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Unwrapping Racial Harassment Law

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Unwrapping Racial Harassment Law

Pat K. Chew† & Robert E. Kelley††

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†† Professor, Tepper School of Business, Carnegie Mellon University. We thank Michele Ruscio, Kathleen Bulger, and Scott Kinross for their invaluable research assistance; the Center on Race and Social Problems at the University of Pittsburgh (2004), Conference of Women Law Faculty of Pennsylvania, West Virginia, Ohio, and Delaware (2003), and the Annual Meeting of the Law and Society Association (2002) for the opportunities to present work-in-progress presentations; and the University of Pittsburgh School of Law, the Document Technology Center of the Law School, and Work Processing and Support Services at the CMU Business School for their substantial support. Finally, we are indebted to Deborah Brake, Theresa Beiner, Richard Delgado, Tanya Kateri Hernández, Michael Olivas, and Rhonda Wasserman who reviewed drafts of this article, and to Lu-in Wang and Michele Kristakis with whom we consulted.
I. INTRODUCTION

*Rogers v. EEOC*\(^1\) is widely cited as the first case to recognize a hostile working environment as a form of illegal employment discrimination in

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\(^1\) Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).
general and of racial harassment in particular. Since this 1971 landmark case, however, little systematic assessment of racial harassment case law has occurred. This Article, and the empirical study on which it is based, begin to fill this void in scholarship. They offer a window into racial harassment law and into actual racial harassment practices in the workplace.

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

Despite these societal beliefs that the workplace is not racist, evidence to the contrary is mounting. Racial harassment is a particular form of racism and of harassment which occurs when individuals are intimidated, insulted, bullied, excessively monitored or otherwise harassed because of

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2. While the plaintiff in the Rogers case based her lawsuit on Title VII of the Civil Rights Act of 1964, the Rogers case and subsequent cases under Title VII have also been applied to cases under 42 U.S.C. §§ 1981 and 1983 of the Civil Rights Act of 1866.


4. Research documents all kinds of racial discrimination in the workplace, including racial harassment. See, e.g., Aaron Bernstein, Racism in the Workplace, BUS. WK., July 30, 2001, at 64-67 (noting patterns of racial harassment in the workplace); ALFRED BLUMROSEN & RUTH BLUMROSEN, THE NATIONAL REPORT: THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA – 1999 (2002), http://www.cee1.com/1999_NR/1999_nr.htm (revealing a widespread pattern of “intentional” discrimination, which is defined as underutilization of minorities or women at more than two standard deviations below the standard of utilization within an industry with the inference that such underutilization cannot be explained by chance or because of a lack of available candidates); CATALYST, WOMEN OF COLOR IN CORPORATE MANAGEMENT: THREE YEARS LATER (2002), http://www.catalyst.org/knowledge/titles/title.php?page=woc_corpmngt3yrs_01 (follow “Download report” hyperlink) (reporting a decline in opportunities for minority women to reach senior management roles); Mariame Bertrand & Sendhi Mullainathan, Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination (Nat'l Bureau of Econ. Research, Working Paper No. w9873, 2003) (their findings suggesting that either employers are prejudiced or employers perceive that race signals different productivity levels: (1) job applicants with White names needed to send about 10 resumes to get one callback, but those with African American names needed to send around 15 resumes to get one callback; and (2) Whites with higher quality resumes received 30% more callbacks than Whites with lower quality resumes, but the positive impact of a better resume for those with African-American names was much smaller).
their race. Racial harassment occurs in a range of settings, including the workplace. This research study notably reveals a more complex and sometimes dramatically different picture of the workplace than American society imagines. This empirical research tests our assumptions about the law and social paradigm in which we frame and interpret racial harassment.


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

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

Traditional legal scholarship of course is subject to these same caveats since it also focuses on published opinions written by judges. This empirical study offers some advantages over traditional legal scholarship. In describing their empirical study of sexual harassment cases, Professors Juliano and Schwab explain: "In broadening the traditional analytical legal approach, we have foregone the ability to examine the nuances of particular cases and doctrinal debates among judges. However, we have gained perspective on the bulk of the issues and fact patterns with which federal judges wrestle... . This sweep of cases, then, presents a particularly important perspective." Ann Juliano & Stewart J. Schwab, The Sweep of Sexual Harassment Cases, 86 CORNELL L. REV. 548, 553-54 (2001). It is purposefully a more representative depiction of racial harassment cases than the traditional approach of citing and analyzing only a handful of "leading" cases that are purposefully selected to support a particular legal or policy proposition.

For examples of empirical research in employment law, see id.; Kevin M. Clermont & Stewart J. Schwab, How Employment-Discrimination Plaintiffs Fare in Federal Court, 1 J. EMPirical LEGAL
Part I of this article offers an overview of racial harassment law and research, noting its common origin with and its close dependence upon sexual harassment jurisprudence. Attributable in part to this dependence, development of racial harassment jurisprudence has been limited.

Part II discusses the findings of the empirical study that is the focus of this article. An interdisciplinary team of legal, social science, and business researchers designed and implemented the methodology for this study. We started by identifying all reported federal district court and appellate judicial opinions where the plaintiffs brought racial harassment claims under the major federal statutes for harassment claims in the workplace in six federal judicial circuits through 2002 ("the racial harassment cases"). These circuits represent different geographical regions and include large states with ethnically diverse populations. Through this method, we identified 625 cases. (An estimate of all reported federal cases on racial harassment would be 1250 cases.) A social science "rule of thumb" would recommend...
a sampling of at least 10—15% of these cases. We exceeded this recommended percentage by drawing 260 cases, representing 40% of all cases, in a stratified random sampling within each circuit. The first case in our study occurred in 1976. Thus, the study covers cases spanning 26 years. 

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

Part III moves the empirical analysis a further step by focusing on the outcome of the proceedings in these cases. It offers grim news for prospective plaintiffs and heartening news for defendants. Plaintiffs are successful in only 21.5% of the cases analyzed in this study. In this section, we consider how the different characteristics of racial harassment cases affect the outcome of the cases. Many interesting patterns appear. In addition, our study indicates that plaintiffs in racial harassment cases are more likely than plaintiffs in sexual harassment cases to fare poorly.
The extensive empirical study described in this article provides rich data on racial harassment case law and breaks new ground. Prior to this study, employees, employers, judges, lawyers, and academics could only speculate on the characteristics and outcomes of racial harassment cases. Part IV offers an integrated analysis and discussion of the study results by highlighting key findings relevant to an emerging racial harassment jurisprudence.18

A. Rogers as the Beginning of the Harassment Doctrine

In the 1971 case Rogers v. EEOC,19 Josephine Chavez charged that her employer, optometrists S.J. and N. Jay Rogers, segregated their patients as evidenced by their color-coding customers' office forms by race—using red ink for Black customers and blue ink for non-Black customers. The Equal Employment Opportunity Commission (EEOC) offered the court the then-novel theory that the segregation of patients, "though not directed against Mrs. Chavez, could 'create an atmosphere that would adversely affect the terms and conditions of her employment' and thus have an effect that is proscribed by Title VII."20

Writing the majority opinion, Judge Goldberg embraced the EEOC’s theory, noting that Congress intended Title VII to be liberally and flexibly interpreted to achieve its anti-discriminatory purposes:

I regard this broad-gauged innovative legislation as a charter of principles which are to be elucidated and explicated by experience, time, and expertise. Therefore, it is my belief that employees’ psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase “terms, conditions, or privileges of employment” in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.21

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

18. See infra discussion accompanying notes 155-75.
21. 454 F.2d at 238. Rogers argued that the charge alleged discrimination against the employers’ patients but not toward any employees and that therefore, Mrs. Chavez could not personally claim discriminatory treatment. Judge Goldberg rejected Rogers’ argument. Noting support from the then recent Supreme Court case, Griggs v. Duke Power Co., 401 U.S. 424 (1971), Judge Goldberg explained that Title VII is also aimed at consequences and effects of an employment practice even in the absence of evidence of discriminatory motivation. Id.
One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers, and I think . . . Title VII was aimed at the eradication of such noxious practices.22

B. Limited Development of Racial Harassment Jurisprudence

The Supreme Court in *Meritor Savings Bank v. Vinson*23 describes *Rogers* as “apparently the first case to recognize a cause of action based upon a discriminatory work environment.” Though the doctrine of discriminatory harassment originated with this landmark racial harassment case in 1971, the development of key legal constructs and jurisprudence in discriminatory harassment subsequently focused on sexual harassment.

Beginning with the pioneering work of Catherine MacKinnon in her 1979 book, *Sexual Harassment of Working Women: A Case of Sex Discrimination*,24 the conceptual debates and evolving models of harassment jurisprudence have been set in the context of sexual harassment.25 For instance, important work by Katherine Franke, Kathryn Abrams, Anita Bernstein, Vicki Shultz, Martha Chamallas, Theresa Beiner and others, all discussing sexual harassment, subsequently received

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22. *Id.*

23. 477 U.S. 57 (1986). The *Meritor* court cited the *Rogers* case with approval, although it erroneously described the facts as a Hispanic complainant charging that her employer created an offensive work environment for employees by giving discriminatory service to its “Hispanic” clientele. The correct facts involved an Hispanic employee plaintiff and the optometrists’ Black clientele. It is unclear how to explain this inadvertent but interesting factual error. Was it merely an error in transcription or, in the alternative, was it a “Freudian slip” because the judges found it too unconventional or dissonant that one minority group might be personally distressed over the treatment of another minority group?

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

25. A review of major legal casebooks on employment discrimination, for instance, indicates that casebook authors use sexual harassment cases and discussion almost exclusively to explain harassment jurisprudence under Title VII. See, e.g., SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 365-97 (2000); ROBERT BELTON, DIANNE AVERY, MARIA L. ONTIVEROS & ROBERTO L. CORRADA, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 440-540 (7th ed. 2004) (but recently expanding coverage to include 10 pages on racial harassment cases out of 100 pages on harassment jurisprudence generally).
This research was in part prompted by five major Supreme Court cases in harassment law, again all dealing with sexual harassment fact patterns. These scholars analyzed and often criticized the Supreme Court’s and other courts’ theoretical grounding of sexual harassment claims. This quintet of cases—Meritor, Harris,27 Oncale,28 Burlington and Faragher29—have been integral to the emerging legal framework for discriminatory harassment.

Despite the origin of these legal principles in sexual harassment fact patterns, the courts and the EEOC presumptively assume that they apply to racial harassment.30 Justice Ginsburg, in a concurring opinion in Harris, explicitly analogized the legal standards for sexual and racial harassment.31 The prominence of the Harris case in racial harassment jurisprudence, moreover, is substantiated by its omnipresent citing in racial harassment cases.32

Social science and empirical research on harassment in the workplace also have focused more on sexual harassment than on racial harassment.33 In part, the comparative lack of research on racial harassment is attributable to our still emerging understanding of what racial harassment is. For instance, previous research has not clearly differentiated between racial harassment and racial discrimination, so the causes, characteristics and consequences of the two are confounded.34

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30. EEOC Compl. Man. (CCH) ¶ 3116, at 3246-48 (2002); see, e.g., 29 C.F.R. § 1604.11 n.1 (2003) (providing that legal principles originating in sexual harassment cases apply to other types of harassment cases, including harassment based on race, color, religion, or national origin).

31. 510 U.S. at 24.

32. In a Westlaw search of most cited cases in racial harassment caselaw on Sept. 24, 2004 (search of West Key “Civil Rights (78k147) Hostile environment” with addition of “race or racially or racial”), the Harris case was cited 1,000 times, while the Rogers case was cited only 164 times.

33. JSTOR (available at http://www.jstor.org.com) is an electronic database that contains the full text of journals in a wide range of social science subjects. A search for articles on “racial harassment” in JSTOR on Sept. 24, 2004 (search of West Key “Civil Rights (78k147) Hostile environment” with addition of “race or racially or racial”), produced 121 matches; in contrast, a search for articles on “sexual harassment” produced 1,037 matches.

34. See, e.g., Schneider et al., supra note 6, at 3-12. Schneider and her coauthors note that social science research has not clearly distinguished between fundamental concepts such as racial/ethnic discrimination versus racial/ethnic harassment, or between racial/ethnic harassment versus sexual harassment. Attempting to add some clarity, they define racial/ethnic discrimination and racial/ethnic
between racial harassment and other types of harassment, such as sexual
harassment, as well as the intersection between racial harassment and other
types of harassment, are just beginning to be recognized and understood. 25

Explanations of racial harassment are further complicated because
there are different forms of racial harassment, including verbal racial
harassment, physical forms of harassment directed at a racial group, and
exclusion from work-related or social interactions because of one's race. 26
This treatment can be blatantly racist, where the harasser manifests overt
hostility and animosity toward those of other races. 27 In the alternative,
racism can take other forms that are more subtle, indirect, and covert. 28
These latter forms of racism, sometimes called "aversive racism," can also
be unconscious and unintentional. Linda Hamilton Krieger, for instance,
points to a number of cognitive processes that are unintentional but
nevertheless result in biased employment decisions and conduct. 29 In
addition, aversive racism has substantial negative effects on the
performance of both the targeted individuals and their work groups. 30

We also are in the early stages of sorting out the perceptions of
different racial groups with respect to racial harassment. Social science

harassment in the following ways. Racial/ethnic discrimination is defined as unequal treatment because
of one's race or ethnicity, and is conceptualized as a structural or institutional variable. Racial/ethnic
harassment in the workplace has two parts: (i) slurs or derogatory comments about a target's group, and
(ii) exclusion of the target from work-related or social interactions as a result of the target's ethnicity or
race.

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

35. See infra note 46.
36. See Schneider et al., supra note 6.
37. See, e.g., FEAGIN, supra note 3.
38. A great deal of research and commentary on the topic of subtle discrimination exists. See,
e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious
Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161
Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment
Discrimination Law, 60 J. SOC. ISSUES 835 (2004); Tristan K. Green, Discrimination in Workplace
Dynamics: Toward a Structural Account of Disparate Treatment Theory, 38 HARV. C.R.-C.L. L. REV.
91 (2003); Devon W. Carbado & Mitu Gulati, Working Identity, 85 CORNELL L. REV. 1259 (2000);
Terry Smith, Everyday Indignities: Race, Retaliation, and the Promise of Title VII, 34 COLUM. HUM.
RTS. L. REV. 529 (2003); Ann C. McGinley, ¡Viva La Evolucion!: Recognizing Unconscious Motive in
Title VII, 9 CORNELL J.L. & PUB. POL'Y 415, 421-33 (2003); John Dovidio, On the Nature of
Contemporary Prejudice: The Third Wave, 57 J. SOC. ISSUES 829-49 (2001); Lu-in Wang, Race as
39. See Krieger, Content of Our Categories, supra note 38.
40. See Green, supra note 38; Carbado & Gulati, supra note 38.
research indicates that racial groups perceive differently whether their organizational environment is racist. In particular, it shows that ethnic minorities are more likely than Whites to conclude that minorities have been treated unfairly. Perhaps these differences in perception are largely attributable to minorities recognizing aversive racism and Whites not recognizing it.

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

Law review articles on racial harassment instead tend to be narrower in focus, emphasizing a particular case, work context, or jurisdiction. Alternatively, scholarship has focused on how racial harassment can be analogized to or considered part of the discourse on sexual harassment and sexual harassment laws. Admirable work by Camille Hebert and Tanya

41. A range of social science research indicates that Americans of different racial backgrounds perceive the workplace differently. See, e.g., K.A. DIXON ET AL., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 1 (2002), http://www.heldrich.rutgers.edu/Resources/Publication/19/Work_Trends_020107.pdf (joint project with Center for Survey Research and Analysis, University of Connecticut and John J. Heldrich Center). Based on a survey of 1,005 workers, the researchers concluded that race is the most significant determinate in how people perceive and experience discrimination in the workplace, more so than income and education. White workers are far more likely than minority workers to believe that everyone is treated fairly at work. For instance, half of African-American workers believe that African Americans are treated unfairly and 22% of Hispanic-Americans believe that Hispanic-American workers are treated unfairly, compared to 10% of white workers. Id. at 1, 8.


42. See DIXON ET AL., supra note 41.

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


45. See, e.g., L. Camille Hebert, Analogizing Race and Sex in Workplace Harassment Claims, 58 OHIO ST. L.J. 819 (1997); Tanya Kateri Hernández, Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race, 4 J. GENDER RACE & JUST. 183 (2001); Tanya Kateri
Kateri Hernández exemplify this. Professor Hebert confirms that courts routinely analogize sexual harassment laws and racial harassment laws to each other. While this analogizing helps to legitimize sexual harassment, it may obscure the differences between race-based and sex-based claims. Furthermore, she notes that the importation of overly strict standards for sexual harassment into the law of racial harassment may adversely affect legitimate racial harassment claims. Professor Hernández particularly considers issues that arise when we consider the intersection of race and sex in the harassment context. In one provocative piece, she queries why women of color are over-represented among those who file sexual harassment charges with the EEOC. She suggests that minority women are disproportionately targeted not just for sexual harassment, but also as targets of a combined, cumulative harassment that is based both on race and sex in ways that are intersectional and not just additive.

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


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

46. Hebert, supra note 45, at 821-36.
47. Id. at 836-48.
48. Id. at 878-82.
49. Hernández, supra note 45, at 183. Furthermore, many minority women are in the lowest playing jobs with little prospect for advancement (for instance, in agricultural, domestic services, and low-level assembly) and thus particularly vulnerable to harassment by their supervisors.
50. As an example, the plaintiff's demonstration that the harassment was "unwelcome" has become a critical issue in sexual harassment cases. The requirement has opened the door to controversial scrutiny of the plaintiff's conduct (her dress, joking, flirting, and past behavior). In contrast, in racial harassment cases, the plaintiff's "unwelcomeness" of racial harassment is rarely an issue. On the other hand, the requirement that the harassment is "because of sex" is infrequently an obstacle in heterosexual sexual harassment cases. In contrast, whether the harassment is "because of race" is a frequent issue in racial harassment cases. See infra discussion accompanying notes 110-12. The comparative emphasis on "quid pro quo" harassment offers another example. We can more readily imagine a supervisor coercing a women employee into unwanted sexual activity with the threat of being
A. Dispute Resolution Process for Racial Harassment Claims

By the time racial harassment cases come before a federal district court or appellate court, the aggrieved employee, accused employer, and accused harasser have already been part of a complex dispute resolution process. We can graphically depict the process as a funnel, where you begin with a very large number of racial harassment incidents (or at least employees' perceptions of such) at the wide end of the funnel.\(^5\) (See Figure 1.)

![Dispute Resolution Process for Racial Harassment Complaints](image)

Every published case thus begins with an employee believing he or she was racially harassed.\(^5\) If an aggrieved employee decides to take some

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\(^{51}\) There is the same need for the discrete exploration of other forms of harassment, such as harassment on the basis of age, religion, or disability that may have been inadvertently overshadowed by the dominance of research on sexual harassment. Assuming that other forms of harassment, such as racial harassment, are indistinguishable from sexual harassment threatens to obscure and belittle the importance of these other forms of harassment and discrimination. At the same time, sexual harassment and sexual harassment jurisprudence continue to be important and evolving areas for legal and social science research.

\(^{52}\) The general dispute resolution process has been described in various ways. See, e.g., William L.F. Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming, Claiming.... 15 LAW & SOC'y REV. 631, 635-36 (1981); David M. Trubek et al., The Costs of Ordinary Litigation, 31 UCLA L. REV. 72, 86-87 (1993).

\(^{53}\) Even before this point, the employee must overcome social-psychological forces that discourage people (women and persons of color especially) from acknowledging to themselves that they
action, a likely next step is to explore grievance procedures within the organization. If the dispute is not resolved within the company, the employee may consider pursuing litigation on the basis of Title VII or other statutes. Before filing a private lawsuit based on Title VII, however, the employee must first go through administrative procedures administered by the EEOC. This includes strict time limits within which the individual must file charges with the EEOC. This charge triggers a number of EEOC procedures, including notice to the employer, an investigation of the facts, and efforts to settle the charge. After these administrative procedures, many employees do not proceed further even if the dispute has not been resolved. They may have exhausted their financial or emotional resources, reassessed their legal claim and determined it is not sufficiently viable, or simply wanted to move on to other priorities in their lives. Some do move ahead with private litigation.

As employees move through the various stages of the dispute resolution process, the number of cases declines. Ultimately, only a small
percentage of the original incidents are litigated and an even smaller number are then reported in opinions. To illustrate, over 56,000 racial harassment charges were filed with the EEOC between 1980 and 1999. Our study estimates 735 judicial opinions on racial harassment during approximately that same time period, which amounts to only 1.3% of the charges. Since not all individuals who believe they have been harassed bring an EEOC charge, the percentage of those who believe they have been harassed and ultimately have their case published is even smaller.

B. The Parties and Setting

1. Plaintiffs' Profile

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

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

24 LAW & SOC'Y REV. 1133, 1144-45 (1990) (finding that 80-90% of employment discrimination cases filed in federal court do not produce a published opinion).

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


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

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

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

64. The gender and racial percentages for both the general population and the general labor force are calculated on the basis of the latest available census data. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 2002: THE NATIONAL DATA BOOK, 16 (Table 14), 368 (Table 562) (122nd ed. 2002) [hereinafter CENSUS BUREAU]. The percentages for the general population and the labor force are fairly comparable. (E.g., African Americans constitute
Table 1. Plaintiffs’ Gender and Race

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<th></th>
<th>As % of All Cases</th>
<th>(N)</th>
<th>As % of Labor Force in General</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Gender:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Women</td>
<td>41.5</td>
<td>(108)</td>
<td>46.6</td>
</tr>
<tr>
<td>Men</td>
<td>58.5</td>
<td>(152)</td>
<td>53.4</td>
</tr>
<tr>
<td><strong>Race or Ethnicity:</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African American</td>
<td>81.6</td>
<td>(191)</td>
<td>11.9</td>
</tr>
<tr>
<td>Asian American</td>
<td>4.7</td>
<td>(11)</td>
<td>3.9</td>
</tr>
<tr>
<td>Hispanic American</td>
<td>4.7</td>
<td>(11)</td>
<td>13.4</td>
</tr>
<tr>
<td>Native American</td>
<td>0.4</td>
<td>(1)</td>
<td>0.9</td>
</tr>
<tr>
<td>White American</td>
<td>8.6</td>
<td>(20)</td>
<td>70.0</td>
</tr>
</tbody>
</table>

The ethnic and racial diversity\(^{65}\) of plaintiffs is notable in various ways and offers more of a contrast with racial demographics in general. Minority plaintiffs constitute approximately 90% of all plaintiffs. While African Americans are by far the most frequent racial group at 81.6% of all plaintiffs, the percentage of White American plaintiffs is larger than that of either Hispanic or Asian American plaintiffs. Native Americans are virtually invisible as a plaintiff group with only one case.

Figure 2

Race or Ethnicity of Plaintiff Employees

11.90% of the labor force and 12.21% of the general population; Asian Americans constitute 3.85% of the labor force and 3.86% of the general population.) Given the work context of racial harassment cases, however, we opt to use the labor force percentages for comparisons. The percentage for Hispanic Americans is based on a calculation in which Hispanics are deducted from each racial group and their participation in the labor force is taken into account. For a detailed description of these calculations, contact the authors.

65. In coding race or ethnicity, the study uses the racial or ethnic category indicated in the judicial opinion, although the authors recognize that the objective determination of “race” and “ethnicity” is contestable. There also are three additional cases where the plaintiff is identified as “not white.”
The racial distribution of plaintiffs in these cases varies in distinctive ways from the racial distribution in the general labor force. As shown in Figure 2 and Table 1, the comparison of Blacks and Whites is most dramatic. African Americans constitute approximately 12% of the labor force, yet constitute over 80% of plaintiffs in racial harassment cases. In contrast, while Whites constitute approximately 70% of the labor force, they are plaintiffs in less than 9% of racial harassment cases. Asian Americans are plaintiffs at only a slightly higher percentage than their percentage in the general population; Hispanics and Native Americans are notably underrepresented in the plaintiff class relative to their representation in the labor force.

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

Table 2. Intersection of Plaintiffs’ Race and Gender

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

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

(b) Employment Profile. While a common perception may be that harassment occurs only in non-professional occupations, the data shows plaintiffs in a wide range of occupations. As displayed in Table 3, while approximately 80% of the plaintiffs are in the service and support occupational category, almost 20% are in the management and professional occupational category. Management occupations include financial analysts and managers, hotel managers, accountants and auditors, information systems managers, and a range of other management roles. Plaintiffs in professional occupations include lawyers, doctors, architects, engineers, counselors, social workers, educators, psychologists, scientists, and economists.

Table 3. Plaintiffs' Occupations

<table>
<thead>
<tr>
<th></th>
<th>As % of Cases</th>
<th>(N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Management and Professional:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Management</td>
<td>10.7</td>
<td>(25)</td>
</tr>
<tr>
<td>Professional Occupations</td>
<td>8.6</td>
<td>(20)</td>
</tr>
<tr>
<td>Service and Support: (Select Categories)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Office and Administrative</td>
<td>21.5</td>
<td>(50)</td>
</tr>
<tr>
<td>Production</td>
<td>10.7</td>
<td>(25)</td>
</tr>
<tr>
<td>Protective Services</td>
<td>8.2</td>
<td>(19)</td>
</tr>
<tr>
<td>Sales</td>
<td>7.3</td>
<td>(17)</td>
</tr>
<tr>
<td>Installation and Repair</td>
<td>5.2</td>
<td>(12)</td>
</tr>
<tr>
<td>Transportation</td>
<td>4.7</td>
<td>(11)</td>
</tr>
<tr>
<td>Healthcare Support</td>
<td>4.3</td>
<td>(10)</td>
</tr>
</tbody>
</table>

66. The plaintiffs' occupations are coded according to a categorization system provided by the U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK (2006), available at http://www.bls.gov/oco/home.htm. There are over 24 different occupational categories under the major headings of management and business and financial operations occupations, professional and related occupations, and service occupations. In addition, the authors added seven categories which appear distinguishable from the 24 original categories. (Complete details are on file with the authors.)

67. These percentages are based on the 233 cases in which the plaintiffs' occupation is indicated. This study thus substantiates that discriminatory harassment allegedly occurs at all occupational levels, including among management and professionals. See also Elizabeth Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 945 (1982).
Service and support occupations are varied, including the examples in Table 3. The occupation with the most plaintiffs in any category is office and administrative supervision positions (with over 20% of all plaintiffs), which include secretaries, office assistants, computer operators, drafters, and phone operators. Following in size among service and support occupations are plaintiffs in production, which includes assemblers, fabricators, machinists, welders, food processing, textile production, and woodworkers. The next largest group is protective services occupations, which include police, firefighters, security personnel, corrections officers, and park rangers.

Many plaintiffs are long-time employees; their average tenure is 8.36 years. (This runs counter to the notion that increased contact and working with people of different races inevitably decreases racism and that people can only be uncivil to “strangers.”)

2. Defendants’ Profile

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

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

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

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

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

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

72. The race of the alleged harasser is indicated in 85 cases. There are seven additional cases where the defendant is identified as a race other than the plaintiff’s race, but the opinion did not indicate the specific race or ethnicity.
Table 4. Alleged Harassers’ Gender and Race

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

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

Figure 3
Race of Alleged Harassers

While the numbers are small, we can make some interesting observations when we consider the race and the gender of defendants simultaneously. As indicated in Table 5, it appears that both African American men and White men are more likely to be accused of racial harassment than are their female counterparts.\(^{73}\) White men constitute about two-thirds of White defendants; and Black men constitute 80% of

\(^{73}\) Among Asian American defendants, two are women and none are men. In two cases, the defendants are identified as African American but their gender is not indicated. Hence, there are fewer cases with African American harassers indicated in Table 5 than in Table 4.
Black defendants, although they make up only 45% of African Americans in the labor force.

Table 5. Intersection of Alleged Harassers’ Race and Gender

<table>
<thead>
<tr>
<th></th>
<th>Gender as % of Each</th>
<th>Gender as % of Each Racial Group in</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Defendant Group in</td>
<td>Labor Force in General</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(N)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African Americans</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Women</td>
<td>20.0 (3)</td>
<td>54.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>80.0 (12)</td>
<td>45.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>White Americans</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Women</td>
<td>33.3 (21)</td>
<td>46.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Men</td>
<td>66.7 (42)</td>
<td>53.5</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

While our image may be that harassment most typically occurs one-on-one with the harasser being the employee’s supervisor, that is not the complete picture. As shown in Table 6, in about two-thirds of the cases, plaintiffs claim that more than one person harassed them. The organizational status and the group composition of the harassers are also noteworthy. In almost half of the cases, the supervisor is the alleged harasser, but co-workers are harassers as well (20.7%). Perhaps most revealing is that in 31% of the cases, the accused harassers include both a supervisor and a co-worker.

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

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

75. This is consistent with Title VII’s prohibition of the “employer” (rather than individual defendants) to engage in discrimination. 42 U.S.C.A. § 2000e-2 (a) (2005).
Since plaintiffs routinely name their employing company, we could identify the range of employment settings in which harassment allegedly occurs. In addition to identifying the company’s industry, we determined that, while about 70% of the work settings in which harassment allegedly occurs are private businesses, public sector settings are not immune with about 30% of the cases. 76 (See Table 6.) Among the public sector employers in the study who identify the level of government in which they operate, federal government employers are less likely than state or local employers to be alleged harassers.

Information gleaned from the cases reveals the industrial categories of the defendant companies. 77 Having both the plaintiff’s occupation and the companies’ industry gives us a more complete picture of the employment

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

77. Defendant employers’ industries are indicated in 247 of the cases.
context in which harassment allegedly occurs. As with the data on private sector versus public sector, the data on industrial categories confirms that charges of racial harassment are not limited to isolated employment settings.

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

3. Novel Fact Patterns

The most common fact pattern by far involves a White supervisor harassing a minority employee. Novel fact patterns, however, are worth mentioning. They prompt us to question our factual assumptions, suggesting unnoticed but revealing racial dynamics. They may be predictive of future patterns. These more novel patterns collectively

78. There has been a range of research on racial discrimination, including racial harassment, in specific occupational areas. See, e.g., Giselle Corbie-Smith, Erica Frank, Herbert W. Nickens & Lisa Elon, Prevalences and Correlates of Ethnic Harassment in the U.S. Women Physicians' Health Study, 74 ACAD. MED. 695 (1999); Aravinda Nadimpalli Reeves, Gender Matters, Race Matters: A Qualitative Analysis of Gender and Race Dynamics in Law Firms (June, 2001) (unpublished Ph.D. dissertation, Northwestern University) (on file with author) (noting racial and sexual harassment of African American attorneys); Heather Antecol & Deborah Cobb-Clark, Identity and Racial Harassment, SOCIAL SCIENCE RESEARCH NETWORK, DISCUSSION PAPER NO. 1149 (May 4, 2004), http://papers.ssm.com/sol3/papers.cfm?abstract_id=547582 (exploring racial harassment in the military).

79. The defendant company's industries are coded according to a Standard Industrial Classification (SIC) system provided by the U.S. Department of Labor, Occupational Safety and Health Administration, http://www.osha.gov/pls/DB_manual.html (last visited Feb. 26, 2006), although the authors added some additional categories that seemed distinguishable from the original SIC categories. (Complete details are on file with the authors.)

Available government data on employment by industries in general do not use the exact categories that we use in this study. Thus, generalizations about the study's data should be done cautiously. With this caveat, it is interesting to note that the industries' percentage of cases in the study as shown in Table 6 approximate their percentage in employment in general. For instance, these industries represent the following percentages in employment in general in 2000: manufacturing (14.7%), health care and social services (11.1%), transportation (7.2%), retail trade (16.5%), finance (6.4%), and educational services (7.7%). CENSUS BUREAU, supra note 64, at 385 tbl. 591.
account for over 20% of all the cases in the study, as indicated in Table 7. Hence, although they are not typical, they also are not rare.

Table 7. Novel Fact Patterns

<table>
<thead>
<tr>
<th>Novel Fact Patterns</th>
<th>As % of Cases</th>
<th>(N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Same-Race Harassment</td>
<td>3.1</td>
<td>(8)</td>
</tr>
<tr>
<td>Minority-on-Minority Harassment</td>
<td>3.5</td>
<td>(9)</td>
</tr>
<tr>
<td>Minority-on-White Harassment</td>
<td>3.8</td>
<td>(10)</td>
</tr>
<tr>
<td>Third-party Harassment</td>
<td>1.2</td>
<td>(3)</td>
</tr>
<tr>
<td>Contra-power Harassment</td>
<td>3.1</td>
<td>(8)</td>
</tr>
<tr>
<td>Derivative Harassment</td>
<td>5.0</td>
<td>(13)</td>
</tr>
</tbody>
</table>

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

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

B. Nature of the Harassment

1. Types of Harassment

Consistent with social science research, plaintiffs' complaints in this study indicate that perpetrators use strikingly varied methods of harassment. We identify over fifty discrete types of harassment. These types of

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80. See supra note 6.
harassment are grouped in four major categories, similar to categories recognized in previous research: Verbal Harassment, Physical Objects, Physical Conduct, and Work-related Decisions. In many cases, plaintiffs claim they are harassed in more than one way. In any one case, if there are multiple forms of harassment, each one is identified and coded. Hence, a plaintiff's claim of harassment might fall in one or all of the categories or in multiple ways within each category. (See Table 8.)

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

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

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

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


84. Examples of other racial slurs reported in the cases include "chinks," "spics," and "wetbacks."
Table 8. Nature of Harassment

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

(b) Physical Objects. This form of harassment, which plaintiffs claimed in 22.7% of the cases, uses a tangible object or medium. For example, pictures, decals, cards, photos, graffiti, or posters (including those with Swastikas, confederate flags or monkeys) are used in 12.7% of all the cases and letters or emails are used in 5.4% of the cases. Actual physical objects, such as nooses or Ku Klux Klan-associated attire, are left for plaintiffs in their work space (and occasionally at the work site more generally) in 5.8% of the cases.85

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

(d) Work-Related Decisions. The plaintiffs in 65.8% of the cases perceive that work-related decisions constitute, or at least contribute, to racial harassment. Complaints dealing with formal employer decisions (such as plaintiff’s promotion, suspension, demotion, or a denial of compensation) are found in 24.6% of the cases. Complaints dealing with employer treatment affecting the employee’s job development and enhancement (such as less favorable assignments, demeaning work, isolation from meetings, denial of training, denial of essential resources for work performance, excessive monitoring, and excessive reprimands) are found in 58.1% of the cases.86 Complaints about employer decisions resulting in a denial of plaintiff’s benefits, compensation, or privileges are

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

86. The most frequent claims within this sub-category are less favorable assignments (28.1%), and excessive reprimands (22.7%).
found in 16.2% of the cases. A cluster of complaints dealt with the employer or others questioning the employee's skills, authority, integrity, or personal stability (12.7%).

2. Frequency and Length of Harassment

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

C. Litigation Characteristics

1. Forum

This study analyzes a number of litigation characteristics: forum, type of proceedings, plaintiffs' claims, and legal issues. The forum of each case is studied in three ways: the federal circuit, the court level, and the state. (See Table 9.) Six federal circuits were selected to represent areas from different parts of the country, including circuits from the northeast, southeast, south, west, and central parts of the United States. These circuits, the First, Second, Fifth, Seventh, Ninth, and the Eleventh, also include most of the largest metropolitan areas in the country. We then did a random sampling of cases within each of these six circuits (without regard to whether the opinion was from the district court or the appellate court). About 80% of the resulting opinions were from the district courts with the remaining 20% from the appellate courts.

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

88. See Juliano & Schwab, supra note 7.

89. Only six cases reported harassment outside the workplace.

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

91. Seven of the top ten metropolitan areas in 2000 are located in these circuits. CENSUS BUREAU, supra note 64, at 32-34 (Table No. 30).

92. Some of the judicial opinions randomly selected as a district court case in the study were also randomly selected as an appellate court case in the study. Approximately 23 cases in the study are linked in this way. For purposes of analysis, however, they are treated as discrete cases.
Table 9. Forum

<table>
<thead>
<tr>
<th>Level of Court:</th>
<th>As % of All Cases</th>
<th>(N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>District Courts</td>
<td>79.2</td>
<td>(206)</td>
</tr>
<tr>
<td>Appellate Courts</td>
<td>20.4</td>
<td>(53)</td>
</tr>
<tr>
<td>Federal Circuits:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>First Circuit</td>
<td>3.5</td>
<td>(9)</td>
</tr>
<tr>
<td>Second Circuit</td>
<td>19.6</td>
<td>(51)</td>
</tr>
<tr>
<td>Fifth Circuit</td>
<td>15.0</td>
<td>(39)</td>
</tr>
<tr>
<td>Seventh Circuit</td>
<td>33.5</td>
<td>(87)</td>
</tr>
<tr>
<td>Ninth Circuit</td>
<td>12.7</td>
<td>(33)</td>
</tr>
<tr>
<td>Eleventh Circuit</td>
<td>15.8</td>
<td>(41)</td>
</tr>
<tr>
<td>Select States:*</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alabama</td>
<td>6.5</td>
<td>(17)</td>
</tr>
<tr>
<td>California</td>
<td>8.9</td>
<td>(23)</td>
</tr>
<tr>
<td>Florida</td>
<td>5.4</td>
<td>(14)</td>
</tr>
<tr>
<td>Georgia</td>
<td>3.9</td>
<td>(10)</td>
</tr>
<tr>
<td>Illinois</td>
<td>24.2</td>
<td>(63)</td>
</tr>
<tr>
<td>Indiana</td>
<td>7.3</td>
<td>(19)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>4.2</td>
<td>(11)</td>
</tr>
<tr>
<td>New York</td>
<td>17.7</td>
<td>(46)</td>
</tr>
<tr>
<td>Texas</td>
<td>9.6</td>
<td>(25)</td>
</tr>
</tbody>
</table>

| Clustering of States:|                   |      |
| Large Diverse States | 70.8              | (184) |
| Smaller Less Diverse States | 29.2 | (76) |

*These states are also included in the study, but have five or fewer cases: Arizona, Connecticut, Hawaii, Massachusetts, Maine, New Hampshire, Oregon, Rhode Island, Washington, Wisconsin. There are four other states (Alaska, Nevada, Vermont, and Mississippi) and Puerto Rico in the six federal circuits indicated in Table 9, but no cases from these states were randomly selected for analysis.

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

The courts in this study sit in nineteen states. Given their populations, Massachusetts and Washington have disproportionately fewer racial harassment cases but Alabama and Louisiana have disproportionately more cases.93 Two states account for the lion’s share of litigation activity: Illinois with 24% and New York with 18% of all cases. While Texas, California, and Indiana are the next most active states, they each represent less than 10% of all cases. These states assure some geographic diversity in

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93. Their population size is ranked as follows, with “1” designating the state with the largest population: Massachusetts (13), Washington (15), Louisiana (22), and Alabama (23). CENSUS BUREAU, supra note 64, at 23 tbl. 19.
the study since they are located in different parts of the country. In addi-
tion, we clustered the states into two groups: states that have the
largest and most ethnically diverse populations (including New York,
Texas, Illinois, California, Florida, and Georgia),\footnote{The states in
this group are among the top ten states with the largest populations. In
addition, approximately 15% or more of their population is African
American, Hispanic, or both. \textit{Census Bureau}, \textit{supra} note 64, at 23, 27-28.} and states with smaller
and less ethnically diverse populations (all other states). Over 70% of
the cases in the study are from the large diverse states.

2. \textit{Proceedings, Representation, and Citation}

While prospective plaintiffs might initially assume that suing their
employers will eventually culminate in a trial on the merits, the study
suggests that this occurs infrequently.\footnote{See Adam Liptak, \textit{U.S. Suits
Multiply, but Fewer Ever Get to Trial, Study Says}, \textit{N.Y. Times},
Dec. 14, 2003, \textsection 1, at 1; Clermont \& Schwab, \textit{supra} note 7, at 440
(indicating rareness of trials in employment discrimination cases).} Trials on the merits occur in less
than 5% of the district court cases.\footnote{These cases are bench
trials on the merit at the district court level. At the appellate court
level, 3.1\% of the cases dealt with a review of a bench trial at the
district court level.} (See Table 10.) The most typical
judicial opinion in a racial harassment case deals with the district court's
disposition of a defendant's pre-trial motion. (The defendants initiate
proceedings at the district court level in 90\% of the cases.) Over 60\% of all
the cases and almost 80\% of the district court cases deal with a motion for
summary judgment at the district court level. The second most common
proceeding in these cases is a motion to dismiss at the district court level.
Yet in comparison with motions for summary judgment, these proceedings
are far fewer. They constitute 9.2\% of all the cases and 11.7\% of district
court cases. At the appellate court level, the most likely proceeding
described in judicial opinions is a review of the district court's ruling on the
motion for summary judgment (73.6\% of the time).\footnote{In addition, there
are two cases of other appellate proceedings other than those indicated in
Table 7. \textit{See also} Clermont \& Schwab, \textit{supra} note 7, at 449-50 (noting that
appeal rates in employment discrimination cases are higher than in other cases).}

Given that plaintiffs may appeal the district court's grant of the defendant's motion, it is also not
surprising that the plaintiffs tend to be the moving party (about 80\% of the
time) at the appellate court level.

Given the complexity of the dispute resolution process, including the
administrative maze that plaintiffs must follow, one would expect plaintiffs
to have attorney representation to provide expert counsel. Indeed, in only
20.4\% of the cases is \textit{pro se} representation indicated.\footnote{This compares to \textit{pro se}
representation in all Title VII cases (18.9\%), Section 1983 cases
(20.8\%), and Section 1981 cases (13.7\%). Clermont \& Schwab, \textit{supra} 7, at 434.}
Table 10. Proceedings, Representation, and Citation

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

We also identified cases as either Federal Reporter cases (published opinions) or cases available only on-line (unpublished opinions). Strikingly, only 38.8% of the cases in this study are Federal Reporter cases (published opinions). (See Table 10.) To state it differently, over 60% of racial harassment cases are not available through the Federal Reporter system. Given the large number of cases in unpublished opinions, lawyers and parties who rely only on published cases are ignoring a substantial amount of case law that may differ significantly from unpublished cases in their facts, reasoning, and outcomes.

The high percentage of unpublished cases in this study is consistent with the current trend among federal circuits. In 2001, for instance, 64.2% of the appellate court opinions in the D.C. Circuit were unpublished. This percentage is low compared to the Fourth and Ninth Circuits, where approximately 90% and 80% of the appellate court opinions, respectively, were unpublished.

99. All the cases in the study are available on-line through LEXIS, WESTLAW or both electronic databases. See supra note 10 (describing research methodology). A case was designated a Federal Reporter case if it had a Federal Reporter citation. About a third of the cases (32.7%) have a citation (typically from a specialized publication source) other than a Federal Reporter case citation.

100. As Professor Pether points out, the bases on which federal judges and publishers choose to publish cases in the Federal Reporter are neither consistent nor predictable. See supra note 58.

101. Jonathan Groner, Circuit's New Citation Rule: Few Takers, LEGAL TIMES, Jan. 6, 2003, at 1, 7; Pether, supra note 58, at 1465 n.139.

102. Groner, supra note 101; Pether, supra note 58, at 1471, 1472. In fact, data from the Administrative Office of the United States indicates that the percentage of judicial opinions that are unpublished in the Federal Courts of Appeals has been increasing, reaching 80% in 2000. Michael
3. **Plaintiffs' Claims**

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

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

Some plaintiffs brought separate race discrimination claims charging their employers with particular intentional business decisions, practices or conduct that discriminated against them on the basis of their race. These race discrimination claims occur in 74% of the cases examined. Hence, it appears that plaintiffs frequently believe that employers both create a

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103. Section 1981 provides that all persons “shall have the right . . . to make and enforce contracts . . . to the full and equal benefit of all laws . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a) (2006). Section 1983 provides a legal and equitable cause of action for individuals who have been denied a constitutional or federal statutory right by a state or local government official, such as the right to equal protection. 42 U.S.C. § 1981.

104. Therefore, as shown in Table 11, the percentages of cases indicated for all three statutory bases exceed 100%. Ten percent of the cases also include a state statute as the basis for their racial harassment allegations.

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

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

107. One marker of these cases is that they refer to the framework laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) providing for (1) the plaintiff having the burden of proving a prima facie case, (2) the defendant countering with an articulation of a legitimate reason for the employer action, and (3) the plaintiff proving the defendant’s reasons as pretextual. In contrast, the racial harassment cases focus on whether the elements of a “hostile work environment” can be shown.
hostile environment and make specific decisions or institute policies that are racially discriminatory.

### Table 11. Plaintiffs' Claims

<table>
<thead>
<tr>
<th>Legal Basis of Racial Harassment Claim:</th>
<th>As % of All Cases</th>
<th>(N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title VII</td>
<td>87.7</td>
<td>(228)</td>
</tr>
<tr>
<td>Post-Civil War Statutes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>' 1981</td>
<td>37.3</td>
<td>(97 )</td>
</tr>
<tr>
<td>' 1983</td>
<td>4.6</td>
<td>(12 )</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Concurrent Claims (Discrimination-Based):</th>
<th>As % of All Cases</th>
<th>(N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race Discrimination</td>
<td>73.9</td>
<td>(192)</td>
</tr>
<tr>
<td>Sex-Based Claims</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sex Discrimination</td>
<td>10.4</td>
<td>(27 )</td>
</tr>
<tr>
<td>Sexual Harassment</td>
<td>13.5</td>
<td>(35 )</td>
</tr>
<tr>
<td>National Origin Discrimination and</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Harassment</td>
<td>8.8</td>
<td>(23 )</td>
</tr>
<tr>
<td>Age Discrimination</td>
<td>3.5</td>
<td>(9  )</td>
</tr>
<tr>
<td>Disability Discrimination</td>
<td>2.3</td>
<td>(6  )</td>
</tr>
<tr>
<td>Religious Discrimination</td>
<td>2.3</td>
<td>(6  )</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Concurrent Claims (Other):</th>
<th>As % of All Cases</th>
<th>(N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retaliation</td>
<td>49.2</td>
<td>(128)</td>
</tr>
<tr>
<td>Emotional Distress</td>
<td>13.8</td>
<td>(36 )</td>
</tr>
<tr>
<td>Constructive Discharge</td>
<td>10.8</td>
<td>(28 )</td>
</tr>
</tbody>
</table>

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

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

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

109. See supra discussion accompanying notes 45-49.
4. Legal Issues

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

The courts also look at procedural issues such as whether the plaintiff’s complaint is timely or whether the plaintiff properly exhausted the administrative processes and remedies. The plaintiff’s noncompliance with procedural requirements is not infrequently the basis on which racial harassment suits are terminated. These procedural pitfalls highlight how important it is for plaintiffs, or more particularly for their lawyers, to understand the potentially perplexing administrative and judicial process for employment harassment claims.

Table 12. Legal Issues

<table>
<thead>
<tr>
<th>Issue</th>
<th>Issue Raised As % of All Cases</th>
<th>Resolution of This Issue In Plaintiffs’ Favor</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Substantive Issues:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is harassment “severe or pervasive”?</td>
<td>61.2 (159)</td>
<td>22.6 (35)</td>
</tr>
<tr>
<td>Is harassment “because of race”?</td>
<td>37.7 (98)</td>
<td>17.0 (16)</td>
</tr>
<tr>
<td><strong>Procedural issues:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is complaint timely?</td>
<td>18.1 (47)</td>
<td>30.6 (11)</td>
</tr>
<tr>
<td>Are administrative remedies exhausted?</td>
<td>4.2 (11)</td>
<td>25.0 (3)</td>
</tr>
</tbody>
</table>

111. While this was not studied empirically, judges sometimes appeared to require that the “severe or pervasive” requirement was actually a “severe and pervasive” requirement. Hence, in these cases, harassment had to be both severe and pervasive to sufficiently satisfy this element.
Our study also considers how these specific legal issues are resolved.\textsuperscript{112} Given that many cases have multiple legal issues, the court in any particular case may resolve each issue differently.\textsuperscript{113} In only 22.6\% of the cases in which the court addresses and resolves the question “Was the harassment severe or pervasive?,” did the court answer affirmatively.\textsuperscript{114} In response to the question “Was the harassment because of race?,” in only 17\% of the cases did the courts answer affirmatively. From the plaintiffs’ perspective, the courts’ resolution of procedural issues is similarly dismal. They lose their argument of a timely complaint over two-thirds of the time and their argument of exhaustion of their administrative remedies three-quarters of the time.

5. Reasonableness Standard

Plaintiffs must show their perceptions of and conclusions about harassment and hostility in the workplace are “reasonable.”\textsuperscript{115} In the context of racial harassment cases, this means their arguments that the harassment was “severe or pervasive” and “because of race” are justified. In determining whether the plaintiff has met this burden, the judge must select a point of reference on which to evaluate the plaintiffs’ arguments. As many legal and social science researchers observe, this choice of perspective can be both complicated and relevant to the outcome.\textsuperscript{116} They point out that the courts may choose between the perspective of a hypothetically gender-neutral, race-neutral “reasonable person,” or, in the alternative, the perspective of a “reasonable person” with the plaintiff’s particular personal characteristics. Thus, this alternative model would use

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

\item How a court resolves a discrete legal issue is not synonymous with how the court resolves the case as a whole See infra discussion accompanying notes 151-53 (indicating outcomes of cases as a whole).

\item For instance, the court’s affirmative response on the issue of the severity of the harassment includes its finding that (1) there is a genuine issue of material fact regarding the severity of the harassment to be decided by the jury or other fact-finder, or (2) the facts are undisputed and the plaintiff has offered enough evidence on the severity issue that a reasonable jury could find for the plaintiff. See also FED. R. CIV. P. 59; STEVEN BAICKER-MCKEE ET AL., A STUDENT’S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 691, 693 (4th ed. 2001).

\item Although there is more discourse on the reasonableness standard in the context of sexual harassment cases, there also are articles that discuss the reasonableness standard when the plaintiff is an racial/ethnic minority. See, e.g., Tam B. Tran, Title VII Hostile Work Environment: A Different Perspective, 9 J. CONTEMP. LEGAL ISSUES 357 (1998); Melissa K. Hughes, Note, Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis, 76 S. CAL. L. REV. 1437 (2003).

\item See supra discussion accompanying note 41.
\end{enumerate}
\end{footnotesize}
“a reasonable woman” standard in a sexual harassment claim, or “a reasonable Hispanic American” standard in a racial harassment claim where the plaintiff is Hispanic American. Even more particularly, the court could acknowledge both the gender and ethnicity of the plaintiff and utilize “a reasonable Hispanic woman” standard.\textsuperscript{117}

This choice of perspective has important practical significance because social science research indicates that the “reasonable person” who is White and the “reasonable person of color” perceive racial prejudice in the workplace differently.\textsuperscript{118} Thus, each perspective might yield different conclusions about whether there is harassment, whether the harassment is severe or pervasive, or whether the harassment is because of the plaintiff’s race.

This study indicates that as far as judges are concerned, the debate on the appropriate reasonableness standard is essentially academic. While social scientists and legal scholars argue the nuances of the issue,\textsuperscript{119} courts do not even raise it. Except for the Ninth Circuit, which has expressly adopted the “reasonable woman” standard,\textsuperscript{120} other courts cite the “reasonable person” or comparable standard\textsuperscript{121} or do not articulate a particular standard. Even the judges in the Ninth Circuit do not always expressly refer to the perspective of the plaintiff’s racial group. In only ten cases (3.9\%) in the study did the courts explicitly use a reasonableness standard based on the plaintiff’s race. What is notable in the study, therefore, is the absence of the reasonableness standard as an issue in the case law.

III.
OUTCOME OF RACIAL HARASSMENT CASES

Part II informs us about plaintiffs and defendants in racial harassment cases, types of racial harassment, and the litigation process. Part III moves the empirical analysis further by focusing on the outcome of the cases and

\textsuperscript{117} This inquiry can take various forms, depending on the nature of the lawsuit. For instance, in a sexual harassment lawsuit, the focus is how Hispanic women perceive sexual harassment (in comparison with any other group including African American women). In a racial harassment lawsuit, the focus is how Hispanic women perceive racial harassment (in contrast to any other group including Hispanic men).

\textsuperscript{118} See supra discussion accompanying note 41.

\textsuperscript{119} Juliano & Schwab, supra note 7, at 582, 584 (Table 6), 577 (also noting that more articles discuss the reasonableness standard than courts adopting the standard in their study of sexual harassment cases). A research of social science literature by the authors, for instance, reveals literally dozens of studies on the reasonableness standard particularly in the sexual harassment context.

\textsuperscript{120} Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

\textsuperscript{121} Some courts refer to the “reasonable juror,” “victim,” “person in plaintiff’s position” (without further specificity), or “fact-finder.”
considering how particular characteristics of the parties, the nature of the harassment, and characteristics of the litigation process affect the outcome.

The outcome of individual cases was determined in the following way. Each judicial opinion was coded as a “win” for the party whose legal position the court favors. Thus, an “employee/plaintiff win” means that the outcome of the legal proceeding described in the judicial opinion is in the plaintiff’s favor; an “employer/defendant win” means the outcome is in the defendant’s favor; and “both the employee/plaintiff and employer/defendant win” means the outcome is in part in the defendant’s favor and in part in the plaintiff’s favor.122 Given that a substantial majority of the cases are employers’ motions for summary judgment, a “plaintiff win” in these cases means that the motion is denied and a “defendant win” means that the motion is granted. Given the legal effect of the court’s decision on a motion for summary judgment, the outcome of these proceedings may well be dispositive.

Our general analysis of outcome begins with the plaintiffs’ and the defendants’ overall success rates. When all the cases in the study are considered, plaintiffs are successful in 21.5% of the cases and defendants are successful in 81% of the cases.123 Thus, defendant employers are much more likely to “win” than plaintiff employees. Furthermore, this study indicates that plaintiffs fare worse in racial harassment cases than in sexual harassment cases.124

In addition to looking at the parties’ success and failure rates in all racial harassment cases as a group, we can also study how the parties fare in cases with particular attributes.125 This study provides data to answer these kinds of questions: Does the plaintiff’s or defendant’s gender or race, for instance, make a difference in whether the plaintiff wins the case? Does the kind of harassment weaken or strengthen the defendant’s likelihood of

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

123. Recall that the percentage of cases where plaintiffs win when combined with the percentage of cases where defendants win exceeds 100%. See supra note 122.

124. See supra note 17; Clermont & Schwab, supra note 7, at 16, 30 (comparing types of employment discrimination cases).

125. This study also took into account the gender of the judges in the district courts. See supra note 90. When the judge is a woman, it appears to improve the plaintiffs’ chances of winning slightly to 27.5%, while the plaintiffs’ success rate before a male judge is 21.3%. At the appellate court level, where cases are typically heard by multiple judges on panels (and where we did not identify the gender of the judges), the plaintiffs’ success rate is 21.1%. See also Nancy E. Crowe, The Effects of Judges’ Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996 (June, 1999) (unpublished Ph.D. dissertation, University of Chicago) (on file with author) (finding that female judges are more likely than male judges to vote in favor of plaintiffs in sex discrimination cases but finding no voting differences in race discrimination cases).
winning? Does the case forum (for example, the state or circuit) correlate with defendants losing their motions for summary judgment?

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

A. Effect of Parties' Profiles

We consider how a range of other plaintiffs' characteristics affected case outcomes, as shown in Table 13. For instance, women plaintiffs have comparable success rates to men, with women employees winning in 20.8% of their cases compared to men winning in 22.8% of their cases. This occurs even though men have brought more cases than women in recent years.

The success rates of plaintiffs of different races and ethnicities vary considerably. Asian American and Black plaintiffs have the lowest percentage of wins, followed by a significant increase of wins by White plaintiffs. Hispanic plaintiffs have a statistically significant and a dramatically higher win rate than any other ethnic group. In the single case with a Native American plaintiff, the plaintiff loses.

126. For some variables, the combined percentages of the plaintiffs' success rate and the defendants' success rate may exceed 100% because there are some cases in which both the parties succeed, see supra note 122, or they may be less than 100% because of rounding of percentages. The combined number (N's) of both plaintiffs and defendants approximates the total sample size for that variable.

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

*This variable is significantly correlated with the outcome indicated at the .10 level.
**This variable is significantly correlated with the outcome indicated at the .05 level.
***This variable is significantly correlated with the outcome indicated at the .01 level.

We consider which of the alleged harassers' characteristics affect the outcome. Given the small difference in the plaintiffs' success rates when the harassers are female (18.7%) or male (20.8%), it appears that the gender of the harasser does not affect the outcome of racial harassment cases. Thus, it appears neither the gender of the plaintiff nor the gender of the harasser affects the results. In contrast, the race of the harasser does appear to make a difference. In comparison to the overall average plaintiffs' win rate of 21.5%, plaintiffs (who are most likely to be Black)\textsuperscript{128} are less likely to win if the harassers are Black (17.6%) or Asian (20.0%) and more likely to win if the harassers are White (26.9%).

\textsuperscript{128.} See supra Table 1 & Figure 2.
The number of harassers and their job status also impact case outcomes. Plaintiffs are about twice as likely to win when there is more than one harasser. In those cases, they win 26.2% of the time, as compared to 13.5% of the time in cases when there is a single harasser. Plaintiffs’ success is comparable in cases in which only a supervisor is the harasser (17.0%) and in cases in which only a coworker is the harasser (17.4%). Strikingly, however, the plaintiffs’ chances of winning go up markedly (32.9%) when both the supervisor and a co-worker are accused of harassing.

The win rate of public sector employees is only slightly higher (22.1%) than private sector employees (18.8%). Within the public sector, the success rates of employees at the different level of governments are comparable, although state employees have a slightly higher percent of wins. (See Table 13.)

Who the plaintiff names as a defendant also appears to have some effect. In cases in which only the company is named as a defendant, plaintiffs win 21% of the time. When both the individual and the company are named defendants, however, the plaintiffs’ success rate improves to 28%. Finally, the length of time that plaintiffs work with their employers also appears to affect outcome. There is a significant positive correlation between the plaintiffs’ tenure and defendants’ winning. In contrast to what one might expect, the longer the employee has been employed, the more likely the defendant will win the case.

B. Effect of the Nature of Harassment

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

It also appears that when defendants’ harassment is blatantly racist, judges are a little more likely to believe plaintiffs’ claims. For instance, when defendants use ostensibly race-linked physical objects (such as nooses or Ku Klux Klan-associated attire) (33.3% success rate) or race-obvious verbal harassment (such as the use of “nigger”) (25.9%), plaintiffs are more likely to win than the average.

129. These relationships are statistically significant at the .05 level.
130. See supra discussion accompanying notes 80-86 (explaining various types of harassment).
131. The correlation of this with plaintiff wins is statistically significant at the .01 level.
Table 14. Effect of Nature of Harassment on Outcomes

<table>
<thead>
<tr>
<th></th>
<th>Plaintiffs' Success Rates</th>
<th>Plaintiffs' Cases (N)</th>
<th>Defendants' Success Rates</th>
<th>Defendants' Cases (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Verbal Harassment</td>
<td>22.8</td>
<td>(48)</td>
<td>80.6</td>
<td>(170)</td>
</tr>
<tr>
<td>Race-linked</td>
<td>25.9*</td>
<td>(43)</td>
<td>78.3</td>
<td>(130)</td>
</tr>
<tr>
<td>Physical Objects</td>
<td>27.1</td>
<td>(16)</td>
<td>76.3</td>
<td>(45)</td>
</tr>
<tr>
<td>Ostensibly Race-linked</td>
<td>33.3</td>
<td>(5)</td>
<td>66.7</td>
<td>(10)</td>
</tr>
<tr>
<td>Physical Conduct</td>
<td>28.2</td>
<td>(11)</td>
<td>74.4</td>
<td>(29)</td>
</tr>
<tr>
<td>Work-Related Decisions</td>
<td>21.6</td>
<td>(37)</td>
<td>80.7</td>
<td>(138)</td>
</tr>
<tr>
<td>Formal Decisions</td>
<td>17.5</td>
<td>(11)</td>
<td>81.5</td>
<td>(52)</td>
</tr>
<tr>
<td>Job Development</td>
<td>20.5</td>
<td>(31)</td>
<td>82.1</td>
<td>(124)</td>
</tr>
<tr>
<td>Denial of Benefit</td>
<td>23.8</td>
<td>(10)</td>
<td>76.2</td>
<td>(32)</td>
</tr>
<tr>
<td>Questioning Plaintiff's</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Authority</td>
<td>21.9</td>
<td>(8)</td>
<td>81.8</td>
<td>(27)</td>
</tr>
<tr>
<td>Length of Harassment</td>
<td>As length of H ↑</td>
<td></td>
<td>P more likely to win</td>
<td></td>
</tr>
</tbody>
</table>

**This variable is significantly correlated with the success rate indicated at the .05 level.**

We studied the range of work-related decisions harassment in more detail to see if judges view different types of employer decisions differently. The type of decision did not seem to make a great deal of difference, although when plaintiffs claim that their harassment is evidenced by an employer’s formal decisions (such as denying plaintiff a promotion, demoting or suspending the plaintiff, or denying the plaintiff compensation), they have the lowest probability of winning (17.5%). Plaintiffs’ success rate when claiming harassment through other types of employers’ work-related decisions varies between 20.5% to 23.8%.

Interesting relationships between the duration and persistence of the harassment and the case outcomes emerge from the data. For instance, the length of the total period of alleged harassment has a significant positive correlation with plaintiffs’ wins and negatively correlated with defendants’ wins.\(^{132}\) This means that the longer the harassment continues, the more likely the plaintiff will win and the defendant will lose.\(^ {133}\)

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132. These relationships are statistically significant at the .05 level.
133. While it was difficult (based on the description of the facts in the opinions) to determine when an incident began and when it ended, we did note whether there were “multiple” incidents of harassments. Moreover, the study indicated that plaintiffs’ wins were positively correlated with multiple incidents.
C. Effect of Characteristics of the Litigation Process

1. Forum

The parties' success rates in the district courts and the appellate courts are comparable: plaintiff employees are slightly more likely to triumph in the appellate court (24.5%) than in the district courts (20.8%), but not by a significant margin. (See Table 15.) While plaintiffs at the appellate level follow the general trend in this study of losing, one small subset of cases is the exception. Plaintiffs have very good odds of winning when appellate judges review the district courts' bench trial decisions.134

The study includes cases from six representative federal circuits; and the outcomes of the cases varied by circuits. Excluding for the moment the First Circuit, the range of plaintiffs' success rate varies from 12.8% in the Fifth Circuit to 23.5% in the Second Circuit. Thus, defendants generally have much higher success rates than plaintiffs, but the gap between the parties is more dramatic in some circuits than others.135 In the Fifth Circuit, defendants clearly appear to be favored, with defendants winning a remarkable 92.3% of the cases. After the Fifth Circuit, the Second Circuit and the Eleventh Circuit have the next greatest defendants' win rates, both with over 80%. In contrast to the other circuits, the plaintiffs in the First Circuit have much more promising odds. In fact, they have better than a fifty-fifty change of winning. The First Circuit has very few cases (N=12) relative to the other circuits, so inferences should be made cautiously.

The six federal circuits studied include nineteen states. Of the states in which there are at least ten cases, the plaintiffs' success rate varies between a low of 8.6% in California followed closely by 9.1% in Louisiana, compared to a high of 29.4% in Alabama followed by 21.7% in New York, 21.4% in Florida, and 20.6% in Illinois.136

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134. As shown in Table 16, plaintiffs succeed 75% of the time. See infra discussion accompanying notes 142-43 (discussing effect on outcome of party who initiates the proceedings).
135. Some legal scholars focus on judicial decisionmaking in particular circuits. See, e.g., Cheryl L. Anderson, Thinking Within the Box: How Proof Models Are Use to Limit the Scope of Sexual Harassment Law, 19 Hofstra Lab. & Emp. L.J. 125, 126-27 (2001) (noting the Seventh Circuit's rigidity in its treatment of Title VII, particularly sexual harassment claims, making it more difficult for plaintiffs to prove their case).
136. In states with fewer than ten cases, it is difficult to draw inferences. However, in New Hampshire and Wisconsin cases, there is a statistically significant positive correlation with plaintiff wins; and in Oregon and Hawaii, there is a significant negative correlation with defendant wins.
The type of legal proceeding appears to make a dramatic difference.\textsuperscript{138} (See Table 16.) At the district court level, plaintiffs are successful against defendants’ motion for summary judgment only 16.5\% of the time. Judges

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|}
\hline
& \textbf{Plaintiffs’} & \multicolumn{2}{c|}{\textbf{Defendants’}} & \\
& \textbf{Success Rates} & \textbf{Cases} & \textbf{Success Rates} & \textbf{Cases} \\
& \textbf{(N)} & & \textbf{(N)} & \\
\hline
\textbf{Level of Court:} & & & & \\
District Court & 20.8 & (43) & 81.5 & (168) \\
Appellate Court & 24.5 & (13) & 79.2 & (42) \\
\hline
\textbf{Federal Circuits:} & & & & \\
First Circuit & 55.5\textsuperscript{**} & (5) & 77.7 & (7) \\
Second Circuit & 23.5 & (12) & 82.3 & (42) \\
Fifth Circuit & 12.8 & (5) & 92.3 \textsuperscript{*} & (36) \\
Seventh Circuit & 21.8 & (19) & 78.1 & (68) \\
Ninth Circuit & 18.1 & (6) & 75.7 & (25) \\
Eleventh Circuit & 21.9 & (9) & 80.4 & (33) \\
\hline
\textbf{Select States:} & & & & \\
Alabama & 29.4 & (5) & 70.5 & (12) \\
California & 8.6 & (2) & 86.9 & (20) \\
Florida & 21.4 & (3) & 78.5 & (11) \\
Georgia & 10.0 & (1) & 100.0 & (10) \\
Illinois & 20.6 & (13) & 79.3 & (50) \\
Indiana & 15.8 & (3) & 78.9 & (15) \\
Louisiana & 9.1 & (1) & 90.9 & (10) \\
New York & 21.7 & (10) & 82.6 & (38) \\
Texas & 16.0 & (4) & 92.0 & (23) \\
\hline
\textbf{Clustering of States:} & & & & \\
Larger Diverse States & 18.7 & (32) & 83.0 & (142) \\
Smaller Less Diverse States & 26.9 & (24) & 77.5 & (69) \\
\hline
\end{tabular}
\caption{Effect of Forum on Outcomes}
\end{table}

\textsuperscript{1}This variable is significantly correlated with the outcome indicated at the .10 level.

\textsuperscript{2}This variable is significantly correlated with the outcome indicated at the .05 level.

We also cluster the nineteen states into larger and more ethnically diverse states or smaller less diverse states,\textsuperscript{137} to see if these groupings are meaningful. The study indicates a dramatic difference between the outcomes in these clusters. Contrary to what one might predict, plaintiffs have notably higher success rates in the smaller less diverse states (26.9\%) than the larger diverse states (18.7\%).

2. \textit{Proceedings, Representation, and Citation}

The type of legal proceeding appears to make a dramatic difference.\textsuperscript{138} (See Table 16.) At the district court level, plaintiffs are successful against defendants’ motion for summary judgment only 16.5\% of the time. Judges

\textsuperscript{137}See supra discussion accompanying note 94.

\textsuperscript{138}Across all types of employment discrimination claims, plaintiffs fare better at trials than at pretrial adjudications and better before jury trials than judge trials. Clermont & Schwab, supra note 7, at 17-18 (Display 11).
are less inclined to grant motions to dismiss. In fact, plaintiffs are three times as likely to be successful against defendants' motions to dismiss, with a comparatively whopping 50% win rate. The few bench trials on the merits end with a 20% plaintiffs' success rate. Because motions for summary judgments are the most common proceeding, the parties' success rates there substantially influences the success rates for all cases.

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

<table>
<thead>
<tr>
<th>Proceedings (Dist. Ct. Level):</th>
<th>Plaintiffs' Success Rates (N)</th>
<th>Defendants' Success Rates (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Motion for Sum. Judg.</td>
<td>16.5** (27)</td>
<td>85.2** (139)</td>
</tr>
<tr>
<td>Motion for Dismissal</td>
<td>50.0*** (12)</td>
<td>54.1*** (13)</td>
</tr>
<tr>
<td>Bench Trial on the Merits</td>
<td>20.0 (2)</td>
<td>80.0 (8)</td>
</tr>
<tr>
<td>Other Proceedings</td>
<td>40.0* (6)</td>
<td>80.0 (12)</td>
</tr>
<tr>
<td>Proceedings (App. Ct. Level):</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Review Sum. Judg. Holding</td>
<td>12.8 (5)</td>
<td>87.1 (34)</td>
</tr>
<tr>
<td>Review Bench Trial</td>
<td>75.0*** (6)</td>
<td>37.5*** (3)</td>
</tr>
<tr>
<td>Review Jury Trial</td>
<td>50.0* (3)</td>
<td>50.0* (3)</td>
</tr>
<tr>
<td>Representation:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney Representation</td>
<td>24.2* (50)</td>
<td>79.2 (164)</td>
</tr>
<tr>
<td>Pro-se Representation</td>
<td>11.3* (6)</td>
<td>88.7 (47)</td>
</tr>
<tr>
<td>Citation:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal Reporter</td>
<td>30.7** (31)</td>
<td>75.2* (76)</td>
</tr>
<tr>
<td>On-Line but not Federal Reporter</td>
<td>15.7** (25)</td>
<td>84.9* (135)</td>
</tr>
</tbody>
</table>

*This variable is significantly correlated with the outcome indicated at the .10 level.
**This variable is significantly correlated with the outcome indicated at the .05 level.
***This variable is significantly correlated with the outcome indicated at the .01 level.

Plaintiffs fare very poorly when appellate courts review the district courts' holdings on motions for summary judgment, winning only 12.8% of the time. Plaintiffs do better in other types of proceedings, ranging from a fifty-fifty chance of winning jury trial reviews to winning three quarters of

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140. See supra Table 10.

141. In other employment discrimination cases, defendants also have this advantage. Clermont & Schwab, supra note 7, at 22, 24-27 (finding that appellate courts hearing employment discrimination cases are much less likely to reverse defendants' wins in the district courts than to reverse plaintiffs' wins); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (substantiating a similar defendants' advantage in ADA cases).
the appellate courts' reviews of the district court bench trials. The number of cases in some of these proceedings is small, however, so it is difficult to draw strong inferences from this sample.

We also consider whether the party who initiates the proceeding (the movant) makes a difference. Although plaintiffs are not the movants at the district court level very often, when they are movants, their success rate of 33.3% is notably higher than the average of 21.5%. The situation reverses at the appellate court level. When plaintiffs appeal the district court decision, their success rate is notably lower at 15.6%. This finding is consistent with our observation above that plaintiffs have a particularly poor success rate at the appellate level. When defendants appeal the district court rulings, the defendants' success rate is 22%. Thus, while appellate courts tend to affirm the district courts' holdings, they are less inclined to do so when the plaintiffs are appealing.

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

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

3. Plaintiffs' Claims

As shown in Table 17, the statutory basis of the plaintiffs' racial harassment claim can significantly affect whether the plaintiffs or the defendants win. Plaintiffs who include Title VII as a basis of their racial

142. In the four cases in which both the plaintiff and the defendant are movants, the plaintiffs are successful in three of the cases.
143. On the other hand, when both the plaintiff and the defendant are movants, there is a positive correlation with plaintiffs' wins and a negative correlation with defendants' wins (both at the .01 level).
144. See supra discussion accompanying notes 52-61.
145. We did not study the different combinations of statutory claims nor of cases with only one statutory claim. It might be, for instance, that cases that are based on Title VII only or on Title VII and
harassment complaint have the lowest win rate (21.9%). Plaintiffs who include Section 1981 have a slightly higher but statistically significant improvement in their success rate (28.9%). Although the number of plaintiffs who include Section 1983 as a basis of their claim is comparatively small, those that do have a much higher win rate than the other two groups, winning over 40% of their cases.\footnote{Clermont & Schwab, supra note 7, at 18 (Display 11).}

<table>
<thead>
<tr>
<th>Basis of Racial Harassment Claim:</th>
<th>Plaintiffs' Success Rates (N)</th>
<th>Defendants' Success Rates (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title VII</td>
<td>21.9 (50)</td>
<td>80.7 (184)</td>
</tr>
<tr>
<td>Post-Civil War Statutes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>' 1981</td>
<td>28.9** (28)</td>
<td>78.4 (76)</td>
</tr>
<tr>
<td>' 1983</td>
<td>41.7* (5)</td>
<td>66.7 (8)</td>
</tr>
</tbody>
</table>

Concurrent Claims (Discrimination-Based):

<table>
<thead>
<tr>
<th></th>
<th>Plaintiffs' Success Rates (N)</th>
<th>Defendants' Success Rates (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Race Discrimination</td>
<td>18.22** (135)</td>
<td>84.9*** (163)</td>
</tr>
<tr>
<td>Sex-Based Claims</td>
<td>22.2 (10)</td>
<td>82.2 (37)</td>
</tr>
<tr>
<td>Sex Discrimination</td>
<td>29.6 (8)</td>
<td>77.8 (21)</td>
</tr>
<tr>
<td>Sexual Harassment</td>
<td>20.0 (7)</td>
<td>82.9 (29)</td>
</tr>
<tr>
<td>National Origin</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discrimination/Harassment</td>
<td>21.7 (5)</td>
<td>89.6 (20)</td>
</tr>
<tr>
<td>Age Discrimination</td>
<td>22.2 (2)</td>
<td>100.0 (9)</td>
</tr>
<tr>
<td>Disability Discrimination</td>
<td>33.3 (2)</td>
<td>83.3 (5)</td>
</tr>
<tr>
<td>Religious Discrimination</td>
<td>16.7 (1)</td>
<td>83.3 (5)</td>
</tr>
</tbody>
</table>

Concurrent Claims (Other):

<table>
<thead>
<tr>
<th></th>
<th>Plaintiffs' Success Rates (N)</th>
<th>Defendants' Success Rates (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retaliation</td>
<td>19.5 (25)</td>
<td>82.0 (105)</td>
</tr>
<tr>
<td>Emotional Distress</td>
<td>30.6 (11)</td>
<td>75.0 (27)</td>
</tr>
<tr>
<td>Constructive Discharge</td>
<td>35.7* (10)</td>
<td>57.1*** (16)</td>
</tr>
</tbody>
</table>

*This variable is significantly correlated with the success rate indicated at the .10 level.
**This variable is significantly correlated with the success rate indicated at the .05 level.
***This variable is significantly correlated with the success rate indicated at the .01 level.

In addition to the racial harassment claim, plaintiffs may bring concurrent claims.\footnote{Sixty-five (25%) of the racial harassment cases have concurrent claims other than those identified in Table 17. If one were to study representative disability harassment or religious harassment cases, for example, the plaintiffs' success rate would be distinct from the success rate in racial harassment cases with concurrent disability or religious harassment claims. Thus, the outcomes in cases in this study are not predictive of the outcomes in those cases.} (See Table 17.) Among the overall discrimination-based concurrent claims, plaintiffs who bring a concurrent racial
discrimination claim have a significantly lower success rate in their racial harassment case (18.2%). In contrast, adding a sex discrimination claim appears to improve plaintiffs’ success rate to about 30%, while a sexual harassment claim seems to have little effect. Other concurrent discrimination-based claims have varied effects, but for many of these cases, the number is small so it is difficult to draw inferences.

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

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

4. Legal Issues

As we discussed earlier (see Table 12), this study indicates how the courts resolve specific legal issues, such as whether the harassment is “severe or pervasive.” Table 18 indicates the plaintiffs’ success rate in the case as a whole when the “severe or pervasive” harassment is raised (and in which the parties may have raised other issues as well).

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

148. See supra discussion accompanying note 107 (distinguishing between racial harassment and racial discrimination claims).

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

150. At the .01 level of significance.

151. See also supra discussion accompanying notes 110-14.
Table 18. Effect of Legal Issues on Outcomes

<table>
<thead>
<tr>
<th>Issue</th>
<th>Plaintiffs’ Success Rates (N)</th>
<th>Defendants’ Success Rates (N)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Substantive Issues:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is harassment &quot;severe or pervasive&quot;?</td>
<td>18.9 (30)</td>
<td>82.4 (131)</td>
</tr>
<tr>
<td>Is harassment &quot;because of race&quot;?</td>
<td>12.2** (12)</td>
<td>87.8** (86)</td>
</tr>
<tr>
<td><strong>Procedural issues:</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Is complaint timely?</td>
<td>25.5 (12)</td>
<td>80.9 (38)</td>
</tr>
<tr>
<td>Are administrative remedies exhausted?</td>
<td>27.3 (3)</td>
<td>72.7 (8)</td>
</tr>
</tbody>
</table>

**This variable is significantly correlated with the success rate indicated at the .05 level.**

This data also substantiates that plaintiffs who succeed in regards to one issue do not necessarily succeed in regards to another issue or win the case as a whole. For instance, the courts resolve the "because of race" issue in the plaintiffs’ favor 17% of the time (Table 12), but plaintiffs win these cases as a whole only 12.2% of the time (Table 18). Apparently in some cases where the plaintiffs succeed on the racial attribution issue, they are defeated on another critical issue.152

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

As we have noted, courts tend not to discuss the appropriateness of one reasonableness standard over another.153 In the ten cases in which the courts did expressly cite their use of the reasonableness standard of the plaintiff’s race, however, the plaintiffs won three of those cases. While this is still dismal plaintiffs’ odds, it is slightly better than the average plaintiffs’ success rate of 21.5%.

IV.
ANALYSIS AND DISCUSSION

This extensive empirical study provides rich data on racial harassment case law based on a detailed analysis of a representative sample of federal district court and appellate court cases between 1976 and 2002. Prior to this study, employees, employers, judges, lawyers, and academics had to

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

speculate about the factual backgrounds, the litigation processes, and the outcomes of these cases. This article reveals who brings these cases, the kinds of harassment they claim, the critical issues the courts consider, and the most frequent fora, among other important topics. These cases offer a glimpse into the nature of racial harassment in the workplace—suggesting for instance, who the perpetrators are and how they harass their targets.

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

A. Highlights of Key Findings

1. Rogers Marked the Beginning of Racial Harassment Litigation in 1971. However, Racial Harassment Jurisprudence Has Been Crafted Largely in the Last Fifteen Years

After Rogers, plaintiffs were slow to utilize a racial harassment theory. As illustrated in Figure 4, there are comparatively few cases each year between 1981 and 1991, a spike in 1992, some activity between 1993 and 1996, and then a clear annual increase every year from 1997 on. In fact, about 87% of all cases occurred since 1991, presenting judges with the opportunity to shape the doctrine during this period. Moreover, because racial harassment law has received less attention than sexual harassment law, judges have been able to craft the laws largely unmonitored by legislators, academics, and advocacy groups.

What explains the surge of cases beginning in the nineties? Legal developments and societal events prior to and during this time do not necessarily favor plaintiffs' position. They may have nonetheless heightened public awareness of harassment in the workplace, including racial harassment, and possible legal causes of action. The Anita Hill and

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154. The growth in racial harassment cases generally reflects the same growth pattern of all employment discrimination cases. Employment discrimination cases have become an increasingly larger percent of federal civil cases, constituting nearly 10% by 2000. Clermont & Schwab, supra note 7, at 1, 429-30 (based on a study of civil cases, including employment discrimination cases—Title VII, ADA, § 1983, ADEA, § 1981, and FMLA—that terminate in a federal district court or court of appeals). While employment discrimination cases peaked in 1998, however, racial harassment cases continued their upward trend.

While the number of racial harassment cases has increased in the last decade and a half, these cases still represent only a very small percent of employee complaints of racial harassment. Many employee allegations of racial harassment are never considered by the judicial system. Legal standards may be so daunting that some prospective plaintiffs, even those with legitimate claims, decide that pursuing a remedy through the judicial system is not worth the effort.
Clarence Thomas hearings in 1991 and important Supreme Court cases occurring in 1994 and 1998 brought these issues to the fore. These events particularly may have motivated certain plaintiffs who in the past felt their claims were not legally cognizable. For instance, cases brought by African American plaintiffs show a greater increase than cases brought by other racial and ethnic groups (Figure 5). At the same time, documented evidence of plaintiffs' dismal prospects in these kinds of lawsuits was not available until this study. Lawyers could only speculate on the general prospect of winning or losing and they may have overestimated the probability of success.

155. Major legal events in contemporary harassment jurisprudence include: the Meritor case in 1986, the 1991 Civil Rights Act, the Harris case in 1994, and the Oncale, Faragher, and Ellerth cases in 1998. See supra notes 27-29. The impact of major legal events is difficult to ascertain. Among other issues, there is an undeterminable time lag between the legal events and their consequences. As we have noted, the time between the beginning of a plaintiff's dispute resolution process (perhaps prompted in part by a particular legal event) and when a district court decides the defendant's motion and reports it, may be years. Nonetheless, we can at least observe to what extent these legal events appear to prompt or chill reported racial harassment litigation in the cases in general and in the different groupings of cases above.

Given Figure 4, the Meritor case in 1986 appears to have had minimal short-term effect, perhaps because the case was perceived as a sexual harassment case rather than one dealing more broadly with harassment in general. The 1991 Act was much heralded as pro-plaintiff which may have spurred increased litigation in 1992. While the Hill-Thomas hearings in 1991 are remembered mostly as focusing on sexual harassment issues, much of the conduct at issue had racial overtones as well. There also was controversy over to what extent the Act would be retroactive, which may also have spurred some litigation activity. The Harris case in 1994 marks the beginning of a small incremental increase in lawsuits. The 1998 cases, however, are part of the dramatic surge in cases that began in 1997. While we can only speculate on their precise influence, these 1998 cases perhaps in conjunction with the cumulative impact of the prior legal events including the 1991 Act, do not appear to have chilled litigation.
It may also be that racial harassment in the workplace simply increased, as suggested by EEOC statistics on employee complaints. Finally, judges may have been particularly willing to hear, write, and release opinions on racial harassment. Perhaps they were cognizant of an increasing number of charges and sensed an opportunity to influence evolving legal principles.

2. Throughout the History of Racial History Litigation, Plaintiffs as a Group Have Been Much More Likely To Lose and Defendants as a Group Have Been Much More Likely To Win

Although the volume of cases increased over time, as shown graphically in Figure 4, plaintiffs’ and defendants’ success rates in general did not change much over the entire 21 year time period. On average, the plaintiffs’ probability of winning a case between 1981 and 1991 was about one in four. When cases increased in number between 1992 and 2002, the plaintiffs’ average success rate dropped to 20.8%.

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156. There were only a few cases between 1976 and 1981, so that an analysis by year did not appear meaningful. In 1984, there were no reported cases in our sample; and in some years there were cases but none of which the plaintiffs won.
Furthermore, summary judgment proceedings constitute a substantial portion of racial harassment cases. District court judges effectively act as gatekeepers, often granting defendants’ motions and effectively terminating plaintiffs’ claims.

Why are plaintiffs so likely to lose and defendants so likely to win? Many explanations are possible (but only those explanations consistent with the data are ultimately persuasive). One could theorize that defendants settle their weak cases before litigation to avoid negative publicity and only litigate stronger cases or that defendants have better lawyers given their resources. Yet an alternative theory could predict that plaintiffs and their lawyers, given their limited resources, are particularly careful to determine the quality of their cases and only proceed with what they believe are high quality cases. After all, attorneys’ fees based on contingency arrangements result only if plaintiffs are successful. In either case, these individual case attributes would be expected to balance out for both sides statistically because of the high number of cases analyzed. It is unlikely, for example, that plaintiffs and their lawyers would consistently be four times more likely to misjudge the quality of their case over a ten year period.

A more plausible explanation is that some systematic factor is at play, such as judges as a group being biased in favor of defendants (or biased against plaintiffs).\textsuperscript{157} When faced with the defendant’s motion for summary judgment, for instance, the judge must decide which party’s position is the most convincing. As products of their socialization, judges may be consciously and deliberately, or as likely, unconsciously and unintentionally biased.

3. Racial Harassment Appears To Be Widespread in the American Workplace (Tables 3, 6 and Figure 1)

Contrary to the societal belief that incidents of racial harassment are isolated, this study suggests otherwise. Plaintiffs’ occupations range from lower-level service and support jobs to professionals of all kinds, including doctors and lawyers. Plaintiffs work in all kinds of industries and in all levels of the private and public sectors. The increase in litigation over time

\textsuperscript{157} Theresa Beiner proposes that a confluence of circumstances have led to increasing judicial hostility toward harassment claims and judicial inclination to use (and misuse) summary judgments, often resulting in inappropriate and premature dismissal of cases. Beiner, supra note 139, at 119-23, 97-118. For instance, she cites legal developments relating to summary judgments that effectively make it easier to grant these motions. Judges also appear skeptical of legal developments, such as the Harris case’s clarification of the plaintiffs’ proof of damages and Civil Rights Act of 1991’s confirmation of the availability of jury trials. See also Michael Selmi, Why Are Employment Discrimination Cases So Hard To Win?, 61 L.A. L. REV. 555, 557 (2001) (also observing the “general consensus” that employment discrimination cases are too easily filed and too easily won, but countering that “this picture is grossly distorted . . . these suits are far too difficult, rather than easy, to win”).
also suggests that these employees believe racial harassment is increasing rather than declining, or that harassment is occurring at the same level but these employees are less willing to put up with it. At the same time, there is evidence that many employees are reluctant to complain and litigate, even though they believe they have been racially harassed.\footnote{See supra note 53.}

4. Blacks Are Disproportionately Represented as Plaintiffs (Given Their Percentage in the Labor Force) (Table 1, Figure 2)

What explains the racial composition of plaintiffs? Given the large and representative sampling of cases, a plausible explanation is that the plaintiffs’ composition simply mirrors what is happening in the workplace: Blacks constitute a disproportionately high percentage of plaintiffs in these cases because they are particularly and disproportionately targeted. It may also be that Blacks are the most conscious of racism and the most likely to complain about it.\footnote{See supra note 53.}

We should also note groups that are not bringing as many lawsuits as we might expect given their percentage in the labor force, and consider why they are not using the judicial system. There is substantial evidence that Hispanics are targets of harassment in American society, including in the workplace.\footnote{Hispanic American, Asian American, and White American plaintiff groups had modest increased litigation activity beginning in the mid 1990s. Given this relatively brief litigation history, it is unclear if these early cases are representative of future cases to be brought by members of these racial groups. It is possible, for instance, that given the novelty of their claim that these plaintiffs were more risk-taking. It is also possible that plaintiffs and their counsel pursued litigation in these pioneering cases in part because they felt they had particularly strong cases. See, e.g., Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 CORNELL L. REV. 1258, 1273-75 (1992) (describing discriminatory stereotypes of Mexican Americans).}

Hispanic plaintiffs, however, are underrepresented relative to their percentage in the labor force. Are Hispanics less likely to complain formally about workplace harassment because of cultural characteristics, lack of knowledge of legal resources and remedies given language or socioeconomic limitations, or other legal risks that might be implicated? For example, a subset of Hispanics whose immigration status does not allow them to work legally in this country, may opt to ignore racial harassment rather than bring attention to their immigration status. Thus, before they bring a lawsuit, their work situation may need to be extremely intolerable and egregious.\footnote{Such a hypothesis would explain in part the comparatively high 54.5% success rate of Hispanic plaintiffs.}

The Black-White binary paradigm of race may also unduly shape racial harassment laws. judges have in mind Black plaintiffs and White
defendants, so that other types of workplace discrimination that Hispanics and Asians face—for example, based on accent, perceived foreignness, or immigration status—might not strike lawyers and judges as racial in nature. For many, “race” means “Black” and Blacks do not tend to experience harassment on these grounds. The law of racial remedies, including harassment law, might turn out to be available to Hispanics and Asians only to the extent they succeed in analogizing what happened to them to events that, if they happened to Blacks, would be actionable.

Figure 5
Cases Brought by Plaintiffs’ Race

162. See FEAGIN, supra note 3, at 203-08 (describing Black-White paradigm).
5. Minority Men Are More Likely Than Minority Women To Be Plaintiffs \cite{Note} (Table 2)

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

\cite{Note} In contrast, White women are more likely than White men to be plaintiffs.
6. *Black and Asian Plaintiffs Lose a Higher Percentage of Cases Than Other Racial Groups (Tables 2, 13)*

The number of cases brought by Blacks surged beginning in the mid-to late-nineties and has continued to increase. (See Figure 5.) At the same time that the number of Black plaintiffs was increasing, their prospects for winning were declining. As depicted in Figure 6, compared to the period of 1981-1991 when Black plaintiffs' average success rate was 22.7%, the success rate was 19.3% between 1992-2002. More recently in 1999-2002, while their cases steadily increased, their success rate was 18.7%. Judges appear to be increasingly critical of African American plaintiffs, perhaps as a way of coping with what they perceive as the excessive number of cases.

Perhaps Blacks bring a broader range of cases, some with weaker facts. Once again, however, this is statistically unlikely over such a large number of cases. A more likely explanation is that courts have different tolerance levels for what is permissible harassment. Courts might demand more extreme employer misconduct before they conclude that Blacks and Asians have been "severely and pervasively" harassed. Judges, who tend to be White, may also be more unconsciously empathic with White plaintiffs' claims, thus finding their positions more persuasive.

7. *When Considering All Cases, the Plaintiffs' Gender Does Not Seem To Affect Outcome; in Recent Years, However, Men Have Been More Likely To Be Successful (Tables 2, 13)*

Men and women plaintiffs have had very different success rates over time. (See Figure 7.) Although women did not bring many cases during 1981-1991, they had a comparatively high average 44.4% win rate. This contrasts markedly with their average win rate of only 17.5% during 1992-2002. The success rate for men who brought lawsuits improved over time. Between 1981-1991, it averaged 15% (substantially lower than female plaintiffs during that period). Between 1992-2002, it averaged 22.1%. (During this period, the number of male plaintiffs also dramatically increased while the number of female plaintiffs stayed flat.) Thus, the trend in recent years is that women bring fewer racial harassment cases and are more likely to lose their litigation than men. It appears that, even without our empirical evidence, women employees are getting the message that courts are increasingly inhospitable to their claims.

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164. There are too few cases for other racial and ethnic groups to meaningfully analyze their wins over time.
8. Alleged Harassers Are More Likely To Be Men and To Be White. (Tables 2, 14)

Men and whites are more likely to hold supervisory or other dominant positions in organizations than women or minorities, and therefore they may believe they can use their positions of power to harass without reprisals. It may also be that these groups are more inclined to harass because, for reasons that are unclear, they are more prejudiced toward minority employees and choose to manifest that prejudice by harassing them. (Given minorities’ perception that the workplace is racist, it may also
be that some minority employees are more likely to label the conduct of these groups as racial harassment, when in fact, the conduct may not be racially motivated. Finally, Whites also constitute a significant majority of the labor force, so the frequency of their harassing actions may simply be a reflection of their large numbers in the workplace.

The data indicates another interesting phenomenon. Given their representation in the labor force, men, Blacks, and Asians are disproportionately represented as alleged harassers. Moreover, minority harassers target the full range of employees, including Whites, other minority groups, and members of their own race. Minority harassers may “just be going along” with ridicule instigated by their bosses and coworkers or they may be manifesting their own within-group prejudices or animosity toward other racial groups. Thus, racial harassment is not just a White-on-Black phenomenon.

9. Plaintiffs Are More Likely To Win if Harassers Are White Than if Harassers Are Minorities (Tables 7, 13)

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

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

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

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

168. In all of these eight cases, the plaintiffs are Black; in five of the cases, there are multiple harassers of mixed racial backgrounds including Blacks. In the ninth case (in which the plaintiff won in part and the defendant won in part), both the plaintiff and the defendant are Asian.
In contrast, the defendants' gender does not seem to affect outcome. Plaintiffs who accuse women of harassing them are as likely to win or lose as plaintiffs who accuse men. Thus, the study indicates that judges are comparably critical of women harassers and men harassers.

10. Racial Harassment May Be a More Socially Accepted Activity Than We Have Suspected—Judges Also Are More Likely To Disapprove of "Ganging Up" on Victims (Tables 6, 13)

One of the most striking findings in the study is that it not unusual for racial harassment to be a group activity involving both supervisors and coworkers of the targeted employee. It often involves multiple individuals at different organizational levels, suggesting a "ganging-up" on the targeted individual. It appears that courts notice this "ganging up." Plaintiffs are twice as likely to win when there are multiple harassers rather than an individual harasser and twice as likely to win when both the supervisor and coworkers are engaged in the harassment. These circumstances appear to strengthen plaintiffs' showing that the harassment was "pervasive or severe."

11. Plaintiffs Claim All Kinds of Harassment—However, Judges Do Not Seem Persuaded That More Subtle and Covert Forms of Harassment Can Constitute "Severe or Pervasive" Harassment (Tables 8, 14)

Contrary to societal perceptions, blatant racist harassment apparently continues in the workplace. Plaintiffs also claim more subtle and covert harassment that is not on its face race-linked (such as supervisors' work-related decisions), but which the plaintiffs perceive as racially motivated because of the context in which it occurs.

While the existence of both blatant racism and subtle racism has been recognized by social scientists, a number of legal scholars argue that the courts do not recognize more subtle discrimination.169 This study supports this contention: judges are slightly more likely to recognize blatant racial prejudice than more contextual or subtle racial prejudice. In perusing the plaintiffs' presentation of facts and particularly when evaluating whether the harassment is "because of race," judges tend to deem relevant only those allegations of harassment that are overtly race-linked. Thus, judges make reference to racial epithets such as "nigger" and to "noose" incidents, but tend not to find relevant plaintiffs' allegations of their exclusion from professional or work-related activities; social isolation; or hostile, rude, and demeaning comments that do not expressly include a racial epithet. Most

169. See supra note 38.
judges do not know, do not find applicable, or do not find persuasive the relevant social science research on subtle and contextual racial harassment.

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

12. The Forum of the Litigation Makes a Difference (Tables 9, 15 and Figure 1)

Given their volume of cases, some circuits and states play a more dominant role in shaping racial harassment jurisprudence. Over half of the cases occurred in either the Seventh or the Second Circuits. Illinois and New York are the most fertile ground for cases. It is not clear why these patterns exist. Population size does not fully explain. California and Texas are the states with the largest populations, but less than 10% of the cases originate in each of these states. Illinois and New York, the states with the fifth and third largest populations respectively, have the highest percentage of cases with almost a quarter of all cases originating in Illinois. Perhaps there are more racial harassment occurrences or racial harassment complaints in these locations (thus the input into the dispute resolution process funnel depicted in Figure 1 is greater); or perhaps more plaintiffs move through the dispute resolution process (thus there is less attrition between the first stage and the last stage of the process). It may also be that in these locations, lawyers are more inclined to take these cases and judges are more inclined to hear and ultimately write opinions on these cases.

It is clear, however, that the location of the case makes a difference in outcome. The plaintiffs’ success rates vary considerably depending on the circuit in which the case occurs (between 12.8% and 55.5%) and the state in which the case originates (between 8.6% to 29.4%). Assuming that courts are confronted with comparable fact patterns, these variations suggest that legal standards are not uniform throughout the United States. Courts in one circuit may find a particular plaintiff’s claims of racial harassment persuasive while courts in another circuit may not. Outcomes across states vary considerably, although stereotyping of states is not appropriate. Given California’s image as a pro-employee and ethnically diverse state which uses the reasonableness perspective of the plaintiff, one would not have predicted that it would have the worst plaintiffs’ success rate. Similarly, given the Southern states’ image as more pro-employer and less socially

170. CENSUS BUREAU, supra note 64, at 23 tbl. 19.
171. Id.
progressive, one would not have predicted than Alabama would have the best plaintiffs’ success rate. On the other hand, other states in the Deep South, such as Georgia and Louisiana, did have lower plaintiffs’ success rates.172

Plaintiffs have significantly higher success rates in smaller, less ethnically diverse states than in larger, more ethnically diverse states. Perhaps racial harassment complaints (and other racial discrimination claims) have become more commonplace in the larger diverse states and judges there have become more cynical and skeptical of them. At the same time, racial harassment complaints (and other racial discrimination claims) may be more novel and therefore noteworthy in smaller less diverse states. Given their novelty, judges there may be more attentive to and consequently more sympathetic toward the complainants. Likewise, judges in these states may be more vigilant to protect the state’s image from being branded biased or racist.

13. Claims Based on Post-Civil War Statutes Sections 1981 and 1983 Are Surprisingly Numerous and Successful (Tables 11, 17)

As the premier federal statute for addressing racial discrimination in the workplace, it is not surprising that almost 90% of the plaintiffs utilize Title VII of the Civil Rights Act of 1964. It is striking, however, that over a third of the plaintiffs also base their racial harassment claim on Section 1981 of the Civil Rights Act of 1866. Plaintiffs’ lawyers must see beneficial attributes of Section 1981 claims. The effect of the statutory claims on outcomes proves that this attraction to Sections 1981 and 1983 is justified. Plaintiffs who included these post-Civil War causes of action had significantly better odds of winning. While the number of Title VII cases brought increased in number in recent years, the plaintiffs’ win rates became worse.173 Meanwhile, Section 1981 and 1983 cases increased more modestly, but their plaintiffs’ win rates remained steady.174

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172. These comparisons are still relative. Even in Alabama, defendants win over 70% of the cases.
173. The growth in racial harassment litigation since the mid-1990s is largely attributable to Title VII cases. Since 1987, the number of cases based on Section 1981 or Section 1983 has been small and steady. The exceptional year is 2002 in which there were a record number of these cases. Even in that year, however, Title VII cases easily dwarfed Section 1981 and Section 1983 cases.
174. Between 1992 and 2002, plaintiffs in Title VII cases won on average 20.8% of the time, in contrast to plaintiffs in Section 1981 and 1983 cases who won on average 32.5% of the time.
14. Many Racial Harassment Claims Are Coupled with Racial Discrimination and Retaliation Claims, Suggesting Plaintiffs' Perception of Pervasive Discrimination (Tables 11, 17)

This data suggests that plaintiffs perceive that hostile work environments, more tangible formal employer decisions, and employer retaliation occur hand-in-hand, and are racially motivated and discriminatory. Plaintiffs portray a very debilitating work situation. Furthermore, plaintiffs who bring a concurrent racial discrimination claim have a significantly lower success rate in their racial harassment case. Perhaps judges believe that the plaintiffs are overexaggerating their situation. Another possibility is that judges want to discourage plaintiffs from multiple race-based complaints, and choose to deny the less-recognized harassment claim.

In contrast to the plaintiffs' coupling of racial harassment with racial discrimination or retaliation claims, a relatively small percentage of the cases included a concurrent sexual harassment claim. This could be because more than a majority of the plaintiffs are male and therefore less likely to bring sexual harassment claims. It could also be that individuals who harass an individual on the basis of their race are not motivated to harass them on the basis of their sex. Finally, it may be that some women plaintiffs, who are racially and sexually targeted, fold their racial harassment claims into their sexual harassment causes of action.


Over 60% of the cases are not published in the Federal Reporter. Thus, a substantial portion of judicial reasoning and interpretation in racial harassment cases does not have the accessibility or the credibility of publication in the Federal Reporter. Moreover, judges, lawyers, and scholars relying only on the Federal Reporter receive a distorted view of racial harassment law, which indicates the plaintiffs' probability of winning a lawsuit are higher than they are when you consider all cases. On the other hand, the higher plaintiffs' win rate in the Federal Reporter offers more positive (albeit unrepresentative) precedents for plaintiffs' use as authority.

B. The Future of Racial Harassment Law

Racial harassment law deserves its own jurisprudence. Although it launched workplace harassment doctrine through the Rogers case, the tide of legal events moved in the direction of sexual harassment. For too long, racial harassment jurisprudence has lived in the backwaters of sexual harassment law. It has remained off the roadmap of legal scholars.
Consequently judges have shaped it haphazardly in different parts of the country.

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

The study benefits plaintiffs, defendants, their lawyers, and judges involved in racial harassment cases. All parties can compare their cases to its detailed baseline. In addition to the traditional selective case precedent method, parties can now draw upon the totality of racial harassment cases to guide their decision-making. Knowing the odds of winning or losing with particular claims, parties, or fora can help determine whether or not to use the courts. Lawyers who tend to see “harassment law” through the lens of sexual harassment now can explore racial harassment as a distinct avenue. Judges in particular can benefit by examining their own decisionmaking against the collective judicial decisionmaking across the country. We hope this study will encourage them to reflect on their own views and potential blind spots when it comes to racial harassment.

Finally, legislators can use this study to guide their own efforts to end racial harassment in the workplace. They can see how legislation has played out in the courts and decide whether their efforts are having the intended consequences. Knowing the results of prior efforts enables them to craft future laws to better achieve their desired end. This study provides a benchmark against which they can measure their progress, monitor the judicial branch’s rendering of their laws, and modify ongoing efforts in response to racial harassment cases.