

NOTE

EMPLOYMENT DISCRIMINATION PLAINTIFFS IN THE DISTRICT OF MARYLAND

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INTRODUCTION

Empirical studies of employment discrimination litigation have steadily increased in number since the early 1990s.¹ Although this increase is largely due to the greater availability of statistical software packages for personal computers and comprehensive data sets from state and federal courts, the realization that such litigation constitutes a significant part of the federal docket has almost certainly provoked further research.² Initially, researchers and commentators were mostly concerned about whether the increasing volume of employment discrimination litigation created an undue burden on federal courts.³ More recently, concern has shifted to the ability of employment discrimination plaintiffs to obtain favorable outcomes in court and through settlement.⁴

Investigations of the success rate of employment discrimination plaintiffs face two primary challenges: obtaining accurate data and defining success. The first challenge is primarily practical; the second challenge is primarily conceptual. Accurate data is available to the

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¹ See, e.g., Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547 (2003); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663.

² See Donohue & Siegelman, *supra* note 1, at 983–84.

³ See *id.*

⁴ See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 103 (2009). Although the focus of empirical research has shifted to the ability of employment discrimination plaintiffs to achieve successful outcomes, the debate surrounding the volume of employment discrimination litigation continues. See, e.g., Nielsen & Nelson, *supra* note 1, at 666.

interested researcher, but collecting a sufficient sample can be a difficult and time-consuming task.⁵ The challenge of defining success, however, is primarily a challenge of defining settlement.

Settlement is the most common successful outcome for plaintiffs,⁶ but definitions of settlement vary considerably from study to study. Any researcher interested in plaintiff success rates must be careful to ensure that the final dispositions coded as settlements reflect plaintiff victories and not merely nonadjudicated terminations, i.e. cases resolved in any form other than a contested judgment. This requires articulating exactly which final dispositions to include in both the numerator and the denominator of the settlement rate.

This empirical study aims to broaden and deepen our understanding of employment discrimination litigation. It broadens our understanding by replicating, in a different federal district, Theodore Eisenberg and Charlotte Lanvers's 2009 study (Eisenberg–Lanvers study), which established a framework for measuring the settlement rate as a proxy for plaintiff success and explored settlement rates for a variety of types of litigation.⁷ By replicating the Eisenberg–Lanvers study in the narrower context of employment discrimination in the United States District Court for the District of Maryland, this study demonstrates the degree to which settlement rates by type of litigation—for example, tort, contract, or employment discrimination—can vary within and across districts. This study deepens our understanding by examining the demographic features of employment discrimination plaintiffs and investigating plaintiffs' ability to achieve successful outcomes before different judges.

Part I of this Note discusses the latest empirical research on employment discrimination litigation in federal court. This research uses the sociolegal concept of the pyramid of disputes to explore employment discrimination litigation as a claiming system and identifies some of the unique challenges employment discrimination plaintiffs face in their place of employment, before the Equal Employment Opportunity Commission (EEOC), and in federal court. Part II of this Note examines different definitions of settlement and the relative advantages of data obtained from the Administrative Office of the U.S. Courts (AO) and Public Access to Court Electronic Records (PACER). This Part draws heavily from the Eisenberg–Lanvers study and contex-

⁵ Although data collection for this type of study can be time-consuming, a single researcher can now feasibly accomplish it. Before the Public Access to Court Electronic Records (PACER) system and its state-court counterparts, this modest study would have required a team of research assistants to visit separate courthouses and physically inspect case records.

⁶ See Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112–13 (2009).

⁷ See *id.* at 111.

tualizes the data and methods that it employed. Part III describes the data I collected, their source, and the coding decisions I made. It lists all of the final disposition codes and their respective frequencies. Part IV summarizes the results of the empirical analysis and presents relevant statistics in tables. It provides several alternative methods of calculating the settlement rate and explores differences in the settlement rate by case category and type of employment discrimination alleged. Part V discusses how this study both corroborates and alters our understanding of employment discrimination litigation with particular reference to the research discussed in Part I. Finally, I summarize the most significant conclusions that I draw from my research and note the need for further research to explain interdistrict differences.

I

PRIOR EMPIRICAL RESEARCH ON EMPLOYMENT DISCRIMINATION

Research into employment discrimination litigation began to intensify in the early 1990s as such litigation began to account for an increasingly large part of the federal docket.⁸ Employment discrimination cases rose as a percentage of the federal docket until reaching a peak of about 10% in 2001.⁹ Since then, this category of litigation has dropped both in absolute numbers and as a percentage of the federal docket.¹⁰ Currently, it accounts for roughly 6% of the federal docket, behind only two other categories of litigation: product liability cases and habeas corpus petitions.¹¹

Laura Beth Nielsen and Robert Nelson, writing around the time that the volume of federal employment discrimination litigation peaked, make some additional observations about the character of these cases. They note that the variety of employment discrimination cases has increased across multiple dimensions.¹² Federal protection of employee civil rights now covers more discriminatory practices, including sexual harassment,¹³ and also recognizes claims of discrimination based on other characteristics such as disability.¹⁴ The Family and Medical Leave Act provides additional protections for employees who become pregnant or sick or who have to care for a family mem-

⁸ See, e.g., Donohue & Siegelman, *supra* note 1, at 983–84.

⁹ See Clermont & Schwab, *supra* note 4, at 103–04; Clermont & Schwab, *supra* note 1, at 429.

¹⁰ Clermont & Schwab, *supra* note 4, at 104.

¹¹ *Id.*

¹² See Nielsen & Nelson, *supra* note 1, at 666.

¹³ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (“[I]n 1980 the EEOC issued Guidelines specifying that ‘sexual harassment,’ as there defined, is a form of sex discrimination prohibited by Title VII.”).

¹⁴ See Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2006).

ber with a serious medical condition.¹⁵ By the late 1990s, claims based on age¹⁶ and disability began to make up a large portion of federal employment discrimination claims.¹⁷

As statutory protection of employee civil rights expanded, however, the Supreme Court and federal appellate courts shortened the reach of employment discriminations laws.¹⁸ The Court's decision in *Wards Cove Packing Co. v. Atonio*¹⁹ made it more difficult for plaintiffs to allege discriminatory impact claims in two ways. First, it required plaintiffs to demonstrate that a particular practice or set of practices created the disparity, and second, it relaxed the "business necessity" standard by which a defendant could rebut the plaintiff's prima facie case.²⁰ In twin decisions, the Court also placed state employees outside of the aegis of the Age Discrimination in Employment Act²¹ and the Americans with Disabilities Act.²² Finally, in *Faragher v. City of Boca Raton*, the Court articulated an affirmative defense for employers whose employees engaged in sexual harassment that creates a hostile work environment: the Court allowed the employers to avoid liability by demonstrating that they had exercised reasonable care to prevent and correct sexual harassment and that the victim failed to use the employer's preventative or corrective measures.²³ Lower courts have construed this defense as a safe harbor, and employers that institute antiharassment policies incorporating a complaint mechanism are virtually immune from liability—even, in some cases, where the plaintiff does use the employer's complaint procedures.²⁴

¹⁵ See 29 U.S.C. §§ 2601–2654 (2006).

¹⁶ See Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2006).

¹⁷ See John J. Donohue III & Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 261, 273 tbl.4 (Laura Beth Nielson & Robert L. Nelson eds., 2005).

¹⁸ Nielsen & Nelson, *supra* note 1, at 675.

¹⁹ 490 U.S. 642 (1989).

²⁰ See *id.* at 658–60 (requiring that the employer demonstrate a business justification, rather than a business necessity, for the challenged practice). The Civil Rights Act of 1991 partially superseded this decision by returning to a stricter standard of business necessity, but the stricter standard still requires plaintiffs to allege that specific employment practices of the defendant have a discriminatory impact. See 42 U.S.C. § 2000e-2(k).

²¹ See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 66–67 (2000).

²² See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001).

²³ See 524 U.S. 775, 807–08 (1998) (articulating the affirmative defense and finding as a matter of law that the city did not exercise reasonable care to prevent the harassing conduct of an employee's supervisors).

²⁴ *E.g.*, *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 267 (5th Cir. 1999); see also John H. Marks, *Smoke, Mirrors, and the Disappearance of "Vicarious" Liability: The Emergence of a Dubious Summary-Judgment Safe Harbor for Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment*, 38 HOUS. L. REV. 1401, 1422–37 (2002) ("[Lower] courts have effectively construed the defense as providing a summary judgment safe harbor against claims of supervisor harassment."). But see David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical*

Underlying this legislative and judicial activity is a debate about whether there are too many or too few claims.²⁵ Members of the employment defense bar and conservative commentators have argued that antidiscrimination statutes have created windfalls for plaintiffs.²⁶ Alternatively, social scientists argue that the failure of women and minorities to close the wage gap with white men and to overcome occupational segregation on the basis of sex and race suggests that there is either an insufficient amount of litigation to discourage these practices or that nonlitigation alternatives are necessary to confront them.²⁷ Neither side of the debate appears to articulate what the appropriate level of employment discrimination litigation should be, and the ability of plaintiffs to obtain either just results or unwarranted windfalls always seems to underlie the debate about the volume of litigation.

To bring some clarity to this debate, Nielson and Nelson employ the concept of the “pyramid of disputes”²⁸ to analyze the employment discrimination claiming system.²⁹ At the bottom of the pyramid are “perceived injurious experiences.”³⁰ A subset of perceived injurious experiences constitutes “grievances”: injuries that are cognizable legal claims.³¹ When the injured individual contacts the alleged perpetrator, the grievance becomes a “claim.”³² The claim becomes a “dispute” if the alleged perpetrator denies responsibility.³³ Finally, a subset of disputes becomes “filings” when the injured party makes a

Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges, 69 *FORDHAM L. REV.* 1265, 1292–93 (2001) (observing that when the affirmative defense is applied mechanically, as in *Moore v. Sam’s Club*, 55 F. Supp. 2d 177 (S.D.N.Y. 1999), employers cannot escape vicarious liability if the plaintiff promptly reports the harassment, no matter how many preventative or corrective measures are in place).

²⁵ Nielsen & Nelson, *supra* note 1, at 666.

²⁶ *See id.* at 666–67.

²⁷ *See id.* at 667–69.

²⁸ *See generally* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC’Y REV.* 631 (1981) (providing a framework for analyzing the emergence and transformation of disputes); 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, 11–36 (1983) (analyzing the dispute and litigation explosion through the lens of the pyramid of disputes); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC’Y REV.* 525 (1981) (analyzing the origin of disputes and the incidence of grievances, claims, and disputes).

²⁹ Nielsen & Nelson, *supra* note 1, at 680–701.

³⁰ *Id.* at 681; *see* Felstiner et al., *supra* note 28, at 633; Galanter, *supra* note 28, at 13.

³¹ Galanter, *supra* note 28, at 13; Nielsen & Nelson, *supra* note 1, at 681; *see* Felstiner et al., *supra* note 28, at 635.

³² Felstiner et al., *supra* note 28, at 635–36; Galanter, *supra* note 28, at 13; Nielsen & Nelson, *supra* note 1, at 681.

³³ Nielsen & Nelson, *supra* note 1, at 681; *see* Felstiner et al., *supra* note 28, at 636; Galanter, *supra* note 28, at 13.

formal complaint.³⁴ Although disputes normally become filings when the claimant files a complaint in court, because employment discrimination claimants must exhaust administrative remedies before filing in federal court, an employment discrimination dispute becomes a filing when the claimant files a charge with the EEOC.³⁵

Because changes at the bottom of the pyramid affect the levels above, information about the lower levels is invaluable. Unfortunately, obtaining a precise estimate of the number of grievances at any given time is probably impossible because of over- and underreporting. Individuals may overreport grievances because not every perceived injury is a cognizable legal claim, and they may underreport grievances because they have a cognizable claim but do not believe the injury gives rise to a claim.³⁶ Despite these difficulties, the best attempts at measuring the pyramid suggest that its slopes are very shallow and that only 5% of grievances become lawsuits and only 0.06% of grievances proceed to trial.³⁷ As noted above, the number of employment discrimination filings has dropped in absolute numbers and as a proportion of the federal docket since the publication of Nielsen and Nelson's article.³⁸ Those concerned that employment discrimination litigation was clogging the federal docket may find some solace in this recent decline.

Kevin Clermont and Stewart Schwab take a more ominous view of the recent downturn in employment discrimination litigation. They suggest that plaintiffs and their attorneys are becoming increasingly discouraged by the realization that they have "a tough row to hoe" in federal court.³⁹ They posit that federal courts may be more hostile to employment discrimination plaintiffs and observe that the steepest declines in filed cases occurred in federal circuits that plaintiffs' attorneys have identified as most hostile to employment discrimination plaintiffs.⁴⁰

³⁴ Nielsen & Nelson, *supra* note 1, at 681.

³⁵ See *Jones v. Calvert Grp., Ltd.*, 551 F.3d 297, 300 (4th Cir. 2009). The Supreme Court's decision in *Faragher* suggests that the formal complaint process may even begin with an internal complaint because failing to utilize the company's complaint process may provide the company with an affirmative defense. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 806–07 (1998).

³⁶ See Nielsen & Nelson, *supra* note 1, at 682–83.

³⁷ See *id.* at 682. These data come from all civil cases, not just employment discrimination cases, and suggest that only 1.2% of court filings proceed to trial. Specifically, if 5% of grievances become court filings and .06% of grievances proceed to trial, then approximately 1.2% of court filings end in trial. This study suggests that a similar percentage of employment discrimination cases end in trial. See *infra* Table 1 (showing that bench trials and jury trials combined represent less than 2% of dispositions of all employment discrimination suits during the study period).

³⁸ Clermont & Schwab, *supra* note 4, at 103.

³⁹ *Id.* at 103, 121.

⁴⁰ *Id.* at 118–19.

They base their conclusion on their analysis of events at the very top of the pyramid: plaintiff success rates before trial, at trial, and on appeal. They reject the intuitive view that employment discrimination plaintiffs suffer higher rates of defeat in federal court because they are overly litigious and bring weak cases.⁴¹ Rather, Clermont and Schwab claim that the unique vulnerability of victorious plaintiffs to reversal on appeal demonstrates that federal appellate courts are biased against employment discrimination plaintiffs. They further argue that this hostility likely explains the lower success rates of employment discrimination plaintiffs in district court before and during trial.⁴²

Although the rate of appeal is similar for plaintiffs and defendants in employment discrimination cases, plaintiffs file more appeals because they suffer more defeats in pretrial and trial adjudications than defendants.⁴³ On appeal, victorious plaintiffs have a harder time defending their victories from reversal than victorious defendants, and unsuccessful plaintiffs are less likely to obtain reversals than unsuccessful defendants. These effects are even more pronounced for employment discrimination plaintiffs.⁴⁴ Clermont and Schwab deny that these effects are due to selection of specific types of cases for appeal. They contend, instead, that these effects result from appellate judges' conscious or unconscious biases towards trial court adjudication.⁴⁵

Clermont and Schwab further speculate that appellate court judges view trial courts as being particularly proplaintiff or that appellate court judges discount plaintiffs' harms because of their distance from the trial process.⁴⁶ If the first hypothesis is true, then the appellate judges' beliefs regarding the sympathies of trial court judges, at least in the case of employment discrimination plaintiffs, is probably mistaken.⁴⁷ As Clermont and Schwab note, employment discrimination plaintiffs suffer more defeats relative to other plaintiffs even at the trial court level.⁴⁸ Whether appellate court bias against plaintiffs is conscious or unconscious, Clermont and Schwab find additional support for their theory in the fact that antiplaintiff bias appears to be strongest in cases systematically involving underdog plaintiffs, i.e. civil-rights-type cases.⁴⁹

⁴¹ See *id.* at 114 n.34.

⁴² See *id.* at 131–32.

⁴³ *Id.* at 109.

⁴⁴ *Id.* at 110–12.

⁴⁵ *Id.* at 112–15.

⁴⁶ *Id.* at 113.

⁴⁷ *Id.*

⁴⁸ *Id.* at 127.

⁴⁹ *Id.* at 113–14.

Clermont and Schwab concede that their attitudinal explanation of the antiplaintiff effect is not irrefutable, but they identify four reasons why the prevailing counterarguments—that plaintiffs bring too many weak cases, present them ineffectively, and appeal too frequently—are less persuasive.⁵⁰ First, they do not find any empirical basis for inferring a difference in strength between plaintiffs' and defendants' cases and state that employment discrimination plaintiffs face many of the same financial incentives as other plaintiffs. Second, employment discrimination cases that make it through pretrial adjudication to trial should be as strong as cases from other types of litigation that proceed that far since they all face the same standard of review. The same can be said for employment discrimination cases that proceed from the district court to the appellate court. Third, the antiplaintiff effect appears to prevail between corporate parties, excluding the possibility that the antiplaintiff effect is purely the result of "one-shot have not[]" litigants proceeding against well-financed repeat players.⁵¹ Finally, no combination of assumptions regarding case strength, repeat players, appeal rates, and judicial accuracy could produce the observed patterns of litigation.

Although the scope of Clermont and Schwab's study—virtually every terminated case in the U.S. District Courts from 1979 to 2006 and in the U.S. Courts of Appeals from 1970 to 2009⁵²—is unparalleled, it relies on problematic data assembled by the AO and the Federal Judicial Center and cannot achieve the level of detail obtainable from direct examination of court records.⁵³ These limitations do not seriously undermine the veracity of Clermont and Schwab's conclusions regarding pretrial motions, trial adjudications, and appeals; they do, however, prevent Clermont and Schwab from addressing other questions about how employment discrimination plaintiffs fare in federal court, particularly with regard to settlements.

II

PRIOR EMPIRICAL RESEARCH ON SETTLEMENT RATES

As I noted earlier, settlement is the modal civil case outcome and the most common successful outcome for plaintiffs, well ahead of pre-trial and trial victories.⁵⁴ Obtaining an accurate assessment of the settlement rate is therefore crucial to evaluating the success of employment discrimination plaintiffs in federal court.

⁵⁰ *Id.* at 115–16 n.34.

⁵¹ *Id.*

⁵² *Id.* at 106 display 1.

⁵³ See *infra* notes 62–69 and accompanying text.

⁵⁴ See Eisenberg & Lanvers, *supra* note 6, at 111.

The federal court data assembled by the AO is “[b]y far the most prominent” database used by legal researchers for statistical analysis of litigation.⁵⁵ Although this claim may be an exaggeration, the AO database is undoubtedly one of the most popular, likely because of its completeness.⁵⁶ Ostensibly, the AO database includes every case filed in federal court: because clerks enter cases upon both filing and termination, permitting reconciliation of case filings, the AO database includes a built-in check to ensure completeness.⁵⁷ This virtue alone makes it an extremely valuable data set. Because the purpose of the database is to allocate limited resources within the federal court system,⁵⁸ variables in the database that are useful for tracking court workload and assigning resources are highly reliable.⁵⁹ Accordingly, one of the most useful variables for researchers is the case category variable, which identifies the specific subject matter of individual cases.⁶⁰ The case codes appear to be highly reliable and are, at the least, not overinclusive.⁶¹

Nevertheless, the purpose of the database gives rise to several limitations for analyzing case outcomes.⁶² For example, courts use nonunique terminology for the same disposition in different cases, and a single disposition can identify a group of cases that contains both settled and unsettled cases. In these instances, the researcher must infer settlement when it appears to be the most likely outcome and vice versa.⁶³ In Gillian Hadfield’s 2004 study of the accuracy of AO disposition codes, she found error rates as high as 69% in the codes in which she expected to find nontrial adjudications.⁶⁴ More

⁵⁵ Frank B. Cross, *Comparative Judicial Databases*, 83 JUDICATURE 248, 248 (2000).

⁵⁶ Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1462 (2003).

⁵⁷ Eisenberg & Schlanger, *supra* note 56, at 1462–63.

⁵⁸ *Id.* at 1462; Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 712 (2004).

⁵⁹ Eisenberg & Schlanger, *supra* note 56, at 1462.

⁶⁰ *Id.* at 1463.

⁶¹ *Id.* Although Eisenberg and Schlanger were unable to ascertain the degree of underinclusiveness of the case category variable, they believe that case codes are highly reliable because the AO uses them to allocate judicial resources. *Id.*

⁶² Hadfield, *supra* note 58, at 712.

⁶³ See Eisenberg & Lanvers, *supra* note 6, at 114 (“No single, agreed method of computing settlement rates exists because judgment calls exist how about [sic] to translate a range of formal case outcomes into the dichotomous characterization of settled or not settled.”)

⁶⁴ Hadfield, *supra* note 58, at 711. For reference, the AO disposition codes are: 0 = Transfer/remand: transfer to another district, 1 = Transfer/remand: remanded to state court, 2 = Dismissals: want of prosecution, 3 = Dismissals: lack of jurisdiction, 4 = Judgment on: default, 5 = Judgment on: consent, 6 = Judgment on: motion before trial, 7 = Judgment on: jury verdict, 8 = Judgment on: directed verdict, 9 = Judgment on: court trial, 10 = Transfer/remand: multi district litigation, 11 = Transfer/remand: remanded to U.S.

significantly, she also found substantial Type 2 errors.⁶⁵ For example, many cases that settled and should be in the AO's "Dismissed: settled" category appear in other categories such as "Dismissed: other" or "Judgment on motion before trial."⁶⁶ These errors are not specifically the result of the AO's coding but rather "the error that researchers will make if they interpret the AO codes to be mutually exclusive and rely solely on the name of the category to understand the nature of the cases coded in that category."⁶⁷ Accordingly, although 97% of Hadfield's sample of cases coded as "Dismissed: voluntary" correctly identified a case as voluntarily dismissed, over half of those cases were really settlements: typically cases dismissed with prejudice on a stipulated or joint motion, a plaintiff's motion, or the court's own motion.⁶⁸ The best source for accurate disposition data on settlement, therefore, is not the AO database but the actual court records.⁶⁹

The Eisenberg–Lanvers study of the settlement rate provides an excellent example of a PACER-based research project and illuminates many of the difficulties of accurately assessing the settlement rate, even when using actual court records. The authors stress that the method for calculating settlement rate should adapt to the purpose for which it is used.⁷⁰ They identify at least two purposes for calculating the settlement rate: to calculate plaintiff success rates and to compare cases that terminate as a result of contested proceedings with those that do not.⁷¹ The purpose for calculating the settlement rate therefore determines which cases are included in the denominator and the numerator.

If the purpose for calculating the settlement rate is to assess plaintiff success rates, then relying exclusively on the AO disposition code is especially risky. The AO code "Dismissals: settled" is an underinclusive proxy for plaintiff success because, as noted above, several other

Agency, 12 = Dismissals: voluntarily, 13 = Dismissals: settled, 14 = Dismissals: other, 15 = Judgment on: award of arbitrator, 16 = Judgment on: stayed pending bankruptcy, 17 = Judgment on: other, 18 = Judgment on: statistical closing, 19 = Judgment on: appeal affirmed (magistrate judgment), 20 = Judgment on: appeal denied (magistrate judgment), -8 = Missing. INTER-UNIV. CONSORTIUM FOR POLITICAL & SOC. RESEARCH, ICPSR STUDY NO. 22300, FEDERAL COURT CASES: INTEGRATED DATA BASE, 2007—CODEBOOK FOR CIVIL TERMINATIONS DATA at 97–98 (2009), available at http://www.icpsr.umich.edu/cgi-bin/file?comp=none&study=22300&ds=1&file_id=1043029.

⁶⁵ Hadfield, *supra* note 58, at 711.

⁶⁶ *Id.*

⁶⁷ *Id.* at 723.

⁶⁸ *Id.* at 723–24.

⁶⁹ Both Hadfield's and Eisenberg and Schlanger's studies used actual court records obtained through PACER to assess the reliability of the AO database. See Eisenberg & Schlanger, *supra* note 56, at 1459; Hadfield, *supra* note 65, at 711.

⁷⁰ See Eisenberg & Lanvers, *supra* note 6, at 114; see also Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1955 n.180 (2009) (calling the definition of the settlement rate "critical").

⁷¹ See Eisenberg & Lanvers, *supra* note 6, at 116.

AO disposition codes reflect settlements.⁷² AO codes that probably reflect settlements include “Judgment on: consent” and “Dismissals: voluntarily.”⁷³ Simply including these dispositions in the numerator, however, will not yield an accurate estimation of the settlement rate as a proxy for plaintiff success. Voluntary dismissals and joint stipulations of dismissal without prejudice likely reflect withdrawals to permit refileing or plaintiffs that have simply given up rather than settlements.⁷⁴ Accordingly, dismissals without prejudice do not belong in the numerator when calculating the settlement rate for the purpose of assessing plaintiff success. Because the AO codes do not distinguish between dismissals with and without prejudice, they are insufficient for accurately calculating the settlement rate as a proxy for plaintiff success.

Clermont and Schwab’s broadly sweeping study using the AO disposition codes illustrates the use of the settlement rate to measure cases that terminate without contested proceedings. They included the following AO disposition codes in the numerator of their settlement rate calculation: (1) “Dismissals: want of prosecution,” (2) “Judgment on: default,” (3) “Judgment on: consent,” (4) “Dismissals: voluntarily,” (5) “Dismissals: settled,” (6) “Dismissals: other,” and (6) “Judgment on: statistical closing.”⁷⁵ These seven dispositions accurately capture cases that terminated without adjudication and are therefore suitable for Clermont and Schwab’s purposes, but they also include a significant number of cases in which the plaintiff did not recover anything from the defendant. Accordingly, they do not reflect settlement as a proxy for plaintiff success.

Which dispositions to include in the denominator is also a contentious issue that can only be solved by exercising good judgment. Several of the AO codes are only temporary dispositions and not final terminations of a case: transfer to another district, remand to state court, transfer to an MDL panel, remand to a U.S. agency, stay pending arbitration, stay pending bankruptcy, and statistical closing.⁷⁶ Cases with these dispositions may settle or the court may decide them on the merits.⁷⁷ Although I exclude them from settlement rate calculations, Eisenberg and Lanvers have suggested that censoring these dispositions and using Cox survival models to perform regression analysis may be a superior method for calculating the settlement rate.⁷⁸

⁷² See *supra* notes 64–69 and accompanying text.

⁷³ See Eisenberg & Lanvers, *supra* note 6, at 116–17.

⁷⁴ *Id.* at 117.

⁷⁵ See Clermont & Schwab, *supra* note 4, at 121 n.56.

⁷⁶ Eisenberg & Lanvers, *supra* note 6, at 117–18.

⁷⁷ See *id.*

⁷⁸ *Id.* at 118 n.17.

III DATA AND METHODS

The present study uses data from docket reports, complaints, and other court documents from cases that terminated in both divisions of the United States District Court for the District of Maryland between October 1, 2007, and September 30, 2008. I selected a district that Eisenberg and Lanvers did not study in order to explore interdistrict variations in plaintiff success rates. I chose the District of Maryland specifically out of personal curiosity. The data in my study are more contemporary than the data in the Eisenberg–Lanvers study and provide a more recent picture of employment discrimination litigation in federal district court. However, the divergence in both time and district complicates comparisons with their study because any differences may be due to either of these independent variables or the interaction of both of them.

I began by obtaining a list of cases that terminated in the District of Maryland during the study period from the AO database.⁷⁹ I sorted that data set by case category and then collected docket reports and complaints from PACER for the following three categories of cases: employment discrimination (AO case category code 442), contract (AO case category 190), and personal-injury tort (AO case category codes 310–68). The final sample includes every employment discrimination and contract case that terminated during the study period and a random sample of roughly half of the personal-injury tort cases that terminated during the same period.

I collected data directly from the PACER records and combined it with the docket numbers and case category information obtained from the AO database. The most difficult part of data collection was coding case outcomes based on docket information. I initially recorded each case's final disposition in a free text field. I reviewed ambiguous dispositions before assigning every case one of the disposition codes in the following table.

Regrettably, some conceptual overlap in the disposition codes remains due to the varying specificity of the information in the docket reports. For instance, a docket report may record a dismissal for lack of subject-matter jurisdiction as either "Lack of jurisdiction" or as a pretrial motion under "Summary judgment, judgment on pretrial mo-

⁷⁹ The Federal Judicial Center assembles the data gathered by the AO, and the Inter-University Consortium for Political and Social Research disseminates the data through its website. For the 2008 database, see *Federal Court Cases: Integrated Data Base, 2008*, INTER-U. CONSORTIUM FOR POL. & SOC. RES., <http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/25002?archive=ICPSR&q=federal+judicial@enter> (last visited Mar. 12, 2011).

TABLE 1: CASE DISPOSITION CODES, D. MD. (2007–2008)

| <i>Disposition</i> | <i>Number of Cases</i> | <i>Percentage of Sample</i> |
|--|----------------------------|---------------------------------|
| Administrative closing, arbitration | 5 | 0.73 |
| Administrative closing, bankruptcy | 2 | 0.29 |
| Administrative closing, MDL | 29 | 4.29 |
| Administrative closing, pending Supreme Court decision | 1 | 0.15 |
| Administrative closing, state court | 2 | 0.29 |
| Arbitration award | 2 | 0.29 |
| Bench trial | 5 | 0.73 |
| Confessed judgment | 4 | 0.59 |
| Consolidated | 6 | 0.88 |
| Default judgment | 27 | 3.95 |
| Dismissal/withdrawal without prejudice | 46 | 6.73 |
| Failure to timely serve, Rule 4(m) | 10 | 1.46 |
| Failure to prosecute or comply with court order/rules | 8 | 1.17 |
| In forma pauperis case dismissed | 17 | 2.49 |
| Judgment as a matter of law | 1 | 0.15 |
| Jury trial | 8 | 1.17 |
| Lack of jurisdiction | 11 | 1.61 |
| Motion to dismiss, other | 6 | 0.88 |
| Referred to bankruptcy | 1 | 0.15 |
| Remanded | 24 | 3.51 |
| Settlement order dismissing | 182 | 26.65 |
| Settlement inferred, consent decree | 23 | 3.37 |
| Settlement inferred, stipulation | 104 | 15.23 |
| Settlement inferred, voluntary dismissal | 17 | 2.49 |
| Summary judgment, judgment on pretrial motion | 131 | 19.18 |
| Transferred | 11 | 1.61 |
| Total | 683 | 100.04 |

NOTE: Sample consists of all employment discrimination cases (AO code 442), all contract cases (AO code 190), and a random sample of roughly half of all personal-injury tort cases (AO codes 310–68) terminating in the District of Maryland between October 1, 2007, and September 30, 2008. Inferences about the relative frequency of disposition codes should account for these features of the sample. Because of rounding error, category percentages do not add to exactly 100%.

SOURCE: PACER.

tion.”⁸⁰ This overlap is largely due to the language and nonunique terminology of the docket reports. For a few obscure dispositions, I consulted the final court order to determine the precise disposition.

IV RESULTS

I have organized the results of my study in a series of tables. Tables 2–5 present various calculations of the settlement rate by case category. These tables illustrate how the settlement rate fluctuates based on the definition of settlement and whether nonterminating

⁸⁰ Of course, these categories do not completely overlap. A summary judgment dismissal could only be coded as the latter and not the former.

dispositions are included in the denominator. I then present further results utilizing the settlement rate calculation contained in Table 2. To illustrate variations across time and district while holding the settlement rate calculation method constant, I have included comparable results from the Eisenberg–Lanvers study.

Tables 2 and 3 report the settlement rate as a proxy for plaintiff success. They count cases with the following dispositions as settled cases: settlement order dismissing, consent decree, stipulation of dismissal (with prejudice), and voluntary dismissal (with prejudice). The difference between the two tables is that Table 2 does not include nonterminating dispositions in the denominator of the settlement rate. I counted the following dispositions as nonterminating dispositions: administrative closing, consolidated, referred to bankruptcy, remanded, and transferred. Because the two tables use the same set of dispositions to determine the numerator but Table 3 includes more kinds of dispositions in the denominator, the settlement rates in Table 3 are lower than those in Table 2.

TABLE 2: SETTLEMENT RATES (EXCLUDING NONTERMINATING DISPOSITIONS) AS A PROXY FOR PLAINTIFF SUCCESS BY CASE CATEGORY; D. MD. (2007–2008), E.D. PA. (2001–2002), AND N.D. GA. (2001–2002)

| <i>District</i> | <i>Case Category</i> | <i>Number of Cases</i> | <i>Settlement Rate (%)</i> ; (95% CI) |
|-----------------|---------------------------|------------------------|---------------------------------------|
| D. Md. | Employment Discrimination | 219 | 44.3; (37.7–50.9) |
| D. Md. | Contract | 204 | 52.0; (45.0–58.9) |
| D. Md. | Personal-Injury Tort | 179 | 68.7; (61.9–75.6) |
| E.D. Pa. | Employment Discrimination | 415 | 82.4; (78.7–86.1) |
| E.D. Pa. | Contract | 170 | 65.3; (58.1–72.5) |
| E.D. Pa. | Personal-Injury Tort | 274 | 87.2; (83.3–91.2) |
| N.D. Ga. | Employment Discrimination | 542 | 55.5; (51.3–59.7) |
| N.D. Ga. | Contract | 160 | 72.5; (65.6–79.4) |
| N.D. Ga. | Personal-Injury Tort | 174 | 63.8; (56.6–71.0) |

NOTE: CI = confidence interval. Case categories reflect the following AO codes: employment discrimination = AO code 442, contract = AO code 190, personal-injury tort = AO codes 310–68. Time period covered for the District of Maryland includes cases terminating between October 1, 2007, and September 30, 2008. Time period covered for the Eastern District of Pennsylvania and the Northern District of Georgia includes cases filed between January 8, 2002, and July 8, 2002, and terminating between July 8, 2001, and January 7, 2002. Comparisons between the settlement rates in the District of Maryland and the other two federal district courts should account for this difference.

SOURCES: PACER; Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 130 (2009).

Tables 4 and 5 report the settlement rate as a proxy for nonadjudicated terminations. In addition to the cases counted as settled in Tables 2 and 3, Tables 4 and 5 count cases with the following

TABLE 3: SETTLEMENT RATES (INCLUDING NONTERMINATING DISPOSITIONS) AS A PROXY FOR PLAINTIFF SUCCESS BY CASE CATEGORY; D. MD. (2007–2008), E.D. PA. (2001–2002), AND N.D. GA. (2001–2002)

| <i>District</i> | <i>Case Category</i> | <i>Number of Cases</i> | <i>Settlement Rate (%)</i> ; (95% CI) |
|-----------------|---------------------------|------------------------|---------------------------------------|
| D. Md. | Employment Discrimination | 227 | 42.7; (36.2–49.2) |
| D. Md. | Contract | 225 | 47.1; (40.5–53.7) |
| D. Md. | Personal-Injury Tort | 231 | 53.2; (46.8–59.7) |
| E.D. Pa. | Employment Discrimination | Unavailable | 77.0; (73.1–80.9) |
| E.D. Pa. | Contract | Unavailable | 55.8; (48.9–62.7) |
| E.D. Pa. | Personal-Injury Tort | Unavailable | 64.8; (59.9–69.7) |
| N.D. Ga. | Employment Discrimination | Unavailable | 52.7; (48.6–56.8) |
| N.D. Ga. | Contract | Unavailable | 58.9; (52.0–65.8) |
| N.D. Ga. | Personal-Injury Tort | Unavailable | 50.0; (43.4–56.6) |

NOTE: CI = confidence interval. Case categories reflect the following AO codes: employment discrimination = AO code 442, contract = AO code 190, personal-injury tort = AO codes 310–68. Time period covered for the District of Maryland includes cases terminating between October 1, 2007, and September 30, 2008. Time period covered for the Eastern District of Pennsylvania and the Northern District of Georgia includes cases filed between January 8, 2002, and July 8, 2002, and terminating between July 8, 2001, and January 7, 2002. Comparisons between the settlement rates in the District of Maryland and the other two federal district courts should account for this difference. Eisenberg and Lanvers did not report the number of cases by district and case category when they calculated settlement rates as a proxy for plaintiff success and included nonterminating dispositions.

SOURCES: PACER; Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 130 (2009).

dispositions as settled: confessed judgment, default judgment, failure to timely serve, failure to prosecute, dismissal/withdrawal without prejudice. The difference between Tables 4 and 5 is the same as between Tables 2 and 3; Table 4 excludes nonterminating dispositions from the denominator and Table 5 does not. Because Tables 2 and 4 use the same denominator but Table 4 includes more dispositions in the numerator, the settlement rates in Table 4 will always be higher than in Table 2. Likewise, the settlement rates in Table 5 will always be higher than in Table 3 because these two tables use the same denominator but Table 5 includes more types of dispositions in the numerator.

Table 6 reports the actual plaintiff victory rate and reproduces the settlement rate as a proxy for plaintiff success excluding nonterminating dispositions from the denominator. The difference between the two rates, which use the same denominator, is that the plaintiff victory rate also includes pretrial and trial judgments for the plaintiff in the numerator. This table illustrates just how important settlement is to plaintiffs in most cases. Out of 219 cases with terminating dispositions, the only successes that employment discrimina-

TABLE 4: SETTLEMENT RATES (EXCLUDING NONTERMINATING DISPOSITIONS) AS A PROXY FOR NONADJUDICATED TERMINATIONS BY CASE CATEGORY; D. MD. (2007–2008), E.D. PA. (2001–2002), AND N.D. GA. (2001–2002)

| <i>District</i> | <i>Case Category</i> | <i>Number of Cases</i> | <i>Settlement Rate (%)</i> ; (95% <i>CI</i>) |
|-----------------|---------------------------|------------------------|---|
| D. Md. | Employment Discrimination | 219 | 51.6; (44.9–58.3) |
| D. Md. | Contract | 204 | 84.3; (79.3–89.3) |
| D. Md. | Personal-Injury Tort | 179 | 76.0; (69.7–82.3) |
| E.D. Pa. | Employment Discrimination | 415 | 83.9; (80.3–87.4) |
| E.D. Pa. | Contract | 170 | 76.5; (70.1–82.9) |
| E.D. Pa. | Personal-Injury Tort | 274 | 89.0; (85.3–92.8) |
| N.D. Ga. | Employment Discrimination | 542 | 37.9; (32.1–43.6) |
| N.D. Ga. | Contract | 160 | 79.4; (73.1–85.7) |
| N.D. Ga. | Personal-Injury Tort | 174 | 72.1; (65.4–78.8) |

NOTE: CI = confidence interval. Case categories reflect the following AO codes: employment discrimination = AO code 442, contract = AO code 190, personal-injury tort = AO codes 310–68. Time period covered for the District of Maryland includes cases terminating between October 1, 2007, and September 30, 2008. Time period covered for the Eastern District of Pennsylvania and the Northern District of Georgia includes cases filed between January 8, 2002, and July 8, 2002, and terminating between July 8, 2001, and January 7, 2002. Comparisons between the settlement rates in the District of Maryland and the other two federal district courts should account for this difference.

SOURCES: PACER; Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 131 (2009).

tion plaintiffs obtained outside of settlement in the District of Maryland were two jury trial victories. Similarly, the only nonsettlement success that tort plaintiffs were able to obtain in the 179 terminating cases was one victory following a bench trial. Although the plaintiff victory rate for contract plaintiffs is significantly higher than the settlement rate, default judgments make up the bulk of that difference. Accordingly, most of those plaintiffs might not be able to collect on the judgment they obtained.

Table 7 reports settlement rates as a proxy for plaintiff success by employment discrimination case category. Once again, I report comparable data from the Eisenberg–Lanvers study. Unfortunately, Eisenberg and Lanvers did not report settlement rates for cases with national origin, disability, or retaliation claims. Because individual employment discrimination plaintiffs frequently bring claims of discrimination on multiple bases, a single case may be counted in more than one employment discrimination case category. Accordingly, the settlement rates for some specific types of employment discrimination claims may be inflated or deflated because that particular type of claim is often brought in conjunction with a more or less successful type of claim.

TABLE 5: SETTLEMENT RATES (INCLUDING NONTERMINATING DISPOSITIONS) AS A PROXY FOR NONADJUDICATED TERMINATIONS BY CASE CATEGORY; D. MD. (2007–2008), E.D. PA. (2001–2002), AND N.D. GA. (2001–2002)

| <i>District</i> | <i>Case Category</i> | <i>Number of Cases</i> | <i>Settlement Rate (%) (95% CI)</i> |
|-----------------|---------------------------|------------------------|-------------------------------------|
| D. Md. | Employment Discrimination | 227 | 49.8; (43.2–56.3) |
| D. Md. | Contract | 225 | 76.4; (70.9–82.0) |
| D. Md. | Personal-Injury Tort | 231 | 58.9; (52.5–65.3) |
| E.D. Pa. | Employment Discrimination | Unavailable | 78.4; (74.5–82.2) |
| E.D. Pa. | Contract | Unavailable | 65.3; (58.7–72.0) |
| E.D. Pa. | Personal-Injury Tort | Unavailable | 66.1; (61.3–71.0) |
| N.D. Ga. | Employment Discrimination | Unavailable | 62.5; (58.5–66.5) |
| N.D. Ga. | Contract | Unavailable | 64.5; (57.8–71.2) |
| N.D. Ga. | Personal-Injury Tort | Unavailable | 56.4; (49.8–62.9) |

NOTE: CI = confidence interval. Case categories reflect the following AO codes: employment discrimination = AO code 442, contract = AO code 190, personal-injury tort = AO codes 310–68. Time period covered for the District of Maryland includes cases terminating between October 1, 2007, and September 30, 2008. Time period covered for the Eastern District of Pennsylvania and the Northern District of Georgia includes cases filed between January 8, 2002, and July 8, 2002, and terminating between July 8, 2001, and January 7, 2002. Comparisons between the settlement rates in the District of Maryland and the other two federal district courts should account for this difference. Eisenberg and Lanvers did not report the number of cases by district and case category when they calculated settlement rates as a proxy for nonadjudicated terminations and included nonterminating dispositions.

SOURCES: PACER; Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 131 (2009).

Finally, Table 8 lists the frequency of race discrimination claims by the race of the plaintiff. African-American plaintiffs clearly represent the bulk of race discrimination plaintiffs in the District of Ma-

TABLE 6: SETTLEMENT RATES (EXCLUDING NONTERMINATING DISPOSITIONS) AS A PROXY FOR PLAINTIFF SUCCESS BY CASE CATEGORY COMPARED WITH PLAINTIFF VICTORY RATES; D. MD. (2007–2008)

| <i>District</i> | <i>Case Category</i> | <i>Number of Cases</i> | <i>Settlement Rate (%) (95% CI)</i> | <i>Plaintiff Victory Rate (%) (95% CI)</i> |
|-----------------|---------------------------|------------------------|-------------------------------------|--|
| D. Md. | Employment Discrimination | 219 | 44.3; (37.7–50.9) | 45.2; (38.6–51.8) |
| D. Md. | Contract | 204 | 52.0; (45.0–58.9) | 70.1; (63.8–76.4) |
| D. Md. | Personal-Injury Tort | 179 | 68.7; (61.9–75.6) | 69.3; (62.4–76.1) |

NOTE: CI = confidence interval. Sample consists of all employment discrimination cases (AO code 442), all contract cases (AO code 190), and a random sample of roughly half of all personal-injury tort cases (AO codes 310–68) terminating in the United States District Court for the District of Maryland between October 1, 2007, and September 30, 2008.

SOURCE: PACER.

TABLE 7: SETTLEMENT RATES (EXCLUDING NONTERMINATING DISPOSITIONS) AS A PROXY FOR PLAINTIFF SUCCESS BY EMPLOYMENT DISCRIMINATION CASE CATEGORY; D. MD. (2007–2008), E.D. PA. (2001–2002), AND N.D. GA. (2001–2002)

| <i>District</i> | <i>Employment Discrimination Case Category</i> | <i>Number of Cases; (% of Total Cases)</i> | <i>Settlement Rate (%); (95% CI)</i> |
|-----------------|--|--|--------------------------------------|
| D. Md. | Race | 107; 48.46 | 38.3; (29.0–47.7) |
| D. Md. | Sex | 80; 35.68 | 47.5; (36.3–58.7) |
| D. Md. | Age | 43; 20.25 | 44.2; (28.7–59.7) |
| D. Md. | National Origin | 27; 12.78 | 51.8; (31.7–72.0) |
| D. Md. | Disability | 31; 14.10 | 32.3; (14.8–49.7) |
| D. Md. | Retaliation | 94; 43.17 | 44.7; (34.4–54.9) |
| E.D. Pa. | Race | 111; 26.75 | 79.3; (71.6–86.9) |
| E.D. Pa. | Sex | 113; 27.22 | 85.8; (79.3–92.4) |
| E.D. Pa. | Age | 68; 16.39 | 77.9; (67.8–88.0) |
| N.D. Ga. | Race | 213; 39.30 | 51.6; (44.9–58.4) |
| N.D. Ga. | Sex | 185; 34.13 | 61.6; (54.5–68.7) |
| N.D. Ga. | Age | 52; 9.59 | 59.6; (45.8–75.4) |

NOTE: CI = confidence interval. Case categories reflect the following AO codes: employment discrimination = AO code 442, contract = AO code 190, personal-injury tort = AO codes 310–68. Time period covered for the District of Maryland includes cases terminating between October 1, 2007, and September 30, 2008. Time period covered for the Eastern District of Pennsylvania and the Northern District of Georgia includes cases filed between January 8, 2002, and July 8, 2002 and terminating between July 8, 2001, and January 7, 2002. Comparisons between the settlement rates in the District of Maryland and the other two federal district courts should account for this difference.

SOURCES: PACER; Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 130 (2009).

ryland. The “Other” category below includes Native-American, Middle Eastern, and Moorish-American, each with one case. In 10% of the race discrimination cases, I could not obtain the race of the plaintiff from any of the documents in the docket. These cases typically had pro se plaintiffs who did not state their race in the complaint and were dismissed before the defendant even replied. In national-origin discrimination cases, the most common nations of origin were African nations followed by nations in Latin America and the Middle East. In sex discrimination cases, roughly three-quarters of plaintiffs were female and the remaining quarter was male.

V

DISCUSSION

These new data on settlement rates suggest an even more complicated picture of employment discrimination litigation. Prior research on employment discrimination has tended to show that employment

TABLE 8: RACE OF PLAINTIFF IN EMPLOYMENT DISCRIMINATION CASES ALLEGING RACE DISCRIMINATION (INCLUDING NONTERMINATING DISPOSITIONS); D. Md. (2007–2008)

| <i>Race</i> | <i>Number of Cases</i> | <i>Percentage of Sample</i> |
|------------------|------------------------|-----------------------------|
| African-American | 78 | 70.91 |
| Asian | 4 | 3.64 |
| Caucasian | 9 | 8.18 |
| Hispanic | 5 | 4.55 |
| Other | 3 | 2.72 |
| Unavailable | 11 | 10.00 |
| Total | 110 | 100.00 |

NOTE: Sample consists of all employment discrimination cases (AO code 442) alleging race discrimination and terminating in the United States District Court for the District of Maryland between October 1, 2008, and September 30, 2008.

SOURCE: PACER.

discrimination plaintiffs fare worse than other kinds of plaintiffs.⁸¹ Although the results of this study corroborate this finding, they also uncover substantial interdistrict and/or temporal differences in the settlement rate for employment discrimination cases.

The relationship between the settlement rates for each of the three case categories varies from district to district. In the District of Maryland, personal-injury tort cases have the highest settlement rate, followed by contract and employment discrimination cases respectively.⁸² Moreover, the differences between the settlement rates for employment discrimination cases and the other two types of cases are statistically significant. The difference between the settlement rate for contract cases and tort cases is also significant.

In the Eastern District of Pennsylvania, tort cases continue to have the highest settlement rate, but the difference between the settlement rates for tort cases and employment discrimination cases is not statistically significant.⁸³ Contract cases in the Eastern District of Pennsylvania have the lowest settlement rate of the three categories, and the differences between the settlement rates for contract cases and the other two categories are significant.

Finally, in the Northern District of Georgia, contract cases have the highest settlement rate followed by tort and then employment discrimination cases.⁸⁴ However, only the difference between the settle-

⁸¹ See, e.g., Clermont & Schwab, *supra* note 4, at 104; Clermont & Schwab, *supra* note 1, at 429; Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 958; Nielsen & Nelson, *supra* note 1, at 673.

⁸² *Supra* Table 2.

⁸³ *Supra* Table 2.

⁸⁴ *Supra* Table 2.

ment rates for contract and employment discrimination cases is statistically significant. The differences between contract and tort cases and between tort and employment discrimination cases are not significant.

The settlement rate for employment discrimination cases also varies significantly between the three districts.⁸⁵ The settlement rate for employment discrimination cases is lowest in Maryland and highest in the Eastern District of Pennsylvania, which generally has high settlement rates. Indeed, Eisenberg and Lanvers found that the Eastern District has a high settlement rate for employment discrimination cases relative to other districts in the Third Circuit.⁸⁶ These interdistrict variations are intriguing but hard to explain.

Eisenberg and Lanvers suggest that this interdistrict variation has not been stable over time.⁸⁷ An older study that looked at cases filed in the Eastern District of Pennsylvania and the Northern District of Georgia during 1980–1981 did not find the same interdistrict variation as for the 2001–2002 data reported here.⁸⁸ Both districts did, however, have low settlement rates for employment discrimination cases.⁸⁹ Because the data in this study from the District of Maryland is largely from 2008, any interdistrict variation may be entirely due to temporal considerations or the interaction of the time and district variables.

One possible explanation is that the differences in employment discrimination settlement rates are due to different mixtures of classes of employment discrimination cases within each district. At least one researcher has found differences in case outcome based on the class of employment discrimination case.⁹⁰ Different relative frequencies of types of employment discrimination cases might explain some of the interdistrict variation. However, the Eisenberg–Lanvers study did not report any significant differences in settlement rates between types of employment discrimination cases.⁹¹ Although the sample sizes in this study are too small to conclusively state that there are no

⁸⁵ See *supra* Table 2.

⁸⁶ See Eisenberg & Lanvers, *supra* note 6, at 142. To reach this conclusion, the authors relied on AO data, reasoning that relative settlement rates would remain roughly stable even if individual actual settlement rates change. See *id.*

⁸⁷ See Eisenberg & Lanvers, *supra* note 6, at 139.

⁸⁸ *Id.*

⁸⁹ See *id.* at 139–40.

⁹⁰ See David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 514 (2003) (“The most significant finding is that women and minorities are substantially disadvantaged in bringing certain kinds of employment discrimination claims, as compared with the success rates of all plaintiffs in all employment law jury trials.”).

⁹¹ Eisenberg & Lanvers, *supra* note 6, at 133–34 (analyzing race, sex, and age case categories).

differences in settlement rates between types of employment discrimination cases, the results tend to corroborate their finding. The analysis did not uncover any significant differences in the settlement rates for race, sex, and age cases or for the other three types of discrimination cases: national origin, disability, and retaliation.⁹² Settlement rates by type of employment discrimination case did differ across districts. The settlement rates for race, sex, and age cases in Maryland differed significantly from their counterparts in the Eastern District of Pennsylvania but did not differ from the settlement rates in the Northern District of Georgia. However, this difference is probably a result of the small sample sizes, given that the overall settlement rates for employment discrimination cases in the two districts differed significantly.

Although this study found no statistically significant differences in settlement rates for different types of employment discrimination cases within each district, future researchers should continue to explore this as a determinant of interdistrict variation. Because the sample size in this study is small, it may be unable to detect a small but real difference in settlement rates by type of employment discrimination alleged and thus cannot exclude this variable as a source of interdistrict variation in the settlement rate for employment discrimination cases generally.

Besides describing the (nonsignificant) variation in settlement rates between types of employment discrimination cases, Table 7 also suggests that district court filing rates for each type of employment discrimination case may diverge from EEOC filing rates. Nielsen and Nelson report the EEOC filing rates for 2002 and assume that the “proportion of race cases filed in federal court is the same as the proportion of race charges in the EEOC charge statistics.”⁹³ This assumption may be problematic. For example, Nielsen and Nelson report that the proportion of race claims in the EEOC charge statistics for 2002 is 35.40%.⁹⁴ During the same time period in the Eastern District of Pennsylvania, the proportion of race cases was 26.75%.⁹⁵ In 2008 in the District of Maryland, the proportion of cases with race claims made up almost half of the total number of cases.⁹⁶

Of course, there are at least two other explanations for this divergence other than a real difference between EEOC charges and district court filings. First, the difference in time might explain the divergence in EEOC filings and the district court filing statistics. Second,

⁹² See *supra* Table 7.

⁹³ Nielsen & Nelson, *supra* note 1, at 689 tbl.1.B, 705–06.

⁹⁴ *Id.* at 689 tbl.1.B.

⁹⁵ *Supra* Table 7.

⁹⁶ *Supra* Table 7.

the EEOC charge statistics are from the entire nation, and individual districts may deviate from the national norm. Nevertheless, this difference may emerge because some plaintiffs, especially pro se plaintiffs, unwittingly circumvent the EEOC and file first at the district court. Future researchers should therefore use caution when using EEOC charge statistics to make inferences about district court filings, especially because information about the relative filing rates of different categories of employment discrimination cases is readily accessible for a low cost through PACER.

As noted earlier, geographic and temporal variables may explain the interdistrict variation observed in this study. Contemporaneous data from other districts will easily reveal whether the District of Maryland has a uniquely low settlement rate for employment discrimination cases. If, however, the interdistrict variation in this study is attributable to temporal considerations, then the results in this study have implications for Clermont and Schwab's hypothesis that employment discrimination plaintiffs and their lawyers are becoming discouraged by their lack of success in federal court.

If the lower settlement rate for employment discrimination cases in the District of Maryland is a result of the difference in time, then two causal factors might be at work: either employment discrimination plaintiffs are not responding to their lack of success by bringing stronger cases or antiplaintiff bias in federal district courts is actually increasing. This would tend to undermine Clermont and Schwab's discouragement hypothesis. Of course, longitudinal data is necessary to demonstrate that the variation in settlement rates is a result of the difference in time. Specifically, knowing the settlement rate for employment discrimination cases in the District of Maryland during 2001 and 2002 and the settlement rates for the Eastern District of Pennsylvania and Northern District of Georgia for 2008 would permit stronger inferences about the cause of the variation in settlement rates. Because this study raises the specter that things might be getting worse for employment discrimination plaintiffs in federal court, it indicates the urgency for further research to explain the observed interdistrict variation.

Turning to the differences between the settlement rates for employment discrimination cases generally and other categories of cases, one unique feature of employment discrimination litigation may help explain the variation between employment discrimination cases and other types of litigation at the district court level. The employment discrimination litigation pyramid of disputes contains a level that other types of litigation typically do not: the EEOC. Claimants who

file at the EEOC can obtain favorable, settlement-type resolutions.⁹⁷ Based on nationwide data, Nielsen and Nelson estimate that about one in five EEOC complainants receive some sort of relief from the EEOC, while more than 63% of complainants may continue to pursue their claim in federal court.⁹⁸ Because these complainants would otherwise begin by filing directly with the federal district court, the EEOC may divert cases that would settle at the district court off the pyramid of disputes before they reach the court. Furthermore, pro se plaintiffs who unwittingly file first in district court without exhausting their administrative remedies may raise the rate of summary judgment for employment discrimination cases and therefore lower the settlement rate. This hypothesis could help to explain the relatively low success rates of employment discrimination plaintiffs early in litigation.

Of course, this hypothesis requires empirical support that is beyond the scope of this Note. In fact, the opposite conclusion might be true; because complainants who do not prevail at the EEOC may abandon their claims at that stage of the pyramid, the EEOC may actually increase the proportion of plaintiffs with successful complaints at the district court level. Moreover, even if the EEOC effect is a wash and does not discourage or encourage plaintiffs to continue to court, district court judges may carry preconceptions about its effect, leading them to prejudge cases as nonmeritorious. Further research should, therefore, consider both the proportion of successful and unsuccessful EEOC claims that are diverted off the pyramid before they reach the district court and the perceptions of district court judges regarding the impact of the EEOC.

I also collected data on interjudge differences in the settlement rate. The results of this study corroborate the findings of several other studies, which indicate that there are no consistent interjudge differences.⁹⁹ Table 9 presents the aggregate settlement rates for each judge across case categories. The number of observations per judge is small in some cases, in particular, for Judges Garbis and Nickerson, who are senior judges.

Although there is at least one significant difference between individual judges (i.e., between Davis and Nickerson), the judge variable is not a good predictor of case outcome. Moreover, the difference be-

⁹⁷ See Nielson & Nelson, *supra* note 1, at 691.

⁹⁸ See *id.* at 705.

⁹⁹ See, e.g., Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) ("Many will be surprised that we cannot find that Republican judges differ from Democratic judges in their treatment of civil rights cases. The religion and gender of the judge had larger but still modest effects."); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1467 (1998).

TABLE 9: AGGREGATE SETTLEMENT RATES (EXCLUDING NONTERMINATING DISPOSITIONS) AS A PROXY FOR PLAINTIFF SUCCESS BY DISTRICT COURT JUDGE; D. MD. (2007–2008)

| <i>Judge</i> | <i>Number of Cases</i> | <i>Settlement Rate (%) (95% CI)</i> |
|--------------|------------------------|-------------------------------------|
| Bennett | 65 | 60.9; (48.7–73.1) |
| Blake | 58 | 47.0; (33.7–60.3) |
| Chasanow | 61 | 53.7; (40.8–66.6) |
| Davis | 61 | 40.2; (27.6–52.8) |
| Garbis | 12 | 57.9; (28.0–87.8) |
| Legg | 31 | 51.0; (32.6–69.4) |
| Messitte | 64 | 50.5; (37.7–63.2) |
| Motz | 54 | 47.1; (33.1–61.0) |
| Nickerson | 19 | 76.7; (56.2–97.1) |
| Quarles | 60 | 48.0; (34.9–61.1) |
| Titus | 68 | 53.4; (41.1–65.8) |
| Williams | 49 | 54.4; (40.2–68.7) |

NOTE: CI = confidence interval. Aggregate settlement rates and confidence intervals account for sample design, but sample omits several significant categories of cases including habeas petitions and civil rights cases unrelated to employment. Time period covered for the District of Maryland includes cases terminating between October 1, 2007, and September 30, 2008.

SOURCE: PACER.

tween Nickerson and Davis may be an artifact of the especially small number of cases that Nickerson handled. A nested logistic regression controlling for case category (tort, contract, and employment discrimination) further diminished the already very low predictive effect. Once again, there may be actual differences between judges that are difficult to discern because they are too small to be detected with the sample sizes in this study. The volume of litigation that judges handle may also impose limitations on the size of differences that statistical analyses can detect. Each additional explanatory variable decreases the number of observations per cell, and several years of data may be necessary to detect interjudge differences within a case category if they exist. If settlement rates vary over time, however, then the interjudge differences may disappear if the sample period is too long.

This study did not address case merit as an explanation for interdistrict, intercategory, or interjudge variations. As noted earlier, many commentators believe, for a variety of asserted reasons, that employment discrimination plaintiffs bring weak cases.¹⁰⁰ I did not address this variable for several reasons. First, merit is hard to define in objective terms. Indeed, outside of medical malpractice, studies of objective merit are rare. Second, because success in litigation is a large part of merit, objective definitions of merit court circularity. Finally,

¹⁰⁰ See *supra* text accompanying note 41.

collecting enough case-specific information to make an assessment of merit is infeasible for a single researcher.

CONCLUSION

The results of this study build on previous research in significant ways. Because it reports a significantly lower settlement rate for employment discrimination plaintiffs, it helps illustrate how much this statistic can vary as a function of time and district. It also highlights the degree that the settlement rate for employment discrimination plaintiffs can vary compared with two other categories of cases: personal-injury tort cases and contract cases. Although limited sample sizes prevented the drawing of conclusive inferences in the presence of many variables, this study suggests that the relative frequency of types of employment discrimination cases cannot alone explain interdistrict variations. Additionally, this study corroborates a growing body of literature that does not find significant and consistent interjudge differences.

Finally, this study has implications for Clermont and Schwab's hypothesis that there is an antiplaintiff bias in appellate courts.¹⁰¹ If appellate court judges believe that district court judges are unduly favorable to employment discrimination plaintiffs, then their belief is probably mistaken. Employment discrimination cases had the lowest success rate in the District of Maryland of the three categories of litigation, and this rate was significantly lower than the rate for tort and contract cases. Furthermore, this study illustrates the urgency for further research to precisely determine the cause of these interdistrict variations. If the observed interdistrict variation is a product of time, then this study paints a graver picture of how employment discrimination plaintiffs fare in federal court. This modest study cannot put these questions to rest, but it may suggest some of the sources of interdistrict variation in the settlement rate for employment discrimination cases and highlight the importance of continuing and sustained investigation.

¹⁰¹ See *supra* notes 41–42 and accompanying text.

