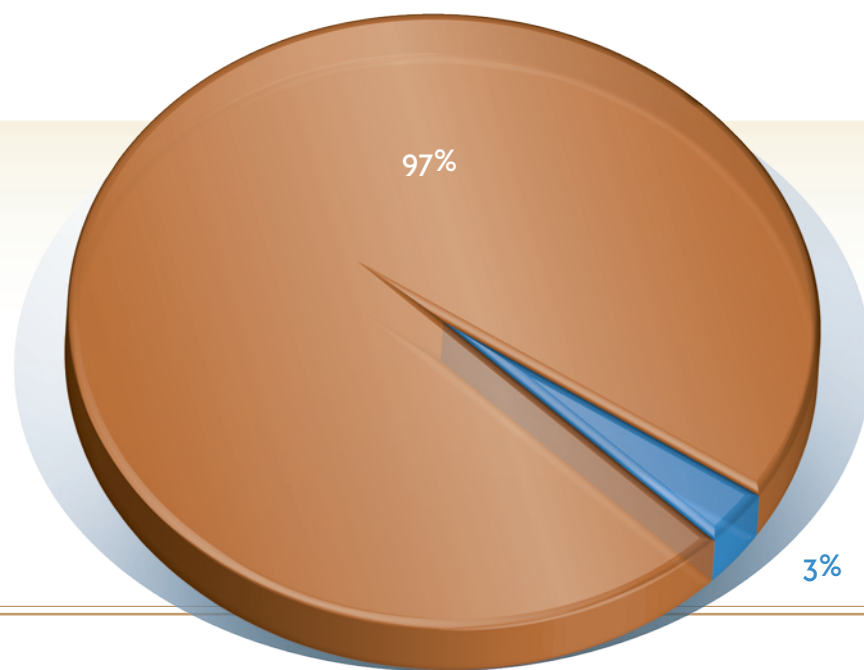
EEOC AS PLAINTIFF

The EEOC's administrative and complaint-processing activities notwithstanding, the agency further possesses prosecutorial authority, and may bring suit in federal court as the plaintiff. It rarely does so. As Figure 2.19 shows, the EEOC intervenes as plaintiff in just three percent of all EDL cases.

FIGURE 2.19 :
PERCENT OF CASES IN WHICH
EEOC INTERVENED AS PLAINTIFF



(n=1788)



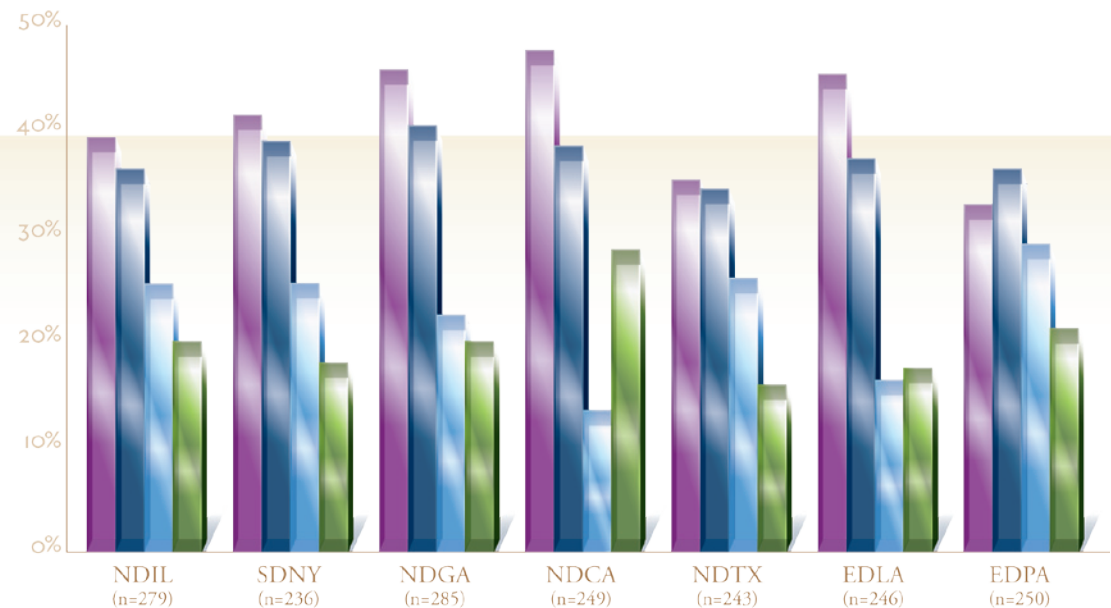
Part 3 | Judicial Districts

This section explores and compares several key EDL case characteristics across the seven judicial districts from which our sample cases were drawn. We focus specifically on discrimination type claims, issue claims, and plaintiff representation variables.

DISCRIMINATION TYPE

Figure 3.1 displays the percentage breakdown of discrimination type claims by judicial district. With a few exceptions, the basic pattern found across all cases (from the previous section) generally holds for each district: Race cases are most common, followed by sex, age, and disability claims. One major exception is the Eastern District of Pennsylvania, where sex claims slightly outnumber race claims. Another exception comes from the Northern District of California, which reveals substantially more disability claims than age claims. Finally, the Eastern District of Louisiana shows essentially an equal number of age and disability claims.

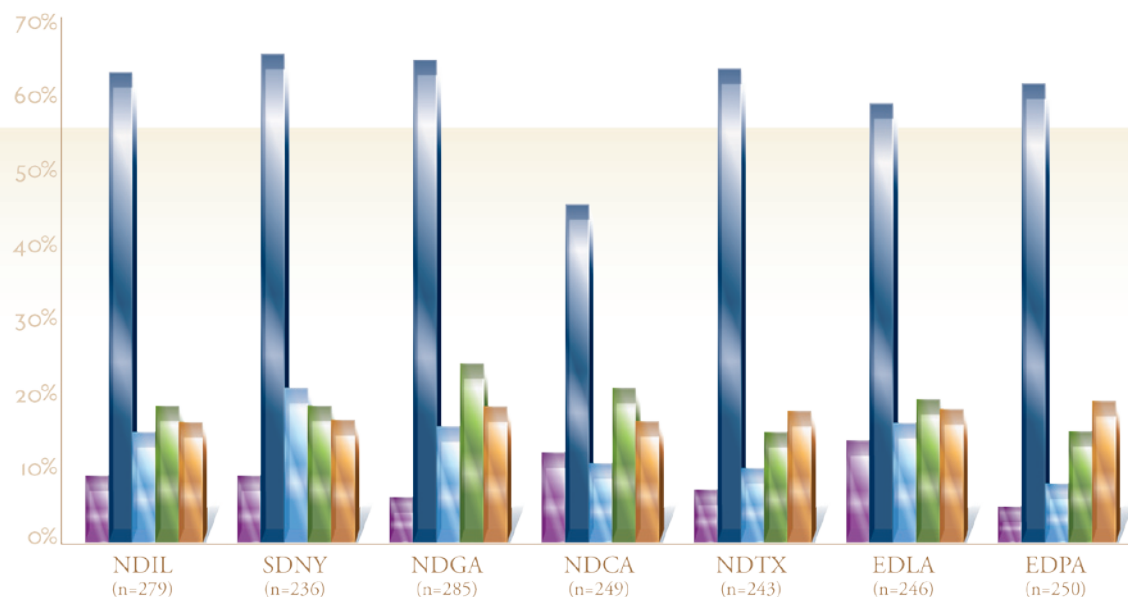
FIGURE 3.1 :
PERCENT OF DISCRIMINATION
TYPE ALLEGED BY JUDICIAL DISTRICT



DISCRIMINATION ISSUES

The breakdown of discrimination issues by judicial district, without exception, is consistent with our core finding in the previous section: discriminatory firing is far and away the most frequent claim made by EDL plaintiffs (Figure 3.2). Also consistent with the general pattern (but with one exception, NDCA), hiring claims are the least frequent (of the five issues presented here). Percentages of promotion and sexual harassment claims are generally comparable, with perhaps a very slight edge to promotion (sexual harassment claims are slightly more frequent in NDTX and EDPA). Finally, both promotion and sexual harassment claims are more common than pay claims, albeit by relatively small margins. The one exception comes from SDNY, where there were slightly more pay claims than promotion or sexual harassment claims.

FIGURE 3.2 :
PERCENT OF DISCRIMINATION
ISSUES ALLEGED BY JUDICIAL DISTRICT

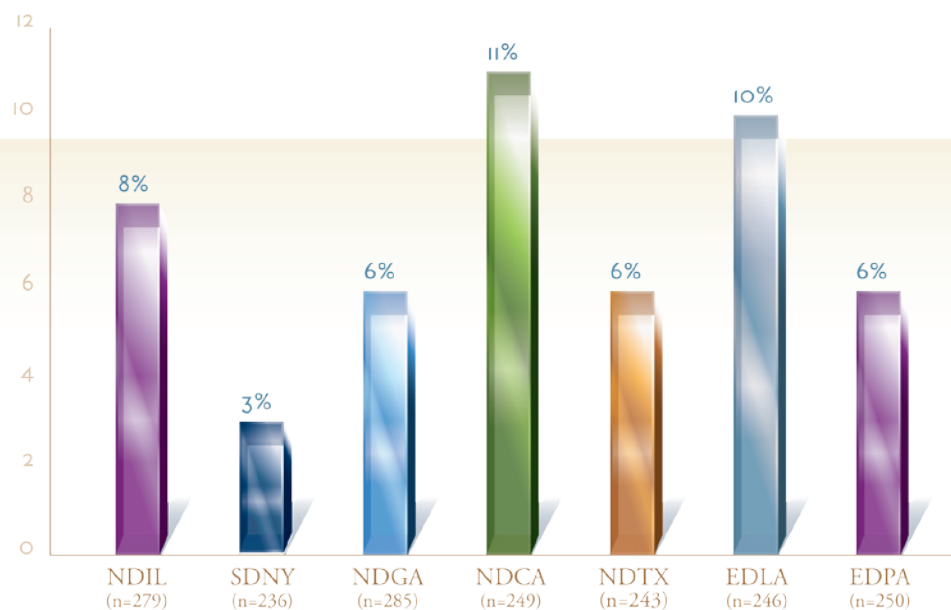


PLAINTIFF REPRESENTATION

As was clearly shown in Part 2, the overwhelming percentage of EDL cases involves a single plaintiff acting alone. Because of the extremely small number of cases that include more than one plaintiff, PILF representation, and/or certified class actions, we combined each of these variables into a new “collective legal mobilization” variable. A case is considered to have collective legal mobilization if it meets *any* of the above criteria (more than one plaintiff, PILF representation, or class action). Yet as Figure 3.3 shows, there does not appear to be a great deal of variation across judicial districts on the collective mobilization. The NDCA and EDLA have the highest percentage of such cases, but even here the percentages are quite small (about ten percent of cases). The remaining districts oscillate somewhere between four percent and seven percent. In short, and regardless of judicial district, the vast majority of EDL cases are solitary endeavors for plaintiffs.

The overwhelming percentage of EDL cases involves a single plaintiff acting alone.

FIGURE 3.3 :
PERCENT OF CASES WITH A
COLLECTIVE LEGAL MOBILIZATION
COMPONENT BY JUDICIAL DISTRICT

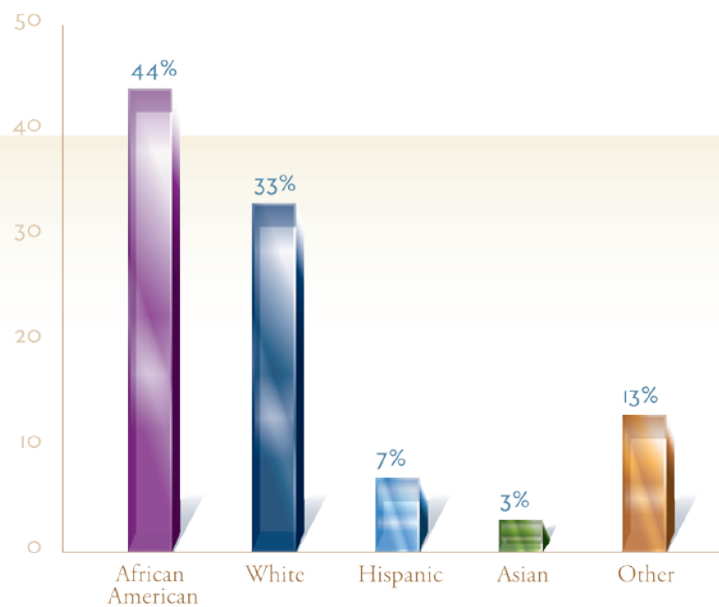


Part 4 | Plaintiff Characteristics

This section explores the distribution of three primary plaintiff characteristics in EDL cases: race, sex, and occupation. We first examine plaintiff characteristics across all cases; Next, we explore the distribution of such characteristics within the four most common types of alleged discrimination: race, sex, age, and disability. Figures 4.1 through 4.3 present, respectively, the overall racial, sex, and occupational characteristics of plaintiffs as a percent of all EDL cases. Forty-four percent of all EDL plaintiffs are African American, while 33 percent are white. All remaining racial categories make up the additional 23 percent of cases.* As for sex demographics, we found essentially equal numbers of male and female plaintiffs (with a very slight edge for women, 51 to 49 percent). As for occupation, the largest plurality of cases (48.5 percent) are filed by plaintiffs who work in sales, service, or administration, followed by those in managerial or professional occupations (32.5 percent). The smallest percentage of EDL cases (19 percent) come from blue collar and/or workers in other occupations.

FIGURE 4.1 :
RACE OF PLAINTIFFS BY PERCENT

(n=1534)



* We could determine the race of the plaintiff in 1,534 of the 1,788 cases. This analysis excludes the “race unknown” category.

FIGURE 4.2 :
SEX OF PLAINTIFFS BY PERCENT

■ FEMALE
■ MALE

(n=1779)

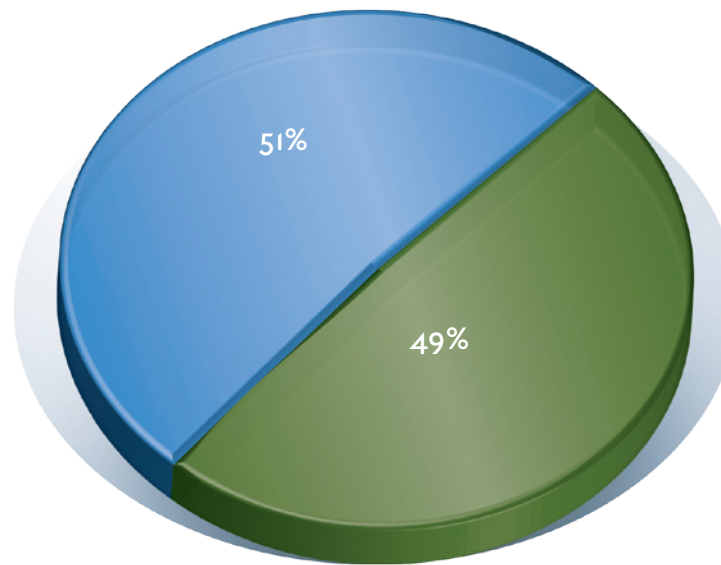
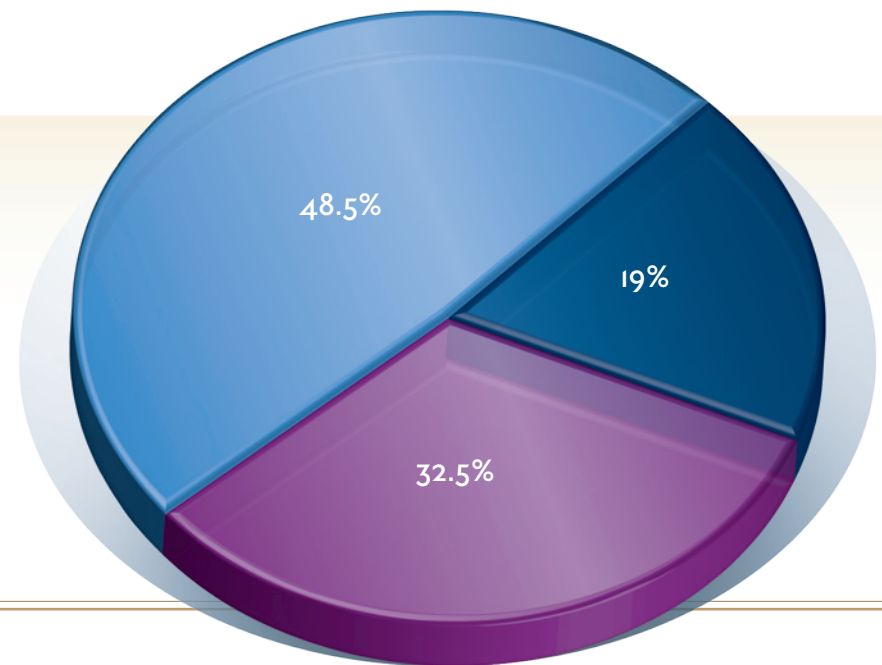


FIGURE 4.3 :
PLAINTIFF'S OCCUPATION BY PERCENT

■ SALES | SERVICE | ADMINISTRATIVE
■ BLUE COLLAR | OTHER
■ MANAGERIAL | PROFESSIONAL

(n=1671)



PLAINTIFF CHARACTERISTICS IN RACE, SEX, AGE, AND DISABILITY CASES

The following figures present the race, sex, and occupational characteristics of plaintiffs in the four most frequent discrimination type allegations.

RACE CASES

Although federal law protects all races from employment discrimination, African Americans account for the overwhelming proportion of plaintiffs in cases alleging racial bias (80 percent). By contrast, eight percent of race cases are filed by whites; all remaining racial groups make up just 11 percent of race-based EDL claims (Figure 4.4). So-called “reverse discrimination” cases are relatively rare.

Turning to the plaintiff’s sex in race cases (Figure 4.5), men are substantially more likely to allege race discrimination than are women (58 percent to 42 percent). As for occupation, Figure 4.6 shows that nearly half (48 percent) of all race cases involve plaintiffs working in sales, services, or administration. A sizably smaller proportion of cases are filed by those in managerial or professional occupations (30 percent), and is smaller still for those in blue collar or other occupations (22 percent).

FIGURE 4.4 :
PLAINTIFF’S RACE IN RACE
DISCRIMINATION CLAIMS BY PERCENT

(n=695)

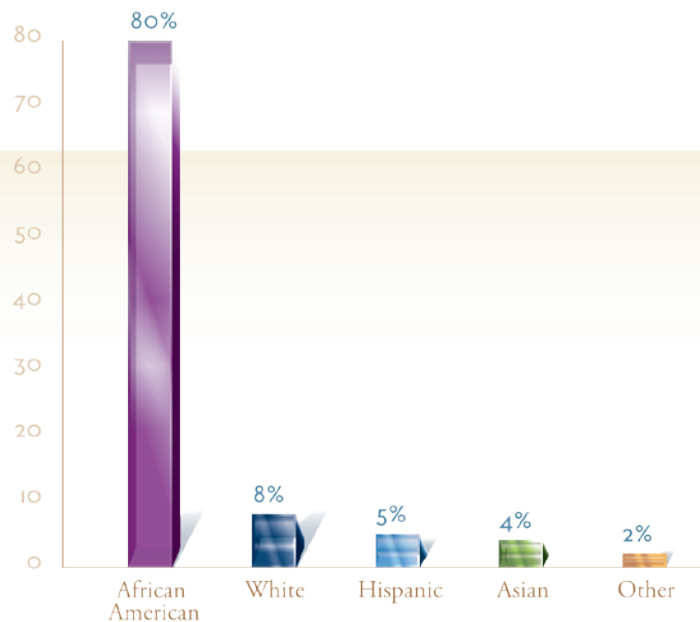


FIGURE 4.5 :
PLAINTIFF'S SEX IN RACE
DISCRIMINATION CASES BY PERCENT

■ FEMALE
■ MALE

(n=722)

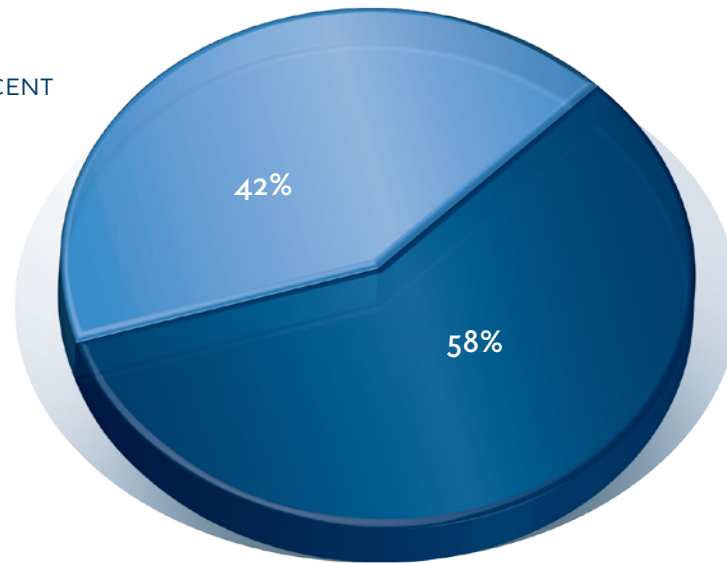
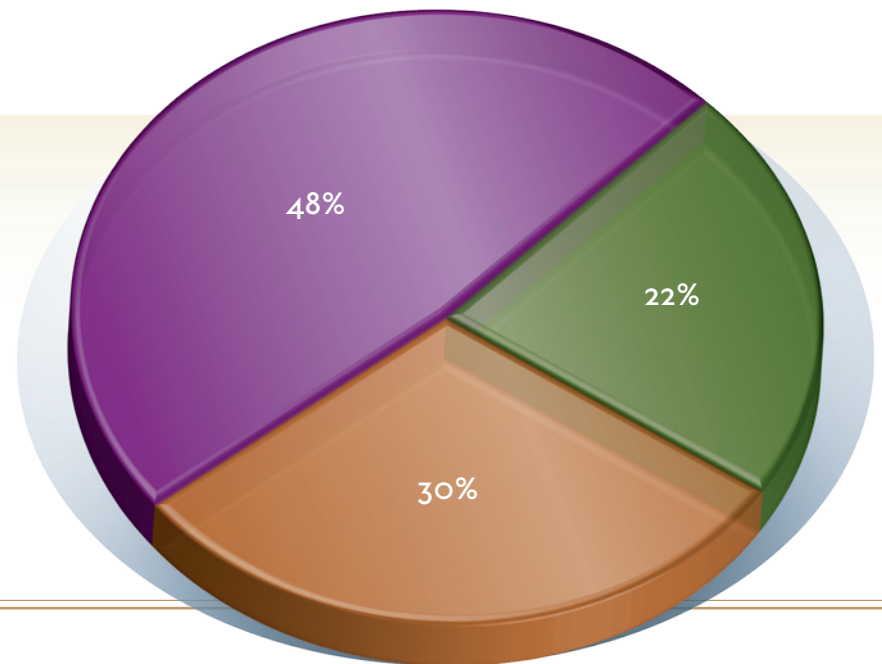


FIGURE 4.6 :
PLAINTIFF'S OCCUPATION IN RACE
DISCRIMINATION CASES BY PERCENT

■ SALES | SERVICE | ADMINISTRATIVE
■ BLUE COLLAR | OTHER
■ MANAGERIAL | PROFESSIONAL

(n=722)



SEX CASES

Figures 4.7-4.9 display the same three plaintiff's characteristics in EDL cases alleging sex discrimination. Not surprisingly, the vast majority of sex cases (80 percent) are brought by women. When looking at the racial demographics of sex cases (Figure 4.8), we found that white women are most likely to allege sex discrimination, followed somewhat closely by African American women (41 to 35 percent, respectively). Finally, occupational status differs in a fundamental respect in sex cases than in race cases: whereas the largest percentage of race cases involve those in sales, service, or administration, the largest proportion of sex allegations are brought by those in management or professional occupations (50 vs. 37 percent). Like race cases, however, cases filed by blue collar or other workers make up the smallest percentage of plaintiffs in sex bias cases (13 percent).

The vast majority of sex cases (80 percent) are brought by women.

FIGURE 4.7 :
PLAINTIFF'S SEX IN SEX
DISCRIMINATION CASES BY PERCENT



(n=654)

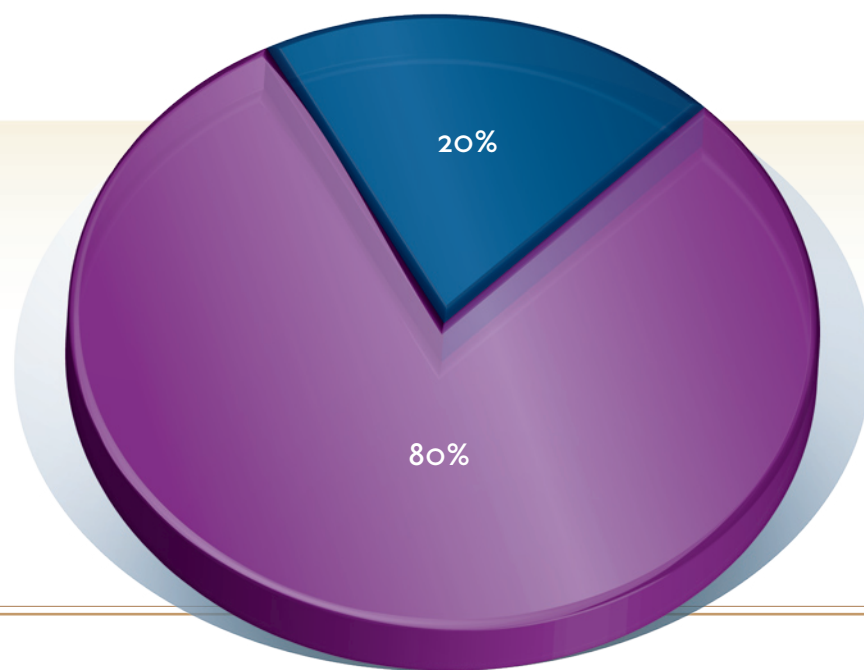


FIGURE 4.8 :
RACE OF PLAINTIFF IN SEX
DISCRIMINATION CASES BY PERCENT

(n=543)

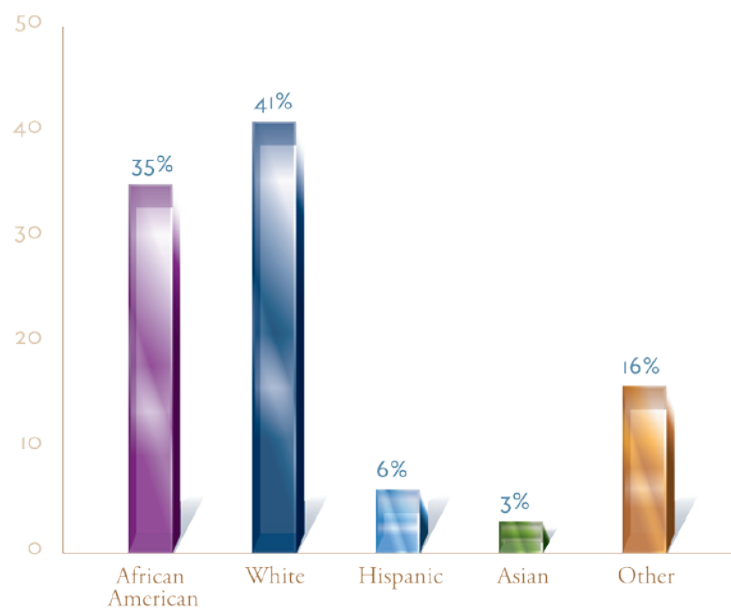
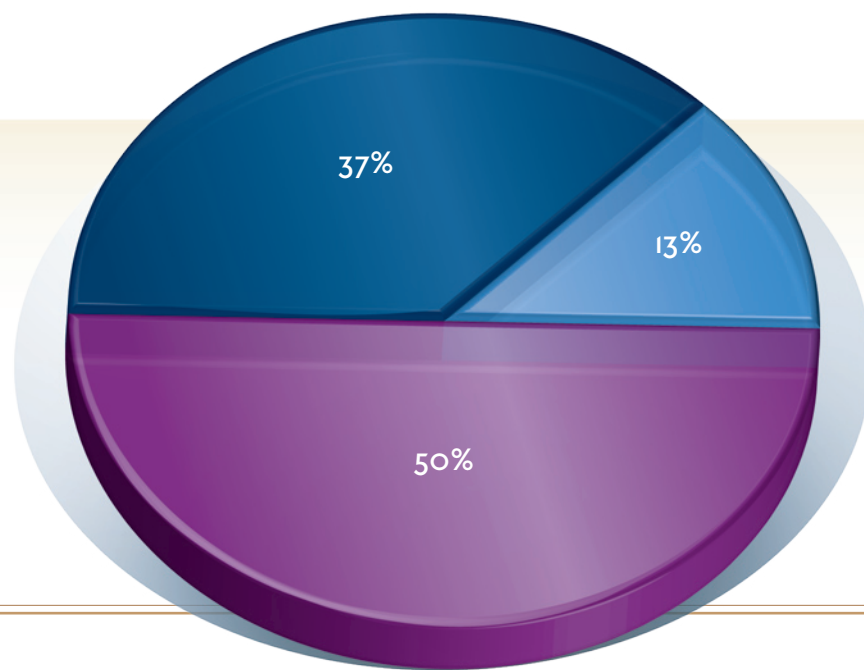


FIGURE 4.9 :
PLAINTIFF'S OCCUPATION IN
SEX DISCRIMINATION CASES BY PERCENT

SALES | SERVICE | ADMINISTRATIVE
BLUE COLLAR | OTHER
MANAGERIAL | PROFESSIONAL

(n=615)



AGE CASES

By a wide margin, whites make up the largest proportion of age discrimination plaintiffs (49 percent). African American, Hispanic, and Asian plaintiffs combined account for 30 percent of age cases (Figure 4.10). Also, as shown in Figure 4.11, male plaintiffs outnumber female plaintiffs by about a two-to-one margin. And finally, Figure 4.12 depicts the occupational breakdown of age discrimination plaintiffs. Those in managerial or professional jobs slightly outnumber those in sales, service, and administration (45 to 39 percent), while blue collar or other workers make up just 16 percent of such cases.

FIGURE 4.10 :
PLAINTIFF'S RACE IN AGE
DISCRIMINATION CASES BY PERCENT

(n=311)

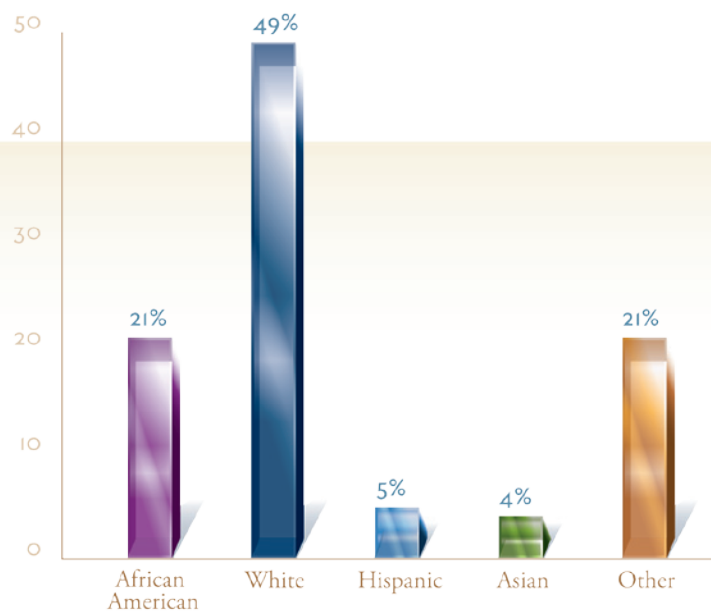


FIGURE 4.11 :
PLAINTIFF'S SEX IN AGE
DISCRIMINATION CASES BY PERCENT

FEMALE
MALE

(n=394)

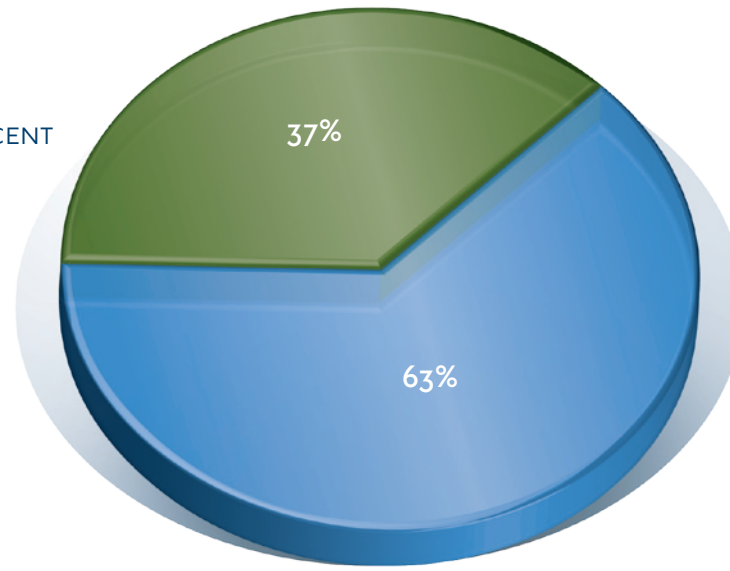
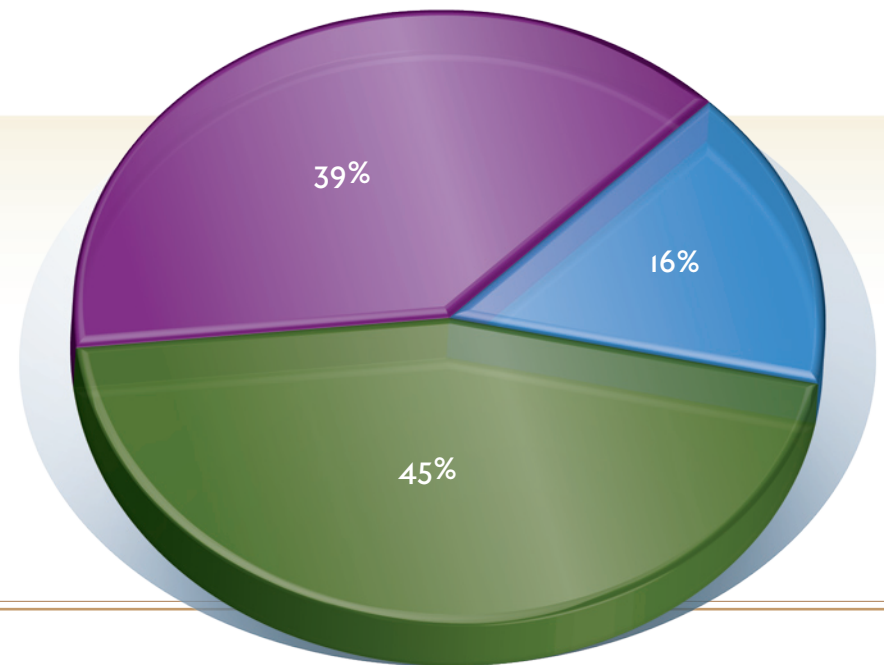


FIGURE 4.12 :
PLAINTIFF'S OCCUPATION IN AGE
DISCRIMINATION CASES BY PERCENTAGE

SALES | SERVICE | ADMINISTRATIVE
BLUE COLLAR | OTHER
MANAGERIAL | PROFESSIONAL

(n=394)



DISABILITY CASES

Plaintiff characteristics in disability cases show a similar pattern as age cases, at least with respect to the plaintiff's race and sex. White men and women (49 percent) and men of all races (59 percent) are most likely to allege disability discrimination (Figures 4.13 and 4.14). Occupational status, however, shows a bit more parity (Figure 4.15). The highest proportion of such cases (43 percent) involve plaintiffs in sales, service, or administration, while about equal percentages of plaintiffs are in managerial/professional (29 percent) and blue collar/other jobs (28 percent).

FIGURE 4.13 :
PLAINTIFF'S RACE IN DISABILITY
DISCRIMINATION CASES BY PERCENT

(n=296)

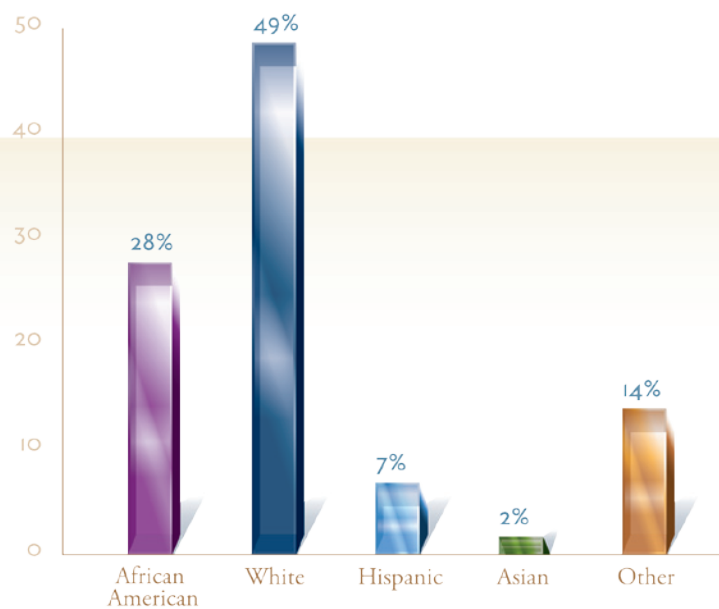


FIGURE 4.14 :
PLAINTIFF'S SEX IN DISABILITY
DISCRIMINATION CASES BY PERCENT

FEMALE
MALE

(n=334)

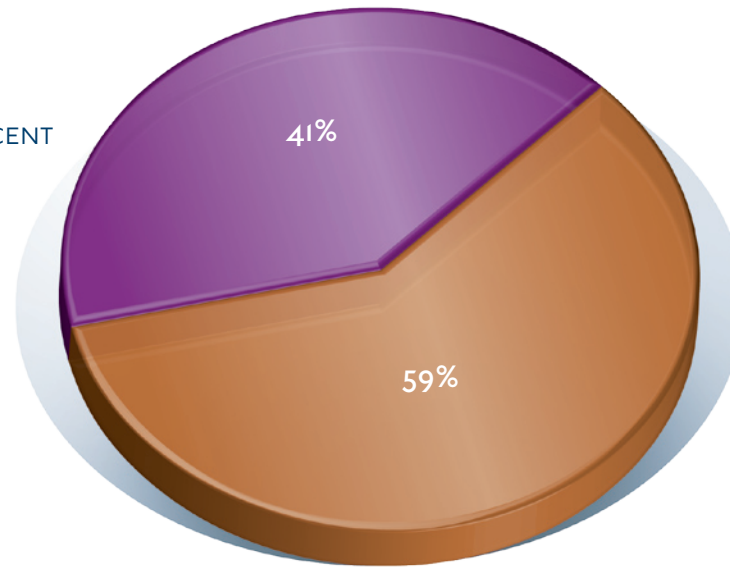
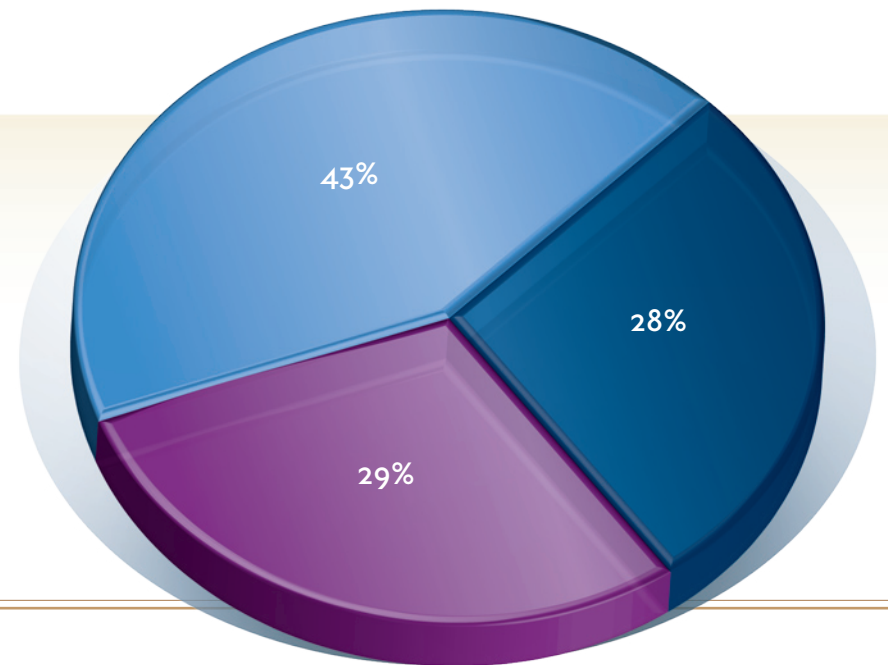


FIGURE 4.15 :
PLAINTIFF'S OCCUPATION IN
DISABILITY DISCRIMINATION CASES BY PERCENTAGE

SALES | SERVICE | ADMINISTRATIVE
BLUE COLLAR | OTHER
MANAGERIAL | PROFESSIONAL

(n=394)



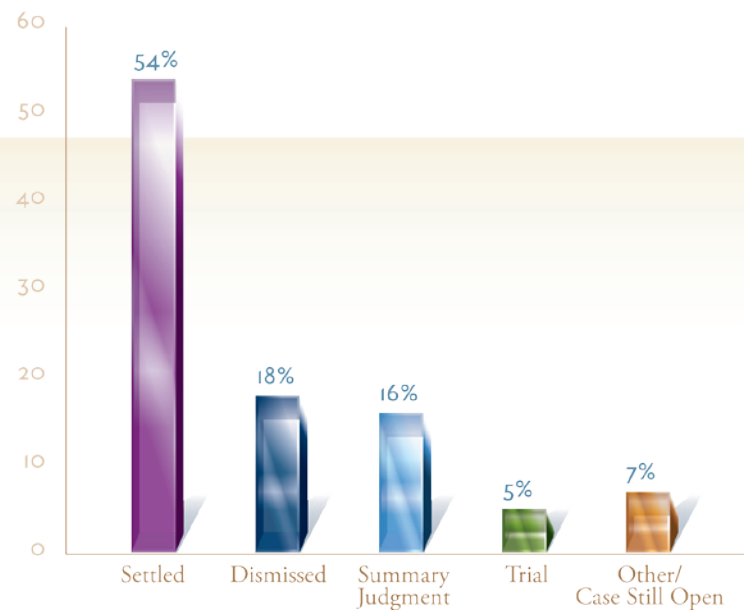
Part 5 | Employment Discrimination Litigation Outcomes

EDL cases can conclude in various ways. For this study, we focused on four major outcomes: dismissal, trial, summary judgment, and settlement.* The following sections summarize case outcomes associated with many of the specific cases characteristics discussed in the previous sections. First, however, Figure 5.1 displays the general contours of EDL cases outcomes. Across all cases, *settlement* is by far the single most likely outcome, and occurs in 54 percent of cases. *Dismissal* and *summary judgment* are about equally likely, with just a slight edge to dismissal (18 to 16 percent, respectively). Finally, *trials* are extremely rare and are by far the least likely outcome in EDL cases (about 5.5 percent). As will become clear below, this general outcome pattern is remarkably robust across virtually all case characteristics and dimensions. (For remaining figures we do not include percentage of cases other/still open.)

Across all cases, settlement is by far the single most likely outcome, and . . . trials are extremely rare.

FIGURE 5.1 :
EDL CASE OUTCOMES BY PERCENT

(n=1788)

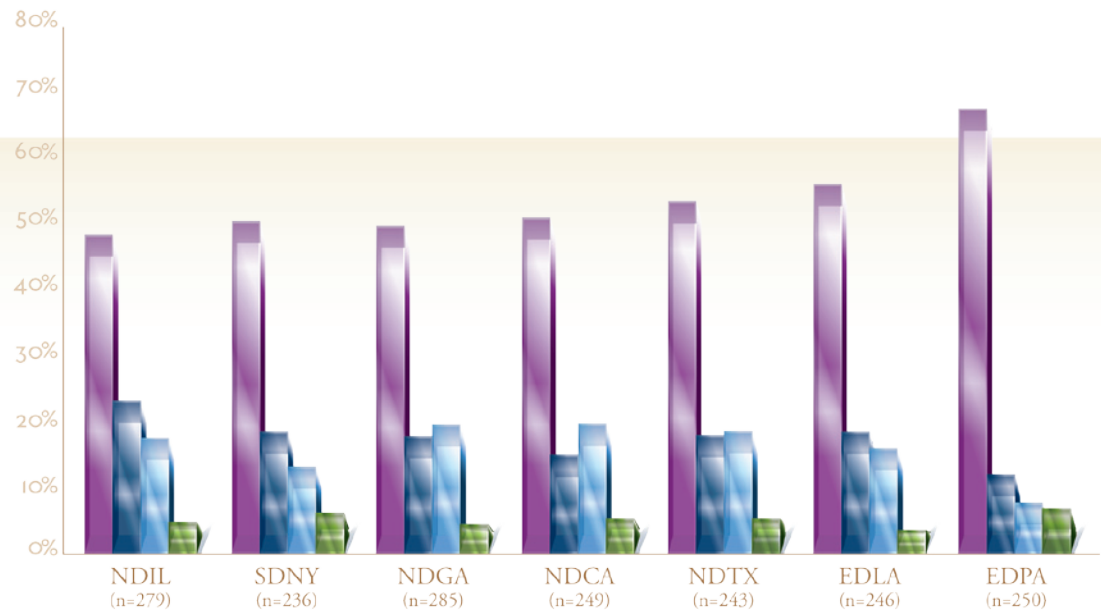
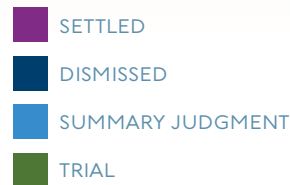


* Refers to cases in which the defendant-employer wins summary judgment on all counts, ending the case at the district court level. It does not refer to summary judgments for procedural or other motions that did not result in case dismissal.

JUDICIAL DISTRICT

Figure 5.2 shows how outcomes are broken down by each of the seven judicial districts from which our cases were drawn. Regardless of where the case is brought, the general pattern holds. Settlement is the most common outcome by a wide margin, while trials are the least common, also by a wide margin. Dismissal and summary judgment fall in between, with dismissal slightly more likely than summary judgment in some districts (four of seven), while in other districts (three of seven) summary judgment is slightly more likely than dismissal. One partial outlier may be the Eastern District of Pennsylvania. While the general outcome pattern holds, two findings stand out. First, 68 percent of all EDPA cases end in settlement, compared to a 52 percent average for the other six districts. Also, trials, although still rare, are more common in this district (seven percent), compared to a five percent average for the other districts. What this seems to suggest is that plaintiffs on average may do somewhat better in this district, as cases are less likely to end in the two most employer-friendly outcomes: dismissal and summary judgment.

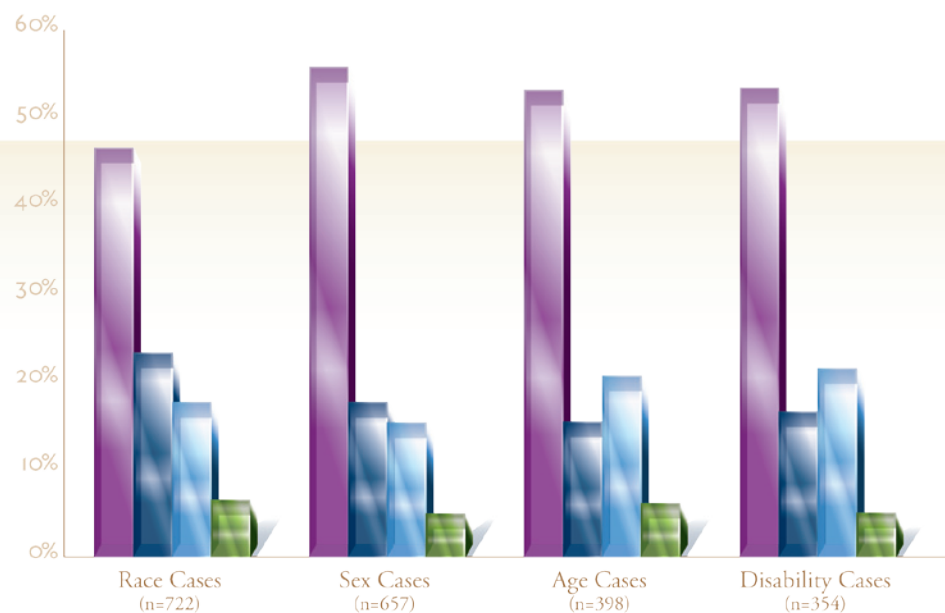
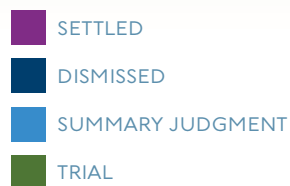
FIGURE 5.2 :
PERCENT OUTCOMES
BY JUDICIAL DISTRICT



DISCRIMINATION TYPES AND ISSUES

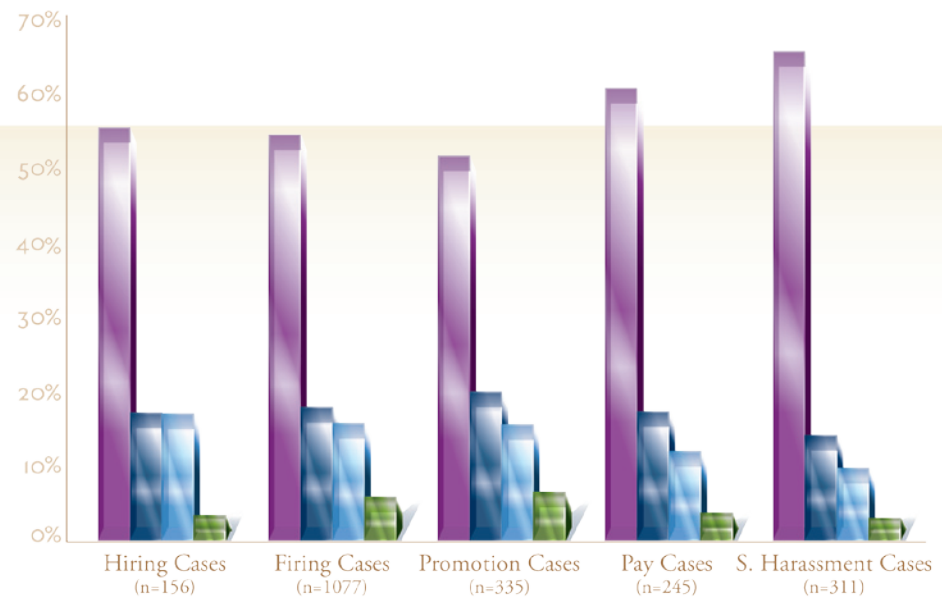
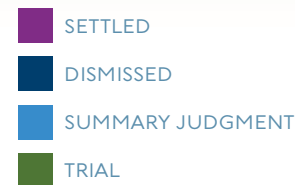
Figure 5.3 shows the breakdown of case outcomes by the type of discrimination claimed. Again, the general outcome pattern holds; regardless of discrimination type, settlements are most frequent, trials almost never happen, and dismissal and summary judgment take turns in the middle. The data further show that, of all discrimination types, sex cases have the highest percentage of settlements (55 percent compared to a 49.5 percent average for the other types), while national origin cases (not shown in figures) have the highest percentage of trials (seven percent) albeit by a very slim margin.

FIGURE 5.3 :
PERCENT OUTCOMES BY
DISCRIMINATION TYPE ALLEGED



Turning to discrimination issues in Figure 5.4, cases involving sexual harassment have both the greatest likelihood of settlement (65 percent) and the lowest likelihood of going to trial (slightly under three percent). Claims of discriminatory promotion show the exact reverse; such cases are the least likely to settle (51 percent) and the most likely to end in a trial (about 6.5 percent). Hiring cases stand out somewhat in that they too are almost as unlikely to end in trial as are sexual harassment cases (just over three percent). Finally, discriminatory firing—the most frequent claim in EDL cases—appears to fall somewhere in between: about 54 percent of firing cases settle, while just under six percent go to trial.

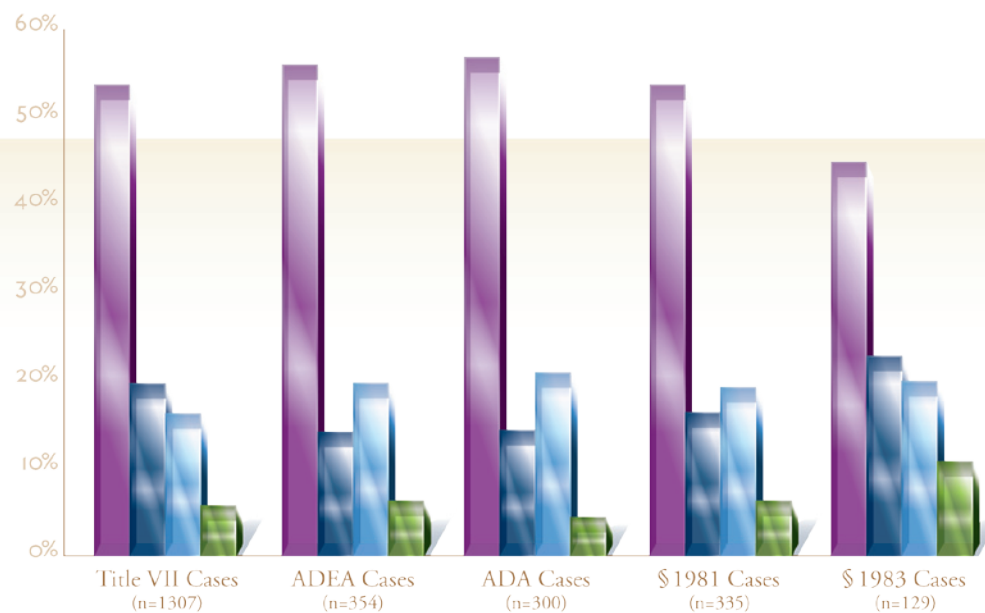
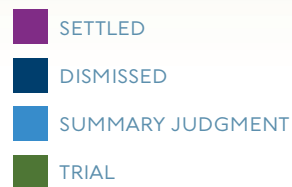
FIGURE 5.4 :
PERCENT OUTCOMES BY
DISCRIMINATION ISSUE ALLEGED



STATUTES

The breakdown of outcomes by statute in Figure 5.5 shows no discernible divergence from the general outcome pattern with one exception. Cases brought under §1983 appear to end with substantially fewer settlements than the average for other statutes (44 vs. 54 percent) and with twice as many trials (11 percent compared to just under six percent average for other statutes).

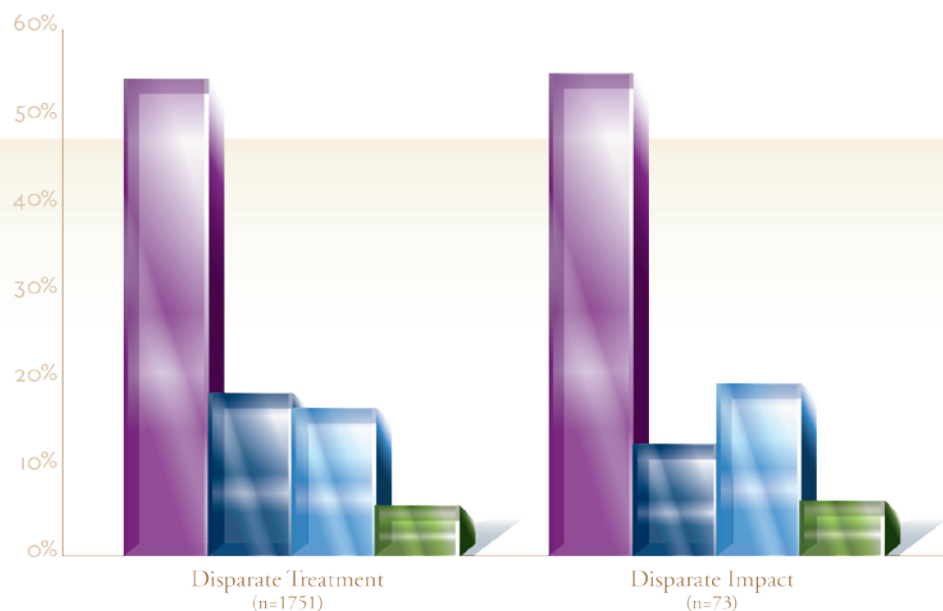
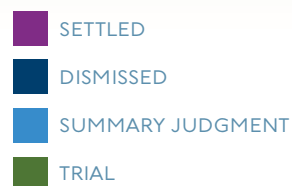
FIGURE 5.5 :
PERCENT OUTCOMES BY STATUTE



CAUSE OF ACTION

Given the extreme disparity in the frequency of cases brought under the two general causes of action (disparate treatment and impact), comparing outcome percentages requires some caution. Nonetheless, Figure 5.6 repeats the same trends. Cases brought under each theory of discrimination are most likely to be settled, and in more or less equal proportions (54 percent for disparate treatment cases, 55 percent for disparate impact cases). And both such cases are highly unlikely to reach the trial stage, again, in almost identical proportions (about five percent likelihood for each cause). To the extent there are any major differences between the two causes, treatment cases appear somewhat more likely than impact cases to be dismissed (18 vs. 12 percent), and somewhat less likely to result in summary judgment (17 vs. 19 percent).

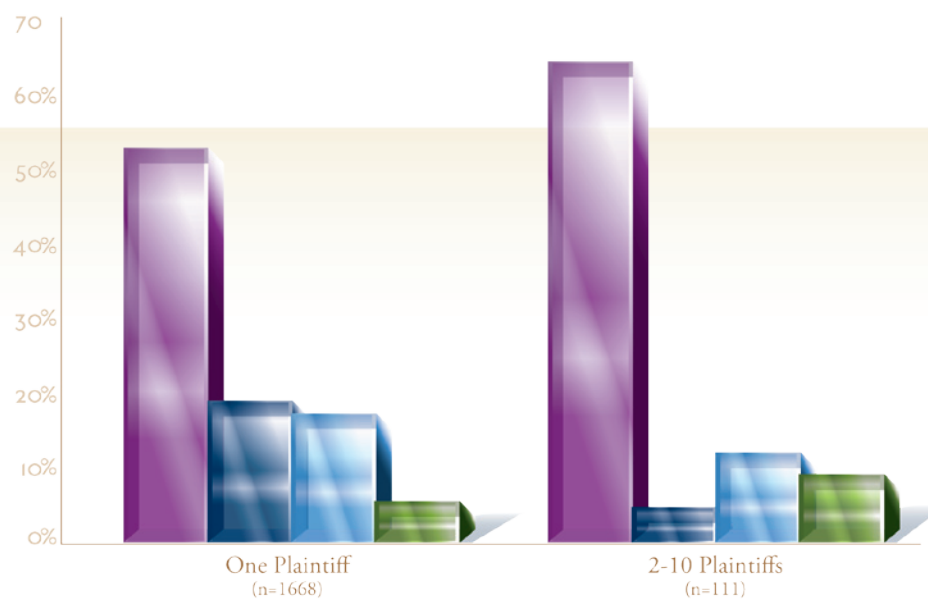
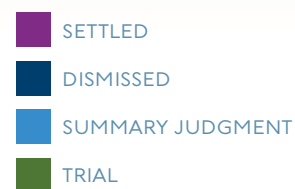
FIGURE 5.6 :
PERCENT OUTCOMES
BY LEGAL THEORY



PLAINTIFFS AND PLAINTIFF REPRESENTATION

Like legal theory just summarized, comparing outcomes by the number of plaintiffs in a case is problematic because of the tremendous frequency disparities. As noted earlier, 93 percent (n=1668) of all sampled cases involved a single complainant, just six percent of cases (n=111) had between two and ten plaintiffs, and a miniscule 0.5 percent of cases had more than ten (n=9). To the extent that comparisons are possible, however, there do appear to be some substantial differences between single-plaintiff cases and those that involve between two and ten complainants. As shown in Figure 5.7, the latter cases have a substantially higher proportion of settlements (65 percent vs. 53 percent) and a substantially higher proportion of trials (nine percent vs. five percent). Given that even this second category of cases is made up disproportionately of cases with *exactly* two plaintiffs—which account for nearly 60 percent of all such cases—we might reasonably speculate that if an aggrieved individual can get just one additional person to join the suit, there may be a significantly greater chance of recovering *something* than is the case when a single complainant acts alone.

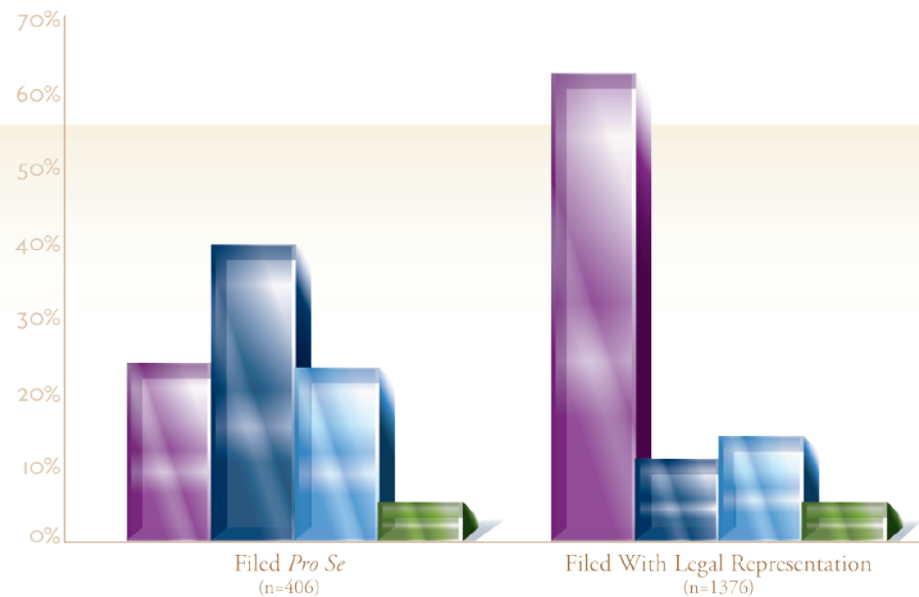
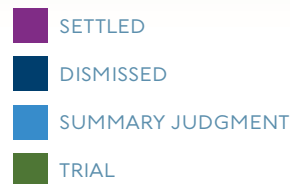
FIGURE 5.7 :
PERCENT OF CASE OUTCOMES
BY NUMBER OF PLAINTIFFS



LEGAL REPRESENTATION

Whether or not a plaintiff files a complaint *pro se* appears to be one of the few case characteristics that diverges greatly from the general outcome pattern shown repeatedly throughout the preceding sections. As illustrated in Figure 5.8, outright dismissal is the most likely outcome when the complainant files *pro se*, accounting for an enormous 40 percent of all such cases (compared to an 11 percent dismissal rate when the plaintiff has representation). Moreover, just 24 percent of *pro se* cases end in settlement, compared to 63 percent when the plaintiff has an attorney. However, legal representation does not seem to affect the likelihood of going to trial (about 5.5 percent for both categories). There appears to be an obvious lesson here: when an aggrieved individual seeks redress for alleged discrimination, some type of representation is absolutely essential.

FIGURE 5.8 :
PERCENTAGE OF CASE
OUTCOMES BY LEGAL REPRESENTATION



PILF CASES

Because the sample frequencies are so small ($n=11$), we cannot say anything definitive about the impact of Public Interest Law Firm representation. Nonetheless, it is interesting to note (figure not shown) that of these 11 cases, 73 percent of them ended in a settlement (as opposed to 53% for cases without PILF involvement), and nine percent went to trial (compared to 5.5 percent for non-PILF cases). Again, however, these are not meaningful comparisons because of extreme frequency disparities.

CLASS ACTIONS

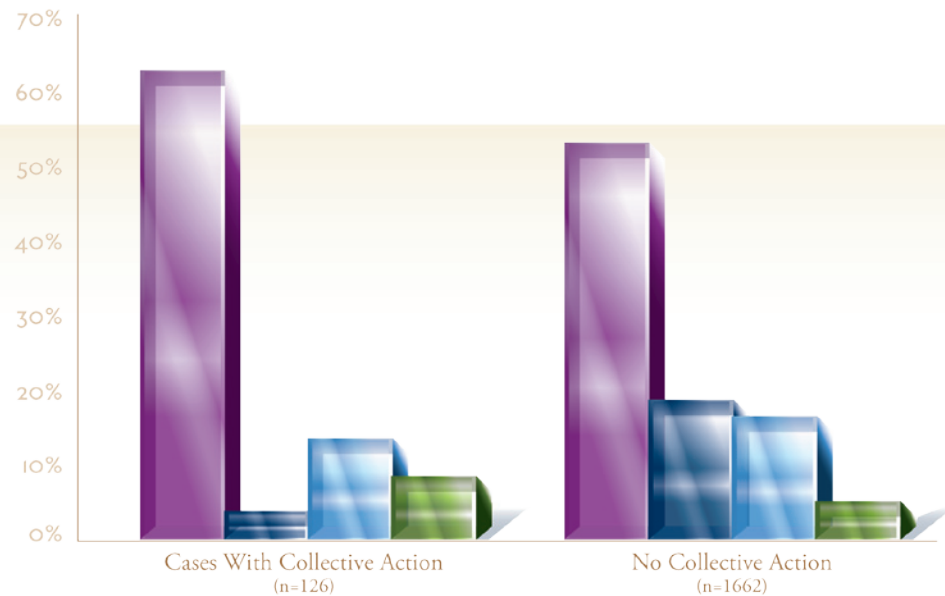
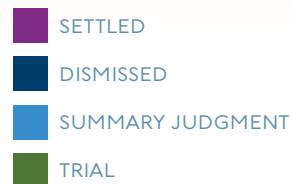
Just 20 cases in our entire sample were certified class actions. Interestingly, only two outcomes were observed (figure not shown). 70 percent of class action cases ($n=14$) ended in settlement, whereas 20 percent ($n=4$) resulted in summary judgment for the employer (the additional ten percent of cases [$n=2$] were still pending).

Just 20
(well under
1 percent) cases
in our entire
sample were
certified
class actions.

COLLECTIVE LEGAL MOBILIZATION AND EDL OUTCOMES

Turning to the collective legal mobilization variable we created and first explored in Part three, Figure 5.9 displays outcome percentages for cases that have more than one plaintiff, are class actions, and/or involve PILF representation. The data suggests that plaintiffs do somewhat better when their case includes a collective action component. Settlements are more likely (63 vs. 53 percent), as are trials (nine vs. five percent). Moreover, cases are substantially less likely to be dismissed (four vs. 19 percent), and slightly less likely to result in summary judgment for the employer (13 vs. 17 percent).

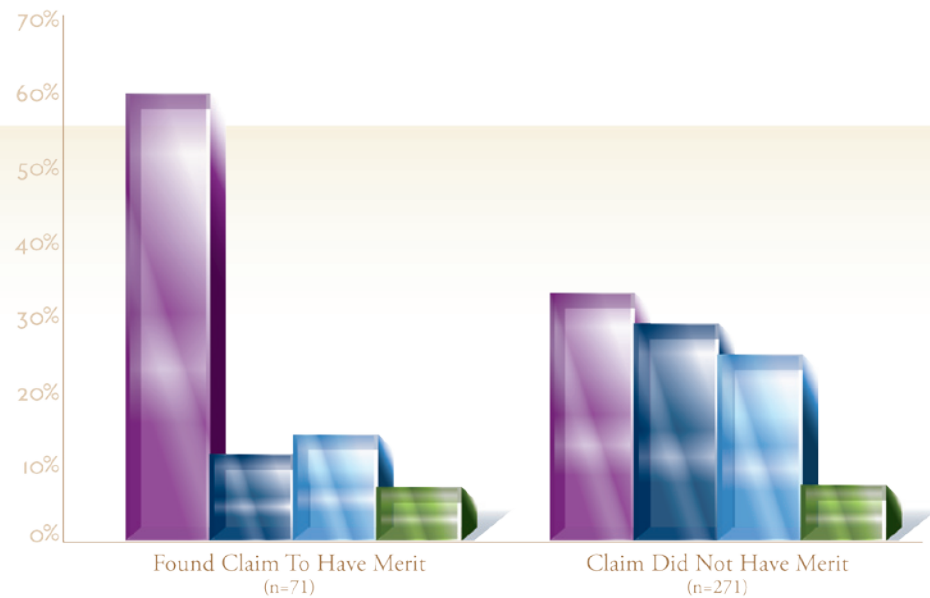
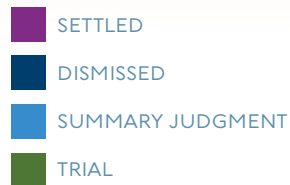
FIGURE 5.9 :
PERCENT OF CASE OUTCOMES
BY COLLECTIVE ACTION STATUS



THE EEOC

As shown earlier, the EEOC does not often rule on the merits of a claim one way or the other prior to the filing of a private lawsuit. But when it does make a finding, it is a rather strong predictor of how the case will conclude in district court. Figure 5.10 shows clearly that the likelihood of a settlement is significantly higher when the EEOC previously made a finding in support of the plaintiff (59 percent of such cases) than when it did not find the claim to have merit (33 percent). Conversely, pro-employer outcomes—dismissal or summary judgment—are far more likely when the EEOC has not found the claim to have merit. However, trials appear to be equally likely for both scenarios (about seven percent).

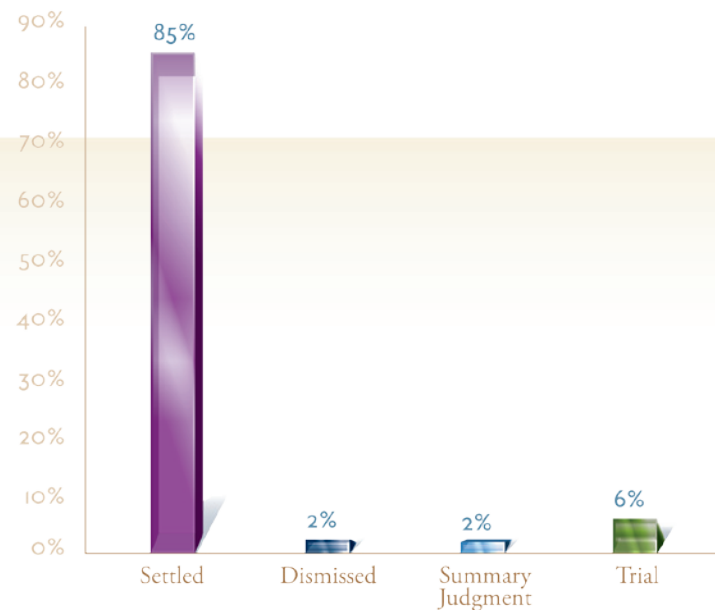
FIGURE 5.10 :
PERCENT CASE OUTCOMES
BY EEOC DETERMINATION



Finally, we examined EDL outcomes for cases in which the EEOC acted as plaintiff. Although the frequency of such cases is extremely small (48, or three percent of our sample), settlement is almost always the outcome, accounting for 85 percent of all such cases (compared to 54 percent for all cases). The likelihood of a trial in EEOC-as-plaintiff cases is about the same as that for all cases (six versus five percent, respectively), while dismissals and summary judgments are far less likely when the EEOC intervenes (two percent each, compared to 18 and 16 percent, respectively across all cases).

FIGURE 5.11 :
PERCENT OUTCOMES WHEN
THE EEOC INTERVENES AS PLAINTIFF

(n=48)



TRIALS AND APPEALS

As is clear from previous sections and figures, EDL cases rarely go to trial. Nonetheless, because trials are often the most dramatic and publicized events in EDL law, and because trials have at least *the potential* to yield far-reaching remedies for discrimination victims, we explored how plaintiffs fared when a case did reach a judge or jury. The answer is straightforward: not particularly well. As depicted in Figure 5.12, employers are significantly more likely than the plaintiff to win at trial (58 vs. 24 percent). A small percentage of cases ended in mixed verdicts (four percent), whereas no verdict was rendered in 14 percent of trials. These cases may not have been complete at the time of coding.

Judges decide about 25 percent of EDL cases, juries 68 percent, and magistrates 7 percent (not shown in figures), but do different decision makers affect outcomes? Figure 5.13 demonstrates that decision makers do affect outcomes. In cases decided by judges, defendants are nearly twice as likely to prevail. Conversely, juries find for the plaintiff over 30 percent of the time whereas judges decide in favor of plaintiffs less than 7 percent of the time.

Finally, some cases are appealed. While the numbers are very small, only 242 cases in our sample, trial court outcomes are reversed in only 12 percent of cases. Appellate judges are most likely to uphold the trial court decision, as shown in figure 5.14.

FIGURE 5.12 :
TRIAL OUTCOMES BY PERCENT

(n=122)

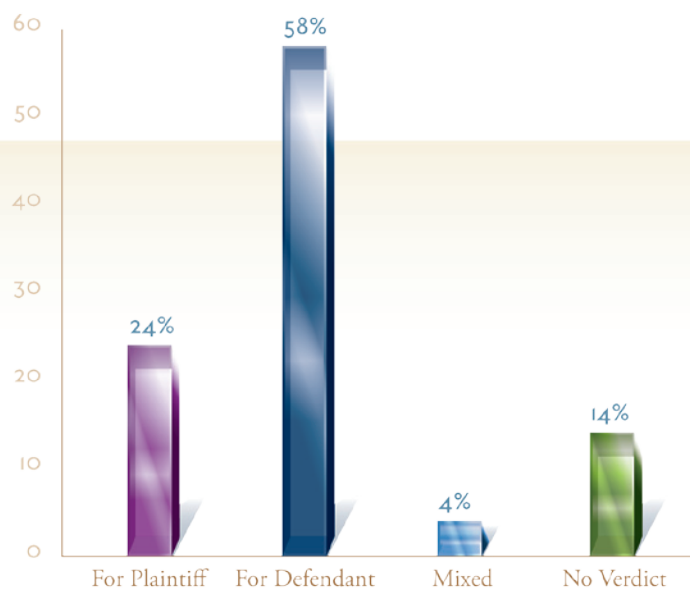


FIGURE 5.13 :
PERCENT TRIAL RESULTS
BY JURY, JUDGE, OR MAGISTRATE

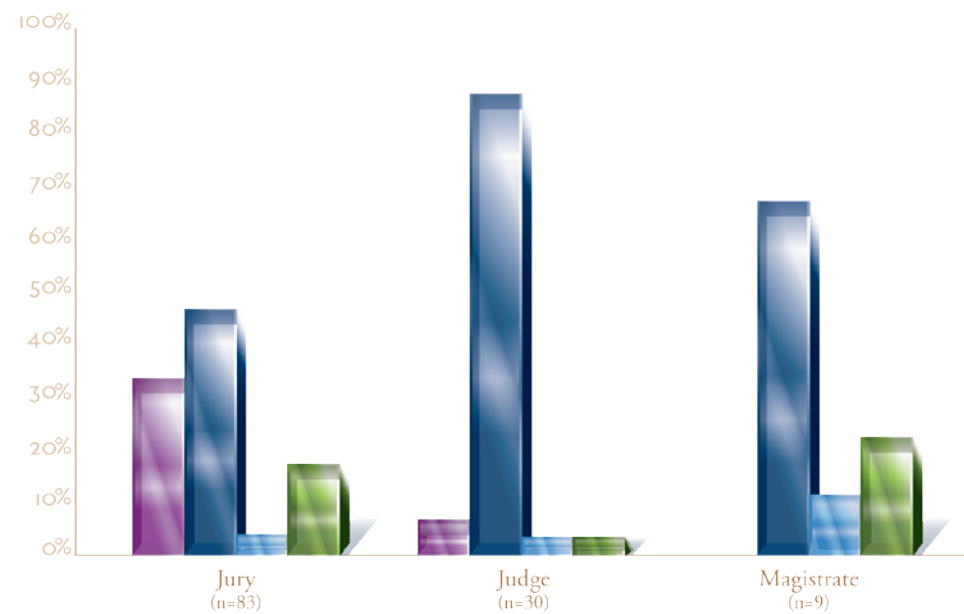
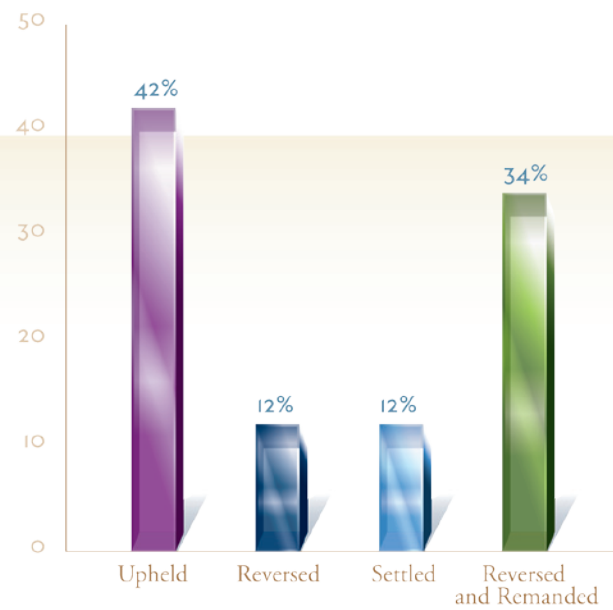


FIGURE 5.14 :
INITIAL APPEAL OUTCOME BY PERCENT

(n=242)



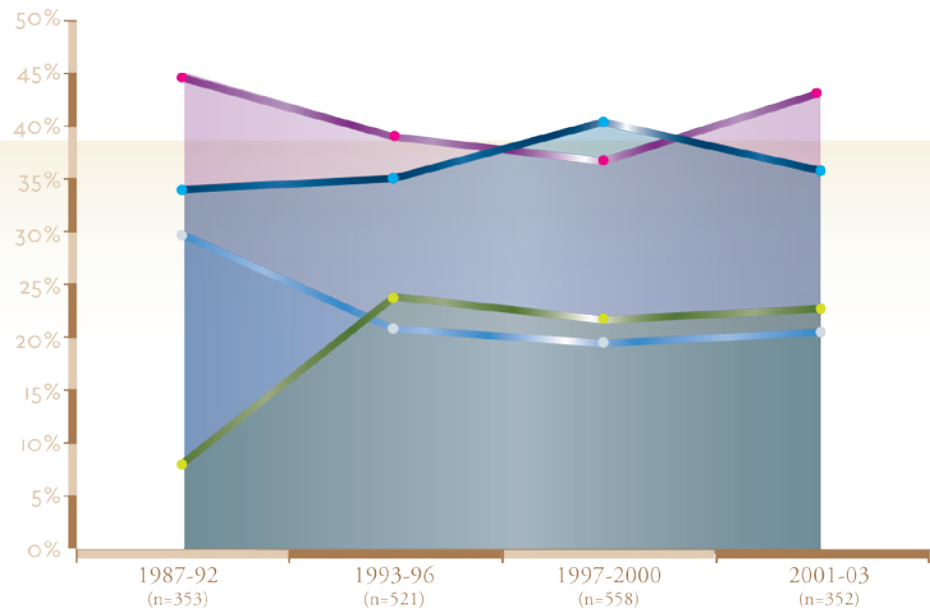
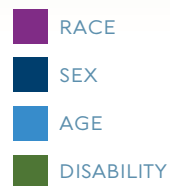
Part 6 | Time Trends

Our final section explores time trends in EDL cases for the 1987-2003 period, focusing on three major case characteristics: discrimination type alleged, discriminatory issue alleged, and outcomes.

DISCRIMINATION TYPE

Figure 6.1 plots the proportion of EDL cases that alleged race, sex, age, and disability discrimination from 1987-2003, broken down by our four discrete time periods.

FIGURE 6.1 :
PERCENT OF CASES ALLEGING
DISCRIMINATION TYPE BY TIME PERIOD



RACE

Allegations of race discrimination peaked during the 1987-92 period, declined steadily during the Clinton years (1993-2000), then rose again in the early 2000s. Moreover, with the exception of the 1997-2000 period, race discrimination made up the highest percentage of all EDL cases in each of the remaining time periods.

SEX

Allegations of sex discrimination more or less show the mirror image of race. Sex cases rose steadily between 1993 and 2000, then began to tail off in the early 2000s. And as noted, sex allegations eclipsed race allegations in the 1997-2000 period.

AGE

After peaking during the 1987-1992 time period (accounting for about 30 percent of EDL cases) claims of age discrimination abruptly declined, then leveled off. Since 1993, allegations of age discrimination dipped to about 20 percent of EDL cases, and have remained virtually unchanged through 2003.

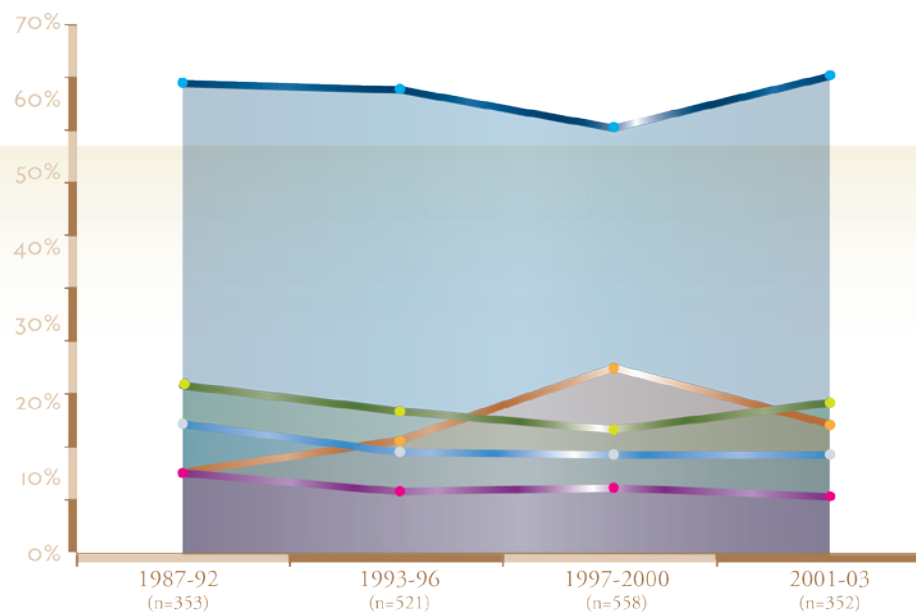
DISABILITY

Cases involving disability discrimination shot up from about eight percent from 1987-1992 to 24 percent in the 1993-97 period. Undoubtedly, much of this increase is attributable to passage of the Americans with Disabilities Act in 1990. Even so, similar to age discrimination cases, the proportion of EDL cases alleging disability bias held steady after 1992, accounting for about 22-24 percent of cases post-1992.

DISCRIMINATION ISSUE

Figure 6.2 displays changes in discriminatory issues alleged over our time frame. Noteworthy is the general stability of the data, with a few exceptions. Proportions of cases claiming pay, promotion, and hiring discrimination varied very little for the entire 1987-2003 period. Allegations of discriminatory firing—by far the most common EDL issue claim—are also generally stable, excepting a slight dip observed in the 1997-2000 period. Sexual harassment is the one discriminatory issue that shows more volatility. Harassment claims rose steadily between 1987 and 2000 (from around ten percent to a peak of about 25 percent of EDL cases), before dipping to 17 percent in the 2001-03 period.

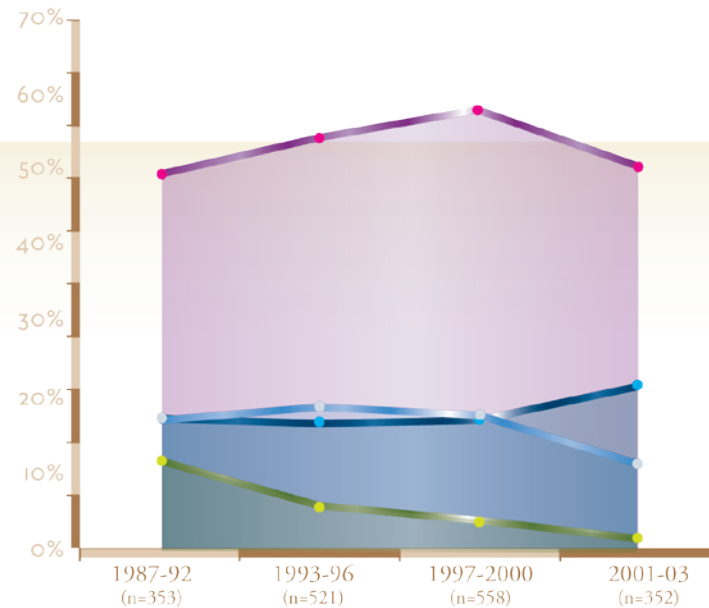
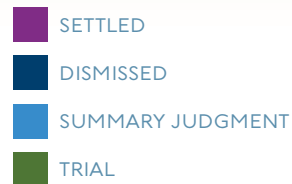
FIGURE 6.2 :
PERCENT OF DISCRIMINATORY
ISSUE ALLEGED BY TIME PERIOD



OUTCOMES

Figure 6.3 shows changes in EDL outcomes over time. Each outcome—settlement, dismissal, summary judgment, and trial—reveals a degree of volatility. Settlements increased steadily between 1987 and 2000, before decreasing somewhat sharply between 2001-03. Proportions of dismissals and summary judgments stay steady until 2001-03, after which they diverge in opposite directions: dismissals go up while summary judgments substantially decrease. And finally, trials—invariably the least common EDL outcome—become increasingly infrequent throughout the entire 1987-2003 period. Indeed, after accounting for about 12 percent of all outcome between 1987-92, by 2001-03, that proportion had dropped dramatically to just over *one percent* of EDL outcomes.

FIGURE 6.3 :
PERCENT OF OUTCOMES
BY TIME PERIOD



Part 7 | Conclusion

Only through the systematic sampling of case filings, such as that employed in this study, is it possible to understand how employment civil rights litigation operates. Our findings rebut many misconceptions about discrimination litigation. Most fundamental, we find that EDL overwhelmingly consists of cases brought by individual plaintiffs (not class actions, multiple plaintiff cases, or lawsuits by the EEOC or public interest organizations). These individuals overwhelmingly complain of disparate treatment, rather than complain about employer policies as would be the subject of disparate impact cases. A significant percentage of cases are brought by plaintiffs who do not have the benefit of counsel, and these plaintiffs have their cases dismissed forty percent of the time. Those claims that are brought by a class, multiple plaintiffs, or the EEOC enjoy much greater chance of success. The most common outcome of a lawsuit is settlement. A significant percentage of plaintiffs lose through a defendant's motion for summary judgment. Very few cases proceed to trial. Plaintiffs prevail in less than one-third of trials.

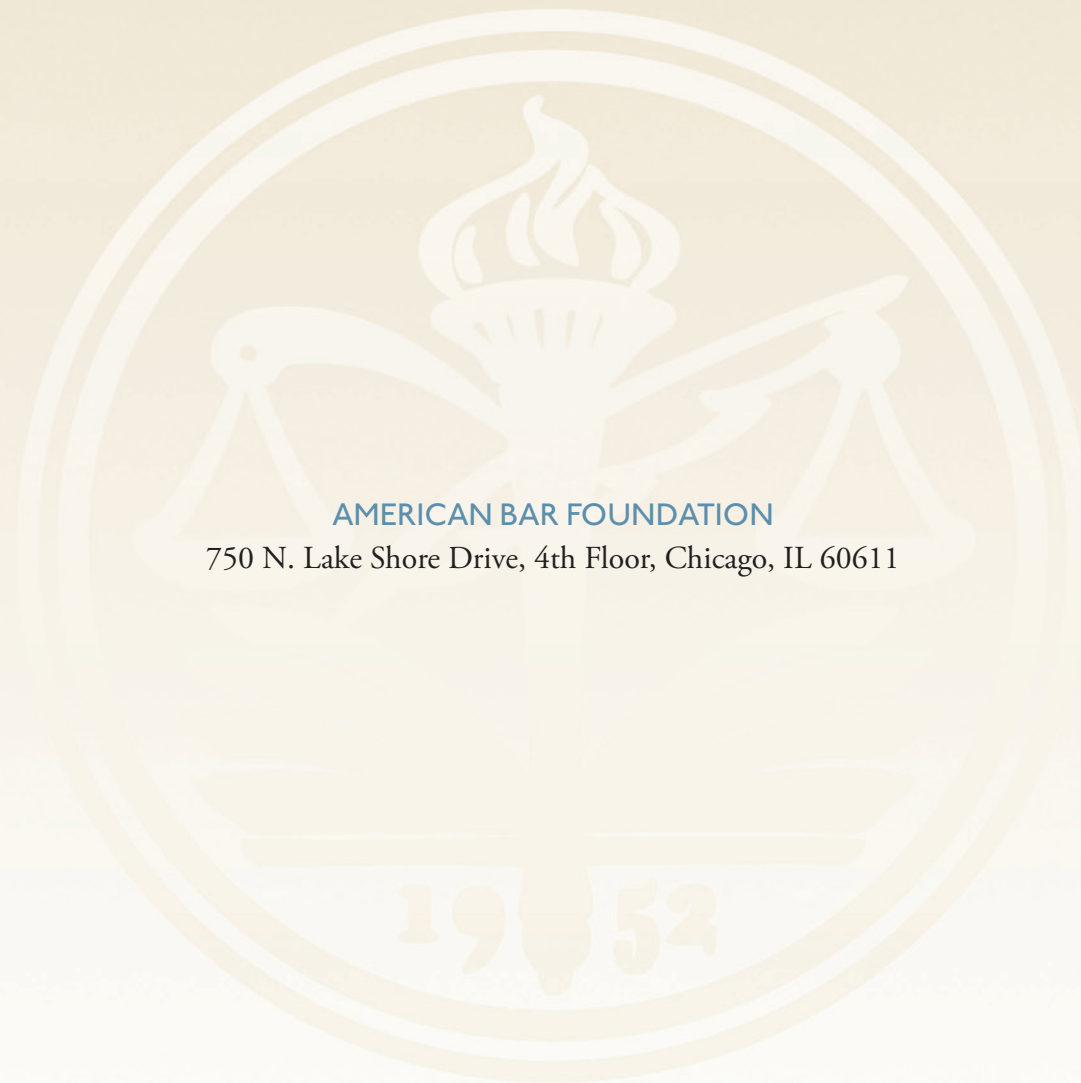
Despite some variation across types of legal claims; the time period in which a case was brought; the federal district in which a case was brought; and the race, gender, age, and disability status of plaintiffs, these patterns are remarkably similar across cases.

Appendix I | Methodology

This report is based on a random sample of employment civil rights cases filed in federal courts between 1988 and 2003. We drew random samples of federal employment civil rights cases from seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco. These districts contain about 20% of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. The sample was drawn from the list of all civil employment discrimination cases filed in these districts from 1987 to 2003 compiled by the Administrative Office of the U.S. Courts (AOUSC). We randomly selected 300 cases from each district over the time period, yielding a sample of 2,100 cases and derived sampling weights by district based on the total number of employment discrimination case filings in each district. Some cases were missing key variables, producing a final sample for analysis of 1,788 cases. The results presented here are not weighted by district.

We developed an extensive coding form and trained teams of coders for each site. The same data collection manager supervised and trained coders in each location. 10% of the cases were coded independently by different coders to allow tests of intercoder reliability. In 94% of cases there was agreement between coders on case outcome.

Manually coding a random sample of case filings provides far more valid and representative data, but the approach faces some limitations. Publicly available files can be incomplete due to misfiling or poor record keeping. Files also can be substantively ambiguous even when “complete” because the file itself, like the case it represents, is constructed through an adversarial process. That is to say, documents filed by the plaintiff and the defendant may (and usually *do*) allege contradictory stories.



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