

From the Pennsylvania Human Relations
Commission to the Courthouse:
Does Civil Rights Litigation Remediate
Racial Inequality in the Workplace?

By David Berney

ABSTRACT

This dissertation examines the ability of civil rights litigation to redress racial inequality in the workplace. It enters the larger historical debate regarding the effectiveness of civil rights litigation to serve as a force for progressive, socio-political change. To focus my inquiry, I studied the operations of the Pennsylvania Human Relations Commission, an administrative agency charged with enforcing civil rights laws. I also interviewed major participants in the civil rights litigation system, including complainants, attorneys, and judges. I drew upon my own experiences as a practicing civil rights attorney. My investigation employed a range of different methods, including interviews, ethnographic observation, and archival research. This is, to my knowledge, the first full study of the actual operations of an important state civil rights agency in close to fifty years.

My dissertation finds that litigation has historically promoted racial equality in employment. But two factors have contributed to limit what lawsuits can realistically accomplish today. First, starting in the 1970s, Republican presidential administrations appointed judges who proved less sympathetic to civil rights claims. The resulting case law made it much harder to bring successful lawsuits. Second, expressions of workplace bias became much more covert over time partly as a consequence of the successes that civil rights litigators achieved. The litigation paradigm is not well designed to tackle such subtleties.

Beyond a lack of effectiveness, litigation can also have deleterious effects as it can cause employees to suffer psychic injury on top of whatever racial indignities they have endured. Nonetheless, civil rights litigation still serves important functions. Litigants report that it provides critical space to actualize their civic identities as political agents. It reaffirms their racial identities by connecting them to important social movements of the past. It also remains a deterrent against ongoing forms of blatant discrimination. But despite its continuing contributions, litigation is unlikely to achieve systematic racial reforms in the workplace beyond what has already been attained. As a result, it may be important for legal activists to rethink strategies for advancing the interests of minorities in the workplace.

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by

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For Sharon, Noa, Sasha, and Jonah and to all whose cause is social justice

PREFACE

In 1989, inspired by legal giants like Thurgood Marshall, I entered the University of Pennsylvania Law School with the twin goals of becoming a civil rights attorney and changing the world. In the 1980s, the courts were becoming increasingly more conservative. Nonetheless, I still held a faith that there existed federal judges on the bench that would be sympathetic enough to enforce the United States Constitution in the same spirit that motivated the Warren Court when deciding *Brown v. Board of Education* and scores of other cases that followed in its wake.¹ As a result, civil rights lawyering still held promise for me as a way of alleviating societal inequalities.

But now having served as a civil rights attorney for close to twenty years, I have become increasingly skeptical about the transformative power of a litigation-based civil rights model. My early legal experiences almost immediately started to challenge my preexisting faith in the system.

During my first summer of law school, I served as a judicial intern for the Honorable John F. Gerry, Chief Judge for the United States District Court of New Jersey. Judge Gerry was a well respected federal judge, who had served as the chair of the executive committee of the Judicial Conference of the United States, which manages the general operations of the federal court system. By most estimates, this was a significant position to have as a first year law student. As a judicial intern, among other responsibilities, I was assigned the task of deciding motions that had

¹ A number of legal scholars and commentators have noted the long shadow that cases like *Brown v. Board of Education* have cast over the civil rights movement. See for e.g.: Kenneth W. Mack, “Rethinking Civil Rights Lawyering and Politics in the Era Before Brown,” *Yale Law Journal*, Vol 115, No. 2, (2005), 258. Mack notes, “The Brown litigation has become the lodestar for a ‘legal liberal’ interpretation of civil rights history. Its core elements have become familiar: courts as the primary engines of social transformation; formal conceptual categories such as rights and formal remedies such as school desegregation decrees, as the principal mechanisms for accomplishing that change; and a focus on reforming public institutions (or, in some versions, public and private institutions without much distinction) as a means of transforming the larger society.”

been filed in prisoner civil rights cases and drafting legal opinions disposing of those motions. Routinely, I would discuss the issues with the judge's law clerks before presenting a draft opinion to the judge for his review. In one case, a plaintiff inmate had filed a civil rights lawsuit under the Eighth Amendment against a prison for its failure to provide him access to a physician. The defendant prison claimed that the plaintiff had failed to establish that the prison had been "deliberately indifferent" to his "serious medical needs" which is the standard to state a legal claim.² As a result, the defendant prison filed a motion to dismiss the case. Already, one can see the inherent subjectivities built into such a legal standard. For example, what is "deliberately indifferent" to one person's sensibilities may not be to another. The term "serious medical needs" can also be open to interpretation. The judge's law clerk assigned the motion to me and suggested that we grant the motion and dismiss the case. I read through the motion, researched the law, and drafted an opinion, denying it. Judge Gerry signed it without amendment. This was my routine experience with Judge Gerry. Given that my drafts were routinely supported by sound legal analyses, he approved all of them without changes. But I am convinced that I could have written an equally compelling opinion deciding the motion in the opposite manner which I believe the judge would also have summarily approved.

The difference in outcome for this prisoner lay simply in the sheer luck of the file having been assigned to me, a judicial intern, as opposed to the judge's law clerk. My sympathies lay with the underdog – the inmate – and not with the more powerful state institution. Perhaps, the law clerk's views were colored by the sheer volume of cases that were filed by prisoners. With considerable time on their hands, inmates

² See for e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976), which holds that "deliberate indifference" by a prison to an inmate's "serious medical needs" amounts to "cruel and unusual punishment" in violation of the Eighth Amendment of the United States Constitution.

often repeatedly initiate lawsuits, many of which amount to frivolous filings.³

Perhaps, less cynically, the law clerk simply did not share my sense of empathy for the plaintiff and his alleged travails. Knowing the law clerk, I believe that both of our analyses would have been equally compelling. But because I possessed a different set of sensibilities, the plaintiff received a different outcome.

I know that some judges take a more proactive role regarding the disposition of legal matters, but many other judges decide motions in the same fashion as Judge Gerry. As a result, many outcomes rest upon the social and political proclivities of the decision-maker rather than through some talismanic formula for deciding legal issues through neutral application of the law. Consequently, subjective legal standards become interpreted through the conscious and unconscious lens of the decision maker's individual cultural norms and biases; so much for our presumptive blind application of the rule of law. In sum, my first legal experience taught me that the law's operation could be as arbitrary as it can be objective.

When I entered law school, I had also imagined the federal courts as a venue where individuals go to safeguard their rights against the abuses of the state or the ruling majority. Perhaps naively, I did not imagine that federal judges at that time could possess their own set of racial assumptions. I was quickly disabused of this assumption. During an interview with a federal judge for a position on his staff, the judge made some rather remarkable comments to me during the course of our interview. For example, he asked me about my religious beliefs, a question that normally gives rise to Title VII implications. He then seemed genuinely surprised when I haltingly offered that I was Jewish which he reframed as being a member of

³ In 1996, Congress passed the Prison Litigation Reform Act to curb the number of Eighth Amendment lawsuits filed by prisoners.

the “Hebrew faith.” At some point during the course of the interview, he pointed out the window to Philadelphia’s City Hall, stating that if the Japanese ever attacked such a venerable symbol, he would give up his life before “we” ever surrendered it. After the interview, I discovered that he had fought in World War II and his memories of the war still lived with him. This episode of bigotry, while dramatic and not necessarily characteristic of other experiences that I had with federal judges, nonetheless hammered home for me the fact that judges are people whose view of the world is shaped by their unique social experiences, cultural biases, and sensibilities. These deeply personal perceptions affect the way that judges adjudicate cases. In sum, this second lesson regarding the operation of the law taught me that judges are not necessarily wise or impartial; rather they possess the same human frailties as the parties that stand before them.

Soon after graduating from law school, I joined a fairly prominent Philadelphia law firm. The firm maintained a national practice concentrating in the area of catastrophic personal injury, including drug, product, and medical device liability, medical malpractice, and toxic tort litigation. Based upon the principle partner’s assurances that I would handle the firm’s burgeoning civil rights practice, I accepted their offer of employment. Even though the firm’s partners all had left-leaning political tendencies, it quickly became apparent that my inability to generate the same level of revenue as my colleagues would limit the amount of civil rights work that I would be permitted to take. The firm operated for-profit. As a result, there was significant pressure to bring in revenue regardless of the importance of the legal cause at stake. Even though I was able to generate a profit, the firm trivialized the importance of my work because my cases earned comparatively less than the firm’s more traditional practice areas. This experience taught me my third major

lesson regarding civil rights: private for-profit firms have inherent difficulties in handling public interest matters. Because private firms are motivated by profit concerns and face significant expenses in their operations, the public interest aspect of their casework is necessarily marginalized.

On top of that limitation, the very first civil rights matter that I handled underscored for me the difficulty in using litigation to change an abusive practice in the Philadelphia police department. The case was *Hague v. The City of Philadelphia*. I represented husband and wife, Lila and Jerry Hague.⁴

On Sunday, August 1, 1992, after attending a morning mass, my clients, Lila and Jerry Hague were tending to their garden. At that same time, an officer, Reggie Zafno, was in foot pursuit of a suspect. In the course of his pursuit, Officer Zafno hurdled the Hague's fence, ran through their flower garden, and yelled: "Which way did he go?" Hearing a noise emanating from somewhere behind their yard, Mr. Hague pointed Officer Zafno in that direction. Officer Zafno then disappeared from sight. Minutes later, the officer returned to the Hague's yard and casually crossed it. In the process, he trampled over the Hague's flowerbed. He then jumped their fence. Taking issue with Officer Zafno's indifference to their garden, Mr. Hague rhetorically suggested that the officer use the cement walk and gate that were immediately adjacent to the flowerbed instead of needlessly trampling the marigolds. Apparently, not appreciating Mr. Hague's comments, Zafno charged Hague and in a confrontational tone, asked, "Do you have a problem?" Mr. Hague explained to the officer that he could have just as easily used the cement walk. In response, the officer grew angry, words were exchanged, and the confrontation became increasingly heated.

⁴ I have changed the names of the plaintiffs to safeguard their privacy.

Mr. Hague had a history of heart ailments. Fearing for her husband's health, Mrs. Hague stepped in between the two men. With her back facing the officer, she urged her husband to remain calm. Without warning, Officer Zafno grabbed Mrs. Hague by the arm and shoulder, spun her around, and struck her in the face. To this day, it remains unclear whether Officer Zafno intended to hit Mrs. Hague, or in whipping her around, his hand simply slipped off her shoulder and inadvertently struck her. Regardless, the blow of the impact caused her to suffer a welt around her eye. Officer Zafno then fled the premises, and Mr. and Mrs. Hague went inside their house to call a police supervisor and to register a formal complaint. Following their phone call, Officer Zafno returned to the Hague residence with several other police officers in tow, barged into their home, and proceeded to arrest Mrs. Hague on charges of "obstruction of justice" and "aggravated assault," classic "cover charges."⁵ As Officer Zafno led Mrs. Hague to the police "paddy wagon," several officers were heard to call Mrs. Hague "white trash" and other incendiary names. Ultimately, all charges were dismissed against Mrs. Hague for lack of prosecution. There were numerous neighbors and witnesses who observed the chain of events and signed affidavits, supporting Mr. and Mrs. Hague's version of what had happened. But the Police Department's Internal Affairs Division (IAD) refused to sustain the Hague's complaint because the IAD investigating officer (IO) maintained that it was their word against that of Officer Zafno. The IO was also dismissive of the neighbors' affidavits because all of the neighbors knew Mrs. Hague, and therefore, in the IO's words, were biased witnesses. As a result of the incident, a firm colleague and I

⁵ "Cover charges" are criminal charges that police officers levy against citizens following an incident of police brutality in order to cast the police officer as the alleged victim. Frequently, these charges take the form of disorderly conduct, obstruction of justice, and some form of alleged assault on the police officer. *See: Cameron v. City of Philadelphia*, 1991 WL 218433 (E.D.Pa. Oct. 18, 1991) at 4 .

agreed to represent Mr. and Mrs. Hague in a civil lawsuit against Officer Zafno and the City of Philadelphia.

As we investigated the case, it quickly became apparent that the fact pattern that gave rise to the claim happened rather routinely in the course of police work. My firm hired James Fyfe, Ph.D., one of the best-known police practices experts in the nation at that time to assist us. Dr. Fyfe was a criminal justice professor at Temple University. He had written a number of books and hundreds of scholarly and popular newspaper articles on police practices. He had also served as an expert witness in approximately 500 police brutality lawsuits. In particular, he was very familiar with the operations of the Philadelphia Police Department from previous cases on which he had worked. He opined that it was common practice in the Philadelphia Police Department for police officers to arrest civilian bystanders who challenged or even questioned a police officer's authority. He faulted the Philadelphia Police Department with failing to specifically address this issue with its rank and file members and to provide training on how to interact with civilians who challenge police authority.

Armed with this opinion, we filed a federal lawsuit, seeking monetary and injunctive relief. The injunctive relief we pursued involved a demand for training to address the issues Dr. Fyfe had highlighted.

In the course of litigating this case several facts quickly became clear to us. First, even though I was appalled by what had happened to Mrs. Hague, the attorneys for the City were not, dismissing them as "run of the mill" civil rights plaintiffs. Second, given the difficulty of proving liability against a police officer in a federal court, the value of the case was considered to be less than if this had been a routine

car accident matter.⁶ Third, because there were no physical injuries, one very prominent Philadelphia civil rights attorney, with whom I had consulted, estimated the case as having a settlement value of about \$20,000. For comparative purposes, at the same time, a jury had only awarded about \$25,000 to a police abuse victim who had had several of his teeth knocked out. But in our case, a \$20,000 settlement did not seem adequate to compensate Mrs. Hague for what had happened as it would give her only several thousand dollars once we had subtracted for legal fees and litigation, including expert costs. Third, the City would not entertain settlements that involved anything other than financial compensation. This almost always proved the case. Thus, no settlements in individual cases involve policy changes. In fact, the litigation system is much better designed and suited to convert cases into monetary terms; it is much less effective at addressing inadequate Department policies and practices. Even regarding class action lawsuits against the Philadelphia Police Department, which have sought broad remedial changes in the way the Department operates, my civil rights attorney colleagues echoed the difficulty of using litigation to change practices. Fourth, our lawsuit would have very little deterrent effect in preventing future instances of abuse as (a) police officers are not responsible for paying for settlement

⁶ The federal court in Philadelphia has jurisdiction over all matters in the Eastern District of Pennsylvania. Because the Eastern District of Pennsylvania draws from many Pennsylvania counties, most of which are predominantly white, there is a dearth of racial diversity in federal juries in the Eastern District of Pennsylvania. As a result, most Philadelphia federal juries are comprised of white individuals who generally view police officers in very positive ways. This is not necessarily the case with African American jurors. As a result, defendants in police abuse cases frequently prefer to be in federal court and can, and routinely do, remove a case to federal court if it is filed in state court since there is a federal issue involved. Additionally, on those occasions where there are African Americans on the venire, I have experienced that they are usually struck by the defense during a process called voir dire. Fortunately, a litigant can always challenge the opposing party's jury strike if it appears to be racially motivated by issuing an attack called a *Batson* challenge, named after a Supreme Court decision that prohibits striking potential jurors on the basis of race. But to overcome the *Batson* challenge, the other side need only offer a neutral, non-discriminatory reason for striking the African American. In my experience, the other side's proffered neutral reason has been that the potential Black juror is from Philadelphia and everyone knows that Philadelphia residents have a tendency to disproportionately find in favor of the plaintiff and/or award higher verdicts. As a result, the *Batson* challenges have been overruled. At least one colleague of mine has had shared similar experiences with me.

or verdict amounts due to City indemnification laws and (b) the collective bargaining agreement generally protects police officers from discharge. The City ultimately “bought” off the plaintiff-wife by offering just enough where it became more sensible for her and her low income husband to accept the money rather than to gamble it at trial. Finally, these cases are very hard to try because generally police abuse plaintiffs have some criminal background that does not look favorable in the eyes of a jury. Our case ultimately settled for considerably more than \$20,000. But in the process, we spent hundreds of hours during the course of the litigation. As a result, it was impossible for us to justify to our firm the amount of time that we had expended given the fee that we ultimately generated. Compounding matters, our work on the case changed nothing about the operations of the Philadelphia Police Department. For example, Officer Zafno received nothing in the way of discipline or training. In fact, he seemed to rather enjoy the whole process, and the Philadelphia Police Department continued to operate the same way as it had prior to our filing. Our clients also expressed deep dissatisfaction with the results given that they believed that the value of their case far exceeded the amount they ultimately received.

From this, I learned that individual civil rights lawsuits generally do not change an entrenched police department and oftentimes do not leave clients feeling particularly satisfied or empowered.

Since that day, I have handled a number of police abuse cases. Almost all of them share the features described above. Additionally, these cases can be very expensive to litigate. In a recent police abuse case that I tried, the out-of-pocket expenses alone were somewhere in the neighborhood of \$15,000-\$20,000.⁷ The high

⁷ The predominant expenses came from the experts. The case involved a claim that a police officer had improperly administered handcuffs and then yanked the plaintiff by his wrists in such a manner and direction as to cause a rotator cuff injury. My client needed two surgeries to repair the damage to his

expenses, along with the low payoff, make these cases particularly unattractive to the private legal bar. And for those who are interested in “making a difference,” almost all civil rights cases are evaluated by the amount of money they generate. The process rarely directly generates any policy changes or training. The whole situation can prove quite frustrating.

As a result of these circumstances, at some point during the course of my career, I started gravitating away from police abuse work. Instead, I began taking on other types of civil rights cases, specifically in the employment realm, as I had always been attracted to the idea of fighting against workplace discrimination. To that end, I have litigated numerous discrimination cases on the basis of race and gender. I have also been counsel of record in several disability and age discrimination lawsuits. But again, my representation in any of these cases has rarely led me to believe that I was changing the existing racial order or eliminating any large scale or entrenched political inequalities that exist in the United States.

The following legal experience is not atypical: In 2005, I represented a female victim in a sexual harassment case. A female supervisor had subjected my client to unwanted sexual harassment over the course of one year. The supervisor would call my client “honey,” “sunshine,” “baby,” etc. My client found such names irritating and asked the supervisor to stop.

In response, the supervisor ramped up the harassment by (a) speaking about her sexual relationships in my client’s presence, (b) leering at my client’s body, including her breasts and buttocks, and (c) finding opportunities to “bump” into her at

shoulder. We had a police practices expert testify to the proper way to administer handcuffs and an orthopedic specialist testify to the mechanism of injury. Between reviewing the file, performing an independent medical examination, writing expert reports, and ultimately testifying, the aggregate expert costs were in the neighborhood of \$10,000-\$15,000.

work. My client complained to her employer, but the employer did nothing about it. The above-described fact pattern is not atypical for a sexual harassment case.

To minimize the emotional impact of the supervisor's harassment my client would attempt to avoid her boss in any way that she could. To prevent drawing any unwanted attention to her body, my client would slouch down in her chair behind her desk and wear sweaters over her blouse. She would lock the door to her office and take other evasive measures to escape her supervisor's presence. But because the harassment continued unabated, the stress experienced by my client continued to build and eventually she was forced to check herself into a hospital after experiencing chest palpitations at work that she mistook for a heart attack. We ultimately litigated the case and received approximately \$40,000 in damages and a separate award for attorney's fees.⁸ The defendant employer appealed, and the case was settled for a comparable amount. By all professional measures, given the non-physical nature of the injuries and the general lack of wage loss or other special damages,⁹ this was a very good result and was in line with what juries have awarded plaintiffs under similar circumstances. Nonetheless, my client expressed deep dissatisfaction with the outcome. She thought that the settlement figure was marginal given the indignities that she was forced to suffer. She felt frustrated at signing a settlement agreement that prohibited her from discussing the settlement amount with friends, family, and colleagues. She felt disgusted that she never received an apology from her company. For her, the process felt startlingly disempowering. What she experienced is not unusual.

⁸ Most civil rights statutes contain fee-shifting provisions such that the defendant will be responsible for paying for the prevailing plaintiffs' attorneys' fees.

⁹ Special damages are damages that are measurable economically and are comprised by such categories as wage loss, medical bills, etc. In contrast, general damages are intangible and are comprised of pain and suffering and other non-economic losses.

In many of my individual employment discrimination cases (much like those involving police abuse as well), I observed a uniform tendency for the courts, the attorneys, and ultimately the parties themselves to view cases solely through a monetary lens. The defendants frequently considered the case as a cost of doing business. For those cases that involve a wrongful discharge, the defendant employer almost never reinstates the plaintiff and the courts are also loath to order it. Even those plaintiffs who bring a claim for purposes of making a larger company difference ultimately end up being co-opted and bought off through a settlement offer due to their own precarious financial circumstances. This is a system that certainly has its shortcomings.

Class action employment discrimination litigation seems to be more promising on its face, but it also has its share of drawbacks. Starting in 2001, I was involved in a class action lawsuit on behalf of roughly one thousand African American and Hispanic employees brought by several firms, including Johnny Cochrane's, against the pharmaceutical giant Johnson & Johnson for race and national origin discrimination. The lawsuit alleged that the company and all of its subsidiary entities discriminated against its African-American and Hispanic employees by affording unequal pay and promotions. The case sought monetary damages and changes to the way that the company operated. The case involved massive discovery, that is, the sifting through of millions of pages of internal company documents and scores of depositions. I was responsible for interviewing putative class members, drafting affidavits regarding their treatment at the company, defending their depositions, and taking the depositions of a number of company executives. It is safe to say that the plaintiff firms spent millions and millions of dollars in time and expenses in litigating this case, which, as of this writing, is still ongoing. This is no small amount for small

plaintiff firms even when they are banded together. After about six years of litigating the case, the trial court denied class action certification on the basis that there were too many individual issues for it to be properly certified as a class action. The plaintiffs appealed the case to the Third Circuit Court of Appeals, and the Appeals Court affirmed the lower court decision. As a result, the plaintiffs' firms scaled down the size and scope of the case in an effort to have it recertified. Consequently, any success the plaintiffs do eventually have will be significantly limited.

At the time of this writing, the renewed Motion for Class Certification was pending. If the Motion was granted, the class certification could be appealed again, which will add another one to two years to the shelf life of the case. If the class certification survives appeal, the case will then proceed to trial, which could also take months to try. At trial, the defendant will have an opportunity to offer evidence to rebut each member's claims that they were illegally discriminated against in pay or promotions. If, on the other hand, class certification is denied, the case will go to trial on behalf of the five or six named class representatives. As anyone can see, any effort to make significant changes in simply one large company is incredibly risky due to the requisite expenditure of vast resources and the dubious probability of success. And even if the plaintiffs are lucky and prevail, there are still 29.6 million other businesses in the United States that may be engaging in similar practices.¹⁰ This experience proved to me how difficult it is in today's day and age to use litigation to systemically challenge workplace discriminatory practices in a large

¹⁰ In 2008, according to the U.S. Small Business Administration Office of Advocacy, there were 29.6 million businesses in the United States. U.S. Small Business Administration Office of Advocacy, "SBA.gov," *U.S. Small Business Administration*, accessible at: <http://www.sba.gov/advo/stats/sbfaq.pdf>

employer. One colleague described the process of rooting out work place discrimination through litigation as performing “brain surgery with a chain saw.”¹¹

As a result of these and other comparable experiences,¹² I began to wonder about the ability of law to engineer the type of changes that I thought it once capable of performing.

I am neither alone nor the first to question the efficacy of litigation as a driver of socio-political reform. In fact, there has been an ongoing debate since the turn of the twentieth century regarding the capacity of litigation to serve as a force for that kind of change.¹³ But the participants to this debate have largely been academics and/or legal scholars. Few have asked the litigants whether the law has served them well. Additionally, with limited exception, no one has interviewed the attorneys who advocate these causes, the judges who adjudicate these disputes, and/or the staff employees of the governmental agencies who are charged with investigating and

¹¹ Interview with Scott George, Esq.

¹² Over the years, I have worked in a number of public interest legal settings. For example, during my second year of law school, I interned at the ACLU National Prison Project, working on a number of very important civil rights cases, including cases that were litigated in the United States Supreme Court and were brought by prisoners alleging unconstitutional prison conditions. Following law school, I volunteered with Community Legal Services in the Employment Department. I also volunteered with a number of legal services organizations providing representation to low income individuals. In 1996, I started my own practice, working in a variety of different civil rights and public interest areas. For example, for several years, I represented families who were suing tobacco companies. I also handled a number of constitutional claims brought by individuals who had been harmed by unconstitutional state action. In addition to my employment discrimination caseload, I also represent children with special education needs against school districts. Currently, I would estimate that forty percent of my practice consists of special education cases, fifty percent of my practice consists of employment discrimination cases, and ten percent of my practice consists of other miscellaneous civil rights matters. A majority of my clients are of limited means and either possess low or no income.

¹³ See for e.g., Austin Sarat & Stuart Scheingold, *Cause Lawyering and the State in a Global Era* (Oxford: Oxford University Press, 2001); Rosenberg, *The Hollow Hope*; Gerald P. López, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice* (Boulder, CO: Westview Press, 1992); Mary Ann Glendon, *A Nation Under Lawyers* (Cambridge: Harvard University Press, 1994); Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Ann Arbor, MI: University of Michigan Press, 1974); Mark Tushnet, “An Essay on Rights,” *Texas Law Review*, Vol. 62, (1984) 1363; Jack Katz, *Poor People's Lawyers In Transition* (New Brunswick, NJ: Rutgers University Press, 1982); Joel Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (New York: Academic Press Inc., 1978).

administering the civil rights laws and prosecuting complaints filed pursuant to those statutes. And, while I have an insider's perspective, I do not know if my particular perspective is uniformly shared.

Accordingly, for the purposes of this dissertation, I decided to examine this very issue by ascertaining the efficacy of these statutes in a two-fold manner: (1) I have conducted an investigation that is informed by ethnographic methodology to assess the perspective of the actual participants in the legal system, i.e., the parties, their attorneys, at least one relevant governmental administrative agency, and the judicial decision makers; (2) I have looked at and analyzed some of the existing empirical studies regarding civil rights litigation. In analyzing this information, I also attempt to portray how our governmentally devised civil rights regime affects notions of race, identity, and citizenship.

In *Racial Formation in the United States: From the 1960s to the 1980s*, Omi and Winant described the notion of "race" as a "socio-historical concept" that is "defined and contested throughout society, in both collective action and personal practice. In the process, racial categories themselves are formed, transformed, destroyed and re-formed."¹⁴ According to Omi and Winant's conceptualization, race is both geographically and temporally bounded and structured. In other words, race is idiosyncratic, possessing different connotations depending upon location, era, and context. In its broadest terms, the forces that shape race are political, economic and socio-cultural, and they serve to generate powerful racial ideologies.¹⁵ One of the

¹⁴ Michael Omi & Howard Winant, *Racial formation in the United States: from the 1960s to the 1990s* (New York: Routledge, 1994), 55.

¹⁵ Thus, the current racial order in Havana, Cuba, with all of its idiosyncratic permutations, will look dramatically different than the late nineteenth century racial order of Los Angeles, California.

above-described political forces at work is the state, which, in part, constructs race juridically.¹⁶

Because the legal system is one place where race is contested, negotiated, and repeatedly reiterated in some form, for purposes of this dissertation, I attempt to describe how the civil rights litigation system currently contributes to the formation of race and affects notions of identity and citizenship in Pennsylvania, and by extension, the northeast region of the United States.

¹⁶ See for e.g.: A. Leon Higginbotham, Jr., *In the Matter of Color* (Oxford and New York: Oxford University Press, 1978); A. Leon Higginbotham, Jr., *Shades of Freedom: Racial Politics and Presumptions of the American Legal Process* (Oxford and New York: Oxford University Press, 1996); Anthony Marx, *Making Race and Nation: A Comparison of the United States, South Africa, and Brazil* (Cambridge: Cambridge University Press, 1998).

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Second, as my graduate school years wore on, there were times when I doubted that I would ever make it beyond ABD. It was Robin Lynn and LT 33 that helped me declare my commitment to completing it. Robin, I will always remain inspired by your vision of the world. To paraphrase Tracey Chapman, it really is possible for ordinary individuals to wear the masks of angels.

Third, as I swirled to find something worthwhile to write about, Victoria Hattam, Ph.D. convinced me to choose a topic that was related to my work as a civil rights attorney. Without her gentle but steadfast prodding, I doubt I would have ever found a project as meaningful and enjoyable as I ultimately did.

Fourth, I labored for a method that would befit the undertaking. Timothy Pachirat, Ph.D. suggested that I write about the perspectives of the major participants of the civil rights system by giving voice to their personal experiences through in depth interviews. I took his advice, and the dissertation is much better for it.

Fifth, I owe a huge debt of gratitude to the Pennsylvania Human Relations Commission and its dedicated staff who have committed their professional lives to the mission of eradicating discrimination in the Commonwealth of Pennsylvania. I owe special thanks to Homer Floyd, Michael Hardiman, Charles Nier, and Stephen Glassman. They were kind enough to open the doors of the Commission to me so that I could observe the Commission's processes and write about its operations.

Sixth, I am sincerely appreciative to the claimants who gave me entry to their lives. I hope that this dissertation adequately expresses their experiences in a way that is dignifying.

Seventh, a number of civil rights attorneys, some of them lions in the field, graciously agreed to share their litigation stories with me. Their insights proved invaluable. They included Alice Ballard, James Bell, Lawrence Besnoff, Alfred Blumrosen, William Braveman, Stephen Console, Jane Dalton, Alan Epstein, Frank Finch, Sidney Gold, Stephen Gold, Harold Goodman, Jack Greenberg, David Kairys, Kevin Lovitz, Charisse Lillie, Cyrus Mehri, Michael Ossip, Barbara Ransom, and David Rudovsky.

Eighth, many federal judges were also kind enough to discuss their perspectives from the perch of the judiciary. They included Judge Stewart Dalzell,

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Chapter 1

Civil Rights Litigation and Racial Equality in the Workplace

I. INTRODUCTION

This dissertation seeks to enter into the historical debate regarding the utility of civil rights litigation to serve as a force for progressive socio-political change. Unlike many of the participants in the debate, I waded into it from the perspective of an insider to the system, having served as a civil rights litigator for roughly twenty years. Furthermore, unlike most others who have considered the question, I investigate it through a lens that is informed by political ethnography by (1) studying the operations of a governmental agency charged with enforcing civil rights laws and (2) interviewing and synthesizing the perspectives of most of the major participants who are a part of the civil rights litigation system, including the claimants who file the charges, the attorneys who litigate the claims, and the judges who adjudicate the disputes. Finally, my own experiences as a practicing attorney inform my conclusions.

The conventional view has been that civil rights litigation, through high impact cases like *Brown v. Board of Education*, can have dramatic effects on the body politic.¹⁷ Subsequent reformists have argued that courts and attendant civil rights litigation have had limited impact.¹⁸

¹⁷ See for e.g.: Richard Kluger, *Simple Justice, The History of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Random House, 1977); Jack Greenberg, "Litigation for Social Change: Methods, Limits and Role in Democracy," (New York: Association of the Bar of New York City, 1974); Robert Carter, "The Warren Court and Desegregation," *University of Michigan Law Review*, Vol. 67, No. 2, (1968), 237-248.

¹⁸ See for e.g.: Donald Horowitz, *Courts and Social Policy* (Washington, DC: Brookings Institution, 1977); Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, 1st ed. (Chicago: University of Chicago Press, 1991).

With some limited exception, most of the traditional scholarship on this issue has framed the inquiry in ways that over-generalize litigation's impact by specifically failing to consider context and circumstances when assessing it.¹⁹ Rather than a critical analysis regarding *Brown*'s applicability to other contexts, scholars assume it *a priori* as part of their study. Unfortunately, such imprecise presumptions invariably distort the analysis by promoting conclusions that will either overstate the value of litigation in some contexts or underemphasize its importance at other times, thereby disserving civil rights lawyering more broadly.

Given the traditional binary nature of the debate, with the literature either glorifying or marginalizing its efficacy, there have been few well-organized attempts to identify the conditions under which civil rights litigation may serve as a catalyst for change. Thus, any attempt to enter into this scholarship should pick a particular area of civil rights litigation to investigate. My research seeks to serve as a corrective to that distortion by examining the efficacy of civil rights litigation in a specific socio-political context – race discrimination in the workplace.

While my investigation was largely confined to the employment context in the Commonwealth of Pennsylvania, from this more discrete investigation, I will seek to make some larger points about the nature of civil rights litigation in general, its effect on individual litigants, and the general role of litigation in remediating racial inequality.

To summarize my arguments at the outset, first, I contend that “rights” are important and matter both to progressive racial causes because “rights” not only serve as important symbols but also directly and empirically impact an individual's life

¹⁹ *But see* Susan Sturm, “The Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review*, Vol. 142, No. 2 (1993), 639-738.

chances. While such a conclusion may sound axiomatic, a number of contemporary progressive reformers have questioned this by pointing to, among other shortcomings, the indeterminacy of rights, and therefore, the potential regressive nature of political movements that are grounded upon them.

Second, in addition to arguing that rights matter, I also contend that litigation has, at times, been instrumental to enforcing those rights and remediating racial inequality. In those circumstances where courts and/or administrative agencies have proven effective, they have also functioned as important progressive political institutions that have consequently changed the fortunes of entire groups of people and affected society more largely.

Third, while civil rights litigation clearly has had an impact in promoting racial progress, I also contend that the liberal narrative that mythologized courts as modern-day protectors of minority interests has largely been oversold to the American public. This perspective arose from such landmark cases as *Brown v. Board of Education*. Even a slightly softer version, which generally views courts as a place to correct smaller injustices, may often prove too grandiose. Rather, the effectiveness of the judiciary, while important at times, can be much modest than many court observers have traditionally allowed. The same is true for civil rights administrative agencies. To be sure, in a number of important circumstances, civil rights litigation can change the trajectory of lives. In fact, in some circumstances, cause lawyering in racial matters has proven determinative to achieving certain political aims and changing the fortunes of many people. But all too frequently, the success of litigation will depend upon a litany of factors, including the administrative personnel, the composition of the court, the identity of the attorneys, the relief sought, the patency of the offense, and a number of other variables, over which administrative agencies and

judicial tribunals exercise little control. Given that, it is important for legal activists to identify those circumstances where litigation has been and can prove politically useful versus those where it may have marginal utility.

Fourth, even worse than being ineffectual, I contend that civil rights litigation can prove detrimental in certain circumstances. On those occasions, the decision to pursue litigation does not simply amount to a choice between faring better and maintaining the status quo. This is most aptly illustrated by the decision in *Dred Scot*. But in cases where legal rulings have no great breadth of social impact, the litigation process can routinely prove highly disempowering to individual parties. It can add a psychic injury to the pre-existing indignities that a discrimination victim has already suffered. Thus, while litigation is politically imagined as a way of advancing rights, in reality, in many instances, litigation can compound the harm. But the story proves more complicated.

Even though claim-making may indeed hurt litigants, I will argue that adjudicative bodies, such as courts and administrative agencies, still serve important psycho-political functions for those invoking their processes. In other words, even though litigation can be injurious, judicial and administrative tribunals nonetheless provide critical space for civil rights plaintiffs to reaffirm their essential political and civic identities. As became clear from my interviews with litigants, the process of pursuing a claim is an important performative act that not only reaffirms an essential aspect of their political, racial, and even human identity, but also connects many of them to important movements of the past. The act of “standing up,” through claim-making, even confers a sense of dignity while concurrently creating a feeling of misrecognition through the process. In that way, civil rights laws and litigation, while ostensibly about the politics of recognition, has a rather paradoxical relationship to it.

Finally, while I will demonstrate that civil right laws and litigation have had an important impact in promoting racial equality in the workplace, I also contend that the model of using civil rights litigation to achieve systemic workplace reforms may have run its course. The reason for this arises from the fact that the nature of racism in the workplace has changed considerably. This change is attributable in some measure to civil rights litigation. Whereas in the 1960s, 1970s and even 1980s, racism in the workplace was much more blatant, now its appearance is subtler and harder to detect. As a result, not only is it more difficult to prove, but adjudicative bodies are much less sympathetic to the claims. Ironically, the successes of litigation are responsible in part for the decline in its efficacy.

But that does not invalidate the significance of anti-discrimination laws as they still serve as essential deterrents to discrimination. Rather, it is simply my position that litigation that aims to achieve additional systematic reforms in the workplace will not attain much above and beyond what racial gains have already been obtained. As a result, it may be important for activists to develop other strategies for advancing the interests of racial minorities in the workplace.

II. DEFINING “CIVIL RIGHTS LITIGATION”

The phrase “civil rights litigation” encompasses a universe of substantive legal sub-fields. In its most general form, “civil rights litigation” can be defined and/or categorized by the subject matter, subset of laws, or special interest groups affected.

This nation’s original civil rights laws are enshrined in the United States Constitution’s Bill of Rights. Initially, the Bill of Rights only protected enumerated individual rights against federal intrusion. In the aftermath of the Civil War, Congress passed the 13th, 14th, and 15th Amendments to the United States

Constitution, which considerably broadened the field. It was these amendments that gave birth to the first wave of civil rights litigation as discussed more fully in Chapter 2.

The 13th Amendment prohibited involuntary servitude and slavery. The 14th Amendment barred states from denying individuals their rights to equal protection and due process. The 15th Amendment forbade denying the right to vote on the basis of color, race, or previous condition of servitude.

Given the sprawling nature of constitutional law, many constitutional practitioners have subspecialized by focusing their practice on a particular set of political and social relationships that they seek to reform. For example, police-abuse civil rights attorneys sue under the 4th Amendment, which bars unreasonable searches and seizures such as the excessive use of force, false arrests, and breaking and entering. These attorneys also resort to the 5th, 6th, and 14th Amendments to protect the rights of the accused.

For civil rights attorneys who specialize in prison litigation, the applicable constitutional provisions are generally either the 8th or the 14th Amendments, which afford certain rights to inmates and/or pretrial detainees. The 1st Amendment is also implicated when prisoners' claim that they are being denied access to courts or prison officials are infringing upon their religious freedoms or rights to free speech.

In addition to the United States Constitution, practitioners also file "civil rights" lawsuits under a variety of federal and state statutes that implicate the rights field.²⁰ Some of these statutes were passed as a result of power conferred to Congress

²⁰ For a number of reasons, there is a fair degree of overlap between constitutional protections and statutory rights. For example, some constitutional amendments explicitly empower Congress to pass laws to enforce constitutional guarantees through legislation. *See for example*, the 13th, 14th, and 15th Amendments. On other occasions, Congress passes and/or amends laws to "legislatively fix" a Supreme Court's overly restrictive interpretations of such laws.

by the 13th, 14th and 15th Amendments. Other important civil rights statutes were passed pursuant to Congressional power under the Commerce Clause of the United States Constitution.

There are legal practitioners who rely primarily on statutory law and specialize solely in the area of voting. Voting rights are specifically protected by the 15th Amendment, the Enforcement Act of 1870,²¹ the Civil Rights Acts of 1957, 1960, 1964, and most extensively, by the Voting Rights Act of 1965 (“VRA”)²² and the VRA’s subsequent amendments.

There is also a body of attorneys who focus their efforts entirely on housing. The right to be free from discrimination in housing is protected by the 14th Amendment, by the Civil Rights Act of 1866,²³ by the Fair Housing Act of 1968,²⁴ and by a number of state and local laws.

Freedom of religion is its own specialization, and rights to the free exercise of religion are protected under the First Amendment²⁵ and under the Religious Freedom Restoration Act of 1993.

²¹ The enforcement act, (42 U.S.C. § 1971), states, in relevant part, that “All citizens of the United States who are otherwise qualified by law to vote ... shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude.

²² The VRA, (42 U.S.C. §§ 1973 to 1973aa-6), provided, among other guarantees, that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

²³ The Civil Rights Act of 1866, (42 U.S.C. § 1982), states that “All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.”

²⁴ The Fair Housing Act, (42 U.S.C. 3601-3619), makes it illegal to deny “a dwelling to any person because of race, color, religion, sex, familial status or national origin or to “discriminate in the terms ... or in the provision of services or facilities” regarding the sale or rental of property. In 1988, the law was extended to prohibit discrimination against families with children and individuals with disabilities.

²⁵ The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

Civil rights attorneys who work primarily in the area of school discrimination rely primarily upon the 14th Amendment, Title VI of the Civil Rights Act of 1964,²⁶ and Title IX of the Education Amendment Acts of 1972.²⁷ Title VI and Title IX respectively prohibit discrimination on account of race and sex, by private entities, like universities that receive federal funding. There are also a number of state and local laws that prohibit such discrimination.²⁸

Experts in the area of employment generally utilize the Civil Rights Act of 1866,²⁹ Title VII of the 1964 Civil Rights Act, as amended in 1991,³⁰ the Equal Pay Act of 1963,³¹ the Age Discrimination in Employment Act of 1968 (“ADEA”)³², Title I of the Americans with Disabilities Act (“ADA”) of 1990,³³ the Family Medical Leave Act (“FMLA”) of 1993,³⁴ Presidential Executive Order 11246,³⁵ and the Immigration Reform and Control Act of 1986.³⁶ There are also a number of state and

²⁶ 42 U.S.C. § 2000d.

²⁷ 42 U.S.C. §§ 1681-1686.

²⁸ Title VI provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance (42 U.S.C. § 2000d). Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” (20 U.S.C. §§ 1681-1686).

²⁹ 42 U.S.C. § 1981.

³⁰ 42 U.S.C. § 2000e.

³¹ 29 U.S.C. § 206(d).

³² 29 U.S.C. §§ 621-634.

³³ 42 U.S.C. §§ 12101 et seq.

³⁴ 29 U.S.C. §§ 2601 et seq. The FMLA requires employers to afford unpaid medical leave to qualified employees.

³⁵ Executive Order 11246 requires contractors who receive federal contracts to engage in “affirmative action” in hiring and promotions of women and qualified minorities.

³⁶ 8 U.S.C. § 1324A. The law prohibits employers from hiring illegal aliens but also prohibits discrimination against United States citizens or individuals intending to become citizens.

local laws that prohibit such discrimination. For purposes of race discrimination in employment, the relevant federal laws are the Civil Rights Act of 1866 and Title VII of the 1964 Civil Rights Act.

Those who concentrate their practice on behalf of disabled individuals may litigate under Section 504 of the Vocational Rehabilitation Act of 1973³⁷ or under various titles of the ADA. Akin to this practice area, there are special education attorneys who also bring cases under the Individuals with Disabilities Education Act (IDEA).³⁸

And, as one can imagine, there are lawyers who dabble in a number of sub-specialties and so may rely upon a number of these laws in the normal course of their work.

For purposes of this dissertation, I will predominantly focus on civil rights litigation in the context of racial discrimination against African Americans in the workplace.³⁹

III. STATEMENT OF RESEARCH QUESTIONS

In this dissertation, I will research the following interrelated questions.

Research Question no. 1 - How effective are the civil rights laws and litigation in preventing racially disparate treatment in the workplace?

³⁷ 29 U.S.C. § 794.

³⁸ 20 U.S.C. §§ 1400 et seq.

³⁹ I justify studying these questions in the employment context for the following reasons. First, while my background in civil rights lawyering is not exclusively limited to employment discrimination, I have concentrated a large percentage of my practice to employment discrimination litigation over roughly the past twenty years. Accordingly, I have significant experience in this legal field. Second, examining discrimination in the workplace is particularly important because one's livelihood generally dictates life chances. Third, there is an abundance of data to examine in the context of job discrimination which makes the analysis feasible.

Research Question no. 2 – How effective are the civil rights laws and litigation in remediating claims of racial discrimination in the workplace?⁴⁰

Research Question No. 3 – How does civil rights claim-making in the employment context empower or disempower individuals and affect notions of race, identity, and citizenship, as assessed through semi-structured claimant interviews?

From my research of these questions, I will attempt to draw out and briefly describe in my concluding remarks several implications for the future of civil rights litigation in general.

A. Research Question No. 1 - How Effective are Civil Rights Laws and Litigation in Preventing Racially Disparate Treatment in the Workplace?

As for the first research question, the data I uncovered suggests that civil rights laws and litigation have proven effective in preventing certain types of racial discrimination from occurring in the workplace. In this dissertation, I will attempt to tease out the circumstances under which these discrimination laws have been more or less effective, which I summarize below.

First, in the employment context, civil rights litigation and the imagined fear of it have been fairly effective at decreasing instances (at least reported instances) of the most overt forms of discrimination, and the laws serve as an ongoing deterrent to such racialized iterations. In the past, whereas it was commonplace for employers to openly discriminate and harass minority employees, now municipalities, unions, and reputable companies generally cannot engage in or tolerate that type of blatant

⁴⁰The first two research questions of this dissertation are derived from the stated purposes of Title VII, that is, (1) to eradicate workplace discrimination and (2) to make victims whole. *See Albermarle Paper Co v Moody*, 422 U.S. 405, 417-18 (1975). *See also*: Nicholas Soltman, “What About “Me (Too)”?” The Case for Admitting Evidence of Discrimination against Nonparties,” *University of Chicago Law Review*, Vol. 76, No. 4, (2009), 1879. Soltman explains, “Broadly speaking, Title VII has two primary purposes: eradicating discrimination and making the victims of employment discrimination whole.”

discrimination for fear of litigation and its attendant financial risks and public backlash.

Historically, co-workers were known to indiscriminately use the “N-word” and other racial epithets, to display nooses in the workplace, to scrawl “KKK” letters across some physical edifice, to depict African Americans in subhuman form, or to otherwise subject black workers to some other form of racial harassment. But the frequency of such occurrences has greatly diminished. Based on the data that I reviewed, I contend that this change is due, at least, in part to civil rights litigation.

Second, in the area of facially neutral policies that had a racially disparate impact, the laws have also proven to be a success story. In the past, many employers screened job applicants by administering to them various psychological, cognitive, and vocational tests⁴¹ in making hiring, promotional and other job assignment determinations. Traditionally, many of the tests had no predictive value for job performance but had a significant disparate impact on black employees and/or applicants in comparison to their white counterparts. Civil rights litigation ended much of the old testing regime, and now testing that disproportionately impacts a protected group is illegal unless the exams are considered both job-related and consistent with business necessity.⁴² As a result, employment opportunities for

⁴¹ Employers utilized a host of tests, but certain popular ones included the Wonderlic Cognitive Ability Test, the *Bennet Mechanical Aptitude Test*, the Minnesota Paper Form Board (MPFB), the Revised Beta Examination, a so-called nonverbal intelligence test, Hartman Value Profile tests, the Lee-Clark Arithmetic Test, and other examinations of reading comprehensions, arithmetic fundamentals, and the like.

⁴² See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which is later codified by the 1991 Civil Rights Act. See also: *Teal v. State of Conn.*, 645 F.2d 133 (1981), which holds that plaintiff had stated a *prima facie* case where employer’s selection test had a disparate impact upon black candidates for employment positions; *Hameed v. International Ass’n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506 (8th Cir. 1980), holding that a high school diploma as a condition for admission into an ironworkers' union's apprentice program violated Title VII since it had a disparate impact upon Black applicants; *Guardians Ass’n of New York City Police Dept., Inc. v. Civil Service*, 630 F.2d 79 (2nd Cir 1980), enjoining testing that had a disparate impact on black applicants applying for entry level police officer positions in the New York Police Department; *James v.*

African Americans and other protected classes of people have exponentially increased.⁴³

Finally, in part as an outgrowth of these civil rights laws, respondents who I interviewed asserted that many employers have institutionalized practices to help prevent illegal discrimination and to promote management of diversity through human resource (HR) departments, EEO training, complaint procedures and processing, and the like. According to respondents, these types of institutional reforms were non-existent either before the passage of Title VII or the subsequent tide of litigation that quickly followed in its wake.

Notably, companies have not adopted such measures for reasons of morality. Rather, they have done so to protect their bottom line. As a result, while in the early 1970s there was no such thing as a human resources department, now it is almost unheard of for most large companies not to have an HR department, some type of equal employment opportunity position, diversity training, complaint procedures, and sometimes even a diversity officer.

The effectiveness of civil rights laws and litigation in achieving their stated aims is also highly dependent upon the type of company involved. For example, smaller companies less frequently understand the ramifications of violating the civil

Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), holding that intelligence testing that had racially disparate impact in initial job assignments violated Title VII.

⁴³For example, in *EEOC v. Ford Motor Co. and United Automobile Workers of America*, No. 1:04-CV-00845 (S.D. Ohio June 16, 2005), the EEOC negotiated a settlement with Ford Motor Co. on behalf of a nationwide class of black workers who were precluded from entering an apprenticeship program after taking a cognitive-abilities test called the Apprenticeship Training Selection System (ATSS). The ATSS supposedly examined applicants in verbal, numerical, and spatial reasoning in order to assess mechanical capabilities. The ATSS disparately impacted African Americans by disproportionately excluding them from consideration. Ford agreed to replace the ATSS with a different selection procedure and to pay out 8.5 million in damages. Additionally, many physical job strength requirements have been eliminated because they disproportionately excluded women when the requirements had no bearing on job performance.

rights laws and therefore are more prone to transgress them. Additionally, the civil rights laws are relatively more effective in guaranteeing equal opportunity with companies that have progressive, forward-thinking leaders. These employers make efforts to learn and understand the laws' mandates and to enforce those prescriptions.

But even as reported instances of blatant discrimination have dropped in frequency, my research revealed that other more subtle forms of racial discrimination have taken hold and persist in the workplace. Civil rights litigation simply appears incapable of rooting out these more covert forms because it is exceedingly hard for a plaintiff to establish an employer's intent to discriminate when the evidence is not blatant. As a result, because it is so difficult to carry the burden of proof, the associated costs for employers who continue to engage in more subtle forms of discrimination is perceived by them to be fairly *de minimis*, that is, as a cost of doing business. Further, the expenses attendant to pursuing litigation is felt to be fairly high for the employee. Consequently, civil rights litigation cannot effectively address subtle circumstantial discrimination.

B. Research Question No. 2 - How Effective Are the Civil Rights Laws and Litigation in Remediating Claims of Racial Discrimination in the Workplace?

As for the second research question - remediating individual claims of discrimination- the data shows that the civil rights laws have been less effective in terms of their remedial power to make discrimination victims whole.⁴⁴ For example, while there are notable exceptions, victims of discrimination generally fair poorly both at trial and in settlements, and they generally settle claims for a mere fraction of the full value of the alleged victim's damages. I argue that this is largely a function of

⁴⁴ As our Supreme Court has held, it is the purpose of Title VII "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

the difficulty that plaintiffs have in proving their allegations. Additionally, there is a general lack of receptivity by federal courts for these types of cases and plaintiffs. Indeed, many attorneys and judges indicated that race discrimination cases are the hardest type of employment discrimination actions to bring. This difficulty depresses their market value.

C. Research Question No. 3 - How Does Civil Rights Claim-making in the Employment Context Empower or Disempower Individuals and Affect Notions of Race, Identity, and Citizenship?

Finally, it is clear that litigation both simultaneously empowers and disempowers litigants and in so doing affects notions of race, identity, and citizenship. The degree to which the litigant feels empowered and/or disempowered depends upon a host of variables. For example, most interviewees testified that the process of learning about discrimination law and the contours of one's civil rights can feel psychologically empowering. The process of filing a claim can also add to that sensation. But there is also a high correlation between poor outcomes in the litigation process and a feeling of alienation. Given that most litigation produces outcomes that favor the employer, it stands to reason that in all but a few cases, litigation is an overall disempowering process. Moreover, even when a plaintiff can successfully prove discrimination, it is exceedingly difficult for a court or administrative body to order, enforce, and monitor changes in the way a company does business. Due to the inability to either reform a company or obtain satisfactory monetary damages to compensate for injuries, litigation almost always amounts to a dissatisfying process.

Most attorneys I interviewed confirmed this conclusion, stating that most of their clients remain deeply dissatisfied by the process. They receive far less than they should have and that their ensuing position is never better or equal to what it would have been had the alleged discrimination never occurred. Furthermore, by and large,

(a) claimants/plaintiffs' expectations of redress and remediation are never met; (b) their claims of exacting justice get converted into monetary sums and the monetary amount received is far less than what they feel that they are owed to fully compensate them for their injury; (c) litigation rarely forces any remedial training in their places of employment; (d) the claimant/employee is forced to agree to a highly dissatisfying confidentiality provision as a condition of settlement; (e) the company rarely, if ever, admits to wrongdoing; (f) the company rarely issues an apology; (g) sometimes, the claimant will have to agree to a non-disparagement clause as a condition of settlement, and (h) if the matter involves a claim of discriminatory discharge, the employee almost never receives reinstatement.

D. Implications of Research for Civil Rights Litigation in General

Based upon my research, in my concluding remarks, I will also sketch out a number of factors that civil rights lawyers should consider when pursuing litigation in other social contexts. There are the obvious considerations, which scholars have traditionally discussed such as a strong and receptive court, effective lawyering, and a fair and impartial jury. But even assuming the coalescence of these factors, I will argue that civil rights litigation will be more or less ineffective unless some combination of the following factors are present: (1) the subject matter of the litigation presents some open and obvious violation of the law, (2) the transgression at issue violates prevailing societal norms of justice, and (3) the relief requested is the type that a court can order, and where appropriate, can supervise to ensure compliance.

There are, of course, exceptions to this tentative outline. Clearly, there are occasions when more subtle issues receive favorable treatment by the courts and instances when courts will go against the grain of public sentiment in mandating relief

that achieves the stated aims of litigation. But the low probability of success becomes self-reinforcing as it is much harder to find an attorney to litigate such cases. Judges are less inclined to stake out uncharted territory.

IV. IMPORTANCE AND NOVELTY OF THIS RESEARCH

The research that I conducted is significant because civil rights activists have long attempted to use litigation as a way of remediating a variety of forms of political and social inequality. In so doing, one of the primary aims of this litigation is to improve the life chances of traditionally disadvantaged individuals, such as African Americans. In the process, cause lawyers may target litigation efforts at discrimination in employment, housing, health, the criminal justice system, education, government, voting, and a host of other areas. Thus, the political stakes involved in assessing the utility of civil rights litigation in certain defined contexts cannot be overstated.

Consider the current circumstances of African Americans. Between the mid-1960s and the year 2000, the median household income for African Americans as a percentage of white household income has hovered somewhere between 55%-65% of what whites earn.⁴⁵ From 1960 to 2000, anywhere from two to five times as many African Americans were living below the poverty threshold as compared to white Americans.⁴⁶ From 1972 to the present, black Americans consistently had unemployment rates that were two to three times higher than white unemployment

⁴⁵ Carmen DeNavas-Walt, Bernadette Proctor, and Jessica Smith, "Income, Poverty, and Health Insurance Coverage in the United States," Consumer Income, Consumer Population Reports (2006). Accessible at <http://www.census.gov/prod/2007pubs/p60-233.pdf>

⁴⁶ Bernadette Proctor and Joseph Dalaker, "Poverty in the United States 2001," Consumer Income, Consumer Population Reports (2003). Accessible at <http://www2.census.gov/prod2/popscan/p60-222.pdf>

rates.⁴⁷ Blacks have ten cents of aggregate wealth for every dollar that whites have.⁴⁸ On average, African Americans live five years less than white Americans,⁴⁹ and infant mortality rates for black babies are twice as high for white babies.⁵⁰ Additionally, blacks are disproportionately singled out for disparately worse treatment by the justice system, subject to greater police stops, arrests, and harsher sentences, including the imposition of the death penalty.⁵¹

Given these disparities, it is essential to gauge the effectiveness of a litigation model at remediating racial inequality, given its traditional use in the United States.⁵²

As noted above, the passage of some of our better known civil rights laws is a fairly recent phenomenon that, with limited exception, really started in earnest in the 1960s. As a result, earlier civil rights cases, that predate the 1960s, were litigated

⁴⁷ See: "Black and White Unemployment Over Time," *Economists View*, (1/16/2006). Accessible at http://economistsview.typepad.com/economistsview/2006/01/black_and_white.html

⁴⁸ Melvin L. Oliver and Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective* (New York: Routledge, 1997); Meizhu Lui, Barbara Robles, Betsy Leondar-Wright, Rose Brewer, and Rebecca Adamson, *The Color of Wealth: The Story Behind the U.S. Racial Wealth Divide* (New York: United for a Fair Economy, 2006).

⁴⁹ Elizabeth Arias, "United States National Life Tables, 2003), *National Vital Statistics Report*, Vol. 54, No. 14 (3/28/2007). Accessible at http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf

⁵⁰ "Infant Mortality and Low Birth Weight Among Black and White Infants – United States, 1980-2000," *Morbidity and Mortality Report from the Center For Disease Control*, 51(27); 589-592, (7/12/2002). Accessible at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5127a1.htm>

⁵¹ See Angela J. Davis, "Race, Cops, and Traffic Stops," 51 *University of Miami Law Review* 425 (1997); David A. Harris, "'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops," *Journal of Criminal Law and Criminology*, Vol. 87, No. 2 (Winter, 1997); David Harris, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters," *Minnesota Law Review*, Vol. 84, No.2, (1999); David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (New York: The New Press, 1999), 36 and note 66; Christopher Schmitt, "Plea Bargaining Favors Whites, as Blacks, Hispanics Pay Price," *The San Jose Mercury News*, Dec. 8, 1991, 1A; David C. Baldus, Charles Pulaski, and George Woodworth, "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology*, Vol. 74, No. 3, (1983), 661-753; *McCleskey v. Kemp*, 481 U.S. 279, 321 (1987), J. Brennan dissenting.

⁵² See for e.g.: John Tye and Morgan Williams who note that classic models of impact lawyering come from cases like *Brown v. Board of Education*. "Networks and Norms: Social Justice Lawyering and Social Capital in Post-Katrina New Orleans," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 44, (2009).

under various articles to the Constitution. Nonetheless, while the sources of legal authority may have been different, both the modern and historical legal models for litigating these cases share a number of important features. Because most of the early civil rights litigation grew out of efforts that culminated in *Brown v. Board of Education*, it is important to understand the origin, history and debates that led to this landmark decision as they have important implications for contemporary civil rights legal efforts.

Thus, in Chapter 2, I provide a history of civil rights litigation and a discussion of the factors that gave it its current form and shape. Specifically, Chapter 2 traces why civil rights activists, at the turn of the 20th century, turned to the courts as one of the primary loci to take on the then-existing racial order. I also discuss some of the intellectual legal developments that made courts more attractive for activists and provide a summary of the contemporary rights debate.

After the more theoretical discussion that takes place in Chapter 2, I examine the current state of some of our more important civil rights statutes in Chapter 3. Specifically, Chapter 3 provides a primer on the Pennsylvania Human Relations Act (“PaHRA”), Title VII and Section 1981, the three statutes that African Americans primarily rely upon to redress claims of unlawful race discrimination in employment. Given the hostility to the passage of these laws, and the fact that such opposition influenced the form of the legislation that was ultimately passed, Chapter 3 also details the history surrounding their enactment. Finally, I also discuss the various rights and remedies these laws prescribe.

In Chapter 4, I review the jurisprudential history following the passage of the PaHRA, Title VII, and Section 1981. In sum, Chapter 4 retells the now familiar story of how an increasingly conservative judiciary has incrementally handed down

opinions that have eviscerated the effectiveness of these laws over time. But an important question remains: What if the courts had not been so conservative and the laws had been interpreted more liberally? Would the trajectory of civil rights litigation and its achievements over the course of the last forty years appear dramatically different?

Chapter 5 starts to examine that question by looking at the effectiveness of a state fair employment practices agency, the Pennsylvania Human Relations Commission, which by all reasonable measures has had a very liberal track record over the years, and has been staffed with very progressive-minded leaders and personnel. I describe the structure of the Pennsylvania Human Relations Commission, the method that I employed in measuring its effectiveness, some of its inherent strengths as an organization, and some historical trends in the filings of race discrimination claims over the last fifty years.

In Chapter 6, I assess Commission effectiveness based upon data and information that I collected from (a) a sampling of case files, (b) roughly fifty years of annual reports, and (c) over forty interviews with staff members and attorneys who practice before the Commission.

In Chapter 7, I examine the effectiveness of the Commission from the perspectives of claimants who have litigated their claims of discrimination before the Commission. To that end, I interviewed approximately fifteen claimants who filed race discrimination complaints and inquired into a number of areas that were designed to elicit a broad array of information about their experiences.

The law generally requires an individual who is claiming discrimination to exhaust his or her claims administratively by filing with either the EEOC or a comparable state fair employment practices commission, such as the Pennsylvania

Human Relations Commission. Following exhaustion, a claimant can then file a formal lawsuit with either the federal or state judiciary. Accordingly, after examining the effectiveness of the Pennsylvania Human Relations Commission, in Chapter 8, I move to the court system to consider the effectiveness of courts in remediating discrimination claims. I reviewed the current statistical trends regarding case filings and outcomes. I also interviewed approximately twenty attorneys and fifteen current or former federal judges. In Chapter 8, I share their views on whether litigation is effective for redressing discrimination.

Finally, in Chapter 9, I summarize my conclusions regarding the effectiveness of civil rights litigation to remediate racial inequality in the workplace and offer some thoughts regarding the future of civil rights litigation.

V. PRELIMINARY STATEMENT ON METHODOLOGY

Broadly speaking, my research relies on a range of methods, including interviews, ethnographic observation, data analysis, and archival inquiry. Specifically, I conducted in-depth, semi-structured interviews with litigants, attorneys, judges, and employees and former employees of the Pennsylvania Human Relations Commission. I also participated in ethnographic fieldwork, reviewed survey data, and examined Pennsylvania Human Relations Commission case files involving claims of race discrimination in the workplace. Because I have been a civil rights attorney for close to twenty years, I drew upon my own experiences to inform much of my research.⁵³ But I also validated my own experiences by asking other attorneys for

⁵³ My experiences as an attorney inform much of the instant analysis. In addition to my years of lawyering, I have also received certain recognition as an attorney by my peers for my expertise in the area of employment discrimination and civil rights that also serves as a testament to a certain level of knowledge in this area. *For more information, see:* <http://www.berneylaw.com/news.php>

their impressions of the litigation process. I also surveyed a vast array of existing data regarding workplace discrimination.

Notably, each method that I drew upon in conducting my research offered its own set of benefits and drawbacks. For example, when interviewing individuals, the researcher is generally limited by the informants' perceptions of events, their truthfulness, their memory, and ultimately, what they are willing to share with an outsider. In some measure, an independent document review allows the social scientist an opportunity to fact check informant responses. Similarly, casual "chatting" with interviewees facilitated more candid sentiments about my areas of inquiry. First hand observations allowed me to personally witness what informants described. And given my experiences as an attorney, I know when to inquire further into important substantive areas. As a result, the mosaic of research methods that I employed served to compensate for the limitations of some and to provide more layered information and accountings to explain the data.

To assess the efficacy of the civil rights laws, I measured their "effectiveness" by looking at a variety of metrics, including: (1) the frequency with which individuals litigate claims, including historical trends in administrative agency and federal court filings, (2) the time period it takes for such claims to be resolved, (3) trends in legal representation, (4) trends regarding the outcomes that claimants receive, including success rates when cases are filed, tried, appealed, and general settlement figures, (5) the costs that claimants incur as a result of bringing claims, and (6) litigants' perceptions of how well the system is working. In order to assess litigant's perceptions of the system, I evaluated the following: (a) claimant expectations when filing a complaint, (b) claimant opinions on whether those expectations were met; (c) claimant opinions regarding their perception of being treated fairly, courteously, and

respectfully, (d) claimant opinions as to whether they believe their claims were fairly investigated; (e) claimant satisfaction with the ultimate outcome of the case; and (f) claimants' overall experience(s) in litigating cases, including general feelings of empowerment.

In order to gauge the viewpoints of participants to the system, I interviewed fourteen civil rights claimants and twenty-three attorneys, approximately two-thirds of whom represent plaintiffs/claimants and the balance either exclusively representing employers or having represented both employees and employers. I also interviewed sixteen federal judges and approximately twenty-five employees of the Pennsylvania Human Relations Commission. As noted, the interviews were semi-structured. Most were tape-recorded and transcribed. I synthesized these interviews in an attempt to understand the utility of civil rights litigation in the employment context.

Chapter 2 - From Charles Hamilton Houston to Critical Race Theory and Beyond: The Debate over Civil Rights Litigation

I. A SHORT HISTORY OF CIVIL RIGHTS LITIGATION

Civil rights litigation was born out of the conflict between, on the one hand, Reconstruction Era amendments and civil rights laws of the 1860s and 1870s that sought to guarantee equal citizenship to the former slaves, and on the other hand, ubiquitous state and private activity that sought to enforce the old racial order.⁵⁴

In 1865, only months after the Civil War had officially ended, the United States Congress ratified the 13th Amendment, which abolished slavery. The following year, under authority of Section 2 of the 13th Amendment,⁵⁵ Congress passed the Civil Rights Act of 1866. This law conferred, *inter alia*, citizenship upon all individuals born in the United States and afforded all citizens of the United States, irrespective of

⁵⁴This is not to say that progressive attorneys had not previously attempted to utilize litigation as a means to challenge earlier racist mandates. For example, in 1849, a young Charles Sumner, who would later gain fame as a radical Republican Senator who sponsored the Civil Rights Act of 1875, brought the first school desegregation case of its kind, *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850). Sumner represented Benjamin F. Roberts, a black man, who sought to have his 5-year-old daughter, Sarah, attend a school closer to home. The school refused her admission on racial grounds. Anticipating arguments made 105 years later in *Brown v. Board of Education*, 347 U.S. 483 (1954), Sumner argued that the City of Boston's racial classifications violated notions of equality for they "inflict[ed] upon [black children] the stigma of caste [which] destroyed the equality of treatment to all citizens guaranteed by the Massachusetts Constitution." Sumner further contended that "the separation of the schools, so far from being for the benefit of both races, is an injury to both. It tends to create a feeling of degradation in the blacks, and of prejudice and uncharitableness in the white." The Massachusetts Supreme Court ruled against Roberts, holding that the City of Boston is empowered to decide what is in the best interests of its resident children. The *Plessy* court later cited the *Roberts* opinion in support of its infamous "separate but equal" principle.

⁵⁵ The 13th Amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

race, the same rights as white citizens to make and enforce contracts and to purchase, lease, sell, hold and convey real and personal property.⁵⁶

But because members of Congress had concerns that they either did not constitutionally have the power under the Thirteenth Amendment to pass this law, or that a conservative Supreme Court might find such authority lacking, in 1870 Congress reenacted the law following congressional ratification of the 14th Amendment in 1868. The 14th Amendment, among other provisions, granted citizenship to individuals born in the United States, irrespective of race, thereby abrogating the holding of *Dred Scott v. Sandford*, 60 U.S. 393 (1857), which had held that blacks were “of an inferior order,” and therefore incapable of possessing citizenship rights.⁵⁷ The 14th Amendment also provided for equal protection and prohibited deprivation of certain rights - life, liberty and property - without due process of law.⁵⁸ In 1870, Congress ratified the 15th Amendment, which guaranteed

⁵⁶ The Civil Rights Act of 1866, 14 Stat. 27 (1866), provides, in pertinent part:

[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, ... shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens ...

⁵⁷ The exact language from the *Dred Scott* opinion is that blacks are “beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect.”

⁵⁸ Sections 1 of the 14th Amendment provides:

Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

the franchise to Negroes.⁵⁹ Five years later, pursuant to Section 5, which gave Congress power to enforce the 14th Amendment, Congress passed the Civil Rights Act of 1875 which guaranteed everyone, irrespective of race, equal usage of public accommodations, including but not limited to private inns, theaters, public conveyances on land, etc.⁶⁰

On their face, these laws were far-reaching and seemed to guarantee political equality for the former African slave population as they appeared to outlaw both governmental and private discriminatory conduct. Nonetheless, both state and private actors continued to discriminate against blacks through the creation of Black Codes-legal edicts that discriminated against blacks in virtually every facet of social and political life.⁶¹ As a result, the first wave of civil rights litigation ultimately pitted

⁵⁹ The 15th Amendment states:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

⁶⁰ Section 1 of the Civil Rights Act of 1875, 18 Stat. 335, provided, in relevant part:

Whereas it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of government in its dealings with the people to mete out equal and exact justice to all, of whatever nativity, race, color, or persuasion, religious or political; and it being the appropriate object of legislation to enact great fundamental principles into law: Therefore,

Be it enacted, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

⁶¹ The Black Codes were laws passed by state legislatures and/or local municipalities that were designed to maintain the social and political subordination of the former slave population by suppressing a variety of political and social rights through barring interracial sexual relationships, mandating segregation in modes of public transportation, restricting the right to vote, limiting the types of jobs that blacks could hold, curtailing ownership rights in real property, restricting movement, and so on.

these Reconstruction Era legal measures against the codes. The codes won most of the early battles.⁶²

Perhaps, one of the most significant lawsuits was the *Civil Rights Cases*, 109 U.S. 3 (1883). The *Civil Rights Cases* consisted of five consolidated actions in which African Americans contended that the Civil Rights Act of 1875 gave them the right to patronize “white-only,” places of public accommodation. In deciding against the petitioners, the Supreme Court held that the Civil Rights Act of 1875 was unconstitutional because Congress did not have authority to enact it under the 14th Amendment because the 14th Amendment only regulated state action.⁶³ The Supreme Court’s ruling was formidable because as a result legal scholars and litigators had assumed for most of the twentieth century that the 1866 Civil Rights Act could only prohibit discrimination by the state. Furthermore, it signaled that Congress lacked the power to prohibit private discrimination. At the very least, the ruling demanded that Congress would have to rely upon a different source of legal authority to regulate it.

The Supreme Court dealt another major blow to the political and social rights of African Americans in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, Homer Plessy, a man who self-identified as octoroon, in the racial parlance of the day,⁶⁴ and

⁶² See for e.g.: *United States v. Reese*, 92 U. S. 214 (1875), upholding the constitutionality of the poll tax even though they prevented blacks from voting; *United States v. Cruikshank*, 92 U.S. 542 (1875), holding that due process and equal protection safeguards only applied to state action and therefore could not be used to prosecute white vigilante groups that attacked blacks; *Virginia v. Rives*, 100 U. S. 313 (1880), imposing procedural hurdle to challenging racial discrimination in jury selection; *Pace v. Alabama*, 106 U.S. 583 (1883), upholding the constitutionality of Alabama’s anti-miscegenation statute; *United States v. Harris*, 106 U.S. 629 (1883), holding that the equal protection clause which applied to state action could not be applied to private mob conduct that resulted in the beating and murder of African Americans; *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), upholding a school board’s authority to tax local black residents to fund an all-white school.

⁶³ See *United States v. Cruikshank*, 92 U.S. 542 (1876), *supra*.

⁶⁴ Octoroon was defined as 7/8th white and 1/8th black.

the Committee of Citizens decided to test the constitutionality of Louisiana's Separate Car Act, which required racially separate railway facilities. In a 7-1 vote, the United States Supreme Court upheld the law as constitutional on the grounds that its enactment had been a valid exercise of state police power. In so holding, the Court distinguished between "political equality" which is guaranteed by the 14th Amendment and so-called "social equality" which it held is not, reasoning that "the underlying fallacy of [Plessy's] argument ... consist[s] in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."⁶⁵ Consequently, "separate but equal" became constitutional doctrine.

Given these developments, prospects for utilizing the courts as a forum for civil rights advocacy seemed rather bleak at the turn of the century. This makes the achievements of civil rights litigators in the first fifty-five years of the 20th century appear all the more remarkable when one considers those successes against the backdrop of legal constraints under which these attorneys labored.⁶⁶

⁶⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁶⁶ However, there were also some important turn-of-the-century Supreme Court decisions that served as stepping-stones for later civil rights victories. The most important of them may have been *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In *Yick Wo*, the City of San Francisco had passed an ordinance requiring individuals who owned and operated laundry establishments in wooden buildings to obtain a license from the Board of Supervisors. The ordinance gave the Board considerable discretion in deciding upon applications for a license. Most of the laundries to whom the ordinance applied were owned and operated by Chinese. Further, no Chinese individuals were granted a license whereas a number of non-Chinese were. Plaintiff Yick Wo was fined for the continued operation of his laundry establishment and imprisoned when he failed to pay the fine. In considering the matter, the Court held that the Equal Protection clause of the 14th Amendment is violated when a race-neutral law is applied in a discriminatory manner. This case later served as important precedent in a number of more progressive court decisions, including *Brown v. Board of Education*.

Given the lack of receptivity of the courts at the turn of the 20th century, it is not surprising that black and other civil rights advocates turned to grass roots organizational activities, such as mutual aid societies, black civil institutions, like churches and schools, and political organizing by forming the Niagara movement, the National Association for the Advancement of Colored People (NAACP), and the Universal Negro Improvement Association (UNIA).

The Niagara Movement was a civil rights organization that was established in 1905 by, among others, W.E.B. DuBois. The group was dedicated to fighting racial discrimination. The group formed in response to a number of factors, including Booker T. Washington's approach to racial reconciliation. Lack of funding and internal dissension regarding policies and strategies caused disbandment. Ultimately, a number of members from the Niagara Movement regrouped, and alongside a number of white liberals, formed the NAACP. The NAACP's stated purpose was similar to that of the Niagara Movement's, that is, to promote equality, combat racism, advance the interests of colored citizens in the United States, secure unfettered access to the ballot, and promote equal employment and educational opportunities.

The UNIA was established by Marcus Garvey. The UNIA promoted the re-colonization of blacks to Africa based upon the belief that whites would never treat blacks equally.

While the courts had traditionally been an uninviting forum for racial causes,⁶⁷ the judiciary, in fits and starts, began to prove a much more hospitable place for

⁶⁷ See for e.g.: *Dred Scott v. Sanford*, 60 U.S. 393 (1857), holding that blacks were "beings of an inferior order, ... and so far inferior that they had no rights which the white man was bound to respect"; *The Civil Rights Cases*, 109 U.S. 3 (1883), *supra*; *Plessy v. Ferguson*, 163 U.S. 537 (1896), *supra*; *Pace v. Alabama*, 106 U.S. 583 (1883), *supra*; *Cumming v. Richmond County Board of Education*, 175 U.S. 528 (1899), *supra*.

attacking Jim Crow mandates.⁶⁸ This was due to a confluence of factors, including the emergence of a number of talented civil rights attorneys, a shift in the intellectual and judicial theories of the day, and the rise of some progressive jurists who were more kindly disposed to civil rights issues.⁶⁹

A. A New Generation of Lawyers

As for the new generation of black attorneys, one person, in particular, deserves extended discussion and credit for his role in conceiving of a litigation strategy for challenging the American racial order. That individual was Charles Hamilton Houston. Houston, an African American, was born on September 3, 1895. In 1922 and 1923, Houston graduated *cum laude* and received his Doctor of Juridical Science from Harvard Law School.

⁶⁸ The decision to resort to the courts can also be interpreted through the lens of the “political disadvantage theory.” Initially espoused by Richard Cortner, this theory claims that interest groups petition courts “as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals, they are almost compelled to resort to litigation.” Richard Cortner, “Strategies and Tactics of Litigants in Constitutional Cases,” *Journal of Public Law*, Vol. 17, No. 1, (1968), 287. Some scholars contend that the NAACP was forced to litigate its interests because other more traditional political avenues for redressing grievances were foreclosed due to Jim Crow laws, intimidation, and the like.

⁶⁹ For example, at the start of the 20th century, Republican Presidents Theodore Roosevelt and William Taft completely reshaped the Court. These presidents nominated eight new justices, seven of whom were Republicans. Some of the more notable appointments included the 1902 appointment of Oliver Wendell Holmes, Jr. and the 1910 appointment of Charles Evan Hughes. Many consider Holmes to be one of the most influential jurists ever to serve on the bench. Justice Holmes was the son of an abolitionist, and some credit Justice Holmes as being the father of a new legal movement, dubbed legal realism. As for Charles Evan Hughes, Justice Hughes gave a broad interpretation of the 13th Amendment in *Bailey v. Alabama*, 219 U.S. 219 (1911), in which the Court overturned the conviction of an African American under Alabama’s peonage laws, holding that the involuntary servitude proscription in the 13th Amendment could entail more than slavery. In 1906, President Roosevelt appointed Republican William Rufus Day. Justice Day ultimately wrote the Court’s opinion in *Buchanan v. Warley*, 245 U.S. 60 (1917), in which the Court declared, as unconstitutional, municipal ordinances that required racially segregated neighborhoods. Also, notably, in 1916, William Brandeis joined the bench. Brandeis was dubbed “The Robin Hood” of the law due to his willingness to represent the underdog in legal disputes involving large corporate interests. Given his socially progressive leanings, many considered him to be too radical (and perhaps too Jewish) to be on the bench. His nomination engendered so much controversy that Congress actually held hearings on his appointment, the first of their kind. It is also important to note that a number of nominations during the first part of the twentieth century also hailed from Columbia Law School where the legal realism movement had been born, including Chief Justice Charles Evan Hughes, Chief Justice Harlan Fiske Stone, Benjamin Cardozo, and Stanley Reed, all of whom were considered socially progressive.

According to Mr. Houston's biographer, there were three pivotal events that shaped his desire to use the law as a vehicle for remediating race discrimination. Those events involved (1) his experiences in a segregated army during World War I, (2) his observation of race riots in 1919,⁷⁰ and (3) his witnessing of the conviction of T.S. Jones, an innocent African American man accused of murder in Houston's hometown of Washington, D.C. As his biographer states:

The Army experience, the riot, and the unjust indictment and conviction of T.S. Jones intervened in the comfortable life of the young Charles Hamilton Houston and changed it with startling completeness. In a deeply personal sense, Charles understood racism as an irrational, ubiquitous, external force that violated human beings, disrupted plans, bred bitterness, and destroyed dreams. Yet at his very center he also knew that he could not be defined by that kind of assault on his spirit. Charles had been jolted, but his future had not been wrenched from his control. With a new sense of authority, he took his stand. The racism that permeated the race riots and the victimization of a T.S. Jones had to be eliminated. The laws that buttressed stifling, oppressive practices and policies had to be fought immediately, directly, and persistently if the opportunities of America were to become options for black Americans.⁷¹

Once at law school, Houston's thought was shaped by his engagement with Roscoe Pound, who was then serving as Harvard's dean. Pound was considered one of the leading legal intellects of the day and had written a good deal of scholarship challenging "formalism," the prevailing legal paradigm. Many scholars credit Pound's predecessor at Harvard, Dean Christopher Columbus Langdell, as having conceived of formalism, which still predominates today.⁷²

⁷⁰ Some notable historians have argued that the great migration of African Americans into Northern cities starting around 1910 as a result of a variety of coalescing economic, social and political factors, such as unfavorable southern living conditions and a northern labor shortage, "ushered in the greatest period of interracial strife the nation had ever witnessed." See, e.g., John Hope Franklin, *From Slavery to Freedom, A History of African Americans* (New York: Knopf/ Random House, 1980), 357.

⁷¹ Genna Rae McNeil, *Groundwork Charles Hamilton Houston and the Struggle for Civil Rights* (Philadelphia, PA: University of Pennsylvania press, 1983), p.49.

⁷² Guido Calabresi, "An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts," *Stanford Law Review*, Vol. 55, No. 6 (Jun., 2003), 2113-2151. Perhaps, the best known formalist is Supreme Court Justice Antonin Scalia, who has declared: "Long live formalism! It is what makes us a government of laws and not of men." Antonin Scalia, *A Matter of Interpretation*, edited by Amy Gutmann, (Princeton, NJ: Princeton University Press, 1998) xx. Legal formalism, itself,

1. Roscoe Pound and Sociological Jurisprudence

Formalism, as espoused by Langdell, contained several core ideas. First, law was understood as a scientific discipline. Wise jurists ostensibly reached case outcomes by objectively applying pre-existing legal rules to facts. Theoretically, there was therefore no room for individual prejudice to influence results. Second, the driving analytical force of the process was a form of syllogistic reasoning from which additional rules of general applicability were derived. In this fashion, court holdings became the self-governing, constituent elements of the legal process. Third, the legal system was closed, meaning that it developed a coherent set of rules without reference to outside influences, such as those which arose from fields like theology, philosophy, and the social sciences. Consequently, legal formalism eschewed normative thinking.

Building upon the early scholarship of Oliver Wendell Holmes,⁷³ and reacting to a variety of assumptions embedded in the Langdellian paradigm, Pound conceived of a different normative framework for conceiving of the way the law operates. He

was a reaction to “legal naturalism” which distinguished between positive law and a set of legal rules and rights that are grounded in a higher source of authority, such as divine providence.

⁷³ In his book, *The Common Law*, Holmes diverged sharply from formalism, taking a much more functionalist approach. Famously, Holmes stated:

The life of the law has not been logic; it has been experience...The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.

The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism

Oliver Wendell Holmes, *The Common Law* (Mineola, Ny: Dover Press, 1881), 1, 35-36.

challenged the idea that “objectively” applying legal axioms to facts would produce fair results, contending that it would produce “mechanical jurisprudence.” Pound questioned the wisdom of conceiving of law as a self-contained process and argued that the very premises upon which the system rested were themselves the product of the jurists’ own peculiar biases. Because “formalism,” according to Pound, hid a more conservative tendency in the law’s operations, he called for a new method of adjudication that was grounded in sociology and which he coined “sociological jurisprudence.”⁷⁴

Pound enumerated five elements for how sociological jurists ideally adjudicate:

1. They look more to the working of the law than to its abstract content.
2. They regard law as a social institution which may be improved by intelligent human effort, and hold it their duty to discover the best means of furthering and directing such effort.
3. They lay stress upon the social purposes which law subserves rather than upon sanction.
4. They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible molds.
5. Their philosophical views are very diverse⁷⁵

“Sociological jurisprudence” therefore recognizes that law and social forces are mutually constitutive. Instead of law being conceived of as an autonomous process, judges are to consider a variety of disciplines outside the law, including ideas expressed in the social sciences. Jurists should also sensitize themselves to actual case outcomes in order to reach a just result.⁷⁶

⁷⁴ Sociological jurisprudence generally falls under the philosophical category of “legal functionalism.” In its broadest terms, functionalism sought less to understand the ontology of law and more to understand its function and purpose. Pound explained, “Attention was turned from the nature of law to its purpose, and a functional attitude, a tendency to measure legal rules and doctrines and institutions by the extent to which they furthered or achieved the ends for which law exists, began to change the older method of judging law by criteria drawn from itself.” Roscoe Pound, *Philosophy of Law* (New Haven, MA: Yale University Press, 1953), 42-43.

⁷⁵ Roscoe Pound, “The Scope and Purpose of Sociological Jurisprudence,” *Harvard Law Review*, Vol. 25, No. 2, (1911), 516.

⁷⁶ The Brandeis brief, which contained over ninety pages of sociological data, epitomized this new school of thought. Justice Holmes’ dissent in *Lochner v. New York*, 198 U.S. 45 (1905), also

A number of legal commentators view sociological jurisprudence as an early forebear of legal realism.⁷⁷ Some of the most notable legal realists, men like Karl Llewellyn and Jerome Frank, initially expressed intellectual indebtedness to Pound's scholarship.⁷⁸ But in later years, an intellectual rift developed between Pound and the younger generation of intellectuals, Llewellyn and Frank, which spurred a rather well known intellectual debate between them.⁷⁹

2. Charles Hamilton Houston and Howard Law School

Charles Hamilton Houston was undoubtedly influenced by Pound's scholarship.⁸⁰ In law school, Pound served as one of Houston's mentors, and he authored a number of letters of reference for the younger Houston. Houston's law school notes were apparently also replete with references to Pound's theories on "sociological jurisprudence."⁸¹ As dean of Howard Law School, Houston also created

exemplified this approach. Law was no longer imagined as a closed system but was to be understood in the context of a variety of outside disciplines.

⁷⁷ Roger Fairfax, Jr., "Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism," *Harvard BlackLetter Law Journal*, Vol. 14, (Spring, 1998).

⁷⁸ See for e.g.: Karl Llewellyn, "The Effect of Legal Institutions Upon Economics," *American Economic Review*, Vol. 15, No. 4, (1925), 665 at n.1. Llewellyn expressly acknowledges a debt to Pound and other early progressive legal scholars.

⁷⁹ Karl Llewellyn, "A Realistic Jurisprudence—The Next Step," *Columbia Law Review*, Vol. 30, No. 4, (Apr., 1930); Roscoe Pound, "The Call for a Realist Jurisprudence" *Harvard Law Review*, Vol. 44, No. 5, (Mar., 1931); Karl Llewellyn, "Some Realism about Realism, A Reply to Dean Pound," *Harvard Law Review*, Vol. 44, (1931). The debate is also colorfully described in an engaging article by N.E.H Hull, in *Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, (Madison: University of Wisconsin School of Law, 1987). As Hull describes, legal realism was a movement to "hold a realistic mirror to the law and then reformulate the law to match its realistic reflection." *Ibid.*, 966. Some of the tenets that loosely characterized legal realism included (1) a belief in the indeterminacy of laws inasmuch as it is not the legal rules that produce the outcomes but unspoken, extrajudicial policy, (2) a belief that laws are a means to an end and not an end in itself and that laws should be adjudged based on how well they serve those ends, (3) a belief in the importance of the interplay between law and other disciplines.

⁸⁰ See for e.g.: Roger A. Fairfax, "Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism"; Timothy Lovelace, Jr., "Revisiting "The Need For Negro Lawyers": Are Today's Black Corporate Lawyers Houstonian Social Engineers?" *Journal of Gender, Race, and Justice*, Vol. 9, (2006).

⁸¹ See for e.g.: Susan Carle, "From Buchanan To Button: Legal Ethics and the NAACP (Part II),"

a number of courses that attempted to apply sociological jurisprudence to the plight of African Americans.⁸²

Applying Pound's theories, Houston asserted that law "had as its chief purpose ... reconcil[ing] conflicting human interests and control[ing] the antagonistic individual and group forces operating in the community, state and nation."⁸³ He was undoubtedly speaking about the corrosive effects of race prejudice which he believed could be attacked through the legal system. Houston believed that "[d]iscrimination, injustice, and the denial of full citizenship rights and opportunities on the basis of race and a background of slavery could be challenged within the context of the Constitution if it were creatively, innovatively interpreted and used."⁸⁴

According to Houston, "[t]he written constitution and inertia against ... amendment give the lawyer wide room for experimentation...[to] enable [black people] to force reforms where they could have no chance through politics..."⁸⁵

To implement his vision, Houston sought to train an elite cadre of law students who would not only meet the general legal needs of African Americans but would also use litigation as the primary strategy for dismantling the nation's segregated racial order.⁸⁶

[The] Negro lawyer must be trained as a social engineer and group interpreter. Due to the Negro's social and political condition . . . the Negro lawyer must be prepared to anticipate, guide and interpret his group advancement. . . . [Moreover, he must act as] business advisor . . . for the protection of the scattered resources possessed or

University of Chicago Law School Roundtable, Vol. 8, (2001).

⁸² McNeil, 66-67.

⁸³ *Ibid.*, 133.

⁸⁴ *Ibid.*, 84-85.

⁸⁵ *Ibid.*, 85.

⁸⁶ Jack Greenberg, *Crusaders in the Courts: Legal Battles of the Civil Rights Movement* (New York: Twelve Tables Press, 2004).

controlled by the group. . . . He must provide more ways and means for holding within the group the income now flowing through it.⁸⁷

[Social engineering] entailed duties to guide . . . antagonistic and group forces into channels where they will not clash and ensure that the course of change is . . . orderly with a minimum of human loss and suffering. A social engineer by definition was to be the mouthpiece of the weak and a sentinel guarding against wrong. The black social engineer was further called on not only to use the law as [an] instrument available to the minority unable to adopt direct action to achieve its place in the community and the nation, but also consistently and competently to interpret the race's rights, grievances, and aspirations.⁸⁸

B. The NAACP Goes To Court

Coinciding with Houston's vision of Howard University as a training ground for the creation of activist attorneys, the NAACP was litigating race discrimination cases. Despite the limitations imposed by the 14th Amendments "state action" doctrine and *Plessy*'s "separate but equal" holding, the NAACP was still experiencing some success. For example, in *Buchanan v. Warley*, 245 U.S. 60 (1917) the Supreme Court invalidated a municipal ordinance that mandated residential segregation on the basis of race. In *Moore et al. v. Dempsey*, 261 U.S. 86 (1923) the Supreme Court held that the physical presence of a Southern white mob outside a courthouse during the criminal trial of certain black defendants, accused of murder, violated their due process rights to receive a fair trial. Given some of these early wins, a 1926 NAACP Annual Report advocated increasing litigation activities due to (1) the low cost of

⁸⁷ McNeil, 71. As further evidence of Pound's influence, it appears that Pound may have been the first to coin the phrase "social engineering" in the context of jurisprudence when he wrote:

Let us think of jurisprudence for a moment as a science of social engineering, having to do with that part of the whole field which may be achieved by the ordering of human relations through the action of political organized society."

Roscoe Pound, *Interpretations of Legal History* (1922), available via the Gale: Making of Modern Law database. Houston apparently defined the phrase "social engineer" as a "highly skilled, sensitive, perceptive lawyer who understood the constitution of the United States and knew how to explore its uses in solving the problems of local communities and in bettering conditions of the underprivileged citizens." McNeil, 84-85.

⁸⁸ McNeil, 85.

having *pro bono* attorneys litigate the cases and (2) the concrete gains they could trumpet. The Report also opined that the federal courts should serve as the forum for litigating these cases given the comparatively diminished racial prejudice that existed in such venues.

To advance this goal, the NAACP secured a grant from the Garland fund. The Garland fund had been established by the left-leaning Charles Garland who wanted to advance progressive causes with a one million dollar inheritance that he had received from his father. The fund was administered by a board, which consisted of a number of individuals, including James Weldon Johnson, who was also the Executive Director of the NAACP. The Garland Fund also was comprised of a Committee on Negro Work. The Committee believed that civil rights litigation could advance black economic interests. It advocated financing legal challenges to state and local laws, including lawsuits that would challenge racially disparate governmental public school expenditures. But the legal focus had a number of detractors. Roger Baldwin, chief administrator for the fund, and one of the principle founders of the American Civil Liberties Union, expressed concerns that “such a legalistic approach will fail ... because the forces that keep the Negro under subjection will find some way of accomplishing their purposes, law or no law.”⁸⁹ In 1932, Houston was consulting with the NAACP and serving on its legal affairs Committee. By this time, the NAACP was actively protesting racial segregation in various public accommodations and was working against the exclusion of black workers from governmental jobs associated with projects like Hoover Dam and the Tennessee Valley.

⁸⁹ See Tushnet (1987). Tushnet delineated the debate that took place regarding where the Board should allocate the fund’s money. At that time, the NAACP was in fierce competition with the International Labor Defense (ILD) and the American Negro Labor Congress – two groups that were decidedly further to the left than the NAACP. Garland, himself, preferred the ILD. By a 6-5 Board vote, the Fund agreed to give the money to the NAACP to promote its coordinated litigation strategy.

C. The Early Debate Over Litigation

In 1933, a group of black leaders, including Houston, DuBois, James Weldon Johnson, Ralph Bunche and others, met at the second annual Amenia conference to discuss a strategy to improve the political status of the American Negro. The participants could not agree on a consensual strategy for action. In fact, this disagreement was emblematic of a general split in philosophies and strategies among some of the most influential civil rights activists that became quite vociferous at times. Some black leaders, like Garvey and his followers, espoused a philosophy of Black Nationalism and separatism. Some, like DuBois, alternatively argued for (1) the organization of social and economic power inside the walled-in boundaries of segregated communities and (2) socialism and internationalism.⁹⁰ Others, like the more liberal Houston, opposed separatism in any form due to the belief that black equality could not be realized under segregated conditions. Mark Tushnet has described the poles of the debate in the following manner.

Two opposed positions were stated...One might be called “economic instrumentalism,” and the other “autonomous legalism.” Those who held the former view regarded legal rules as among the instruments wielded by the economically powerful in their own interests; they concluded that litigation was likely to be futile unless it was preceded by alterations in the distribution of power, and, ultimately of wealth. In contrast, the “autonomous legalists” thought that the expressed norms of fairness embodied in American law could, at least occasionally, be employed with significant effect to remedy racial segregation, even if segregation was in some sense the product of economic forces and interests.⁹¹

DuBois resigned from the NAACP in protest in 1934. That same year, Houston crafted and presented a position statement to the NAACP outlining a strategy

⁹⁰ For example, DuBois stated that “a Black man...has no right...to send his own helpless, immature child into school where white children kick, cuff or abuse him, or where teachers openly neglect, hurt or dwarf its soul.” Quoted in Tushnet (1987),10.

⁹¹ Tushnet (1987), 11.

for challenging legalized racial discrimination in transportation and education.⁹² The debate continued and was captured in the July 1935 edition of the *Journal of Negro Education*, in which some of the leading black intellectuals of the day contributed, including DuBois, Ralph Bunche, Alain Locke, E. Franklin Frazier, Raymond Alexander, and Dean Charles H. Thompson, to name just a few.

DuBois argued against a strategy for integration because he believed that racial prejudice would serve to make education in an integrated setting worse than what could be obtained in an all black setting.

Much as I would like [for racial animosity to end], and hard as I have striven and shall strive to help realize it, I am no fool; and I know that race prejudice in the United States today is such that most Negroes cannot receive proper education in white institutions. If the public schools of Atlanta, Nashville, New Orleans and Jacksonville were thrown open to all races tomorrow, the education that colored children would get in them would be worse than pitiable. It would not be education. And in the same way, there are many public school systems in the North where Negroes are admitted and tolerated, but they are not educated; they are crucified... Under such circumstances, there is no room for argument as to whether the Negro needs separate schools or not. The plain fact faces us that either he will have separate schools or he will not be educated.⁹³

For his part, Bunche opined that the NAACP's strategy for court intervention was misguided in thinking that it would advance black interests:

Perhaps the favorite method of struggle for rights employed by minority groups is the political. Through the use of the ... courts strenuous efforts are put forth to gain social justice for the group. Extreme faith is placed in the ability of these instruments of democratic government to free the minority from social proscription and civic inequality. The inherent fallacy of this belief rests in the failure to appreciate the fact that the instruments of the state are merely the reflections of the political and economic ideology of the dominant group that the political arm of the state cannot be divorced from its prevailing economic structure, whose servant it must inevitably be. ... Organizations such as the National Association for the Advancement of Colored People ... have conducted a militant fight under this illusory banner. They have demanded full equality for the Negro, involving the eradication of all social, legal, and political restrictions tending to draw a line of distinction between the black citizen and the white.... The confidence of the proponents of the political method of

⁹² According to Houston, because "education is a preparation for the competition of life, ... a poor education handicaps black youth [who with] all elements of American people are in economic competition." Quoted in McNeil, 132.

⁹³ W.E.B. DuBois, "Does The Negro Need Separate Schools?" *The Journal of Negro Education*, Vol. 4, No. 3 (Jul., 1935), 328-329.

alleviation is based on the protection which they feel is offered all groups in the society by that sacred document the Constitution. Particularly do they swear by the Bill of Rights and its three supplements, the Thirteenth, Fourteenth and Fifteenth amendments, as a special charter of the black man's liberties. The Constitution is ... detached from the political and economic realities of American life ... This view ignores the quite significant fact that the Constitution is a very flexible instrument and that, in the nature of things, it cannot be anything more than the controlling elements in the American society wish it to be. In other words, this charter of the black man's liberties can never be more than our legislatures, and, in the final analysis, our courts, wish it to be. And, what these worthy institutions wish it to be can never be more than what American public opinion wishes it to be. Unfortunately, so much of American public opinion is seldom enlightened, sympathetic, tolerant or humanitarian. Too often it resembles mob violence.... It follows, therefore, that the policy of civil libertarianism is circumscribed by the dominant mores of the society. Its success, in the final analysis, must depend upon its ability to create a sympathetic response to its appeals among influential elements in the controlling population. In the long run its militancy must be softened ... It is not surprising, therefore, that assertedly militant civil-libertarian organizations like the N.A.A.C.P. should employ tactics which are progressively less militant....⁹⁴

In relation to the aforementioned analysis, Bunche further stated,

...so long as this basic conflict in the economic interests of the white and black groups persists, and it is a perfectly natural phenomenon in a modern industrial society, neither prayer, nor logic, nor emotional or legal appeal can make much headway against the stereotyped racial attitudes and beliefs of the masses of the dominant population... [As a result], [t]he most that such organizations can hope to do is to devote themselves to the correction of the more flagrant specific cases of abuse, which because of their extreme nature may exceed even a prejudiced popular approval...⁹⁵

Rather than a litigation strategy aimed at vindicating black political and civil rights, he advocated for creating a black-white working class alliance.

Dr. Charles H. Thompson⁹⁶ advocated yet another position, in opposition to those taken by DuBois or Bunche. Thompson argued that there were no feasible alternatives to litigation. Indeed, the alternatives that were sometimes advanced, including: (1) migration of blacks to a separate land, (2) revolt, and (3) appeal to the

⁹⁴ Ralph Bunche, "A Critical Analysis of the Tactics and Programs of Minority Groups," *The Journal of Negro Education*, Vol. 4, No. 3 (Jul., 1935), 314-316.

⁹⁵ *Ibid.*, 310-311.

⁹⁶ Dr. Thompson was the founder of the *Journal of Negro Education*. Dr. Thompson also served in a variety of capacities at Howard University, including, as its chairman of the Department of Education, dean of the College of Liberal Arts, and dean of the Graduate School.

fairness of whites, simply were not workable in practice. As a result, for Thompson, court action was the only viable strategy. In further defending litigation, he went on to debunk the notion that court action was ineffective because public opinion would always undermine progressive holdings.

To be sure, there have been many attempts to circumvent court decisions by devising more subtle legal means of attaining the same ends secured by the procedure outlawed by the courts. And the answer is briefly this: Circumvention is not a universal practice; and, even where it is attempted, it is not always successful; and, even where it is successful, the very subtlety necessitated by circumvention, either makes administration of the practice so difficult as to defeat itself in the long run, or furnishes another opening for attack.⁹⁷

While this debate raged on, the NAACP had started using its grant from the Garland Fund to initiate litigation, challenging the segregated educational system of the South. Nathan Margold, a constitutional legal scholar from Harvard Law School, had drafted a strategy memorandum for attacking segregated educational and residential housing practices. But because Margold ultimately proved unavailable to lead the campaign due to his decision to accept a position with the Department of the Interior, the NAACP offered the position to Houston who accepted it.

Houston's strategy was premised on a methodical and deliberative attack on segregated education and transportation from a number of fronts. He intended to invoke the courts. But perhaps influenced by the aforementioned debate, he did not believe that requesting the judiciary to issue orders forcing integration would necessarily be entirely effective. In a speech to the National Bar Association, he offered his reasons for this perspective.

We must never forget that the public officers, elective or appointive, are servants of the class which places them in offices and maintains them there. It is too much to expect the court to go against the established and crystallized social customs, when to

⁹⁷ Charles H. Thompson, "Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School," *The Journal of Negro Education*, Vol. 4, No. 3 (Jul., 1935), 425-426.

do so would mean professional and political suicide....We cannot depend upon the judges to fight ... our battles.⁹⁸

Houston also believed that any effective court strategy must, *a priori*, involve mass black mobilization and support for such litigation. Houston was counting on the black community to petition local schools and demand budgetary and other information so that comparisons could be drawn between the qualities of local black and white schools. In summarizing Houston's strategy and perspective, his biographer stated:

Houston ... extract[ed] from his legal training those aspects of the judicial process that were likely to have the greatest impact on the black struggle. In planning his activity, he took into account *stare decisis*, judicial self-restraint, the step-by-step process and the requirement of reasonable predictability of legal consequences. The result was a three-pronged strategy: selecting cases that presented clear legal issues and building strong records in those cases; overturning negative legal decisions by invalidating gradually or attacking directly the controlling precedents; and developing a sustaining community or mass interest in each case.⁹⁹

D. Thurgood Marshall and The Legal Defense Fund

A young man by the name of Thurgood Marshall caught Houston's eye while he was a student at Howard. Marshall ultimately graduated as the valedictorian of the class of 1933. Influenced by Houston, Marshall accepted a position with the NAACP as a staff attorney. By 1938, Houston turned over the reins as chief counsel to Marshall.¹⁰⁰ By 1939, Houston had resigned from the NAACP altogether.

Part of the strategy of LDF, under Marshall's leadership, was to expand the state action doctrine in order to reach conduct that had previously been considered private. For example, in *Smith v. Allwright*, 321 U.S. 649 (1944), the Democratic party excluded blacks from participating in the Texas state primaries, citing a statute

⁹⁸ McNeil, 135.

⁹⁹ McNeil, 219.

¹⁰⁰ In 1939, the NAACP Board of Directors created the Legal Defense Fund (LDF) as its legal wing. In 1957, LDF became a separate legal entity to ensure the NAACP's continued tax-exempt status. In the early 1960s, conflict arose between the leadership of the NAACP and LDF, which further dissolved the ties between the two entities.

that granted the Texas Democratic Party the sole discretion to establish voter qualifications. LDF sued under the Equal Protection Clause, claiming that the Court should impute state action to the Texas Democratic Party by virtue of the statute. The Supreme Court agreed and held that the conduct of the Texas Democratic Party violated the 14th Amendment.

Another part of the LDF strategy involved bringing cases where states allegedly failed to provide equal accommodations under *Plessy*. Ultimately, LDF decided to challenge “separate but equal” itself.

Under Marshall, the prestige of the LDF grew. The organization won close to thirty Supreme Court cases, including landmark decisions such as the aforementioned *Smith v. Allwright*, 321 U.S. 649 (1944), *Shelley v. Kraemer*, 334 U.S. 1 (1948),¹⁰¹ *Sweatt v. Painter*, 339 U.S. 629 (1950),¹⁰² culminating most famously in *Brown v. Board of Education*, 347 U.S. 483 (1954). Marshall had not only been influenced by the Houstonian notion of politically conscious attorneys serving as “social engineers,” but also by sociological jurisprudence as a significant section of its *Brown* brief had been dedicated to the effects of discrimination from a social-science perspective.¹⁰³

E. Cause-Lawyering After *Brown*

Through the fifties, there were really only two civil rights litigation organizations: LDF and the ACLU. But *Brown v. Board of Education* created a new model for lawyering that imagined attorneys as socially progressive change agents. Spurred on by the passage of civil rights and social welfare legislation in the 1960s, a

¹⁰¹ *Shelley v. Kraemer*, 334 U.S. 1 (1948), invalidated racially discriminatory real estate covenants.

¹⁰² *Sweatt v. Painter*, 339 U.S. 629 (1950), successfully challenged the “separate but equal” doctrine of racial segregation in law schools.

¹⁰³ Apparently, the *Brown* legal team had engaged in a considerable amount of debate regarding whether to include the Kenneth Clarke social science in its brief. Ultimately, Marshall opted to include it.

number of attorney activists came together and formed their own public interest legal organizations.¹⁰⁴ These litigators shared a common mission of using litigation as a way of transforming the existing political order to improve certain sets of social and political relationships. Such public interest legal organizations included, the Mexican American Legal Defense and Educational Fund (MALDEF), the Puerto Rican Legal Defense and Education Fund, the Women's Rights Project, the NOW Legal Defense Fund, the Asian American Legal Defense Fund, the Native American Rights Fund, the Lawyers Committee for Civil Rights Under the Law, as well as a host of private firms that specialized in civil rights work.

The work done by these organizations was complemented by that of the Lawyers' Constitutional Defense Committee (LCDC), the Law Students Civil Rights Research Council, and the Lawyers' Committee For Civil Rights Under the Law.

These entities litigated cases based on contributions either from private foundations or from membership dues.¹⁰⁵ Due to the seeming hospitableness of the federal courts,

¹⁰⁴ "Public interest" law can generally be defined as representing powerless people who cannot otherwise afford the financial cost of legal representation. *See for e.g.*: "In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice," Vol. 90, No. 6 (May, 1981), 1436, n.3.

¹⁰⁵ In the mid-1960s, the poverty law movement also gained considerable force, arising out of President Johnson's anti-poverty legislation which created the Office of Economic Opportunity ("OEO"). *See for e.g.*: Matthew Diller, "Poverty Lawyering in the Golden Age, Review of *Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973* by Martha F. Davis," *Michigan Law Review*, Vol. 93, No. 6, 1995 Survey of Books Relating to the Law (May, 1995). Jean and Edgar Cahn, two early, influential poverty lawyers persuaded Sergeant Shriver, the then head of the OEO, to specifically allocate funds for legal services. In short time, OEO had created its own legal services program. By 1967, OEO had given approximately 40 million dollars to 300 newly and/or recently created legal services organizations throughout the nation. Like Houston, the then director of the Legal Services Program had a vision of lawyers as social engineers. In 1965, he stated:

Lawyers must be activists to leave a contribution to society. The law is more than a control; it is an instrument for social change. The role of [the] OEO program is to provide the means within the democratic process for law and lawyers to release the bonds which imprison people in poverty, to marshal the forces of law to combat the causes and effects of poverty.

Deborah Cantrell, "A Short History of Poverty Lawyers in the United States," *Loyola Journal of Public Interest Law*, Vol. 5, (2003), 17. Through philosophy, funding, and planning, the OEO had caused the creation of a systematic network of poverty attorneys across the country. However, the evolution of

these organizations won a wide range of cases that have long been thought to have changed the socio-political fabric of America, including in the areas of race relations,¹⁰⁶ the rights of the criminally accused,¹⁰⁷ civil rights litigation,¹⁰⁸ religion,¹⁰⁹ free speech,¹¹⁰ the right to privacy,¹¹¹ and in a host of other areas. Given the frequency of these wins, some civil rights practitioners recalled that there was a sense of invulnerability in litigating before the Supreme Court during that time period.¹¹²

Other public interest organizations also cropped up as a result of the passage of statutes that established rights for certain groups of people. Thus, in the early seventies, with congressional passage of the Rehabilitation Act of 1973, which protected disabled individuals from discrimination by entities that received federal funding, groups like the Disability Rights Project came into being. And in short

the poverty law movement is well beyond the scope of this dissertation and is only offered to illustrate the influence of the civil rights litigation movement.

¹⁰⁶ See for e.g.: *Katzenbach v. McClung*, 379 U.S. 294 (1964), declaring the Civil Rights Act of 1964 constitutional; *Loving v. Virginia*, 388 U.S. 1 (1967), declaring Virginia's anti-miscegenation statute unconstitutional and in the process overturning *Pace v. Alabama*, 106 U.S. 583 (1883).

¹⁰⁷ See for e.g.: *Brady v. Maryland*, 373 U.S. 83 (1963), mandating disclosure by the prosecution to the defense of material exculpatory evidence; *Gideon v. Wainwright*, 372 U.S. 335 (1963), holding that the failure by states to provide legal counsel in criminal cases to defendants violates the Sixth Amendment; and *Duncan v. Louisiana*, 365 U.S. 167 (1968), expanding the right to a jury trial.

¹⁰⁸ See for e.g.: *Monroe v. Pape*, 365 U.S. 167 (1961), holding that private individuals can sue governmental officials for violations of their constitutional rights.

¹⁰⁹ See for e.g.: *Abington Township School District v. Schempp*, 374 U.S. 203 (1963), holding that school-sponsored Bible reading in public schools violated the Establishment Clause of the First Amendment.

¹¹⁰ See for e.g.: *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), requiring a public figure to prove "actual malice" in order to establish liability in a defamation action; *Brandenburg v. Ohio*, 395 U.S. 444 (1969), holding that the government cannot punish free speech unless the speech is (1) "directed at inciting or producing imminent lawless action" and (2) is "likely to incite or produce such action"; and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), recognizing free speech rights on behalf of school children.

¹¹¹ See for e.g.: *Griswold v. Connecticut*, 381 U.S. 479 (1965), establishing a right to privacy by declaring unconstitutional a statute that prohibited the use of contraceptives even by a marital couple.

¹¹² Interview of Professor David Rudovsky, Esq (transcript on file with the author). Professor Rudovsky is widely considered one of the deans of the civil rights bar in the City of Philadelphia.

order, public interest organizations designed to protect other specialized interests appeared such as: Ralph Nader's Public Citizen Litigation Group that sought to safeguard consumer interests; the Environmental Defense Fund, the Sierra Club Legal Defense Fund, and the Natural Resources Defense Council all of which litigated environmental concerns; the Education Law Project; the Children's Defense Fund; and a variety of poverty law projects among other public interests. Like the school desegregation cases, these groups petitioned courts to order and supervise structural reforms in a host of public and private institutions and areas, including in prisons,¹¹³ psychiatric facilities,¹¹⁴ residential placements,¹¹⁵ hospitals,¹¹⁶ and so on.

In 1976, Congress passed the Civil Rights Fee Act, 42 U.S.C. § 1988. In constitutional litigation, this statute would entitle prevailing plaintiffs to collect statutory attorney's fees from the defendant. As a result of this statute, private-for-profit firms were able to take on a range of civil rights cases too. Most statutory civil rights laws also have fee-shifting provisions, including Title VII of the 1964 Civil Rights Act and the PaHRA, both of which prevent workplace discrimination. But because these statutes also have damage components, these cases also became more attractive for the private plaintiff's bar to handle.

Attorneys employed by public interest organizations, governmental organizations, private public interest law firms, and private law firms who engage in *pro bono* activities comprise the universe of attorneys who are now involved in public interest litigation. The percentage of public interest work allocated between these

¹¹³ See for e.g.: *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972),

¹¹⁴ See for e.g.: *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974).

¹¹⁵ See for e.g.: *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1299 (E.D. Pa. 1977).

¹¹⁶ See for e.g.: *Greater Wash. D.C. Area Council v. District of Columbia*, 406 F. Supp. 768 (D.D.C. 1975).

legal entities has varied over time depending upon different factors, including, most importantly, funding sources.

But as the early debates between DuBois, Bunche, Thompson and others illustrate, “rights litigation” has never been without intellectual or emotional controversy, as more fully described below.

II. THE “RIGHTS” DEBATE

In some quarters, the idea of using law to effectuate progressive changes, of which civil rights law was one illustration, became known as “cause lawyering.” And for many, *Brown v. The Board of Education* became “the lodestar for a “liberal legal” “interpretation of civil rights history” in which civil rights lawyers, such as Thurgood Marshall were upheld as leaders of a burgeoning, transformational political movement.¹¹⁷ For some, these attorneys became heroes of the civil rights movement and inspired successive generations of lawyers, including fellow colleagues and myself, to follow in their path.¹¹⁸ For many, the notion of attorneys fighting for the rights of traditionally disadvantaged groups became one of the important legacies of *Brown v. Board of Education*. As a result, attorneys employed litigation to

¹¹⁷ Kenneth W. Mack, “Rethinking Civil Rights Lawyering and Politics in the Era Before Brown,” *Yale Law Journal*, Vol. 15, (2005), 258. See also: Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (Ann Arbor, University of Michigan Press, 1975). Kluger opines that the status of black people had been changed overnight by the Supreme Court’s decision in *Brown v. Board of Education*.

¹¹⁸ See for e.g.: Bernie Jones, “Critical Race Theory: New Strategies for Civil Rights in the New Millennium?” *Harvard BlackLetter Law Journal*, Vol. 18, (Spring, 2002), 11. Notes that “African Americans of the civil rights era hailed the men and women of the Legal Defense Fund as heroes and heroines, lawyer warriors fighting on their behalf in the Supreme Court....These lawyers inspired generations to follow.”

redistribute power in a variety of areas, including in prisons, with the environment, regarding children's rights, and in innumerable other causes.¹¹⁹

However, by the mid-1970s, this form of "legal liberalism" gained a number of detractors from a variety of different quarters, including from the Left, the far Left, and the Right. From one corner on the Left, there were those who believed that a rights-based strategy of vindicating "civil rights" was ultimately unpredictable and therefore unstable in producing long-lasting progressive political changes. One of the principal progenitors of this view was Stuart A. Scheingold, in his seminal work, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (1974).¹²⁰ Thus, for every progressive *Brown v. Board of Education* there may be a reactionary *Dred Scott v. Sandford* or a *Plessy v. Ferguson*.

From further on the Left, there was the critical legal studies movement. Critical legal studies (CLS) scholars or Crits as they were called, built upon the works of (a) legal realism,¹²¹ (b) Frankfurt School critical theory, and (c) post-structuralism. CLS scholars such as Mark Tushnet, Duncan Kennedy, Morton Horowitz, and Roberto Unger began critiquing certain assumptions and prevailing legal norms,

¹¹⁹ See for e.g.: Susan Sturm, "The Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review*, Vol. 142, No. 2, (1993), 639. "For the last twenty years, public interest litigation has been the preeminent tool of social reform in a variety of contexts. Building on the test case approach to law reform developed in *Brown v. Board of Education*, lawyers have attempted to use litigation to achieve far reaching changes in the distribution of public resources and the quality of life in public institutions."; Owen Fiss, "The Supreme Court 1987 Term, Foreword: The Forms of Justice," *Harvard Law Review*, Vol. 93, (1979), 1, 2. "[S]tructural reform has its roots in the Warren Court era and the extraordinary effort to translate the rule of *Brown v. Board of Education* into practice."; Jack Greenberg, "Litigation for Social Change: Methods, Limits and Role in Democracy," *Association of the Bar of the City of New York*, Vol. 29, (1974), 331. "Brown and the cases preceding it are sometimes looked upon as a paradigm of law making in the courts and probably they have been the principle inspiration to others who seek change through litigation."

¹²⁰ See also: Michael McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Ithaca, NY: Cornell University Press, 1986).

¹²¹ See for e.g.: Gary Peller, "Neutral Principles in the 1950's," *Michigan Journal of Law Reform*, Vol. 21, (1988).

including rights discourses that had provided the primary bases for the legitimacy of the legal system.¹²²

Crits argued that the legal regime had *a priori* biases built into it because the rules inherent in the system privileged certain social classes and normative categories over others.¹²³ Consequently, CLS sought to deconstruct power hierarchies embedded in the legal process by revealing that political reasons drove the rule of law.¹²⁴

According to Tushnet, given that law was embedded in and circumscribed by asymmetries in power, the law, even with built-in liberal tenets, could not be used to overcome such asymmetries. Moreover, litigation served counterproductive ends because it (1) misdirected resources away from more effective strategies, (2) disregarded opportunities for transformational change, and (3) preempted mass mobilization.¹²⁵ As a result, the logic employed by CLS challenged the very theoretical heart of the vaunted civil rights movement generally, and the Houston-Marshall strategy in particular, as it had relied on a rights-based discourse as the discursive underpinnings for its political struggle.

There were also those who, while not necessarily objecting to cause lawyering per se, objected to the remedies that cause lawyers strived for on behalf of its constituency. For example, by the mid-1970s, in a position reminiscent of DuBois in

¹²² See for e.g.: Tushnet (1984a); Mark Tushnet, "Perspectives On Critical Legal Studies: Introduction," *George Washington Law Rev*, Vol. 52, No. 2, (1984b); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge, MA: Harvard University Press, 1988); Mark Tushnet, "Critical Legal Studies: A Political History" *The Yale Law Journal*, Vol. 100, No. 5, (Mar., 1991); Gerald Clark, "A Conversation with Duncan Kennedy," *The Advocate, The Suffolk University Law School Journal*, Vol. 24, No. 2, p. 56 (Spring 1994); Morton Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge, MA: Harvard University Press, 1992).

¹²³ See for e.g.: Mark Kelman, *A Guide To Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987); Tushnet (1984a).

¹²⁴ See for e.g.: Kelman (1987).

¹²⁵ Ann Southworth, "Lawyers And The "Myth Of Rights" In Civil Rights And Poverty Practice" *Boston University Public Interest Law Journal*, Vol. 8, (1999).

the lead up to the *Brown* case, former LDF litigator and Harvard Law Professor Derrick Bell argued against the ideals of educational integration and the mission of LDF, advocating instead for making all black schools educationally effective.¹²⁶

From a different perspective, Political Scientist, Gerald Rosenberg empirically challenged the generally accepted wisdom that landmark decisions, like *Brown v. Board of Education*, even had the social transformational effects generally ascribed to them.¹²⁷

But for each critique of the rights discourse, there was a counter critique. For CLS, it was the Critical Race Theorists (“CRT”). Contra to CLS, CRT questioned some of the CLS’ assumptions in the following ways: First, whereas CLS viewed rights as unstable, indeterminate, and dangerous,¹²⁸ CRT proponents, such as Mari Matsuda,¹²⁹ Harlan Dalton,¹³⁰ Anthony Cook,¹³¹ Kimberly Crenshaw,¹³² and others

¹²⁶ Derrick Bell, “Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation,” *Yale Law Journal*, Vol. 85, No. 4, (March, 1976).

¹²⁷ Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (Chicago: University of Chicago Press, 1991). See also Richard Delgado, “A Comment on Rosenberg’s New Edition of the Hollow Hope,” *Northwestern University Law Colloquy*, Vol. 103, (2008), 147. But for an account that rights matter and that courts and constitutional principles operate in partnership with legal rights advocates, see: Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998). In *Rights Revolution*, Epp provides an account to explain the so-called “rights revolution” that took place during the twentieth century. As he explains, many traditional accounts credit or blame (depending upon one’s political persuasion), the United States Supreme Court for expanding the civil rights and liberties of individuals. Explaining the explosion in the Supreme Court’s civil liberties docket from 10% percent in the 1930s to 70% by the end of the 1960s, Epp gives much less credit to accounts that attribute the “rights” explosion solely to the work of a select number of appointed, anti-majoritarian judges and much greater credit to the pro-democratic influences of a number of grass roots civil rights organizations and advocates that were able to mobilize mass support for their various agendas.

¹²⁸ Tushnet (1984a).

¹²⁹ See for e.g.: Mari Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 22 (1987).

¹³⁰ Harlan Dalton, “The Clouded Prism,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 22, (1987).

¹³¹ Anthony Cook, “Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King,” *Harvard Law Review*, Vol. 103, No. 5 (Mar., 1990)

viewed rights as a necessary, albeit imperfect, way to protect minorities against an historically racially oppressive state regime. These CRT proponents believed that the white-led, CLS movement did not fully understand the experiences of racism, and therefore, could not adequately capture the perspective of persons of color. Secondly, these CRT academics criticized CLS for its failure to specifically focus on the special role that the legal system and the state played in constructing racial hierarchies.¹³³ Third, CRT attacked CLS as non-programmatic, overly cynical and nihilistic.¹³⁴ Instead of offering a pragmatic alternative to legal liberalism that served to help people of color, they simply assailed the system.¹³⁵

Straying into the debate, some poverty lawyers began to argue that litigation reinforced the powerlessness of litigants by (1) repackaging grievances in an alienating foreign legal language for courts to process and (2) diffusing social conflict into individualized legal claims that are remediated by monetary damages.¹³⁶ These attorneys also critiqued so-called “impact litigation,” “as elitist, disempowering to clients and too reliant upon notions of change through the courts.”¹³⁷ But these poverty lawyers were also subject to critique for their purported tendency to overlook, and as a result, marginalize political identities such as issues of race, gender, and

¹³² Kimberly Crenshaw, “Race, Reform and Retrenchment: Transformation and Legitimization in Antidiscrimination Law,” *Harvard Law Review*, Vol. 101, (1988).

¹³³ Cook (1990).

¹³⁴ Matsuda (1987).

¹³⁵ Matsuda (1987); Dalton (1987).

¹³⁶ John N. Tye & Morgan W. Williams, “Special Project: Networks and Norms: Social Justice Lawyering and Social Capital in Post-Katrina New Orleans,” *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 44 (2009), 264.

¹³⁷ Gerald P. Lopez, *Rebellious Lawyering* (Boulder, CO: Westview Press, 1992).

sexual orientation.¹³⁸ And so, the narratives and the counter-narratives have moved back and forth in zigzagging fashion ever since.

Yet in all of this critique and counter-critique, no one, including the CLS academics, the CRT scholars, and the community legal service attorneys has ever undertaken a comprehensive inside account, such as the instant one. What is missing from the field, and what this dissertation seeks to provide, is an examination and synthesis of the perspectives of the primary participants of the system. This project therefore systematically (1) asks the litigants, who the laws are designed to protect, about their experiences, (2) interviews the attorneys who advocate the litigants' causes, (3) assesses the opinions of the judges who adjudicate the disputes, and (4) investigates the operations of at least one administrative agency charged with investigating and enforcing civil rights statutes.

III. METHODOLOGICAL APPROACHES TO DATE

As much of the above discussion illustrates, the challenge and counter-challenge to the rights discourse has largely been waged on theoretical grounds.¹³⁹ While recently there has been some empirical work, it remains limited. As previously noted, one group of empirical scholars comes squarely from political science and is best typified by Gerald Rosenberg's *The Hollow Hope*. But *The Hollow Hope* only assessed the social and political significance of a couple of landmark Supreme Court decisions, such as *Brown v. Board of Education* and *Roe v. Wade*. Rosenberg's

¹³⁸ Scott L. Cummings & Ingrid V. Eagly, "A Critical Reflection on Law and Organizing," *UCLA Law Review*, Vol. 48, (2001), 486.

¹³⁹ L.M. Friedman, "Litigation and Society," *Annual Review of Sociology*, Vol. 15 (1989), 23. Stating, "Unfortunately, despite the enormous literature on civil rights, empirical research on civil rights litigation is rare."

scholarship also only addressed the Supreme Court's impact and contained no discussion of the effectiveness of civil rights laws or litigation more broadly as a strategy for change.

Another area of empirical scholarship comes from a legal sub-discipline aptly named empirical legal studies. Empirical Legal Studies (ELS) is a fairly new discipline that was established by legal scholars who sought to analyze legal issues through empirical/quantitative techniques more frequently associated with economics, psychology and sociology. A number of ELS scholars have looked at litigation data to assess the effectiveness of civil rights laws.¹⁴⁰ For example, analyzing data from the Administrative Office of the United States Courts, Clermont and Schwab found that during the time period from 1979 to 2006, employment discrimination plaintiffs won their trials only a scant 15% of the time.¹⁴¹ In comparison, over that same period, non-job discrimination plaintiffs won 51% of the time.¹⁴² Equally dramatic, Clermont and Schwab also found that discrimination plaintiffs have more difficulty

¹⁴⁰ See for e.g.: Kevin M. Clermont & Stewart J. Schwab, "Employment Discrimination Plaintiffs In Federal Court: From Bad to Worse?" *Harvard Law & Policy Review*, Vol. II, (2008), 30; Kevin M. Clermont & Stewart J. Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court," *Journal of Empirical Law Studies*, Vol. 1, (2004), 440; See also Laura Beth Nielsen, Robert Nelson & Ryon Lancaster, "Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States," *3rd Annual Conference on Empirical Legal Studies Papers American Bar Foundation Research Paper No. 08-04* (Apr 16, 2008), available at <http://ssrn.com/abstract=1093313>; John Friedl & Andre Honoree, "Is Justice Blind? Examining the Relationship Between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases," *Cumberland Law Review*, Vol. 38, No. 1, (2007); Lee Reeves, "Pragmatism Over Politics: Recent Trends In Lower Court Employment Discrimination Jurisprudence," *Missouri Law Review*, Vol. 73 (2008).

¹⁴¹ Clermont & Schwab, "Employment Discrimination Plaintiffs In Federal Court: From Bad to Worse?" 30; Clermont & Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court," 429, 440.

¹⁴² Clermont and Schwab, "Employment Discrimination Plaintiffs In Federal Court: From Bad to Worse?", 30; Clermont and Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court"; Kevin M. Clermont & Theodore Eisenberg, "Trial by Jury or Judge: Transcending Empiricism," *Cornell Law Review*, Vol. 77, paper no. 246, (1992), 1124. The authors note that discrimination plaintiffs are least likely to win at trial in comparison to all other categories of federal plaintiffs).

maintaining favorable lower court outcomes and reversing unfavorable ones on appeal than their adversaries do, noting that plaintiffs win reversals on appeal 6% of the time whereas discrimination defendants win their appeals nearly 44% of the time, subjecting the viability of plaintiffs' trial wins to little more than a "coin flip."¹⁴³

Clermont and Schwab have also found that the number of employment discrimination claims filed in federal court have been decreasing dramatically over the last decade, perhaps as a reaction to the hostility of federal courts.¹⁴⁴ From 1970 to 1989, the number of such claims rose from 336 to 7613.¹⁴⁵ Following passage of the 1991 civil rights act which provided significant additional protections and remedies to discrimination victims, such as punitive damages, the right to a jury trial, etc., the number of claims terminated in federal court went from 8303 in 1991 to 23,722 by 1998.¹⁴⁶ However, since 1998 there has been a steady decline in filings, and by 2007 the number of cases terminated had dropped to 15,007, a decrease of approximately 37%. They continue to occupy an increasingly lower percentage of the overall federal docket.¹⁴⁷

While looking at statistical data can serve to help outsiders make some sense of the efficacy of the civil rights laws, it hardly provides a complete picture and has

¹⁴³ Clermont and Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court"; Clermont and Schwab, "How Employment Discrimination Plaintiffs Fare in the Federal Courts of Appeals," *Employee Rights & Employee Policy Journal*, Vol. 7, (2003).

¹⁴⁴ Clermont and Schwab, "Employment Discrimination Plaintiffs In Federal Court: From Bad to Worse?"

¹⁴⁵ John Donohue and Peter Siegelman, "The Changing Nature Of Employment Discrimination Litigation," (1991). Faculty Scholarship Series. Paper 42. Accessible at: http://digitalcommons.law.yale.edu/fss_papers/42

¹⁴⁶ Clermont and Schwab, "Employment Discrimination Plaintiffs In Federal Court: From Bad to Worse?"

¹⁴⁷ Clermont and Schwab, *Ibid.*; See also Laura Beth Nielsen, et al, "Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United," reporting a decrease in federal employment discrimination filings from an acme of 23,796 in 1997 to 14,353 in 2006.

limited explanatory power. Additionally, the statistical data is also limited as close to 70% of all federal cases are resolved through pretrial settlements.¹⁴⁸ Additionally, the majority of cases are never filed in federal courts, as they are resolved administratively. That may explain why Blumrosen, one scholar in this area, opined, “no meaningful understanding of the significance of law can be gleaned from a study of constitutions, statutes, and [case] decisions alone. The human meaning of these materials must be found in the day-to-day functioning of the agencies charged with their implementation.”¹⁴⁹ I would add to Blumrosen’s assessment that “human meaning” cannot be comprehended without understanding the perspectives of all of the major participants of the litigation process.

There are several notable studies that do attempt to assess the perspective of one set of stakeholders in the litigation system. For example, in trying to make sense of race relations litigation from the 1960s through the 1980s, Wasby attempted to blend information accumulated from attorney interviews and secondary sources.¹⁵⁰ In attempting to understand how rights impact the daily lives and legal consciousness of one subaltern population, Engel and Munger spent years obtaining autobiographical narratives by interviewing individuals with disabilities during the 10 year period

¹⁴⁸ Clermont and Schwab, “How Employment Discrimination Plaintiffs Fare in Federal Court,” *But also see*: Minna Kotkin, “Outing Outcomes: An Empirical Study Of Confidential Employment Discrimination Settlements,” *Washington & Lee Law Review*, Vol. 64, No. 1 (2007). Kotkin was given access to private settlement data that was compiled for 1,170 cases that were settled by Chicago federal magistrate judges during a period of 1999 through 2005. She reports that, on average, plaintiffs received \$54,651 in settlements. However, even this data has limitations as (a) it does not address the vast amount of discrimination claims which get resolved at the administrative level, (b) comprises only one study, (c) does not tell us how much individuals received as a percentage of their overall claim, and (d) does not address whether the plaintiffs were satisfied with the results or whether the judges thought that the settlements were fair.

¹⁴⁹ Alfred Blumrosen, “Anti-Discrimination in Action in New Jersey: A Law-Sociology Study,” *Rutgers Law Review*, Vol. 19, (1965),188.

¹⁵⁰ Stephen Wasby, *Race Relations Litigation in the Age of Complexity* (Charlottesville, VA: University of Virginia Press,1995).

following passage of the 1990 Americans with Disabilities Act. In analyzing the empowering and/or disempowering effects of the 1964 Civil Rights Act, Bumiller interviewed victims of race, gender and age discrimination, and based on those interviews, concluded that the Civil Rights Act actually serves to reinforce their victimization.¹⁵¹ In attempting to assess the performance of the Division on Civil Rights, a statewide administrative agency, to eradicate discrimination in New Jersey, Blumrosen, *inter alia*, interviewed black residents of New Jersey and reviewed Agency case files during the 1962 fiscal year. Blumrosen concluded that the New Jersey Commission was a failure inasmuch as it was overly cautious, sloppy, inept, and systematically failed to secure significant relief on behalf of the complainants.¹⁵² In a similar study, in the early sixties, Mayhew reviewed 118 complaints of discrimination filed with the Massachusetts Commission, interviewed a number of complainants and respondents, and also met with Commission personnel in an attempt to analyze the effectiveness of the Massachusetts Commission Against Discrimination in regulating race relations. He concluded that it was not effective.¹⁵³

But these research studies are of marginal value as the most comprehensive ones are significantly outdated, and none attempt to systematically synthesize the perspectives of all major stakeholders by an insider to the system. The purpose of this project is to fill that gap. But before synthesizing these different perspectives, some background discussion on the state of the law is required.

¹⁵¹ Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims*, (Baltimore, MD: Johns Hopkins University Press, 1988), 2.

¹⁵² Alfred Blumrosen, "Anti-Discrimination in Action in New Jersey: A Law-Sociology Study," 187-200.

¹⁵³ Leon Mayhew, *Law and equal opportunity, a study of the Massachusetts Commission Against Discrimination*, (Cambridge, MA: Harvard University Press, 1968).

Chapter 3 – From Jim Crow to the 1964 Civil Rights Act: What our Equal Employment Laws Prescribe

I. INTRODUCTION

This chapter reviews the Reconstruction Civil Rights Act of 1866 and the fair employment legislation movements that gave birth to the PaHRA and Title VII. These two ensuing pieces of civil rights legislation fulfilled what the Reconstruction Era act aimed to but initially failed to accomplish. Chapter 4 reviews the jurisprudential history following passage of these newer measures and how an increasingly conservative judiciary incrementally handed down decisions that eviscerated the effectiveness of these laws.

As an initial matter, in the United States, employment discrimination laws are comprised of a patchwork of interrelated measures that were the product of compromises between opposing political factions following bitter partisan divides. The relevant laws for individuals who sue employers in Pennsylvania for racially discriminatory conduct are (1) the PaHRA, (2) Title VII of the 1964 Civil Rights Act, and (3) the Civil Rights Act of 1866.¹⁵⁴

¹⁵⁴ There are other statutes that may provide a source of additional substantive rights for workers in Pennsylvania, but they have diminished relevance due to their less frequent invocation. For example, in addition to the PaHRA, Title VII, and the Civil Rights Act of 1866, a Pennsylvania plaintiff may be able to sue under local municipal ordinances that create private causes of action to redress discrimination. In Philadelphia, plaintiffs may bring a claim against a Philadelphia employer for race discrimination by filing with the Philadelphia Commission on Human Relations. If the employer is a state actor or otherwise engaged in “state action,” such as in the case of a municipality, an individual may also sue the defendant employer under 42 U.S.C. § 1983 for a constitutional violation under the 14th Amendment’s Equal Protection Clause. The reason that an individual may choose to sue under some *or all* of these legal avenues lies in the fact that each statute provides varying remedies and procedural hurdles. For example, as discussed more fully below, both Title VII and the PaHRA only apply to employers of certain sizes. Section 1981 applies to employers of any size. Title VII and the PaHRA limit the types of damages that are available to a plaintiff. With limited exception, Section 1981 does not. The PaHRA and Title VII have much shorter statutes of limitations than Section 1981. But a lawsuit under Section 1981 may, in certain instances, be more onerous than one filed under Title VII or the PaHRA.

II. CIVIL RIGHTS ACT OF 1866, TITLE VII, AND THE PaHRA

A. The Civil Rights Act of 1866

As noted in Chapter 2, the first time that the federal government ever systematically acted to address racial discrimination occurred through ratification of the 13th, 14th, and 15th Amendments to the United States Constitution and passage of the Reconstruction Era Civil Rights Acts of 1866, 1871,¹⁵⁵ and 1875. Of the statutes, the only ones that could possibly reach and prohibit private discrimination in employment were the Civil Rights Acts of 1866 and 1875.

As for the Civil Rights Act of 1866, Congress originally passed that measure pursuant to Congressional authority under the 13th Amendment, which outlawed slavery. Due to potential concerns about Congressional overreach in passing the statute, Congress reenacted the statute in 1870 following passage of the 14th Amendment.¹⁵⁶ The statute, which is, in part, codified at 42 U.S.C. § 1981, reads:

All persons within the jurisdiction of the United States shall have the same right...to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

On its face, Section 1981 is not limited to regulating state action. But due to the *Civil Rights Cases* of 1888 - where the Supreme Court invalidated the Civil Rights Act of 1875 as an unconstitutional exercise of Congressional power under the 14th

¹⁵⁵ The Civil Rights Act of 1871 is codified, in part, at 42 U.S.C. § 1983. It provides for a private civil action against any person who, under color of state law, deprives another of any right, privilege or immunity secured by the constitution and federal law.

¹⁵⁶ Barbara T. Lindemann and Paul Grossman, *Employment Discrimination Law*, Volume II (BNA Books: American Bar Association, Section of Labor and Employment Law, Equal Employment Opportunity Committee, 2007), 2363.

Amendment¹⁵⁷ - it was assumed for a better part of the twentieth century that Section 1981 could only be applied to regulate the conduct of state actors. As a result, the early civil rights litigation pioneers, such as the NAACP, never invoked Section 1981 as a way of attacking private racially discriminatory conduct. In fact, following the *Civil Rights Cases*, the Supreme Court at the turn of the 20th century signaled that Section 1981 did not apply to private entities.¹⁵⁸ Later, in 1948, the Supreme Court noted in *dicta* that “state action must be present before a violation of the 1866 Act can be found.”¹⁵⁹

As a result, it was assumed that the only way for the federal government to regulate purely private conduct was through passage of a new set of laws based upon some hitherto unspecified legal authority. At the federal level, the newly identified source for congressional authority would be the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3), which by the 1930s New Deal era was being interpreted in increasingly expansive ways. In several notable decisions, such as *National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937) and *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court signaled a sea change in how it would interpret the Commerce Clause; it began deferring to congressional legislative action, holding it as valid when the regulated activities, in the aggregate, had *any* rational effect on interstate commerce. As a result of the expansive interpretation given to the Commerce Clause, proponents suggested that Congress could rely on these laws for passage of new federal civil rights

¹⁵⁷ 109 U.S. 3 (1883).

¹⁵⁸ *Hodges v. United States*, 203 U.S. 1, 16 (1906).

¹⁵⁹ *Hurd v. Hodge*, 334 U.S. 24, 31 (1948).

legislation. The legal underpinnings for federal fair employment legislation sprang out of this new interpretative scheme.

B. A Short Legislative History of Title VII

The history leading up to passage of the 1964 civil rights act has been extensively written about by a number of scholars and for purposes of this dissertation need only be summarized here.¹⁶⁰ Suffice it to say, the Act represents an historic measure in which the federal government intruded into the private affairs of employers in a manner that many in the corporate and legal communities believed went well beyond its authority.

The precursor to the Equal Employment Opportunity Commission was the Committee on Fair Employment Practices (FEPC). Even though African Americans had served as an important part of FDR's Democratic coalition in the thirties and forties, the administration largely ignored the pleas of activists for a civil rights bill to tackle the issue of race discrimination. As a result, in 1941, A. Phillip Randolph and other civil rights leaders threatened a march on Washington to protest the federal government's neglect in responding to nationwide employment discrimination. In response to the threat and before the march took place, President Roosevelt signed Executive Order 8802 into law in June 1941, thereby creating the federal Fair Employment Practices Commission (FEPC). The FEPC was charged with investigating and remediating complaints of discrimination by defense industry employers who received government contracts. Two years later, Roosevelt signed Executive Order 9346 which expanded the powers of the FEPC. But by 1946, the United States Congress voted to abolish the FEPC.

¹⁶⁰ See for e.g.: Davis Graham, Hugh, *The Civil Rights Era: Origins and Development of National Policy 1960-1972* (Oxford: Oxford University Press, 1990).

In 1948, President Truman introduced a civil rights package that would have created, among other items, a permanent FEPC, but a southern coalition of conservative Democrats killed the bill. In 1950, the House passed a permanent FEPC bill, but Southerners defeated it in the Senate. Consequently, each president from Roosevelt to Kennedy was forced to resort to executive order to create a fair employment practices committee.

In 1963, in the wake of violent civil rights activity, President Kennedy proposed a far-reaching civil rights bill to Congress under authority of the Commerce Clause. While a number of civil rights activists expressed dismay that the bill did not go far enough in addressing institutional racism, Kennedy and then President Johnson resisted alterations for fear that strengthening it would make it impossible to pass. Following, and perhaps due to, Kennedy's assassination Congress passed the bill. On July 2, 1964, President Johnson signed it into law. Not surprisingly, opponents of the law challenged its constitutionality. But in the cases of *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court upheld the Act as a valid exercise of congressional authority under the Commerce Clause.

While its provisions are sweeping in scope, the 1964 Civil Rights Act contains a number of provisions that critics have argued made it less robust than a number of its state counterparts. For example, with regard to Title VII, the EEOC was originally modeled after the NLRB, and therefore had the power not only to investigate but also to prosecute and adjudicate complaints. But by the time the bill passed, Congress had stripped the EEOC of such adjudicatory and enforcement

authority.¹⁶¹ Nonetheless, despite the compromises that took place, many observers believe that the 1964 Act still represents a crowning achievement in the history of the civil rights movement.

C. A Short Legislative History of the PaHRA

As noted above, even though a possible alternative legal source to support passage of a broad based civil rights law existed in the form of the Commerce Clause, the federal government stalled on taking any systematic remedial action during the first half of the twentieth century. As a result of the federal government's inaction, a number of states stepped into the void and passed their own legislation.¹⁶²

Pennsylvania was one of those states.

The logical starting point for understanding the history behind the passage of the PaHRA is the 1934 election of George Earle, Pennsylvania's first Democratic governor in forty years. Like the corresponding federal election, in Pennsylvania, the African American electorate had proved to be a critical faction of the Democratic coalition in Commonwealth. In response to the failure of the Roosevelt administration to address racism in any programmatic fashion, in 1935 Governor Earle signed into law the very first employment discrimination bill in the Commonwealth, which made it illegal for contractors to engage in racial discrimination in public works projects.¹⁶³ Around the same time, Pennsylvania also criminalized violations of certain civil rights.

¹⁶¹ For a comprehensive history regarding the passage of the 1964 Civil Rights Act, *see generally*: Graham, *The Civil Rights Era: Origins and Development of National Policy 1960-1972*.

¹⁶² Several scholars have already chronicled the history of the passage of the PaHRA, including Gibson Gray in his 1970 book *The Lobbying Game; A Study of the 1953 Campaign of the State Council for a Pennsylvania Fair Employment Practice Commission* (Tyler, Texas: Tyler Publishing), and Smith and Wolensky in their 2002 article, "A Novel Public Policy: Pennsylvania's Fair Employment Practices Act of 1955," *Pennsylvania History*, Vol. 69, (Fall 2002).

¹⁶³ Smith and Wolensky, 5.

In 1937, Representative Homer S. Brown, one of the first African Americans ever to serve in the Pennsylvania House of Representatives and a former President of the local chapter of the NAACP, sought to amend Pennsylvania's Labor Relations Act (PLRA) to exclude unions that discriminated on the basis of race. Despite opposition from the AFL and CIO, the bill passed. With these laws in place, Pennsylvania civil rights advocates saw as the next logical step a measure that would ban any form of race-related, workplace discrimination by an employer in the Commonwealth. Their efforts were met by considerable resistance from a number of factions, including the powerful Pennsylvania business community.

Given claims that insufficient discrimination existed in the state to support legislative intrusion into the private affairs of employers, in 1939 the state assembly created the Pennsylvania State Temporary Commission on the Conditions of the Urban Colored Population. The ostensible purpose for the Commission's existence was the investigation of the welfare of the state's black population. That same year, Pennsylvania's Secretary of Labor and Industry also commissioned a report to investigate the conditions of African Americans in the workplace. Both of these agencies produced reports documenting the existence of widespread racial discrimination, for which they urged legislative correction, such as the formation of a state fair employment practices commission. These reports came on the heels of a high profile incident in Philadelphia that underscored the existence of race discrimination inside the Commonwealth, and in turn, the need for legislation to remediate it.

In the early forties, the Philadelphia branch of the NAACP and the National Negro Congress started to exert pressure on various Philadelphia employers to hire

more African Americans. When it approached the Philadelphia Transportation Company (PTC) about hiring more blacks as motor car operators, the PTC refused based upon concerns that the Philadelphia Rapid Transit Employees Union would object to integration.

With WWII depleting the American labor force, in 1943 the PTC asked the United States Employment Office to assist in finding eligible *white* workers to fill open positions. The FEPC began to investigate the PTC's practices, as did the federal War Manpower Commission, created in 1942 by executive order 9139. Due to federal pressure about what these agencies might do if the PTC did not promise to change the way it operated, in 1944 the PTC agreed to hire more African Americans and to promote several of its black workers to the position of street car operator. The very day that these African Americans were scheduled to commence their new positions, the PTC's mostly white workforce called a "sick-out" and failed to appear for work.¹⁶⁴ Because the ongoing "sick-out" occurred during wartime, President Roosevelt sent in the federal troops to take control of the transit system pursuant to presidential war powers. The leaders of the sick-out were arrested, and it was only when all remaining strikers returned to their jobs under threat of termination that business returned to normal. But the PTC incident was important insofar as (1) the highly publicized show-down served to mobilize public sentiment in favor of anti-discrimination legislation and (2) it undermined one of the primary justifications that opponents had mustered to contest the bill - the purported lack of discrimination in the Commonwealth.

¹⁶⁴ Smith and Wolensky, "A Novel Public Policy: Pennsylvania's Fair Employment Practices Act of 1955," 5.

Due to the federal government's continued failure to pass a comprehensive anti-discrimination civil rights measure in the face of ongoing discrimination, a number of states concurrently began introducing their own fair employment practices measures. In March of 1945, the FEPC movement met its first success when the State of New York passed the first "Law Against Discrimination" (LAD), a response to the lobbying of a coalition of black and Jewish civil rights activists who urged the state government to ban discrimination against minorities in the workplace. New York's LAD was modeled after the National Labor Relations Act and created a NLRB-like administrative agency that was empowered to receive and investigate complaints, mediate settlements, hold hearings, make findings of fact, and adjudicate disputes.¹⁶⁵

That same year, in Pennsylvania, Representative Homer Brown introduced a piece of legislation that called for banning race discrimination in the workplace.¹⁶⁶ By a vote of 102 to 97, with 102 Republicans opposing the bill and only 5 supporting it, the House refused to pass the measure. Between 1945 and 1952, on approximately twenty ensuing occasions, the Pennsylvania legislature defeated some version of a FEPA bill. But given the perceived popularity for FEPA, by 1952 the Pennsylvania Republican Party adopted a plank that supported the immediate passage of effective fair employment legislation even though a number of business interests, which comprised a powerful part of the Republican coalition, remained opposed to it.¹⁶⁷

¹⁶⁵ Following passage of the LAD in New York, New Jersey passed its own fair employment practices act in 1945, and was followed by Massachusetts in 1946, Connecticut in 1947, New Mexico, Oregon, Rhode Island, and Washington in 1949. Hugh, *The Civil Rights Era: Origins and Development of National Policy 1960-1972*, 131.

¹⁶⁶ "Homer S. Brown Biography," *Brief Biographies*. Accessible at: <http://biography.jrank.org/pages/2333/Brown-Homer-S.html#ixzz0v5PpEnDU>

¹⁶⁷ *PA House Legislative Journal*, 1955 Session, (Harrisburg, PA: Pennsylvania Commonwealth, 02/22/1955), 446.

In 1952, the newly elected governor of Pennsylvania, John Fine (R), created the Governor's Commission on Industrial Race Relations. The Commission was charged with conducting a broad survey of workplace discrimination faced by respective ethnic, racial, and religious groups across the state. The Commission surveyed 1229 businesses in 44 locales in Pennsylvania, representing 80% of the State's population.¹⁶⁸ The Commission reported that 38% of polled employers claimed to discriminate on the basis of race in unskilled employment hiring; 67% claimed they discriminated on the basis of race when hiring skilled labor; 83% claimed they discriminated in supervisory hiring; approximately 85% claimed they discriminated in office hiring; 89% claimed they discriminated in hiring engineers; and 92% claimed they discriminated when hiring for sales positions.¹⁶⁹ Based upon its research, the Commission also reported that black workers held the most menial jobs. The Commission also reported that Jews, Italians, and Catholics experienced discrimination in employment opportunities.

In offering reasons for their refusal to hire, respondents reported "tradition," "company policy," "union restrictions," "perceived employee and customer reactions to an integrated workforce," and the difficulty in providing for racially segregated accommodations.¹⁷⁰ For civil rights advocates, this study proved the lynchpin for advocating for fair employment legislation. Following the report's issuance, the House of Representatives promptly passed a FEPA bill, but the Senate's judiciary committee refused to vote the Senate version out of session.

¹⁶⁸ *PA Senate Legislative Journal*, Vol. 34, No. 16, 1955 Session, (Harrisburg, PA: Pennsylvania Commonwealth, 02/22/1955), 2827.

¹⁶⁹ *Ibid.*,

¹⁷⁰ Smith and Wolensky, "A Novel Public Policy: Pennsylvania's Fair Employment Practices Act of 1955," 5.

In 1955, the House passed another FEPA bill. This time, instead of sending the bill to the Judiciary Committee, the new Governor's administration assigned the bill to the much friendlier Senate Education Committee. But the Senate Education Committee initially refused to vote the bill out of conference. It then did an abrupt about-face and ultimately voted it out. In what would presage a Southern strategy to scuttle the 1964 Civil Rights Act by adding gender as a protected category, Pennsylvania Republicans added a poison pill to the FEPA bill in the form of an anti-age discrimination provision which many supporters opposed.¹⁷¹ But in October 1955, the Pennsylvania House and Senate both passed the amended bill. Governor George Leader then signed it into law.

Originally, the law banned discrimination on the basis of race, color, religious creed, ancestry, age and national origin for employers who had at least twelve employees. As a result, at the time of enactment, the statute applied to approximately 38,000 employers and impacted approximately three million workers. The stated purpose of the bill was to “foster the employment of all individuals in accordance with their fullest capacities regardless of their race color religious creed ancestry age or national origin and to safeguard their right to obtain and hold employment without such discrimination.”¹⁷²

Following its passage, the Pennsylvania Assembly amended the PaHRA a number of times. In 1961, it amended the law to prohibit discrimination in housing, public accommodations, and education. It also changed the name of the statute from the Fair Employment Practices Act (FEPA) to the PaHRA. It also increased the

¹⁷¹ In the House, some Republicans attempted to add a provision prohibiting discrimination based on disability, sex, and selective service status. But Democrats successfully defeated these amendments.

¹⁷² *PA Senate Legislative Journal*, Vol. 34, No. 16, 1955 Session, (Harrisburg, PA: Pennsylvania Commonwealth, 02/22/1955), 2821.

number of commissioners from six to eleven. In 1966, the state amended the PaHRA again to give the Commission jurisdiction over religious, fraternal, charitable, and sectarian employers employing at least six individuals. In 1967, the act was amended to expand Commission jurisdiction by applying to employers with four or more employees. In 1969, the act was amended to outlaw sex discrimination. In 1974, in response to federal congressional passage of the 1973 Rehabilitation Act, the PaHRA was similarly amended to prohibit disability discrimination.

D. The Warren Court and the Civil Rights Act of 1866

In hindsight, as far as race-related employment discrimination goes, the PaHRA and Title VII may have proven largely unnecessary in the wake of the Warren Court's decision in the 1968 case of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). In that case, the Supreme Court had an opportunity to reconsider the reach of the Civil Rights Act of 1866.

In *Jones*, the petitioner alleged that the respondents had discriminated against him by refusing to sell him a house based on racial grounds. Following earlier Supreme Court decisions, the Eighth Circuit, in an opinion written by then Court of Appeals Judge Harry Blackmun, held that the existence of state action was a necessary prerequisite to sue a private entity for discrimination under the Civil Rights Act of 1866.¹⁷³ In reversing the Eighth Circuit, the Supreme Court explicitly overruled its earlier decision in *Hodges v. United States*, 203 U.S. 1 (1905), and held that Section 1982, a codified portion of the Civil Rights Act of 1866, “bars *all* racial discrimination, private as well as public, in the sale or rental of property.”¹⁷⁴ In so holding, the Court reasoned that Section 2 of the Thirteenth Amendment, which gave

¹⁷³ *Jones v. Alfred H. Mayer Co.*, 379 F.2nd 33 (8th Cir. 1967).

¹⁷⁴ *Ibid.*, at 413

Congress the power “to determine what . . . the badges and incidents of slavery [are],” also gave it “authority to translate that determination into effective legislation.”¹⁷⁵

Thus, Congress could ban private discriminatory conduct.

Ironically, as part of the compromise for passage of the Civil Rights Act of 1964, Congress had exempted private clubs from coverage. The Warren Court had now made it possible for civil rights litigators to sue these entities, including private schools, an outcome thought unimaginable in earlier decades. In 1976, the Supreme Court extended the analysis of *Jones* to Section 1981 actions in the case of *Runyon v. McCrary*, 427 U.S. 160 (1976). Due to *Jones* and *Runyon*, the 1866 Act has become a rather robust legal source to reach racially discriminatory conduct left unaddressed by the 1964 Civil Rights Act.

E. What the Law Provides: The 1964 Civil Rights Act

The 1964 Civil Rights Act bans a number of forms of discrimination in a variety of different contexts. Title I of the Act bans certain discriminatory practices, such as particular types of literacy tests that had the effect of excluding minorities from the voting booth. Title II prohibits discrimination by places of public accommodations on the basis of race, color, religion, or national origin. Title III bars state and local governments from discriminating in affording access to public facilities based on race, color, religion, or national origin. Title IV confers certain enforcement powers upon the United States Attorney General. Title V enumerates and expands the powers of the United States Commission on Civil Rights, created by the Civil Rights Act of 1957. Title VI prohibits race and national origin discrimination by recipients of federal funding. Title VII, as more fully discussed

¹⁷⁵ *Ibid.*, at 440.

below, proscribes employers¹⁷⁶ with at least fifteen employees, employment agencies,¹⁷⁷ and labor organizations¹⁷⁸ from discriminating against individuals on the basis of race, color, religion, sex and/or national origin. Title VIII requires the Secretary of Commerce to compile voter-registration and voting data in geographic areas designated by the Civil Rights Commission. Title IX strengthens safeguards to ensure that the adjudication of civil rights cases in federal forums. Title X creates a Community Relations Service, charged with assisting in the resolution of general claims of discrimination in local communities.¹⁷⁹

Returning to Title VII, it specifically provides that: (1) employers may not discriminate “with respect to compensation, terms, conditions, or privileges of employment”¹⁸⁰; (2) employment agencies may not “fail or refuse to refer for

¹⁷⁶ Under Title VII, an “employer” is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person...” “Person” does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 (the Internal Revenue Code of 1986), except that during the first year after March 24, 1972 (the date of enactment of the Equal Employment Opportunity Act of 1972), persons having fewer than twenty-five employees (and their agents) shall not be considered employers. Title VII also defines “person” to include “one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 or receivers.

¹⁷⁷ Title VII defines an “employment agency” as “any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.” 42 U.S.C. § 2000e.

¹⁷⁸ Title VII defines “labor organization” as one that is “engaged in an industry affecting commerce... and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.” 42 U.S.C. § 2000e.

¹⁷⁹ As noted in Chapter 1, Congress would also subsequently pass laws that would ban discrimination on the basis of age and disability through enactment of the ADEA in 1968, the Rehabilitation Act in 1973, and the ADA in 1990.

¹⁸⁰ 42 U.S.C. § 2000e.

employment, or otherwise to discriminate against, any individual”¹⁸¹; and (3) labor organizations and apprenticeship programs may not “exclude or ... expel from its membership, or otherwise ... discriminate against, any individual” on the basis of the above-described protected classifications.¹⁸² Like the PaHRA, Title VII also contains a provision that prohibits retaliation against an employee for assisting in any investigation pursuant to the Act.¹⁸³

The 1964 Civil Rights Act also created the Equal Employment Opportunity Commission (EEOC). The EEOC is comprised of five commissioners, whom the President appoints with the advice and consent of the Senate for terms of five years, and no more than three of whom may be members of the same political party.¹⁸⁴

Regarding what the EEOC does: First, it has the power to receive and investigate complaints of employment discrimination and to compel the production of documents through the issuance of subpoenas.¹⁸⁵ Second, where the EEOC believes that a violation of rights took place, it may attempt to formally resolve the matter through a process called conciliation. Third, the EEOC is empowered to file a civil action under its own name in federal court when it is unable to obtain a conciliation agreement from an employer that it deems acceptable. As a practical matter, the EEOC rarely files suit unless there is a “pattern and practice” of discrimination involving a large enterprise and a large number of individuals. Fourth, the EEOC may issue certain types of rules that require the employer to engage in record keeping,

¹⁸¹ 42 U.S.C. § 2000e-2(b).

¹⁸² 42 U.S.C. § 2000e-2(c)(1).

¹⁸³ 42 U.S.C. § 2000e-3(a).

¹⁸⁴ 42 U.S.C. § 2000e-4(a).

¹⁸⁵ 42 U.S.C. § 2000e-5(b).

reporting, and notice-postings. Fifth, the EEOC may issue interpretive guidelines of the law.

F. What the Law Provides: The PaHRA

As stated, the PaHRA was enacted in 1955.¹⁸⁶ In its most general form, the PaHRA bars discrimination on the basis of race, color, religious creed, ancestry, age, sex, national origin, and non-job related disability or prior disability in the areas of employment, housing, commercial matters, education, and public accommodations within the Commonwealth of Pennsylvania.¹⁸⁷ In the context of employment, the PaHRA specifically provides:

[i]t shall be unlawful ... [f]or any employer because of the race, color, religious creed, ancestry, age, sex, national origin, or no-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.¹⁸⁸

The PaHRA also bars:

- labor organizations and employment agencies from discriminating on the basis of race, color, religious creed, ancestry, age, sex, national origin, and non-job related disability;
- employers from discriminating because a prospective employee has a general education development certificate (“GED”) as opposed to a high school diploma;
- retaliation against any individual who opposes any practice proscribed by the act;¹⁸⁹

¹⁸⁶ The PaHRA is codified at 43 Pa.C.S.A. §§ 951—963,

¹⁸⁷ 43 Pa.C.S.A. §§ 951—963.

¹⁸⁸ 43 Pa.C.S.A. § 955(a).

¹⁸⁹ 43 Pa.C.S.A. § 955(d).

- the aiding, abetting, inciting, compelling, or coercing of others to engage in unlawful discrimination.¹⁹⁰

The PaHRA also created the Pennsylvania Human Relations Commission (Commission or PaHRC).¹⁹¹ The PaHRC is charged with, among other responsibilities, investigating complaints of discrimination, issuing findings based upon such investigations, conciliating complaints, holding hearings, adjudicating disputes, and issuing cease and desist and “make whole relief” orders, including back pay, where warranted. Chapters 5 and 6 of this dissertation provide a more substantive review of the PaHRC.

G. Comparing Remedies Between The PaHRA, Title VII, and The Civil Rights Act of 1866

Part of the purpose of this dissertation is to understand the efficacy of laws in remediating racial discrimination. Thus, some discussion of remedies available under these laws is important. Under all three acts a party can seek injunctive relief, that is, an order from a tribunal banning discrimination in the workplace. As for monetary relief, under Title VII, the PaHRA, and Section 1981, a plaintiff is entitled to compensatory damages for past and future wage loss, pain and suffering, attorney’s fees, and equitable relief that can take a variety of forms, such as a court ordering a promotion, reinstatement, etc. Unlike Title VII and Section 1981 though, a plaintiff may not obtain punitive damages under the PaHRA. Furthermore, unlike the PaHRA, under Title VII, a court will cap a plaintiff’s compensatory damages as follows: (1) no more than \$50,000 against employers that have between 15-100 employees, (2) no more than \$100,000 against employers that have been 101-200 employees, (3) no

¹⁹⁰ 43 Pa.C.S.A. § 955(e).

¹⁹¹ 43 Pa.C.S.A. § 956.

more than \$200,000 against employers that have between 201-500 employees and (4) no more than \$300,000 against employers that have more than 500 employees.

As far as an award of back pay is concerned, under both Title VII and the PaHRA, a plaintiff will not be entitled to back pay for a period extending beyond more than two years from the date of filing with the administrative agency.¹⁹²

Unlike the PaHRA, a plaintiff is also entitled to a jury trial under Title VII and Section 1981.

Section 1981 perhaps provides the most robust available relief as it is under Section 1981 that a plaintiff is entitled to almost all the relief available under the PaHRA and Title VII without a cap on damages. Under Section 1981, there is also no duty to exhaust administratively. Additionally, under Section 1981, there is a four-year statute of limitations for filing. Table 1 shows some of the comparable advantages and disadvantages between these statutes.

[TABLE 1 ABOUT HERE]

Additionally, filing under Section 1981 or Title VII subjects the plaintiff to automatic removal to federal court, which sometimes can serve as a disadvantage to a plaintiff due to the inhospitality of the federal courts these days.

III. POLITICAL CONTESTATION AND THE NATION'S ANTI-DISCRIMINATION LAWS

Much of the discussion in this chapter has centered on the battles that various political forces waged to secure passage of Title VII and the PaHRA. In Chapter 4, I will discuss how these anti-discrimination laws have subsequently been interpreted by the courts. But before doing so, it is important to understand that “rights,” even after

¹⁹² 42 U.S.C. § 2000e-5(g).

their legislative enactments, are always subject to an ongoing process of contestation by political actors and interests intent on bending them to their will in either politically progressive or regressive directions.¹⁹³ This historical lesson sometimes appears lost by social movements that are grounded upon a rights discourse. Thus, for many political causes, the aim is passage of certain legislative reforms. For example, one of the goals of the postbellum activists involved ratification of the 13th, 14th and 15th amendments which were all designed to integrate the former slave population into the body politic. Similarly, one of the crowning achievements of the civil rights movement of the fifties and sixties involved passage of laws such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968 that supposedly would fulfill the pledges of equality and liberty promised by the constitution. But even though many of these statutes seemingly contain plain text, as part of the political process, the laws themselves become subject to ongoing negotiation, interpretation, and change. This very fact lends purchase power to those detractors who highlight the indeterminacy of rights, and therefore the instability of any causes that are grounded upon them. While these rights are indeterminate in the sense that their meaning is open to debate and can be subsequently construed in restrictive ways, they are only partially indeterminate because they still have sufficient moral clarity, certainty and purpose to possess an essential determinate nucleus.

¹⁹³ See for e.g.: Lauren B. Edelman, et al. "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth," *American Journal of Sociology*, Vol. 105, No. 2 (September 1999), pp. 406-54, p.407. The authors state, "The construction of law is invariably contested: many voices contribute to the process of legal enactment and vie for favorable interpretations of law once it is enacted.... The more ambiguous and politically contested the law, the more open it is to social construction. Law regulating organizations is especially open to social construction because the corporate lobby is usually successful in softening regulation that infringes on corporate interests, thus producing broad, vague mandates."

Thus, part of the story behind the anti-discrimination laws, such as Title VII and Section 1981, is the very contestation that took place after their passage. Some of the debate occurred at an institutional level, pitting different governmental structures against each other: that is, on the one hand, the Rehnquist and Roberts courts and their inferior judiciary against administrative agencies and the Warren and early Burger Courts.¹⁹⁴ When the federal judiciary strayed too far to the right, another institution – the United States Congress – stepped into the fray by providing legislative correctives such as through: (1) passing the Civil Rights Act of 1991, which explicitly reversed five Supreme Court decisions that civil rights supporters contended had watered down important civil rights protections¹⁹⁵; (2) ratifying amendments to the American with Disabilities Act (“ADA”) in 2008¹⁹⁶; and (3) enacting the Lily Ledbetter Fair Pay Act

¹⁹⁴ There are many examples that serve to illustrate this point. For instance, a number of commentators contend that federal courts are granting summary judgment motions, that is, applications by defendant employers that judgment be entered in their favor before the case even goes to trial, at exponentially greater rates than ever before. As a result, it has become a routine matter for defendant employers to file such motions. It has also become much more common for courts to grant these motions. Some judges have even become quite vocal in expressing their dismay with employment discrimination cases. *See for e.g.*: Henry L. Chambers, Jr.: “Recapturing Summary Adjudication Principles in Disparate Treatment Cases,” *SMU Law Review*, Vol. 58, No. 1, (Winter, 2005) 135; Michael Zimmer, “Slicing & Dicing of Individual Disparate Treatment Law,” 61 *Louisiana Law Review*, Vol. 61, (2001) 577; Natasha Martin, “Pretext in Peril,” *Missouri Law Review*, Vol. 75, No. 2, (Spring, 2010) 344-45, maintaining, “For sure, motions for summary judgment are now customary – a routine screening mechanism for the courts, as common a pleading as the initial complaint and answer that initiate the litigation cycle.”; *Keegan v Dalton*, 899 F Supp 1503, 1514-15 (E.D. Va. 1995) where the future chief judge of the Eastern District of Virginia granted defendant’s motion for summary judgment, declaring:

To the case brought before the Court this day, it is enough to say that the plaintiff’s claims fail entirely, and that the case will be dismissed. To the genre of cases to which it belongs, however, there is something more. This case is yet another entrant in a tiresome parade of meritless discrimination cases. Again and again, the Court’s resources are sapped by such matters, instigated by implacable parties and prosecuted with questionable judgment by their counsel. It is high time for this to stop.

¹⁹⁵ The cases that Congress overturned through passage of the Civil Rights Act of 1991 include: *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Martin v. Wilks*, 490 U.S. 755 (1989), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989).

¹⁹⁶ The ADA amendments overturned a number of Supreme Court decisions, including: *Sutton v. U.S. Air Lines*, 527 U.S. 471 (1999); *Murphy v. UPS*, 527 U.S. 516 (1999); *Alberstons, Inc. v. Kirkinburg*, 527 U.S. 555 (1999); and *Toyota v. Williams*, 534 U.S. 184 (2002)

of 2009.¹⁹⁷ Dissatisfied with these amendments, a number of civil rights advocates are clamoring for Congress to pass an omnibus civil rights act that would correct some other notably restrictive Supreme Court decisions, but such bills have never been reported out of Committee.¹⁹⁸ Despite the amendments, a conservative federal judiciary has subsequently interpreted these correctives in narrow fashion, again illustrating ongoing contestation and negotiation.

A comparable evolutionary course has taken place with the PaHRA because the Pennsylvania courts have generally construed the statute in conformity with its federal counterparts.¹⁹⁹ As a result, Pennsylvania courts have adopted many of the conservative turns that the federal courts have taken.

¹⁹⁷ The Lily Ledbetter Act overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007). In that case, Lily Ledbetter sued her company for gender inequity in pay. The Supreme Court ruled that Ms. Ledbetter was not entitled to back pay because the alleged initial violation took place before the 180-day statute of limitations. Under the Ledbetter law, actionable discrimination transpires when, *inter alia*, the employee is affected by the application of the discriminatory practice, including each time the employee is paid. The law further provides that an individual may receive back pay for up to two years prior to the filing of the charge as long as the charge is timely filed.

¹⁹⁸ In 2008, in the House of Representatives, Congressman John Lewis, along with thirty plus Democratic co-sponsors, and Senator Ted Kennedy, alongside nineteen Democratic co-sponsors, sponsored bills that would have done just that. *See*: The Civil Rights Act of 2008 - H.R. 5129 and S.2554. These bills would have legislatively overturned a number of restrictive Supreme Court and lower court decisions, including, but not limited to: (1) *Alexander v. Sandoval*, 532 U.S. 275 (2001), where the Supreme Court abolished the right of a private party to bring a disparate impact case under Title VI of the 1964 Civil Rights Act, against a recipient of federal funding who discriminates on the basis of race; (2) *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998), where the Supreme Court declared stringent standards for a private party to recover damages in a sexual harassment case against an entity receiving federal funding, such as an educational institution, under Title IX of the Education Amendments of 1972; (3) *Smith v. City of Jackson*, 544 U.S. 228 (2005), where the Supreme Court limited the scope of age discrimination claims that can be brought under the ADEA; (4) *Buckhannon Board & Care Home, Inc. V. West Virginia Dept. Of Health and Human Resources*, 532 U.S. 598 (2001), where the Supreme Court abolished plaintiff's formerly recognized right to obtain attorney's fees where the parties settle a civil rights case for some of the relief that the plaintiff had sought; (5) *West Virginia University Hospitals Inc. v. Casey*, 499 U.S. 83 (1991), where the Supreme Court refused to interpret the Civil Rights Attorney's Fees Awards Act of 1976 to authorize the award of expert fees as part of the damages awardable to a prevailing civil rights plaintiff.

¹⁹⁹ *Kroptavich v. Pennsylvania Power and Light Co.*, 795 A.2d 1048, 1055 (Pa. Super. 2002), holding that "Generally, claims brought under the PHRA are analyzed under the same standards as their federal counterparts."

TABLE 1 – COMPARISON BETWEEN PaHRA, TITLE VII, AND SECTION 1981

	PaHRA	Title VII	Section 1981
Right to Jury Trial	No	Yes	Yes
Right to Punitive Damages	No	Yes	Yes
Duty to Exhaust Administratively	Yes	Yes	No
Caps on Compensatory Damages	No	Yes	No
Right to Compensation for Pain and Suffering	Yes	Yes	Yes
Right of Administrative Agency to Adjudicate Dispute	Yes	No	n/a
Right of Administrative Agency to Initiate Action on Behalf of Complainant	Yes	Yes	n/a
Time limitations for filing	180 days to file with PaHRC from date of last incident and two years from date of Notice of Complainant's Rights	180 days or in some cases, 300 days to file with EEOC from date of last incident and ninety days to file complaint from receipt of Right to Sue letter	Four years to file from date of last incident of discrimination
Individual liability	Yes	No	Yes
Protected Categories Under the Statute	Race/color Sex Religion National Origin Disability Age (forty and over)	Race/color Sex Religion National Origin	Race Ancestry

I. REPUBLICANS AND THE FEDERAL JUDICIARY

The year is 1969, Richard Nixon has just won the presidency, the civil rights movement is still gripping the nation, and the judiciary is vulnerable to partisan assault and presidential interventionism. Just four short years earlier, Congress passed the Civil Rights Act of 1964. The Fair Housing Act of 1968 passed only months before. It is clear that President Nixon viewed the judiciary as a point of attack in his campaign to win the White House. In fact, as part of his Southern strategy, Nixon adopted rhetoric of attacking the courts as excessively liberal. He also voiced deference to states' rights to oppose federal interventions to assist black Americans. Almost immediately following his election, Nixon signed off on a memorandum written by White House aide Thomas Charles Huston that stated:

Through his judicial appointments, a President has the opportunity to influence the course of national affairs for a quarter of a century after he leaves office. . . . In approaching the bench, it is necessary to remember that the decision as to who will make the decisions affects what decisions will be made. . . . [T]he President [should] establish precise guidelines as to the type of man he wishes to appoint--his professional competence, his political disposition, his understanding of the judicial function--and establish a White House review procedure to assure that each prospective nominee recommended by the Attorney General meets the guidelines.²⁰⁰

Nixon made good on his campaign rhetoric, appointing jurists that were considerably more conservative than their liberal predecessors, including Warren Burger, Lewis Powell, and William Rehnquist. Twelve years later, President Ronald Reagan utilized the same strategy by creating an institutional apparatus in the form of the White House Justice Department Selection Committee to vet potential judicial candidates to

²⁰⁰ Sheldon Goldman, "Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts," 39 *University of Richmond Law Review*, Vol. 39, No. 3, (2005) 879.

ensure that they possessed appropriate conservative credentials.²⁰¹ Reagan also sought to appoint young ideologues who could serve on the bench for decades.²⁰² In some instances, the Democrats successfully blocked the most conservative nominees. Most famously, they defeated Judge Robert Bork's nomination, and, as a result, President Reagan ultimately nominated a much more moderate judge in the form of Justice Anthony Kennedy. But at other times the Democrats were less successful in serving as a check, with a notable example being the appointment by President G.H.W Bush of Clarence Thomas.

As a result of this politicization, the Supreme Court has turned a page from its liberal antecedents of the fifties and sixties. In 1968, when Nixon was elected, the Court consisted of Chief Justice Earl Warren and Associate Justices Hugo Black, William Douglas, William Brennan, Thurgood Marshall, Abe Fortas, Byron White, John Harlan, and Potter Stewart. Today, it is comprised of five conservatives - Chief Justice John Roberts and Associate Justices Scalia, Thomas, Alito, and Kennedy and four moderately liberal or slightly left of center justices – Associate Justices Ginsburg, Breyer, Sotomayor, and Kagan.²⁰³ But perhaps it is the rightward swing of the lower courts that has been the most important victory of the conservative backlash, considering that these courts adjudicate over 99.9% of the cases that are filed in the federal system. The numerical disparity in federal appointments to the bench over the last forty years is also revealing as Republican Presidents, since

²⁰¹ *Ibid.*

²⁰² Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*, (New Haven, CT: Yale University Press, 1997), 116, 329.

²⁰³ Since 1968, Republican presidents have had the opportunity to appoint twelve new justices to the Democrats' four. After announcing his retirement, Justice Stevens quipped that with Democratic appointments, each justice appointed has been decidedly more conservative than his predecessor. None are cut from the same liberal cloth as a Justice Brennan, Warren, Douglas or Black.

Nixon, have appointed over eleven hundred federal judges and Democratic Presidents have appointed fewer than eight hundred federal judges.²⁰⁴ Not surprisingly, a number of scholars have correlated a relationship between a judge's status as a Republican appointee and his or her voting against civil rights plaintiffs.²⁰⁵ As a result, changes in the judiciary, as an institutional body, have dramatically changed what civil rights litigants may expect to find when they enter the federal courthouse.²⁰⁶

As a point of comparison, it is interesting to consider whether the current court would have decided *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964) differently had it been the one to consider the constitutionality of the 1964 Civil Rights Act under the Commerce Clause.

The conservative turn of the judiciary certainly lends some credence to those who would attack "rights" as normatively indeterminate. But that does not completely undermine their symbolic power for movements given that ongoing political struggles tend to always encompass definitional battles. More importantly, once these definitional contests are "resolved," reiterated, and incorporated into the political culture of the nation, it becomes much harder to completely undo them. For

²⁰⁴ "History of the Federal Judiciary," *Federal Judicial Center*. Accessible at: <http://www.fjc.gov/public/home.nsf/hisj>

²⁰⁵ See for e.g.: Timothy B. Tomasi and Jess A. Velona, "All The President's Men? A Study Of Ronald Reagan's Appointments To The U.S. Courts Of Appeals," *Columbia Law Review*, Vol. 87, No. 4 (May, 1987).

²⁰⁶ It used to be the case that the federal courts served as a judicial oasis from the biased state court system of the South. Not anymore. Given the general hostility that federal courts show toward civil rights plaintiffs, I generally advise my clients to forgo federal court in favor of bringing their civil rights claims under analogous state law provisions, such as the PaHRA, in state court even though, by doing so, they waive important rights and remedies only found under federal statute, such as a jury trial. I have a number of colleagues who utilize similar strategies. So, from a personal perspective, the Republican strategy of targeting the courts and appointing more conservative jurists has achieved many of its aims.

example, we went from a nation that recognized a right to chattel slavery as part of a fundamental right to property (*Dred Scott*) to a nation that recognizes a fundamental right to be free from involuntary servitude. It took a civil war and passage of amendments to the constitution to accomplish that feat. But while the concept of “servitude” remains open to interpretation, can anyone really imagine the United States returning to a nation that would permit the total divestiture of rights for African Americans? It is hard to envision any set of circumstances that would lead to such a radical reinterpretation of such rights. Accordingly, while CLS scholarship raised important theoretical concerns for rights-based political causes, it would also appear that their worries were overstated.

II. ELEMENTS OF AN EMPLOYMENT DISCRIMINATION CLAIM

Race discrimination plaintiffs may file two types of claims: (A) disparate treatment, which involve claims of intentional discrimination, and (B) disparate impact, which involve claims that neutral employment policies have discriminatory effects on a protected class of people.²⁰⁷

A. Disparate Treatment

In disparate treatment cases, the plaintiff must prove that (1) the defendant intentionally discriminated against the plaintiff based upon the plaintiff’s status as a member of some protected class of people, e.g., the individual’s race, (2) the intentional discrimination was a motivating factor that led the plaintiff to suffer some adverse employment action, and (3) the adverse employment activity is of a type that is remediable under the statute. While seemingly straightforward on its face, as we

²⁰⁷ Title VII and the PaHRA authorize disparate impact lawsuits. Section 1981 does not.

will see, disparate treatment can prove tricky in its application, especially because the face of discrimination has changed so dramatically over time.²⁰⁸

1. The Intent Element

In 1955 and 1964, when the PaHRA and Title VII were respectively passed, race discrimination in the workplace was fairly easy to identify as many employers readily admitted that they discriminated against Negro job applicants and employees. In Pennsylvania alone, as much as ninety percent of employers readily admitted that they would not hire blacks for certain positions.²⁰⁹ National sentiment regarding excluding African Americans from the workplace similarly ran high.²¹⁰ But as employers became more sophisticated in navigating these laws, and as expressions of racial bias evolved in response to evolving social mores and legal sanctions, the courts had to adapt their jurisprudence to these changing circumstances. As a result, a plaintiff can prove the intent requirement through either direct or circumstantial evidence.

a. Direct Evidence of Discrimination

Direct evidence of discrimination, in its most classical sense, consists of an admission by the employer that it has taken an adverse employment action due to an individual's membership in a protected class. For example, direct evidence may consist of an employer stating his refusal to hire an applicant due to the applicant's race, sex, or religious affiliation. Some courts have defined the term as evidence that

²⁰⁸ See for e.g.: *Rose v. Mitchell*, 443 U.S. 545, 559 (1979), where it is noted that "today ... discrimination takes a form more subtle than before. But it is not less real or pernicious."

²⁰⁹ "First Annual Report of the Pennsylvania Fair Employment Practices Commission," (Pennsylvania: Fair Employment Practices Commission).

²¹⁰ Howard Schuman, et al., *Racial Attitudes In America: Trends And Interpretations* (Cambridge, MA: Harvard University Press, 1988), 71-138.

proves the existence of discrimination without needing to resort to inference.²¹¹ But because direct evidence of discrimination has become less frequent over time,²¹² the courts have held that plaintiffs may prove intent through circumstantial evidence.²¹³

b. Pretext and *McDonnell-Douglas*

In 1973, the United States Supreme Court formulated a new judicial approach for considering claims of discrimination in the absence of direct evidence. In the seminal case of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), Percy Green, a long time black civil rights activist, was discharged from his position as a mechanic as part of a workforce reduction. Green alleged that his termination was racially motivated. Following it, Green and the Congress on Racial Equality protested by stalling their cars on the main roads leading up to the employer's plant, thereby blocking access to it. Ultimately, Green was arrested for blocking traffic when he refused to move his car at the request of police officers. On July 2, 1965, unidentified individuals pad-locked plant doors preventing employees of the company from leaving. The extent of Mr. Green's involvement was uncertain and hotly disputed. Three weeks later, McDonnell Douglas advertised that it was hiring mechanics. Green applied for a position, and McDonnell Douglas refused to hire him. Green then filed a complaint with the EEOC, alleging that McDonnell Douglas's refusal to hire him was racially motivated.

²¹¹ *Brown v. East Mississippi Electric Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993).

²¹² *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) states: "There will seldom be 'eyewitness' testimony as to the employer's mental processes."; *Fernandes v. Costa Bros. Masonry*, 199 F.3d 572, 580 (1st Cir. 1999), *abrogated by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which holds on other grounds, "[D]iscrimination tends more and more to operate in subtle ways, [therefore] direct evidence is relatively rare."

²¹³ *See for e.g.: McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In considering Green's charge, the Court announced a three-step analytical framework for considering discrimination claims in the absence of direct evidence. In the first step of a failure to hire case, the plaintiff has the burden of establishing a *prima facie* case of discrimination by showing that: (1) she is a member of a protected class; (2) she applied and was qualified for the job; (3) the employer rejected the application; and (4) the employer tried to fill the position after the rejection. In a discharge case, the elements are similar as the plaintiff must establish that: (1) she is a member of the protected group; (2) she was performing her job satisfactorily; (3) she was discharged; and (4) the employer sought a replacement.²¹⁴ Historically, the "burden of establishing a *prima facie* case of disparate treatment [was] not [supposed to be an] onerous" affair.²¹⁵

After the first step has been satisfied, the employer is given the opportunity to defend against the claim of discrimination by articulating, through admissible evidence, a legitimate, nondiscriminatory reason for the adverse employment action. If the employer fails or refuses to provide an alternative explanation, then it is presumed that the employer engaged in illegal discrimination and courts presumably should enter judgment in favor of the employee.

But if the employer produces some evidence of a legitimate non-discriminatory reason,²¹⁶ then, in the third step, the plaintiff is given the opportunity to prove, by a preponderance of the evidence, either that the more likely explanation

²¹⁴ *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979). In a reduction in force case, the elements are identical, except the plaintiff need not show that the employer sought a replacement. *See: Williams v. Gen. Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

²¹⁵ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Recently, courts have been examining the second factor with greater scrutiny. *See for e.g., Cengr v. Fusibond Piping Systems, Inc.*, 135 F.3d 445 (7th Cir. 1998).

²¹⁶ *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

for the action is illicit discrimination or that the employer's stated reason for the adverse action is false and was given to hide illegal discrimination.²¹⁷ It is at this third step in the process where the legal battle between the two parties generally ensues.

To establish pretext in race discrimination claims, the *McDonnell Douglas* court held that the plaintiff may use comparative evidence to demonstrate that similarly situated individuals from a different protected class were treated differently under comparable circumstances. Thus, in *McDonnell Douglas*, the Court noted that the plaintiff could prove pretext by showing that the employer hired or retained white employees who had engaged in acts of similar disruption. According to the *McDonnell Douglas* court, a plaintiff may also attempt to prove pretext by introducing statistical evidence to demonstrate that there is general reluctance toward treating a particular racial group in a similar fashion as a majority group. Finally, the plaintiff may adduce any other evidence that tends to show discrimination. This can include proof of racial slurs, the invocation of racial stereotypes, or other evidence that tends to demonstrate racial bias. But since the time the Court decided *McDonnell-Douglas* in 1973, the attitude of the judiciary toward employment discrimination claims has become decidedly more restrictive. One instance of this rests in its interpretation of what amounts to “pretext.”

c. “Pretext-only,” “Pretext May,” and “Pretext Plus”

In a number of ways, the lower courts have made it much more difficult for plaintiffs to demonstrate the third step involving pretext.

Originally following *McDonnell Douglas*, a number of lower courts held that where a plaintiff is able to prove that the employer’s stated reason was false, then, as a

²¹⁷ *McDonnell Douglas*, 411 U. S. 792 (1973), at 802-04.

matter of law, judgment should be entered in favor of the plaintiff. But lower courts ultimately split on the plaintiff's burden in the third step, devising three different tests of increasing difficulty to establish pretext. These tests came to be known as "pretext-only," "pretext-may," and "pretext-plus."²¹⁸

Courts employing the pretext-only rule held that the employee need only prove, by a preponderance of the evidence, that the employer's stated reason for the adverse employment action was not credible. Once demonstrated, the plaintiff was entitled to judgment as a matter of law. A number of other courts adopted a "pretext-may" rule. Under this scenario, courts held that the employee is entitled to a permissive inference of discrimination when the employee submits evidence that the employer's stated reasons are pretextual. As a result, the case would go to a jury for deliberation but judgment was not automatic.²¹⁹ Finally, under the most demanding standard of "pretext plus," courts held that not only did disproving the employer's stated reason not satisfy the plaintiff's burden, but the plaintiff also needed to submit additional evidence that established that the real reason for the adverse employment action was illegal discrimination.²²⁰

While the Supreme Court of the *McDonnell Douglas* era seemed to have a more liberal view on demonstrating pretext, in the cases of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Rehnquist Court issued opinions that generally made it more difficult for workers to show pretext. In *Hicks*, Justice Scalia, writing for a five-to-

²¹⁸ Following *Burdine*, 450 U.S. 248, 253 (1981), the Seventh Circuit Court of Appeals summarized these three different interpretations in *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1122-23 (7th Cir. 1994).

²¹⁹ *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 657 (7th Cir. 1991)

²²⁰ *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9 (1st Cir. 1990).

four majority, appeared to adopt the most onerous pretext-plus standard. At least, the dissent thought he had done so. In dissent, Justice Souter opined that the majority opinion

greatly disfavors Title VII plaintiffs without the good luck to have direct evidence of discriminatory intent...[E]mployers who discriminate are not likely to announce their discriminatory motive. And yet, under the majority's scheme, a victim of discrimination lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's stated reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a fact-finder might find lurking in the record.²²¹

Seven years later, in *Reeves*, the Court seemed to modify the approach, adopting a position somewhere between “pretext may” and “pretext plus,” by holding that “[a] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.”²²² But the Court also held that in some circumstances pretext plus would be required where either (1) “the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision,” or (2) the plaintiff's evidence creates “only a weak issue of fact” regarding the employer's explanation, and the record contains “abundant and uncontroverted independent evidence that no discrimination had occurred.”²²³ But what is considered a “weak issue of fact” lies in the eyes of the beholder. As one can easily imagine, such a formulation gives lower court judges ample space to require “pretext plus” where in their sole discretion they determine that the cases have presented “weak issues of fact.”²²⁴

²²¹ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) at 534.

²²² *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) at 148. .

²²³ *Ibid.*, at 148.

²²⁴ See for e.g.: *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 47-48 (1st Cir. 2002), upholding summary judgment in favor of the employer where “plaintiff creat[ed] (at best) a weak issue of fact as

To summarize, in the absence of direct discrimination, an employment discrimination plaintiff must establish a *prima facie* case, utilizing the *McDonnell-Douglas* framework. As observed by the Burger Court, establishing a *prima facie* case was not supposed to be burdensome. In the next step of the analytical framework, the employer is supposed to produce admissible evidence of a legitimate, non-discriminatory reason for taking the adverse employment action. The language of *McDonnell Douglas* clearly can support a pretext-only interpretation, meaning that where a plaintiff can show that the defendant's proffered reason is false, judgment should then be entered in the employee's favor. But the courts have made the *McDonnell Douglas* test more onerous for purposes of demonstrating intent.

d. Use of Comparative Evidence

Even though *McDonnell Douglas* never mandated it, a number of courts require the plaintiff employee to establish pretext by demonstrating that he or she was treated differently than similarly situated co-workers.²²⁵ Furthermore, in requiring comparative evidence, a number of lower courts have created a body of case law that has made it considerably more difficult for employees to carry their burden of proving

to pretext on the face of strong independent evidence that no discrimination occurred.”; *Vadie v. Mississippi State Univ.*, 218 F.3d 365 (5th Cir. 2000).

²²⁵ See: Charles Sullivan, “The Phoenix From The Ash: Proving Discrimination by Comparators,” *Alabama Law Review*, Vol. 60, No. 2, (2009) (collecting cases). For further information, see the following: Ernest Lidge, “The Courts' Misuse Of The Similarly Situated Concept In Employment Discrimination Law,” *Missouri Law Review*, Vol. 67, No. 4, (Fall, 2002), 849, noting that six circuits mandate some comparative evidence (the Fourth, Fifth, Seventh, Ninth, Eleventh, and District of Columbia); three Circuits don't require it (the First, Second, and Tenth); and in three circuits, “the case law goes both ways” (the Third, Sixth, and Eighth). *Beamon v. Marshall & Isley Trust Co.*, 411 F.3rd 854, 863 (7th Cir. 2005), finding judgment in favor of the defendant employer where plaintiff employee was unable to point to other white employees who were treated any better. Natasha Martin, “Pretext in Peril,” *Missouri Law Review*, Vol. 75, No. 2, (Spring, 2010), 344-45. Martin writes, “Plaintiffs undertake the task of demonstrating pretext in numerous ways. The most common involve presenting comparative evidence to show that the employer inconsistently dealt with similar situations involving similarly situated individuals.”

pretext.²²⁶ For example, the Fifth and Eleventh Circuit Courts of Appeals have restricted the use of comparative evidence by requiring that the comparator be nearly identical to the plaintiff in all respects. In discharge cases, for instance, the Eleventh Circuit has held that when making a determination as to whether the comparator is similarly situated, the plaintiff must demonstrate that “the quantity and quality of the comparator’s misconduct be nearly identical to prevent courts from second-guessing employers’ reasonable decisions and confusing apples with oranges.”²²⁷

As one court observed, the obvious problem with such an approach is that, “(a)ll employees can be characterized as unique in some ways and as sharing common ground with ‘similarly situated employees’ in some other ways, depending on the attributes on which one focuses, and the degree of specificity with which one considers that employee’s qualifications, skills, tasks and level of performance.”²²⁸ Further, with smaller business entities, enterprises that are decentralized into a number of smaller departments, or with positions that are unusual or unique, there simply are not going to be comparators against which to make the required

²²⁶ See for e.g.: *McDonald v. Santa Fee Trail Transportation Co. v.*, 427 U.S. 273, 283 n.11 (1976), observing that “precise equivalence in culpability between employees is not the ultimate question...[but rather] that other ‘employees involved in acts of comparable seriousness were nevertheless retained...’”

²²⁷ “[T]he jury must find the employees’ circumstances to have been nearly identical in order to find them similarly situated,” *White v. Hall*, 2010 WL 2977443 (11th Cir. July 29, 2010); *Perez v. Tex Dep’t of Criminal Justice*, 395 F.3d 206, 213 (5th Cir. 2004). See also: Martin, “Pretext in Peril,” 345, where it is noted that “comparator(s) must be, for all practical purposes, tantamount to a carbon copy of the plaintiff”; Sullivan, “The Phoenix From the Ash: Proving Discrimination by Comparators.” As a result, where a black plaintiff makes threatening remarks to a supervisor but a white employee gets into a heated exchange during which he hangs-up the phone on the supervisor or where a co-worker is arrested for domestic violence outside the workplace, the black employee cannot use either instance to demonstrate that she was treated differently to show pretext. *Roxbury –Smelie v. Florida Department of Corrections*, 324 Fed. Appx. 783 (11th Cir. April 24, 2009).

²²⁸ *Marzano v. Computer Sci. Corp.*, 91 F.3d 497, 511 (3d Cir. 1996).

contrasts.²²⁹ But even where the comparators are similar, some courts have also required the plaintiff to rule out other explanations that could justify the differential treatment. For example, in *Timmerman v. U. S. Bank*, 483 F.3d 1106 (10th Cir. 2007), the employer, a bank, terminated the plaintiff-employee for reversing overdraft charges on behalf of co-workers that totaled around \$1000. In considering and rejecting comparative evidence for similar conduct by similarly situated employees, the court stated:

Sometimes apparently irrational differences in treatment between different employees that cannot be explained on the basis of clearly articulated company policies may be explained by the fact that the discipline was administered by different supervisors, or that the events occurred at different times when the company's attitudes toward certain infractions were different, or that the individualized circumstances surrounding the infractions offered some mitigation for the infractions less severely punished, or even that the less severely sanctioned employee may be more valuable to the company for nondiscriminatory reasons than is the other employee. Other times, no rational explanation for the differential treatment may be offered other than the inevitability that human relationships cannot be structured with mathematical precision, and even that explanation does not compel the conclusion that the defendant was acting with a secret, illegal discriminatory motive. . . . Hence, it is up to the plaintiff to establish not only that differential treatment occurred, but also to rule out nondiscriminatory explanations for the differential treatment.²³⁰

The court seemingly demanded the plaintiff to prove discrimination with an absurd scientific certainty that is well beyond the normal burden of proof that a civil plaintiff ever bears and is contrary to Supreme Court formulations that “precise equivalence in culpability between employees is not the ultimate question...[but rather] that other ‘employees involved in acts of comparable seriousness were [treated more favorably]...’”²³¹

²²⁹ See for e.g.: Tricia Beckles, “Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have No ‘Similarly Situated’ Comparators?”, *University of Pennsylvania Journal of Business & Employment Law*, Vol. 10, No. 2, (2008) (describing the problem).

²³⁰ *Ibid* at 1120-21.

²³¹ *McDonald v. Santa Fee Trail Transportation Co.*, 427 U.S. 273, 283 n.11 (1976).

With regard to comparative evidence, some courts have also limited the use of such evidence by requiring that the plaintiff and the comparable co-worker have the same supervisor.²³² Again, in so mandating, these courts have driven up the standard of proof that a plaintiff must adduce to a level that starts to approach quantum precision. Only the most unusual and fortuitous plaintiffs can ever marshal such evidence.

e. Stray Remarks Doctrine

In addition to the use of comparative evidence, the *McDonnell Douglas* court also contemplated that a plaintiff may prove discrimination by introducing evidence, such as racial epithets, that demonstrate the employer's animus. For example, a decision-maker may use slurs, tell racial jokes, invoke stereotypes, etc. In response to such evidence, lower courts have subsequently developed the "stray remarks" doctrine, which limits the relevance of such evidence if the court determines that the comments are: (1) too distant or remote in time to the termination or adverse action to be related to it; or (2) are not made by an individual with authority over the challenged decision; or (3) are supposedly unrelated to the adverse action.²³³ As a

²³² See for e.g.: *Green v. New Mexico*, 420 F.3d 1189, 1194-95 (10th Cir 2005), which finds that plaintiff and co-workers were not similarly situated where they did not share supervisor who made adverse employment decision.; *Gilmore v. AT&T*, 319 F.3d 1042, 1046 (8th Cir. 2003) (same); *Wyvil v. United Cos. Life Ins. Co.*, 212 F.3d 296, 305 (5th Cir. 2002) (same). But see also: *McMillan v. Castro*, 405 F.3d 405, 414 (6th Cir. 2005), which holds that co-workers are similarly situated where they are in the same basic chain of command.

²³³ See for e.g.: *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir. 1996)). A typical example of an application of the "stray remarks" doctrine took place in *Rubenstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392 (5th Cir. 2000). In that case, Tulane University refused to afford plaintiff, a Jewish professor, a pay raise. Plaintiff put forth evidence that a member of the university committee responsible for giving pay raises made derogatory remarks related to the fact that plaintiff was Jewish. Finding that such comments amounted to "stray remarks," the trial court refused to give the comments any weight, granting summary judgment. See also: *Williams v. Raytheon Company*, 220 F.3d 16 (1st Cir. 2000), an age and sex discrimination case brought by an older male worker, the court refused to credit and deemed as "stray remarks" comments made by the plaintiff's supervisor that she wanted more women and young people, that she sought to change the company's "old, white men culture," and that when the plaintiff "accused her of wanting him out because he was an older man, she remained silent." The court deemed these comments as amounting to "stray remarks" because the

result, an employee may have a case involving a decision-maker who has made racially charged comments, but if they are not sufficiently proximate in time to the adverse employment decision, the comments are simply insufficient to demonstrate discrimination. This is just one more example of how the lower courts have made employment discrimination cases much more difficult to bring.

f. Same Actor Doctrine

The Court has also increased the burden for plaintiffs by creating what is now known as the Same Actor Doctrine. In 1991, the Fourth Circuit was the first court to announce the “Same-Actor Doctrine,”²³⁴ which strongly presumed that illegal discrimination is not the motivating factor for termination if the same decision-maker terminates the employee within a relatively short period of time after hiring her. The Court based its ruling on a presumption that it would be irrational for a decision-maker to fire someone based on discriminatory intent when that same decision-maker had previously made the decision to hire that individual, and was ostensibly free of such animus. As one commentator has noted, the Fourth Circuit’s decision

...has spawned a virtual cottage industry for employer successes, including summary dismissals, directed verdicts, and judgments as matters of law. Workplace discrimination is already difficult to prove. *Proud* and its progeny further impeded plaintiffs' quest when it proclaimed that “the nature of the hirer-firer relationship bears significantly on the ultimate question of discrimination.”²³⁵

One review of 140 cases revealed that the federal appeals courts have affirmed, at a rate of about 80% judgments that were automatically entered in favor of the defendant, without trial, based upon some invocation of the Same-Actor doctrine.²³⁶

supervisor had hired men and had even replaced a female employee with a male employee.

²³⁴ *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

²³⁵ Martin, “Pretext in Peril,” 344-45. Martin notes that most circuit courts apply some version of the “same actor” doctrine to limit claims.

²³⁶ *Ibid.*

2. Causation, *Price Waterhouse* and Mixed Motive

After the plaintiff establishes the employer's intent to discriminate, the plaintiff also must show that the defendant's intentional discrimination actually caused some "adverse employment action." As the courts began to face situations where an employer had multiple reasons for acting in a certain way, they were called upon to address whether employers could be held liable for discrimination where it was motivated by both illegal discrimination and permissible factors such as job performance. The Supreme Court undertook to resolve this issue in the case of *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a Title VII case involving sex discrimination. The court's reasoning in sex discrimination cases applied with equal force to race discrimination.

In *Price-Waterhouse*, the employer, an accounting firm, was considering the plaintiff, a senior level manager, for firm partnership. At that time, Price-Waterhouse apparently utilized a three-step practice to consider its employees for partnership: first, it solicited comments from other partners regarding the candidate's qualifications; second, the firm's Admissions Board made a recommendation to the Policy Board based upon that input; third, the Policy Board passed judgment. Based upon the solicited comments, Price-Waterhouse passed over Ms. Hopkins for partnership. While it was clear from the process that Ms. Hopkins acted abrasively toward staff, it was also evident that a number of partners voted against her because her demeanor did not conform to their stereotypical assumptions about how women should behave. For example, Ms. Hopkins was advised that she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have

her hair styled, and wear jewelry.”²³⁷ Given that sexually stereotypical thinking had seemingly undermined her promotion, Ms. Hopkins filed a Title VII lawsuit. The lower court and the appeals court found that illegal factors motivated the employer’s decision. But because there were other factors that may have impacted the employment decision, the court held that to escape liability Price Waterhouse would have to prove that it would have denied partnership in the absence of discrimination.

In a fractured decision, with a three-justice plurality and two justices writing separate concurrences, the Supreme Court held the following: where mixed motives, only some of which are illegal, prompt an adverse employment action, the employer is entitled to judgment if it can show by a preponderance of the evidence (a lower standard than what the appeals court would have required) that it would have engaged in the same adverse employment action, irrespective of the illegal discrimination.

3. Adverse Employment Actions

On its face, Title VII of the Civil Rights Act of 1964 specifically prohibits discrimination with respect to “compensation, terms, conditions, or privileges of employment.”²³⁸ While the facial language of the statute is clear, a number of courts have interpreted this to mean that Title VII only protects against employment decisions that impact a tangible job benefit, including hiring, promotions, pay, discharge,²³⁹ but may not affect a host of other discriminatory activities, such as discriminatory transfers, assignments, change in job duties, and reprimands. As a

²³⁷ *Price Waterhouse v. Hopkins*, 618 F. Supp. 1109, 1118 (D.D.C. 1985).

²³⁸ 42 U.S.C. § 2000e-2(a)(1).

²³⁹ See for e.g.: *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997).

result, through a restrictive judicial interpretation, many acts that are plainly discriminatory may not actually give rise to a cause of action.

B. Disparate Impact

The second category of employment discrimination cases involves disparate impact claims. The original text of the 1964 Civil Rights Act never mentioned disparate impact as a form of actionable discrimination. Rather, the original text simply made it an “unlawful employment practice” for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.” It similarly made it unlawful for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of” any of the same reasons.²⁴⁰

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), the more liberal Supreme Court interpreted the latter provision to “proscrib[e] not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” Specifically, the Court held that “[if] an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”²⁴¹ This was in keeping with early EEOC regulations which had also interpreted Title VII as proscribing neutral employment policies that resulted

²⁴⁰ 42 U.S.C. § 2000e-2(a)(1) and § 2000e-2(a)(2).

²⁴¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

in a disparate impact.²⁴² But roughly twenty years later, in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Rehnquist Court gave a much more restrictive read of disparate impact. *Wards Cove* essentially held that “a disparate impact plaintiff had to identify specifically which employer practice was causing the complained of effects, that the plaintiff, rather than the defendant, carried the ultimate burden of demonstrating that the practice was not a business necessity, and that any proposed alternative practice had to be equally as effective and no more costly.”²⁴³

C. Section 1981 and *Patterson v. McLean Credit Union*

As noted in Chapter 3, the Warren and the Burger Courts expanded the scope of Section 1981 by making it applicable to purely private conduct. A little over a decade later, the Rehnquist Court was called upon to consider whether Section 1981 prohibited discriminatory conduct that took place after the initial formation of the contract.

The case was *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Ms. Patterson, a black woman, claimed that her supervisor singled her out for more work than her white co-workers. On one occasion, he stated that blacks worked slower than whites, he failed to provide certain training to her, and he refused to give her pay raises. He also assigned her menial chores, such as sweeping the floor. Ultimately, she was terminated. Following her discharge, she filed suit under Section 1981.

Section 1981 provides that “all persons born in the United States . . . shall have the

²⁴² Equal Employment Opportunity Commission Guidelines on Employment Testing Procedures, issued August 24, 1966, codified at 29 C.F.R. § 1607, which provide: “The Commission accordingly interprets ‘professionally developed ability test’ to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant’s ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.”

²⁴³ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) at 657-61.

same right ... to make and enforce contracts....” Based upon a literal reading of the statute, the Court held that the law did not reach conduct that took place after the initial formation of the contract. According to the Court, because Section 1981 “did not protect against employment discrimination in the performance of contracts, as distinguished from their making and enforcement,” Ms. Patterson had no remedy, and judgment was entered in favor of her employer.

From these various examples, one can see a judiciary bent on restricting the reach of the anti-discrimination laws.

III. CONGRESSIONAL PUSHBACK: TITLE VII AND SECTION 1981 GET A MAKEOVER

Dissatisfied with the Supreme Court’s conservative interpretations of the civil rights laws, in 1991, Congress interceded and amended the statutes in a number of ways to override some of the more onerous above-described decisions.

Concerned that the Supreme Court’s holding in *Price-Waterhouse* would permit employers to completely escape liability if they could convince a court that they would have taken the same action in the absence of discrimination, Congress amended Title VII so that in mixed motive cases, employers, at a minimum, will be liable for declaratory judgment, injunctive relief, and plaintiff’s attorney’s fees.²⁴⁴

With regard to disparate impact cases, Congress legislatively reversed the holding in *Wards Cove* by returning the burden to the employer to demonstrate that

²⁴⁴ 42 U.S.C § 2000e-5(g)(2)(B) (2000). In other employment cases, such as age discrimination, the Supreme Court has held that in order for a plaintiff-employee to recover, the plaintiff must prove that the discrimination was the sole factor that caused the adverse employment action. *See: Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009). In a 5-4 decision, with Justice Thomas writing for the conservative majority, the court held that due to the specific language of the ADEA, which prohibits discrimination “because of” an individual’s age, a plaintiff must prove that age was the sole factor in the employment decision. A number of commentators have since called upon Congress to “legislatively correct” the Supreme Court’s holding in *Gross*.

the challenged practice was a business necessity and that there was no less discriminatory alternative.²⁴⁵

With regard to Section 1981, Congress amended it so as to prohibit discrimination in the “making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Specifically, Congress added the two following subsections to the statute:

(b) For purpose of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.²⁴⁶

This serves as yet another example of the legislature providing a corrective to what it perceived as overly conservative jurisprudence. In short, when the courts have reached holdings that are considered too extreme, forces have sometimes been successful in rolling back some of the most extreme interpretations.

Thus, the story regarding the effectiveness of the civil rights laws must take into account the dialectical battle between how the courts have interpreted the laws, the efforts by Congress to legislatively override such holdings, and subsequent efforts by the courts to re-exert their will.

IV. CONCLUSION

The above discussion provides a broad outline of the current state of employment discrimination law, the types of barriers that courts, in the last twenty to

²⁴⁵ Recently, Justice Scalia raised the specter that employer liability based upon “disparate impact” may itself violate the constitutional guarantees of equal protection. *See: Ricci v. DeStefano*, 129 S. Ct. 2658, 2682 (2009).

²⁴⁶ 42 U.S.C. § 1981.

thirty years, have erected in the face of these claims, and the reaction of Congress to those judicially manufactured impediments. There are legions of other cases, too numerous to include, in which both the Supreme Court and the lower courts have created obstacles to prevailing in an employment discrimination civil rights case.²⁴⁷

Every plaintiff-side employment discrimination attorney that I know can describe their own individual “war stories” where these judicially manufactured impediments have caused them and their clients to lose cases.

It is clear that the greater conservative nature of the courts has made it more difficult for employees to prove illegal discrimination. Nevertheless, I contend that even had the Courts been more receptive to employment discrimination litigation, the landscape may not have proven decidedly different given the difficulty and expense inherent in proving illegal discrimination. To consider that assertion, I turn next to the PaHRC and the success or lack thereof that it has had in rooting out and eradicating discrimination in the workplace and making whole victims of discrimination as per its legislatively prescribed mandate.

²⁴⁷ See for e.g.: *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), where, by a 5-4 decision, the Supreme Court heightened the pleading standards by requiring plaintiff to include more evidence in the initial complaint. The problem with the Court’s holding is that frequently evidence is only uncovered after the parties start discovery, exchange documents, and conduct depositions.

I. INTRODUCTION

In terms of judging the efficacy of our anti-discrimination laws, the first pivotal step in the investigative process is an examination of the practices and outcomes of a typical fair employment practices agency that is charged with enforcing these laws. The PaHRC is well suited for this investigation given the length of time that it has been in existence, its reputable status among fair employment practice commissions around the nation, and its size.

In this and the next two chapters, I tell a number of stories from several different perspectives regarding the ostensible successes of the PaHRC in fulfilling its legislative mandate in preventing and remediating claims of racial discrimination. These narratives emerge from information and data that I gleaned from: (1) the Commission's annual reports which span over five decades; (2) interviews that I conducted with key agency stakeholders, such as Commission staff members, private attorneys, and litigants; and (3) my review of a sampling of Commission case files and my observations of its operations over approximately a six month period of time.

In this chapter, I specifically describe the method that I employed in measuring the Commission's effectiveness, the structure of the Commission, its inherent strengths as an organization, and some historical trends in the filings of race discrimination claims.

Chapter 6 assesses Commission effectiveness based upon data and information that I collected from (a) a sampling of case files, (b) approximately fifty annual reports, and (c) interviews with staff members and attorneys who practice before the

Commission. Chapter 7 describes claimant experiences litigating before the Commission.

At the outset, to summarize my overall impressions regarding Commission efficacy, my investigation revealed that the Commission possesses a number of essential attributes that are critical for success. For most of the last forty years, the Commission was led by a highly competent, respected, and dedicated executive director. The Commission also possesses a diverse and credentialed investigative staff, employs a smart and hardworking legal team, and generally has supportive commissioners. Its operations are highly systematized and routinized for investigating and adjudicating complaints of discrimination. The Commission is also equipped with a state-of-the-art computer system that assists it in conducting its affairs efficiently, useful case management software, and on-site technical support. The Commission's operations similarly benefit from its professional-looking office space, which confers upon it a certain level of credibility to the outside world and helps make it a welcoming space for not only its staff, but also its clientele.

But despite these attributes, my investigation revealed that claimant successes are substantially limited. There are some notable exceptions to this, but most claimants fare rather poorly before the Commission. Most claimants and their attorneys express a high degree of dissatisfaction with the investigative process and its outcomes. Furthermore, training and other preventative measures that the Commission uses with employers to curtail discrimination are superficial and, therefore, are of limited utility.

As Homer Floyd, the executive director stated during one of my interviews, at any given period during his forty-year reign as executive director, the *highest* grade that he would have ever given his organization is a "B minus." The fact that at any

given moment in time, the agency's highest mark was a "B minus" does not exactly serve as a ringing endorsement regarding its work, productivity, or effectiveness. While I have no quantitative formula for calculating overall Commission success, I assessed it by qualitatively comparing the general purposes of anti-discrimination laws, as noted by the courts and the Commission itself, against what the Commission appears to achieve on behalf of its complainants.

II. METHODOLOGY TO ASSESS COMMISSION'S EFFECTIVENESS

To assess the Commission's effectiveness, I employed the following methodology. During the summer of 2009, I reviewed approximately eighty case files from fiscal years 2005 and 2007. I chose to examine cases from these years for several reasons. First, in choosing the 2005 fiscal year, I wanted to assure sufficient time to guarantee complete investigations and closures of case files. Second, I tried to choose filings from relatively recent years to avoid investigating cases that were so dated that claimants and investigators would potentially not remember their impressions of the Commission's performance. Third, I wanted to choose more recent filings to maximize the chances of having current addresses and telephone number for claimants so that I could conduct follow-up telephone calls and/or interviews.

Regarding my review of specific files, I examined only files where complainants alleged race discrimination in the employment context. Therefore, I did not inspect any of the Commission's files that involved claims of disability, age, religious, or sex discrimination. In order to correct for bias, I systematically sampled a portion of my cases from the Commission's electronic docket system. The Commission's case files are scanned into the computer system and then assigned a

chronological docket number based upon filing date, so I was able to sequentially select every fiftieth case file for review. If the fiftieth case did not involve race discrimination in employment, I reviewed the following docketed case(s) in successive filing date order until I reached one that did. Sometimes the case files were quite extensive, spanning hundreds of pages of exhibits. As a result, the file itself could take a number of hours to review. Other times, the file was small and took no more than one hour to read. As I examined case files, I set up a general data base that tracked frequency of attorney representation, length of time from filing to resolution, settlement amounts, when recorded, and 'cause' versus 'no cause' determinations.

In addition to my review of case files, I traveled to the Commission's central office in Harrisburg and reviewed all of its annual reports, beginning in 1956. These reports compiled, categorized, and summarized a great deal of data and other qualitative information regarding the work of the Commission during its fifty plus years of existence. I charted and graphed what I believed to be certain relevant data in an excel spreadsheet so that I could analyze historical trends over time.

In addition to my review of case files and my analysis of annual reports, I met with and interviewed a number of Commission personnel. I formally interviewed a combination of approximately twenty investigators and compliance supervisors. All of them were located in the Philadelphia office. Because Philadelphia is widely considered to be the best performing Commission office, it stands to reason that the Philadelphia Office presents the best case scenario of what the Commission is able to achieve. I was also able to interview the executive director of the Commission over three sessions for a total interview time of approximately three hours, the Commission's general counsel, and three Commission staff attorneys. Additionally, I

interviewed one of its two hearing examiners, and two PaHRC Commissioners. I also spoke to the Commission compliance director, its executive assistant, and its director of communications. I digitally recorded interviews of the executive director, the attorneys that I interviewed, and the hearing examiner.

Over a six-month period in 2009-2010, I went to the Commission at least fifty times, participated in meetings with staff attorneys, spoke to investigators, observed fact-finding conferences, and conciliations, attended Commissioner meetings, and otherwise observed the normal operations of the Commission.

I also interviewed fourteen Commission complainants. Thirteen out of fourteen interviews were conducted over the telephone. In part, I chose to conduct the interviews over the telephone for the sake of convenience. However, my decision was also influenced by studies that report divergent answers to questions depending upon the respondent's knowledge of the interviewer's race. I hoped that conducting interviews over the telephone might mitigate such potential pitfalls.

I chose the complainants whom I interviewed based upon a variety of factors, including a desire to have a sampling of those who had received differing outcomes from the Commission, such as 'no cause' determinations, 'cause' outcomes, loss at a public hearing, and both relatively low and high settlements. I also wanted to interview complainants based upon archetypical fact patterns. Consequently, I sought out complainants who: (1) had direct evidence of discrimination; (2) had circumstantial evidence of discrimination; (3) may have experienced discrimination but could not prove it, and (4) had meritless claims.

To schedule interviews, I drafted a letter for Commission approval and sent it to complainants, asking them to participate in a "brief interview." Most interviews lasted between thirty to forty-five minutes. The interviews were semi-structured

based upon a questionnaire that I devised. All interviews were digitally recorded and transcribed.

Of the fifty or so letters that I sent out to complainants, I received responses from about twenty. I think part of the reason for the relatively low response rate was due to the fact that addresses and/or telephone numbers that the Commission had on file for many of these individuals were outdated. Ultimately, fourteen claimants participated in the interview process. Approximately, an additional six had also agreed to participate but then failed to return my calls to schedule interviews. Following the initial interviews, I called all of the claimants to engage in follow-up questions. Ten returned my telephone calls, and all ten agreed to participate in a supplemental interview.

As for attorney interviews, I primarily chose lawyers based upon their general reputation and status in the Philadelphia legal community, and the frequency with which they litigated before the Commission. Additionally, I aimed to obtain a balance of perspectives between plaintiff and defense side attorneys.

III. THE STRUCTURE OF THE PaHRC

In regards to the purported purpose of our anti-discrimination laws, the United States Supreme Court has observed that the aim of these laws is twofold: (a) to eliminate discrimination, and (b) to compensate victims of discrimination by making them whole.²⁴⁸ In terms of the Commission's professed aims, its mission statement

²⁴⁸ The purpose of Title VII "was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . . It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur(e) complete justice.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).

provides the best summary, holding that the PaHRC is supposed to “administer and enforce the Pennsylvania Human Relations Act and the Pennsylvania Fair Educational Opportunities Act through investigation, identification, and elimination of unlawful discrimination and the promotion of equal opportunity for all persons.”²⁴⁹ It is axiomatic that investigations should be timely as it is hard to gainsay the old adage that ‘justice delayed is justice denied.’ Delays necessarily engender hardships for claimants trying to substantiate their allegations as witnesses may become unavailable, memories may fade, and evidence may become harder to preserve.

To achieve its mission, the Commission is empowered by law to: (1) conduct mandatory training seminars to educate residents about the terms of the PaHRA; (2) employ attorneys to render legal advice to Commission members and to prosecute claims on behalf of complainants; (3) adopt rules, regulations, and policies to implement the terms of the Act; (4) initiate, receive, investigate, and pass upon complaints charging unlawful discrimination, issue findings based upon such investigations, conciliate complaints, hold hearings, adjudicate disputes, issue cease and desist and “make whole relief” orders, including back pay where warranted, and initiate investigations and hold hearings regarding incidents of racial discrimination even where no complaint has been formally filed by a third party; (5) hold hearings, subpoena witnesses and documents, and take testimony; (6) issue publications that it believes will assist in eliminating unlawful forms of discrimination; (7) generate annual reports to be distributed to the General Assembly, the Governor, the Labor and Industry Committee of the Senate and the State Government Committee of the House that summarizes yearly work; (8) prepare and distribute fair practices notices to

²⁴⁹ See: PaHRC website. Accessible at:
http://www.portal.state.pa.us/portal/server.pt/community/about_us/18975.

employers in the state; (9) draft and publish findings of fact, conclusions of law and final decisions following a public hearing; and (10) create educational programs for the purpose of eliminating prejudice and promoting good will for Pennsylvania students and schools.²⁵⁰ As a practical matter, most of the Commission's resources are spent investigating complaints filed by individuals claiming some form of discrimination. As a result, well over 75% of Commission personnel work in the area of compliance in some form or another.

The Commission has four offices whose locations are geographically dispersed throughout the state. They are the: (1) Philadelphia Office, (2) Harrisburg Office, (3) Pittsburgh Office, and (4) Central Office. The Philadelphia, Harrisburg, and Pittsburgh Offices are responsible for investigating complaints of discrimination. The Central Office houses the executive staff of the PaHRC. Display 1 below is a color-coded map of the Commonwealth of Pennsylvania that illustrates the PaHRC regional offices and the corresponding geographic regions within Pennsylvania that they serve. On the map below, the Pittsburgh Regional Office serves those counties that appear in dark blue, the Harrisburg Regional Office those counties that appear in light blue, and the Philadelphia Office is responsible for those areas designated by purple.

[Display 1 about here]

The Commission has eleven commissioners, all of whom are appointed by the Governor with the advice and consent of the state Senate for five-year terms. Commissioners, as a group, set the policies of the Commission, which are then implemented by Commission staff. Because the Commission is supposed to be non-

²⁵⁰ 43 Pa.C.S.A. §§ 957-958.

partisan, no more than six commissioners may be members of the same political party at any one time. Commissioners are paid sixty dollars per day for time spent devoted to Commission work. The commissioners also occasionally serve on three member panels to adjudicate public hearings of complaints, and the commissioners vote whether to adopt or reject the findings of fact and conclusions of law made by hearing officers following public hearings. Commissioners may also serve as liaisons between the agency and the community at large.

An executive director oversees the Commission's day-to-day operation. At the time this chapter was written, there have been five executive directors of the PaHRC since its founding. Homer Floyd served as the Executive Director of the Commission from 1971 until January 2011, and provided a great deal of continuity in terms of its operations. In addition to the executive director and his or her special assistant, the central office also houses, among others, the Commission's chief legal counsel, its two hearing examiners, the Compliance Division Director, the Education/Community Services Director, the Housing Division Director, and the Communications Director.

Display 2 below is an organizational chart for the Commission. Display 2 shows that the Commission is divided into the following different functions: (1) legal counsel, (2) hearing examiners, (3) compliance, (4) education and community services, (5) housing, and (6) communications.

[Display 2 about here]

A regional director manages each of the Commission's three regional offices. At a minimum, each regional office is composed of: clerical staff, intake staff, investigators, and legal staff. By way of example, in the Philadelphia Office, there is an intake supervisor who manages five other Commission employees assigned to

intake. There are approximately fifteen investigators. These investigators are divided into five groups of approximately four individuals and are managed by a compliance supervisor. Three of the investigators are dedicated to the housing unit and the remaining ones are all responsible for investigating claims of discrimination in employment, education, and public accommodations. There are also two staff members who work on community outreach projects that consist of educational efforts. There are four attorneys who are responsible for answering legal questions that may arise, handling motions that are filed by attorneys, approving probable cause recommendations by investigators, and preparing cases for and litigating cases at public hearings for which probable cause has been approved.

The offices in Pittsburgh and Harrisburg are comparably structured. Display 3 below is a typical organizational chart for one of the regional offices and illustrates this structure.

[Display 3 about here]

A. Filing a Complaint

The PaHRA outlines what procedures must be followed in order to file a complaint of unlawful discrimination.²⁵¹ Either the Commission or an individual may initiate a complaint charging unlawful discrimination against a Pennsylvania employer that has at least four full time employees. The complaint must be filed within 180 days after the last alleged act of discrimination takes place. After the complaint has been filed, the Commission will assign it a docket number and will then serve it upon the respondent. Following service, the respondent has thirty days in

²⁵¹ 43 Pa.C.S.A. § 959.

which to file an answer to the complaint. Once the parties have filed their pleadings, the Commission is required to conduct a prompt investigation.

Initially, the regional office where the complaint is filed will assign an investigator to the case. Once assigned, the investigator will generally do the following: (1) speak to the complainant, or if represented, the complainant's attorney, to discuss the facts alleged in the complaint, (2) speak to the respondent, or if represented, the respondent's attorney, to discuss the answer to the complaint, and (3) speak to witnesses who can provide information regarding the allegations in the complaint and answer. As a practical matter, counsel represents respondents most of the time while complainants are represented less than half of the time. The investigator will send out data or document requests to investigate the allegations in the complaint. At some point in the process, the investigator will schedule a fact finding conference where the parties can meet face to face, and the investigator can pose questions to each party in the presence of the other to try to further substantiate or refute allegations contained in either the complaint or the answer to the complaint. In addition to assisting in the investigation, the fact finding conference can also facilitate a potential settlement.

Based upon what is elicited at the fact finding conference, the investigator may send out additional data requests and speak to additional witnesses. Finally, based on her investigation, the investigator makes a decision whether there is "probable cause" to credit the allegations in the complaint. The investigator will write up her findings and conclusions, which are then circulated to a supervisor. If the investigator determines that no probable cause exists to credit the allegations in the complaint, then the Commission will issue a notice of 'no cause' to the complainant along with a "Notice of Complainant's Rights." Although such determinations are

highly legalistic in nature, the Commission does not require its legal staff to provide any oversight to ensure that the no cause determinations issued by its investigators are legally justified. Given the legal nature of the inquiry and that most investigators have no formal legal training, the obvious lack of oversight is not only theoretically shocking but can prove problematic in practice.²⁵² If the investigator finds the existence of probable cause then the regional office's legal department must review and approve it. If approved, the case is assigned to one of the regional office's attorneys and is placed on the Commission's public hearing docket. Between the point at which cause is found and the date of the Public Hearing, the Commission is required by law to endeavor to eliminate the unlawful discrimination by resorting to conference, conciliation, or persuasion. If such efforts fail, then the case will go to hearing before one of two hearing examiners designated by the Commission or before a panel of three Commission members in the county where the alleged discriminatory offense took place.

If, based upon the evidence at the hearing, the Commission finds that the Respondent engaged in unlawful discrimination, the Commission will memorialize its findings of fact and will issue an order, requiring the Respondent to (1) cease and

²⁵² I can personally attest to the potential pitfalls that accompany such lack of oversight. For example, in the fall of 2010, I settled a case in which a City of Philadelphia employee alleged that her supervisor had sexually harassed her over a period of years by regularly propositioning her and continuously making comments to her about her breasts, her nipples, her cleavage, her bra, her hair and her buttocks. His descriptions of how he wanted to sexually touch her were extreme. A typical comment might involve him stating to her that he "wanted to grab [her] hair and ride [her] like a horse." He also cursed at her by calling her, among other names, "f-in' bitch," stared at her in sexually explicit ways, and occasionally groped her body. The Commission found against the existence of probable cause by concluding that her alleged failure to complain to the City or otherwise put it on notice of the harassment insulated it from liability. After she received the 'no cause' determination, she retained me to represent her. I agreed to handle the case because I believed the PaHRC investigator had erred both factually and legally in her conclusions. Because of the pervasive nature of the sexual harassment that so many of her co-workers had witnessed, it could be argued that the City had been put on constructive notice of the sexual harassment but had failed to take steps to remediate it. Due to the severity of the harassment and the clear-cut nature of the liability, the City ultimately settled the case for \$67,500 even though my client had suffered no wage loss. In my experience, the City of Philadelphia would never have settled a case for that kind of figure unless it clearly believed that it was liable and faced significant exposure if forced to defend the case at trial.

desist from engaging in such conduct, (2) reimburse the complainant for certifiable travel expenses, (3) compensate the complainant for loss of work, and (4) provide employment terms and conditions that the complainant would have received if not for the discrimination.

Either party may appeal the disposition to the Commonwealth Court of Pennsylvania, one of Pennsylvania's intermediary appellate courts. From the Commonwealth's disposition of the appeal, either party may then file an appeal with the Pennsylvania Supreme Court. If, within one year after the filing of a complaint with the Commission, the Commission has not entered into a conciliation agreement with the Respondent or if the Commission finds that there is insufficient probable cause to credit the allegations contained in the administrative complaint, the claimant may file a complaint in the state trial court of general jurisdiction also known as the Pennsylvania Court of Common Pleas or in federal court if the plaintiff includes a claim under a corresponding federal statute such as Title VII. The complainant has two years from the date that he or she receives the Pennsylvania Notice of Complainant's Rights to file a lawsuit.

In addition to the aforementioned forms of relief, under the PaHRA the complainant may also be entitled to compensation for pain and suffering and for other legal or equitable relief that the state court deems appropriate, including attorney's fees and litigation costs.

Display 4 below is a flow chart that illustrates, in summary form, the above-described investigative procedure.

[Display 4 about here]

IV. THE HISTORICAL WORK OF THE COMMISSION²⁵³

A. Discrimination Complaint Trends Over Time

In order to give a broad overview of the Commission's work, what follows is a brief historical examination of the Commission's case filing statistics and trends over time. As for the work of the Commission, Display 5 below shows the number of discrimination complaints that have been filed with the Commission from 1960 to 2008. The number of complaints has slowly increased over time from a low of 103 complaints filed in its first year of operation in 1956, to a high of 7267 complaints filed during the 1996 fiscal year. After the 1996 fiscal year, the filings steadily decreased to 4658 filings during the 2007 fiscal year. It is not clear why the number of complainants so dramatically decreased during the last ten to fifteen years. During this same period, the EEOC also reported that in 1997 there were a total of 80,680 charges filed, with the filings dropping to a low of 75,428 in the 2005 fiscal year and then slowly increasing to 89,792 in the 2007 fiscal year.²⁵⁴

[Display 5 about here]

As of the writing of this Chapter, Commission personnel anticipate that the filings will increase given the poor state of the economy and correspondingly ongoing high unemployment rates. It remains unclear whether citizens will increase their filings because the first individuals to be laid off will be members of protected classes

²⁵³ The data from this subsection comes from the Commission's annual reports. The primary strength of the data is its comprehensiveness. Its primary weaknesses involve the lack of independent ways to verify its accuracy and the Commission's tendency to alter the categories of data that it recorded from year to year, making it sometimes difficult to obtain longitudinal comparisons of the same variables. For example, in some years, the Commission reports the total number of race discrimination cases filed. In other years, the Commission reports the number of race discrimination cases filed by African Americans as opposed to Asians or Whites.

²⁵⁴ "Charge Statistics, FY1997- FY2011," U.S. *Equal Employment Opportunity Commission*. Accessible at: <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>

or because those who are terminated will look for some way to address their discharge, including by filing with the Commission even if the claims lack legal merit.²⁵⁵

The Commission generally investigates claims of discrimination in the areas of employment, housing, public accommodations, commercial property, and education. Display 6 below illustrates that employment claims have historically always dominated the work of the Commission. In some fiscal years, the number of employment cases filed has been fifteen times greater than the number of all other cases combined during the same period of time. Table 2 below shows the number of claims filed historically over the years, broken down by case type. As one can see, even recently, employment discrimination cases have generally dominated, followed next by housing cases, then public accommodation cases, and lastly by education cases.

B. Employment Discrimination Trends

Display 6 and Table 2 demonstrate that the number of employment discrimination cases has generally increased over time from less than three hundred cases filed in the early 1960s, to over one thousand by the early 1970s, over three thousand by the early 1980s, over four thousand by the early 1990s, to over five thousand by the year 2000. From the year 2000 forward, the numbers have fluctuated, ranging from anywhere between approximately 3000-5000 filings in any given year.

[Display 6 about here]

[Table 2 about here]

²⁵⁵ See John J. Donohue, III, and Peter Siegelman, “The Changing Nature of Employment Discrimination Litigation.” *Stanford Law Review*, Vol. 43, (1991), 983, finding that employment discrimination litigation grows as unemployment rates increase.

In addition to filings, the Commission receives a substantial number of inquiries. In the 2008 fiscal year, the Commission claimed to have fielded over 27,000 inquiries.

C. Race Based Discrimination Trends

In any particular filing, claimants can allege discrimination on the basis of race, sex, religion, color, age, and disability. In regards to race discrimination complaints, the total number of complaints based on race and color has slowly increased over time. In fiscal year 1960, the total number of complaints based on race and color was 405. In 1962, the Commission switched from recording simply the totals for race discrimination complaints and began keeping track of the number of individual race discrimination claims based upon education, housing, employment and commercial property. In 1962, the highest number of race discrimination complaints was in the area of employment at 121 filings. Based on the data, it is clear that race discrimination claims in the area of employment have tended to increase exponentially over time, steadily increasing to a high of 1297 in 2002. This was followed by a slight decrease to about 1000 filings for every year thereafter for which complete records are available. Display 7 below illustrates filings that allege racial discrimination in employment, housing, public accommodations, education and commercial property. As Display 7 illustrates, the number of complaints based solely on race has generally trended upward from under 200 in 1960 to anywhere between 1000-2000 complaints by 2008.

[Display 7 about here]

For statistical purposes, the Commission generally categorizes racial groups using the following designations: White, Black or African American, American Indian, and Asian, and/or Pacific Islander. As sociological and political

classifications of race have changed over time, so has the way that the Commission has gone about defining and collecting statistics based on race.

Generally, the race complaints filed with the Commission involve African Americans. For example, during the fiscal 2007 year, 1032 employment discrimination complaints based on race were filed. Of those, 896, or 87%, were filed by African Americans. During that same fiscal year, there were 104 race-based housing discrimination complaints. Of those, 86, or 83%, were filed by African Americans. Similarly, that year, 82 complaints were filed alleging race discrimination in public accommodations. Of those, 74, or 91%, were filed by African Americans. That year, 29 complaints were filed alleging race discrimination in education. Of those, 26, or 90%, were filed by African Americans. Displays 8-11 below illustrate filings based upon particular socio-legal racial groups in the areas of employment, housing, public accommodations, education and commercial property over the last decade. These displays demonstrate that African Americans file complaints at a rate almost ten times as high as whites, who file the second largest number of complaints.

[Display 8 about here]

[Display 9 about here]

[Display 10 about here]

[Display 11 about here]

D. Outcomes for Discrimination Cases

Displays 12-15 below illustrate what happened to cases once the Commission approved a determination of probable cause. Specifically, displays 12 and 13 demonstrate the number of public hearings that the Commission held in any given year. Because not every annual publication reported the number of cases that went to public hearing, the graph lines contain gaps. During those years where the

Commission did report the information, with limited exception, the number of annual public hearings has generally ranged between five to twenty. In comparison to the average annual number of case filings, the percentage of complaints that ultimately sees the light of day through a public hearing is miniscule.

[Display 12 about here]

[Display 13 about here]

For a five year period from fiscal years 2002-2006, display 14 below illustrates the number of cases that the Commission: (a) placed on the public docket, (b) settled after placing on the public docket, and (c) for which there was either pre-hearing conferences and/or hearings. For cases placed on the public docket, the number has ranged from a low of thirty five to a high of ninety seven cases in a given fiscal year. For those settled after going onto the public docket, the number has ranged from seventeen to thirty seven. For those where there were either pre-hearing conferences and/or hearings, the number has ranged from thirty one to sixty one.

[Display 14 about here]

Finally, during a ten year period from fiscal years 2000-2009, display 15 below shows the number of final orders that the Commission approved after public hearing. The number has an average range of between five to ten orders, with an exception during the 2004 fiscal year where the number spiked to twenty-five.

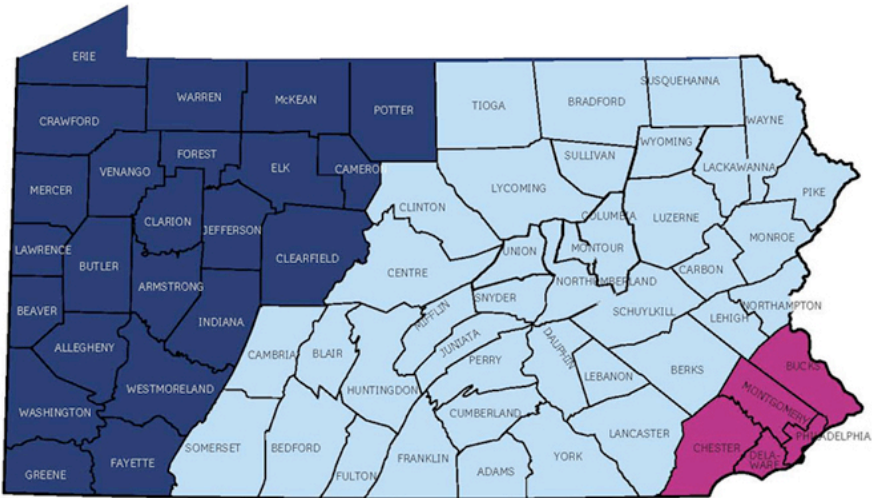
[Display 15 about here]

The reader may observe that in any given year, there may be more hearings held by the Commission than orders actually issued. This is due to the fact that there can be a considerable delay between the conclusion of a hearing and the issuance of a final order as all of the Commissioners must review the entire transcript of the hearing

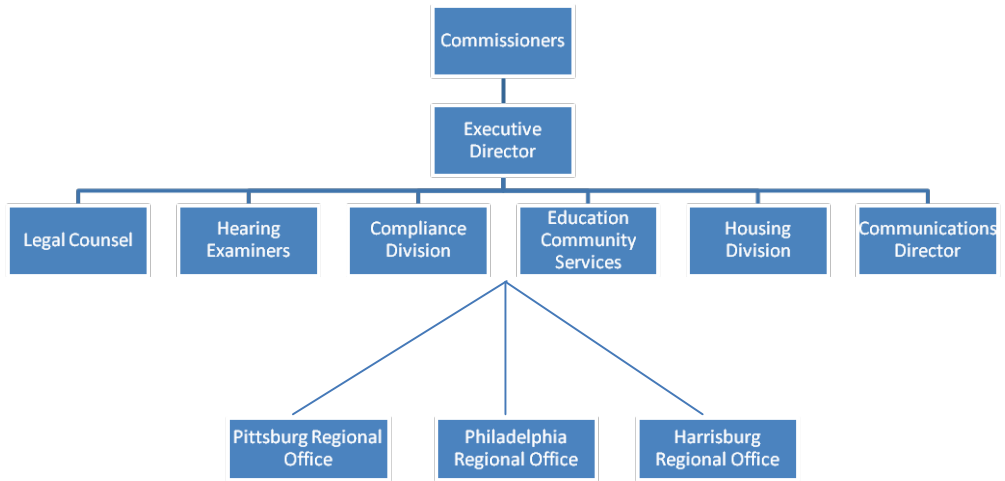
and then vote on whether to approve or reject the recommendations of a hearing officer or the panel of three Commissioners that presided over a hearing.

As one can see, the Commission starts with a very high volume of cases that it must investigate in any given year. But a tiny fraction of those cases actually make their way to a hearing. This has implications for the work of the Commission as most of it happens behind closed doors.

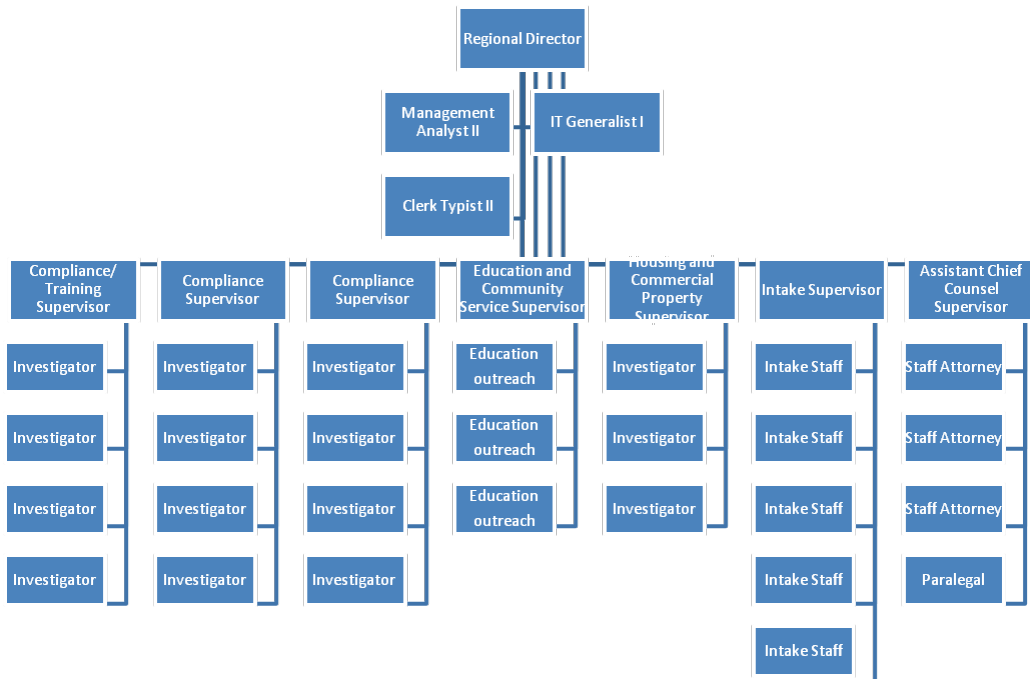
DISPLAY 1 – MAP OF THE GEOGRAPHIC REGIONS OF THE PAHRC



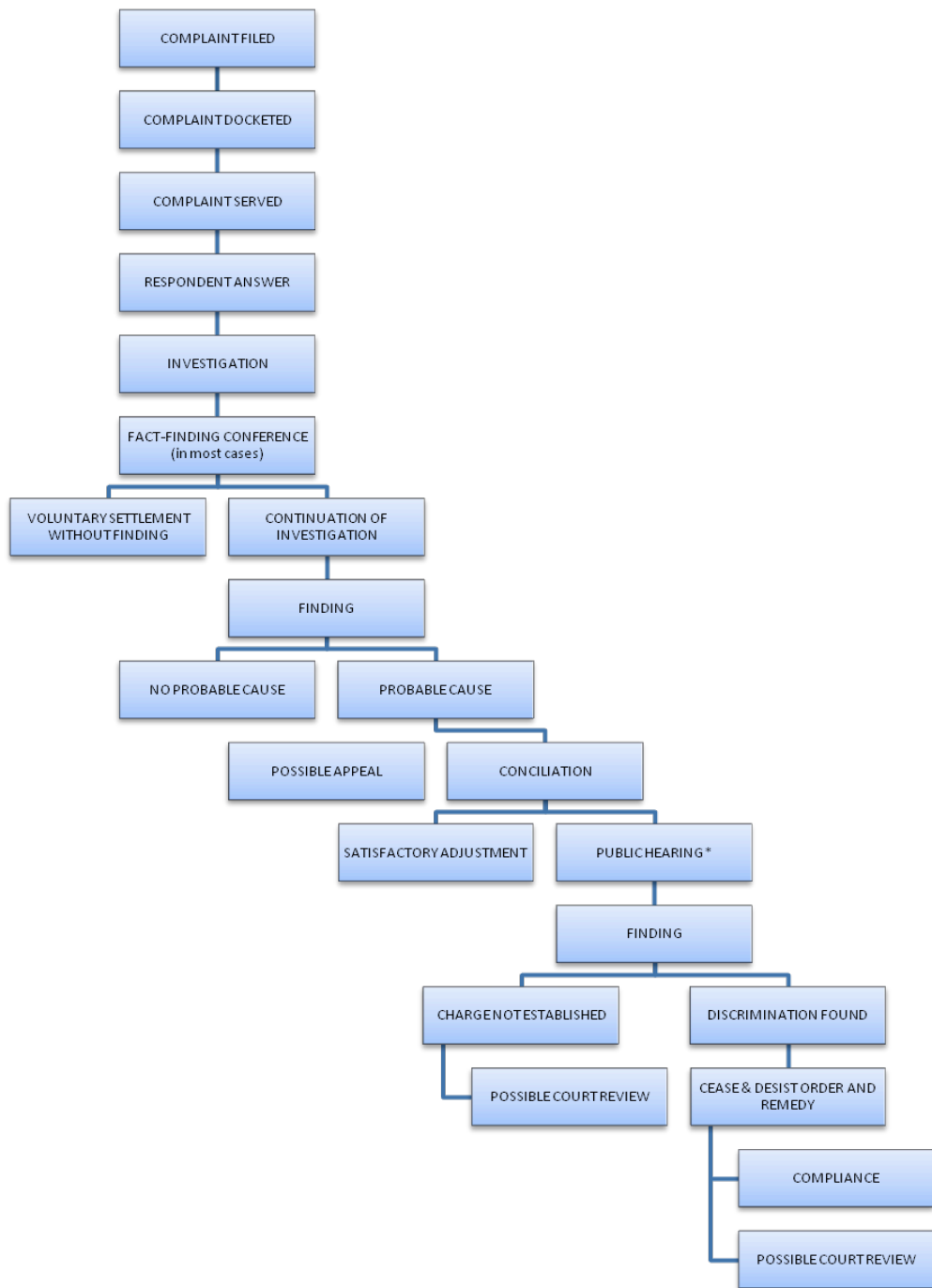
DISPLAY 2 – ORGANIZATIONAL CHART OF THE PAHRC



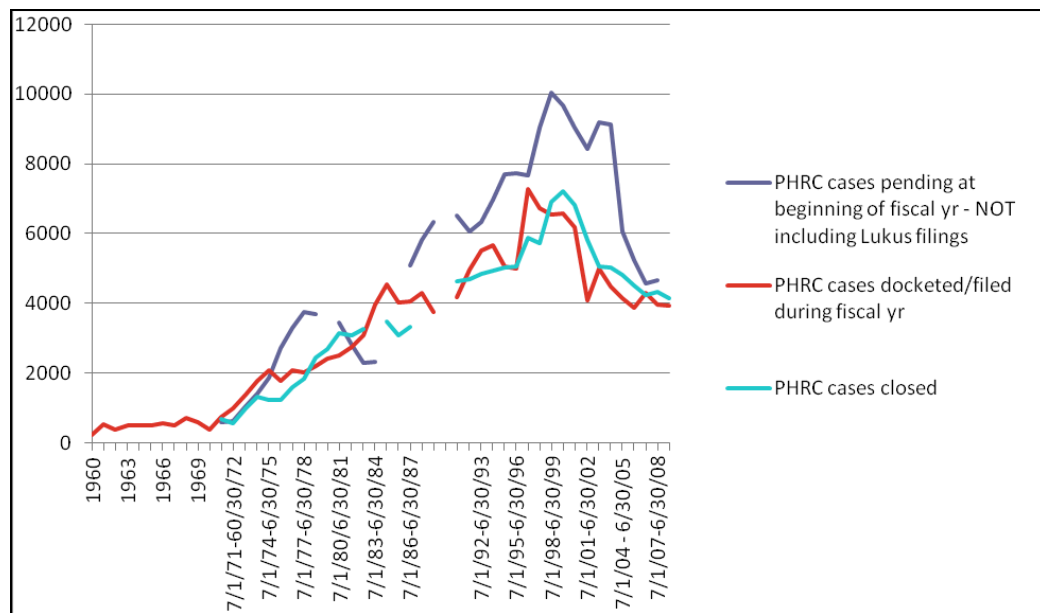
DISPLAY 3 – ORGANIZATIONAL CHART OF THE PAHRC



DISPLAY 4 – FLOW CHART FOR PAHRC INVESTIGATIVE PROCEDURE



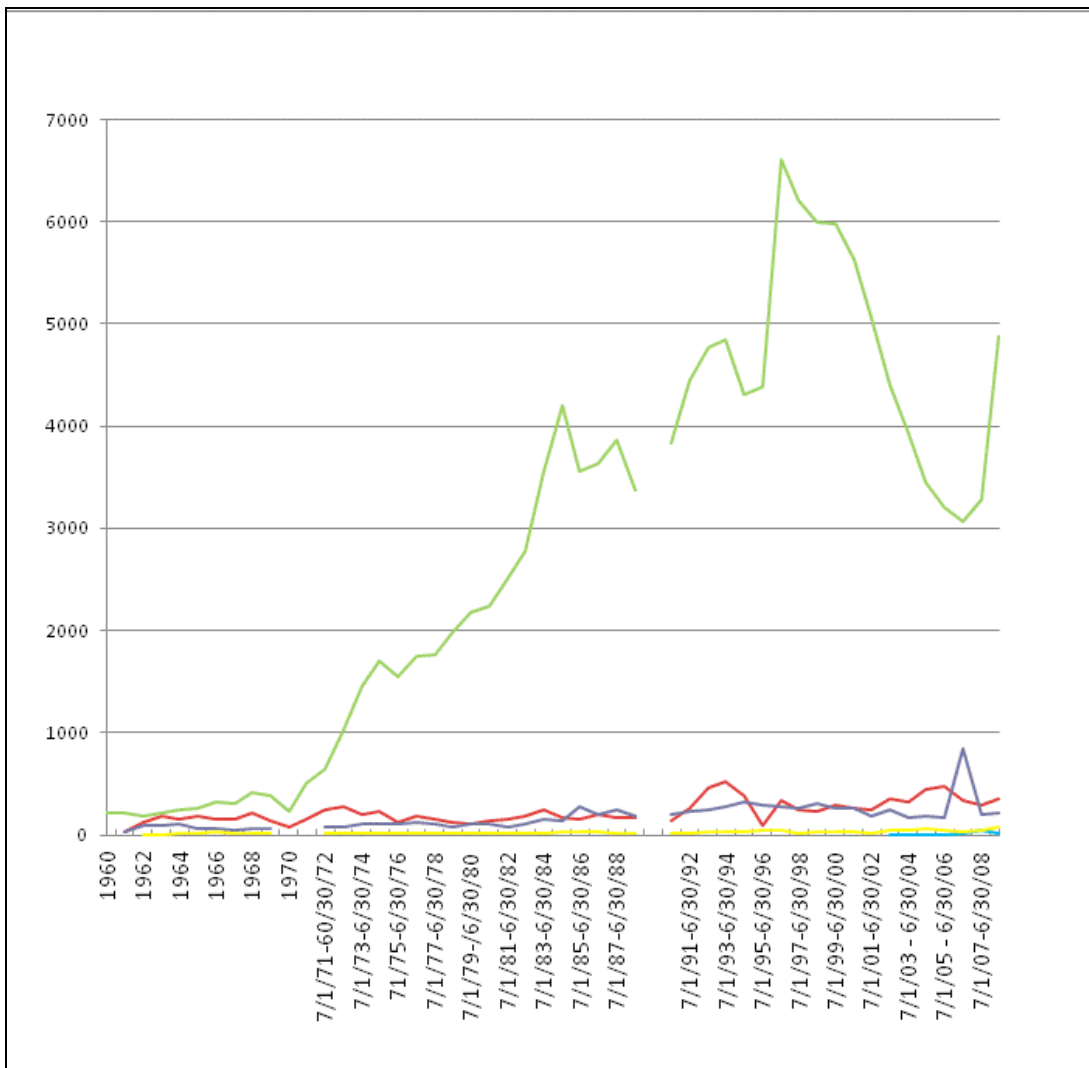
DISPLAY 5 – NUMBER OF COMMISSION COMPLAINTS FROM 1960-2008



* Please note the following for this and for other graphs and tables contained in this chapter. The gaps in the lines in the graphs above are due to either (a) missing data points that are absent from PaHRC annual reports or (b) a missing 1989-1990 annual report. Additionally, in 1970, the Commission began compiling data based upon the fiscal year whereas previously, they had reported the data for the calendar year.

** A “Lukus filing” is a complaint physically filed with the EEOC but simultaneously considered dual-filed with the PaHRC. Because it is originally filed with the EEOC, the EEOC has primary responsibility for investigating the complaint, and the PaHRC will generally adopt the EEOC’s conclusions and disposition.

DISPLAY 6 – NUMBER OF COMMISSION COMPLAINTS FROM 1960-2008 BY CASE TYPE



- No. of PHRC Employment cases filed per yr
- No. of PHRC Housing cases filed per yr
- No. of PHRC Commercial Property cases filed per yr
- No. of PHRC Public Accommodation cases filed per yr
- No. of PHRC Education (Post Secondary) cases filed per yr

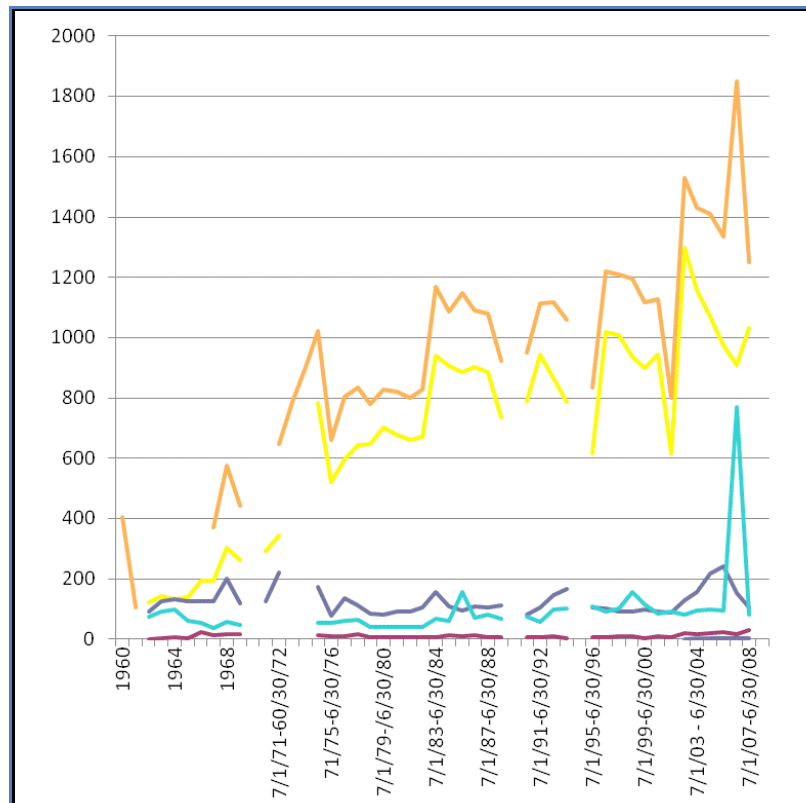
Table 2 – PaHRC Filings From 1960-2009

Data Set I	No. of PHRC Employment cases filed per yr	No. of PHRC Housing cases filed per yr	No. of PHRC Commercial Property cases filed per yr	No. of PHRC Public Accommodation cases filed per yr	No. of PHRC Education (Post Secondary) cases filed per yr	Total
1960	222	NA	NA	NA	NA	222
1961	217	31	NA	37	NA	285
1962	178	119	NA	93	3	393
1963	220	185	NA	97	4	506
1964	239	160	NA	107	9	515
1965	260	184	NA	64	10	518
1966	325	156	NA	60	26	567
1967	310	146	NA	42	15	513
1968	410	222	NA	64	15	711
1969	376	133	NA	56	16	581
1970	229	84	NA	NA	NA	313
7/1/70-6/30/71	501	147	NA	NA	NA	648
7/1/71-6/30/72	649	245	NA	80	8	982
7/1/72-6/30/73	1025	271	NA	71	16	1383
7/1/73-6/30/74	1455	193	NA	107	18	1773
7/1/74-6/30/75	1709	234	NA	111	23	2077
7/1/75-6/30/76	1541	125	NA	100	16	1782
7/1/76-6/30/77	1752	189	NA	121	18	2080
7/1/77-6/30/78	1759	148	NA	107	20	2034
7/1/78-6/30/79	1983	118	NA	78	13	2192
7/1/79-6/30/80	2181	101	NA	110	10	2402
7/1/80-6/30/81	2239	145	NA	101	23	2508
7/1/81-6/30/82	2519	146	NA	82	12	2759
7/1/82-6/30/83	2770	187	NA	103	13	3073
7/1/83-6/30/84	3560	245	NA	154	19	3978
7/1/84-6/30/85	4196	167	NA	143	28	4534
7/1/85-6/30/86	3550	160	NA	283	24	4017
7/1/86-6/30/87	3626	198	NA	207	30	4061
7/1/87-6/30/88	3863	173	NA	238	23	4297
7/1/88-6/30/89	3378	176	NA	185	18	3757
7/1/89-6/30/90						
7/1/90-6/30/91	3838	145	NA	198	10	4191
7/1/91-6/30/92	4447	268	NA	230	14	4959
7/1/92-6/30/93	4763	461	NA	253	27	5504
7/1/93-6/30/94	4842	514	NA	275	37	5668

Table 2 (cont'd)

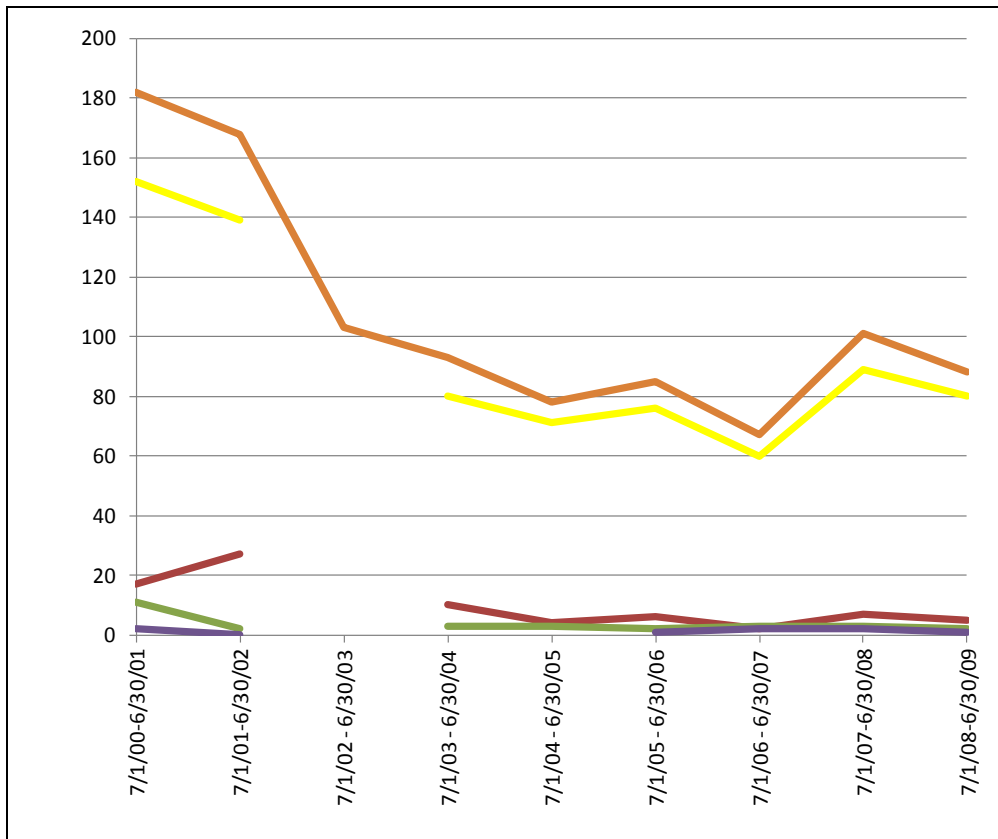
Data Set I	No. of PHRC Employment cases filed per yr	No. of PHRC Housing cases filed per yr	No. of PHRC Commercial Property cases filed per yr	No. of PHRC Public Accommodation cases filed per yr	No. of PHRC Education (Post Secondary) cases filed per yr	Total
7/1/94-6/30/95	4306	390	NA	320	31	5047
7/1/95-6/30/96	4387	94	NA	286	39	4806
7/1/96-6/30/97	6609	336	NA	275	47	7267
7/1/97-6/30/98	6203	238	NA	261	18	6720
7/1/98-6/30/99	5987	226	NA	300	31	6544
7/1/99-6/30/00	5985	295	NA	261	28	6569
7/1/00-6/30/01	5621	262	NA	259	30	6172
7/1/01-6/30/02	5060	245	NA	190	14	5509
7/1/02-6/30/03	4403	352	5	247	42	5049
7/1/03-6/30/04	3932	322	7	173	39	4473
7/1/04-6/30/05	3457	440	6	182	59	4144
7/1/05-6/30/06	3199	468	7	166	47	3887
7/1/06-6/30/07	3070	337	12	848	34	4301
7/1/07-6/30/08	3287	294	48	204	51	3884
7/1/08-6/30/09	4870	350	18	210	82	5530

DISPLAY 7 – NUMBER OF RACE DISCRIMINATION COMPLAINTS BY CASE TYPE FROM 1960-2008



- PHRC cases alleging racial discrimination in Commercial Property
- PHRC cases alleging racial discrimination in Education
- PHRC cases alleging racial discrimination in Employment
- PHRC cases alleging racial discrimination in Housing
- PHRC cases alleging racial discrimination in Public Accommodations
- Total Race and Color Complaints (filed - without any other basis in complaint, i.e., sex, disability, etc.)

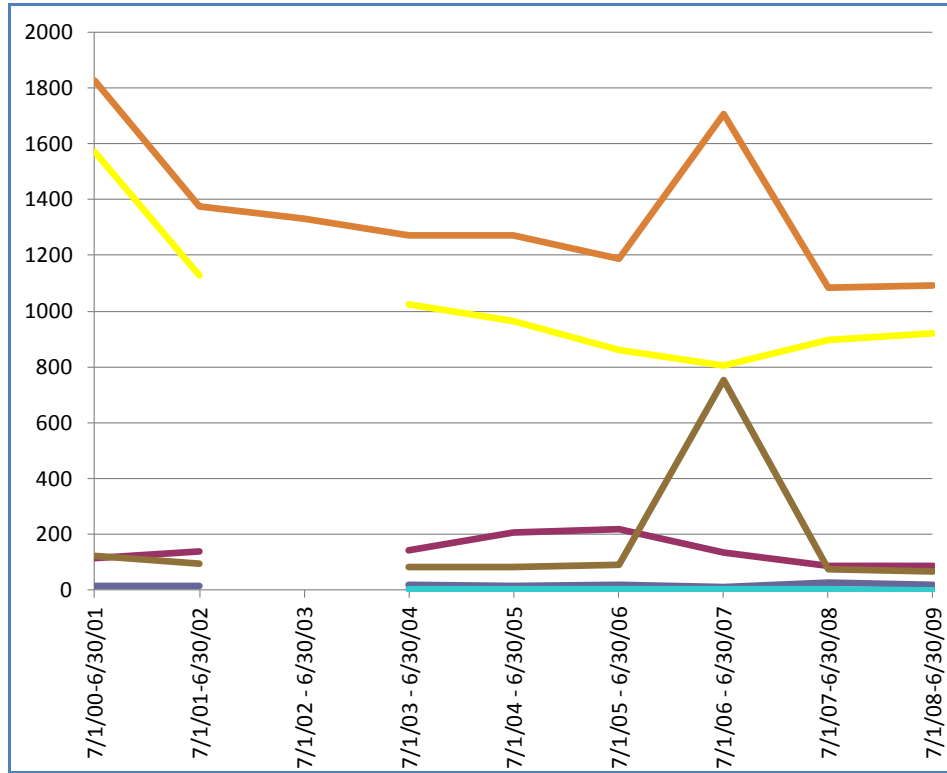
DISPLAY 8 – NUMBER OF RACE DISCRIMINATION COMPLAINTS BY CASE TYPE FILED BY WHITE INDIVIDUALS FROM 2000-2009



Note: No commercial property discrimination complaints were filed by individuals who self-identify as white.

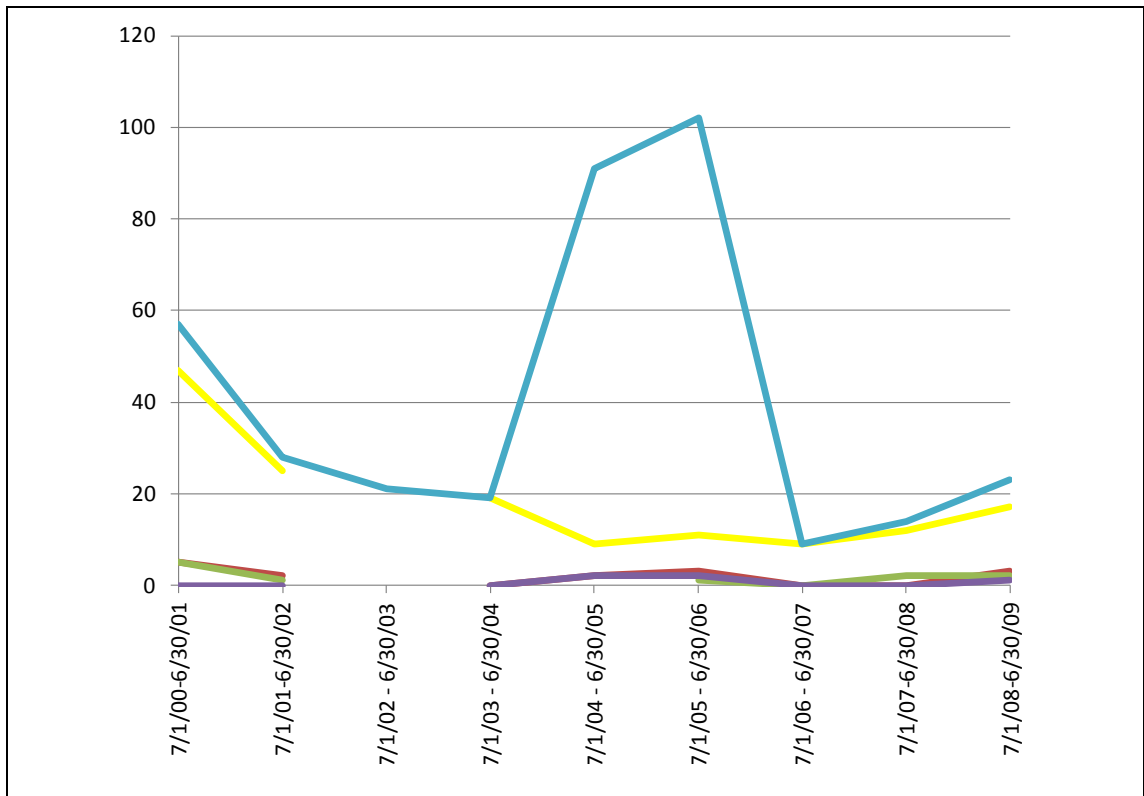
- Employment Discrimination By Whites
- Housing Discrimination by Whites
- Public Accommodations Discrimination by Whites
- Education Discrimination by Whites
- Commercial Property Discrimination by Whites
- Total complaints by Whites

DISPLAY 9 – NUMBER OF RACE DISCRIMINATION COMPLAINTS BY CASE TYPE FILED BY BLACK INDIVIDUALS FROM 2000-2009



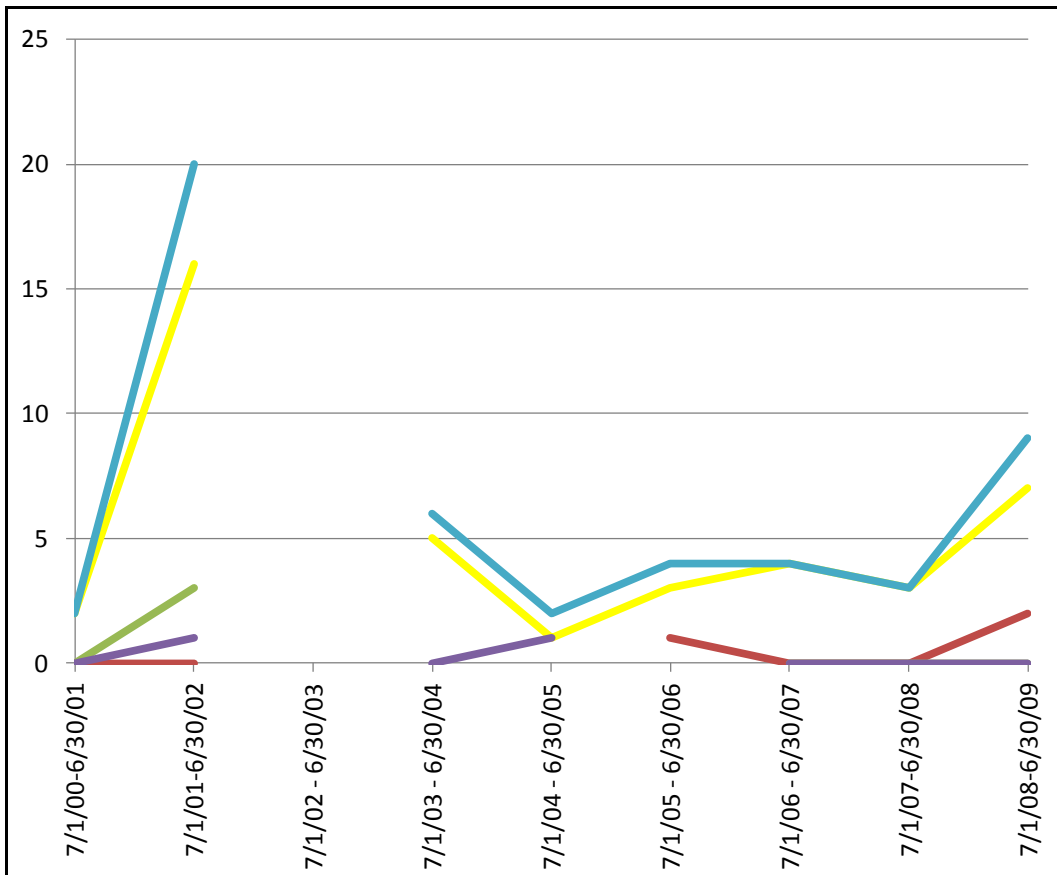
- Employment Discrimination by African Americans/Blacks
- Housing Discrimination by African Americans/Blacks
- Public Accommodations Discrimination by African Americans/Blacks
- Education Discrimination by African Americans/Blacks
- Commercial Property Discrimination by African Americans/Blacks
- Total complaints by African Americans/Blacks

DISPLAY 10 – NUMBER OF RACE DISCRIMINATION COMPLAINTS BY CASE TYPE FILED BY ASIAN & PACIFIC ISLANDERS FROM 2000-2009



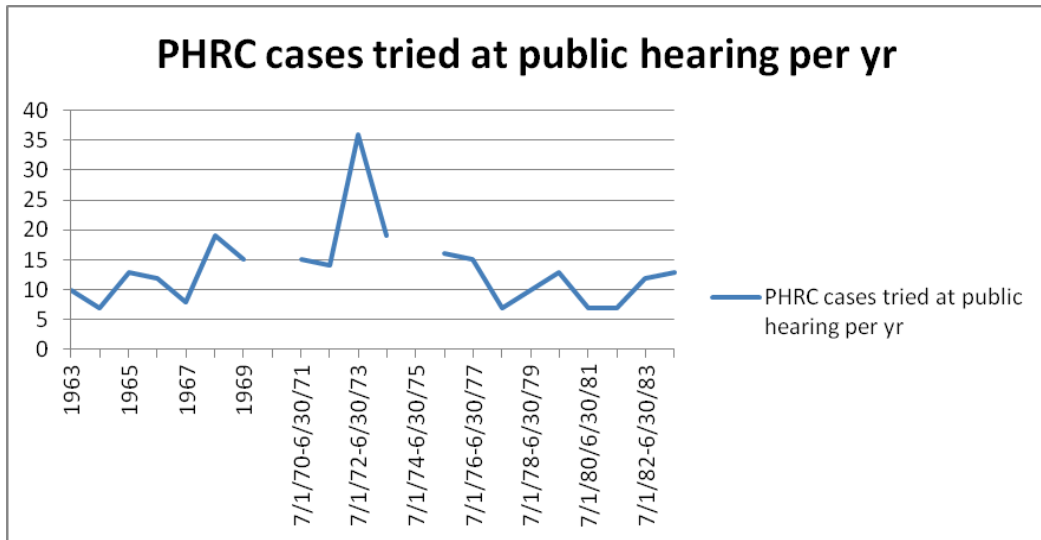
- Employment Discrimination by Asian & Pacific Islander
- Housing Discrimination by Asian & Pacific Islander
- Public Accommodations Discrimination by Asian & Pacific Islander
- Education Discrimination by Asian & Pacific Islander
- Total complaints by Asian & Pacific Islander

DISPLAY 11 – NUMBER OF RACE DISCRIMINATION COMPLAINTS BY CASE TYPE FILED BY NATIVE AMERICANS FROM 2000-2009

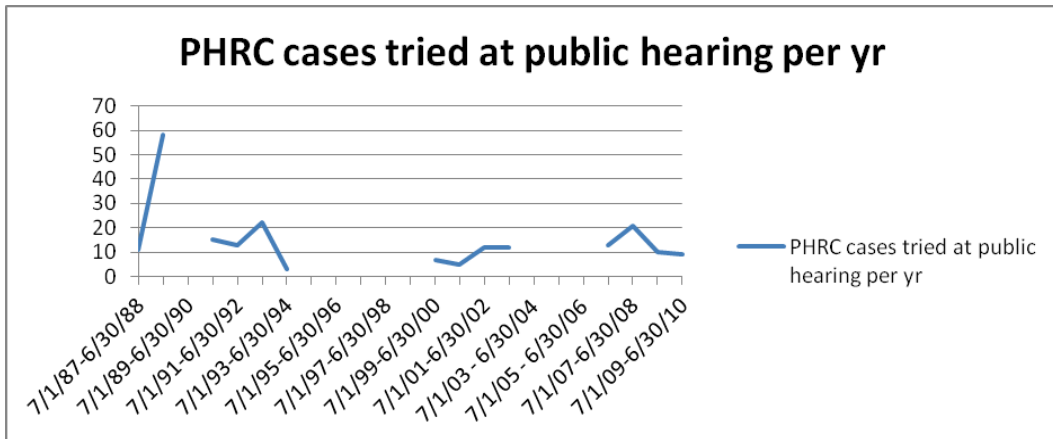


- Employment Discrimination by Indian
- Housing Discrimination by Indian
- Public Accommodations Discrimination by Indian
- Education Discrimination by Indian
- Total complaints by Indian

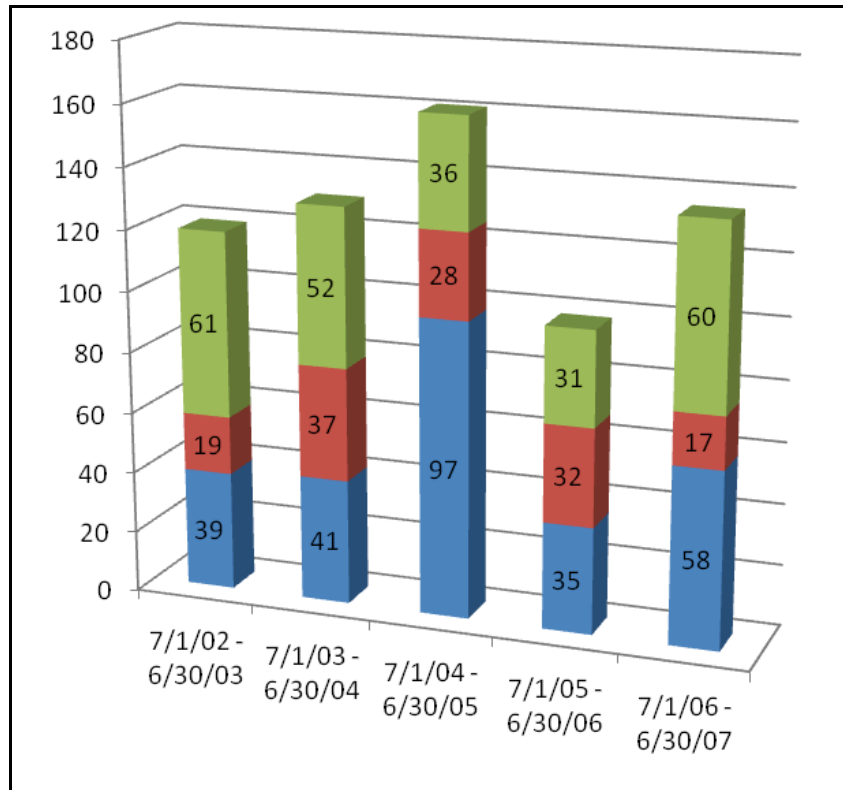
DISPLAY 12 – NUMBER OF PAHRC CASES ANNUALLY TRIED AT PUBLIC HEARING FROM 1963-1983



DISPLAY 13 – NUMBER OF PAHRC CASES ANNUALLY TRIED AT PUBLIC HEARING FROM 1988-2010

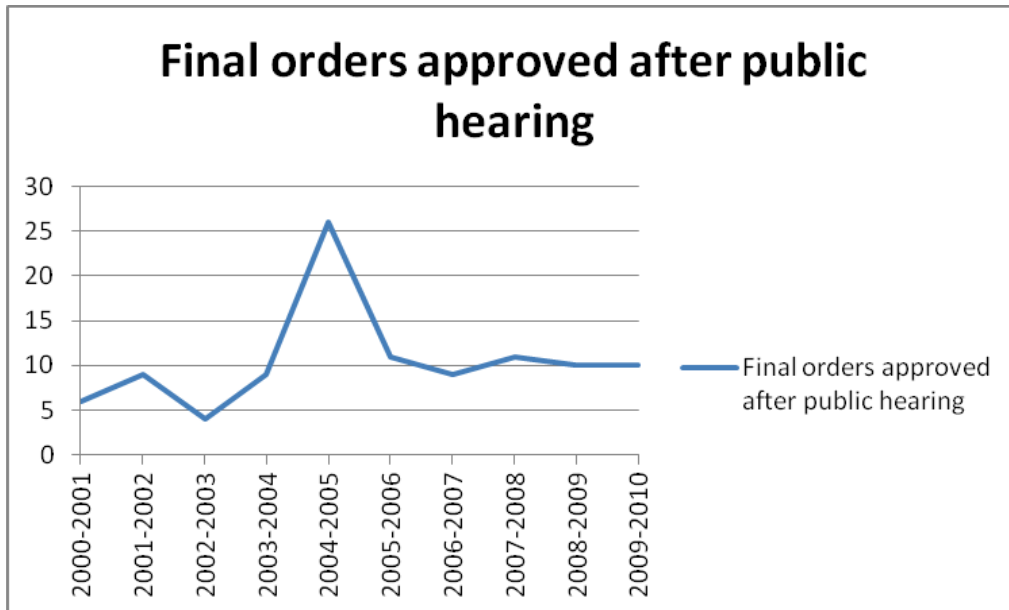


DISPLAY 14 – COMMISSION CASE DISPOSITIONS FOLLOWING PROBABLE CAUSE DETERMINATION



- PHRC Cases with Pre-hearing conferences and public hearings conducted
- PHRC Cases settled after public hearing approval per yr
- PHRC Cases placed on public hearing docket per yr

DISPLAY 15 – NUMBER OF FINAL ORDERS APPROVED
AFTER PUBLIC HEARING FROM 2000-2010



Chapter 6 – Administrative Outcomes Before The Pennsylvania Human Relations Commission

I. INTRODUCTION

In this chapter, I discuss the effectiveness of the PaHRC by comparing its apparent achievements against its stated aims. In summary, I contend that while the PaHRC has a number of important success stories that have helped to establish its historical relevance, these successes now prove to be the exception rather than the rule. Indeed, as a general rule, individual claimants now fare rather poorly before the Commission. While the Commission clearly lacks the resources to investigate the sheer volume of cases that it has on its docket, it would appear that the factor that is most responsible for underperformance is the changing face of discrimination itself, which has become increasingly subtle and harder to detect than it previously was.

II. COMMISSION STRENGTHS

At the outset, I note that the Commission possesses a number of important characteristics that help it to achieve its objectives in enforcing Pennsylvania's anti-discrimination laws. Generally, these strengths fall into the following categories: (A) leadership, (B) legal staff, (C) personnel, (D) diversity, and (E) organization.

A. Leadership

As previously noted, for approximately forty years, until January 2011, Homer Floyd served as the executive director of the PaHRC. While interviewees gave candid assessments regarding their satisfaction with their fellow co-workers, every staff member with whom I spoke uniformly praised Mr. Floyd for his leadership skills, his dedication to civil rights work, and his nationwide reputation for competence as the

executive director of the Commission. Mr. Floyd has worked in the civil rights field for close to fifty years, and during that time he has been repeatedly honored for his work. When political winds have buffeted the Commission, including attempts by Pennsylvania legislators to disband the Commission, Mr. Floyd worked tirelessly to ensure its continued existence and relevance. Mr. Floyd has also been somewhat of a trailblazer, choosing to utilize a strategy of litigation early in the Commission's history when many of its state counterparts would only engage in persuasion to convince employers to stop discrimination.²⁵⁶

In addition to Mr. Floyd, the entire executive staff also appears to be a dedicated and competent group that works hard to effectively carry out the operations of the Commission. As for PaHRC commissioners, based upon interviews and my attendance at Commission meetings, it would also appear that the commissioners take their jobs very seriously. They are passionate about their work and most appear to seek equitable policies and the fair adjudication of disputes. Obviously, as strong leadership from the top is critical for any organization's success, the Commission has benefited from its executive leadership.

²⁵⁶ One former Commission staff attorney had this to say about Homer Floyd.

I think that he is a very skilled administrator and a very good politician and he has managed to keep the commission afloat during some very difficult times because of ... his ability to interact very well with political people and also his ability to be a buffer between the staff and the commissioners, which is a very important role..... I think that the Commission would not be where it is today had it not been for the leadership of Homer. He has been in there many years even before I came there and he has had to fight the legislature for funds, he had to fight many incendiary local battles where the commission has gotten involved and he is quite a person – one of the people I admire the most among the people that I have encountered in my years of working in anti-discrimination law. I think he is one of the greatest people in the anti-discrimination area in the nation.

B. Legal Staff

Given that many of the issues upon which the Commission works are legal in nature, it is also important for it to have a competent legal staff. Michael Hardiman, Esq., serves as chief counsel for the Commission. Mr. Hardiman is impressive in terms of his breadth of knowledge, his understanding of the law, and his appreciation for the conceptual difficulties that the current legal framework presents for addressing the ever-evolving nature of racism, especially in the employment context.

His staff attorneys, at least those whom I interviewed, are all also well versed in this complicated area of law, and some have devised very innovative ways to root out different forms of discrimination. For example, based on the initiative of one staff attorney, the Commission recently adopted a project, grounded upon ideas developed by Professor Alfred Blumrosen,²⁵⁷ to utilize the Equal Employment Opportunity Commission (EEOC) Employer Information Report (EEO-1) data as a way of establishing *prima facie* evidence of intentional discrimination. The EEO-1 data will allow the Commission to discern which employers persistently underemploy and segregate minorities and female employees by comparing employer practices against one another for significant statistical disparities.²⁵⁸ This same staff attorney also made the Commission the first state fair employment practices agency to take on predatory lending as a civil rights issue, suing Wells Fargo for reverse redlining practices of certain Philadelphia neighborhoods. The suit alleged that Wells Fargo

²⁵⁷ Alfred Blumrosen, *The Reality Of Intentional Job Discrimination In Metropolitan America – 1999*. Report accessible at: http://www.eeol.com/1999_NR/Title.pdf

²⁵⁸ As part of its efforts to enforce equal employment opportunity laws, the EEOC requires employers of a certain size to annually complete EEO-1 reports. For purposes of filling out these reports, employers must compile and provide information regarding the number of its employees who are (a) “Black,” (b) “White,” (c) “Asian/Pacific Islander,” (d) Hispanic and (e) “American Indian/Alaskan Native” and work in the following nine job categories: (a) Officials and Managers, (b) Professionals, (c) Technicians, (d) Sales Workers, (e) Office and Clerical Workers, (f) Craft Workers (skilled), (g) Operatives (semiskilled), (h) Laborers (unskilled), and (i) Service Workers.

concentrated a statistically disparate number of exceedingly high interest loans in predominantly black neighborhoods. The Commission's trailblazing work in the area of racially disparate predatory lending has become a model for other FEPA agencies around the nation to emulate. Additionally, another staff attorney recently initiated a project aimed at educating the public about the illegality of automatically disqualifying individuals from employment based upon criminal records because of the disproportionate disparate impact that such policies have on African Americans.

C. Lower Level Commission Staff Members

Based upon my interviews, I came away with the impression that many lower level commission staff members are also dedicated and passionate about their work. Most with whom I spoke appeared generally enthusiastic about the work of the Commission and dedicated to the cause of remediating discrimination. Most are politically progressive and some self-describe as "leftists." One investigator whom I interviewed openly identify as a Marxist.²⁵⁹ Almost all have sympathies that lie with protecting an individual's civil rights or otherwise helping them through the trauma of perceived job discrimination. And while not all staff members came to the Commission due to such a professed commitment, a good many did. For instance, one compliance supervisor whom I interviewed expressed his aspiration to work for the Commission in the following manner.

I always had a desire to work in this area. I came through the civil rights movement with MLK and he left an impression on me. I read everything he wrote and what was written about him and seeing injustice and hearing injustice, I could do something about it. I am an ordained minister. So that also fits in with my principles I uphold. From seeing and experiencing injustices while I was growing up, I felt like I could be part of the solution.²⁶⁰

²⁵⁹ Interview with Thomas. I have changed the names of the investigators to protect their identities.

²⁶⁰ Interview with William.

One Commission staff member stated:

I am the daughter of a community activist so I always did community outreach work. I like to [help] them [with] their grief [since] they are hurting.”²⁶¹

An investigator stated:

I graduated from Temple University where I studied African American studies. By doing that, I studied Martin Luther King, Malcolm X, Fanny Lou Hamer and we studied the civil rights movement.

The job description of being an investigator seemed interesting and I like to fight discrimination on all fronts. I have always been involved in civil rights.²⁶²

Another well-respected investigator stated:

I was born for this job.... Before I finish with a case, I make sure that I turn over every stone. I put myself in their shoes and I listen to the complainants.... When I see discrimination, I get this chill in my body.... I enjoy finding discrimination and helping people come to some resolution about it [and giving them the opportunity to be] heard.... For the most part... I feel comfortable here. I don't feel comfortable in corporate America where I cannot be myself because of discrimination. Here, I can be myself. In corporate America, and even in school, you have to act and talk white and I hate that and I'm not going to do that. I just love the work. I hate racism.... This is a way that I can deal with it as opposed to complaining about it.²⁶³

While supporters of civil rights can still be politically conservative, many of the staff seem to openly declare their allegiance to more progressive political sensibilities.

This is evidenced by the fact that while visiting Commission offices I observed that many staff members adorn their workspaces with photos of famous progressive black leaders, such as Barack Obama and Martin Luther King, Jr., but none have pictures of famous conservative leaders such as Condolezza Rice, Clarence Thomas, or even more moderate conservatives, like Colin Powell.

²⁶¹ Interview with Tamika.

²⁶² Interview with Ralph.

²⁶³ Interview with Kelly.

On a final note, in addition to being passionate about what they do, many of the investigators are also highly credentialed. For example, a number of them have law or other advanced degrees in a variety of relevant fields.

D. Diversity of Commission Personnel

It is also valuable for the personnel of an anti-discrimination agency, such as the PaHRC, to reflect the diversity of the community it serves. Such diversity has a tendency to not only increase the Commission's credibility but also serves to facilitate sensitivity to the needs of putative victims. By all accounts, the PaHRC appears to be racially, ethnically, and socio-economically diverse. For example, at the time I undertook this study, of the eleven commissioners, six were African American, one was Asian American, one was Hispanic, one was Arab American, one was Jewish, and one was openly gay. The executive director, Mr. Floyd, is African American, as are the regional directors. In addition, I interviewed about 80% of the investigators in the Philadelphia office. Table 3 below provides information about investigators by years of experience, and racial and gender identities. About 75% of the investigators that I interviewed were persons of color and slightly over 50% were women. Furthermore, a majority of the compliance supervisors, to whom investigators report, are persons of color.

[Table 3 about here]

E. Organization

Over the years, the Commission has systematized the filing of citizen complaints by implementing case management software that assists intake workers in navigating the very complicated terrain of employment discrimination law. The Commission also has a fairly sophisticated training program for all of its investigators, and holds regular trainings regarding changes and developments in the

law. In addition, its offices appear professional in nature. In past years, the physical appearance of the Commission looked like it was in a state of disrepair. The furniture appeared worn. The rooms were dirty. The building itself was old. However, about five years ago, the Commission moved into a new space. The waiting room now appears brightly lit, orderly, and spacious enough to accommodate up to approximately fifteen individuals. The Commission has at least four conference rooms and a large public hearing room ornately decorated with artwork that illustrates the Commission's dedication to promoting civil rights.²⁶⁴

As for self-assessment, a number of Commission personnel, from the executive director to lower level Commission staff members, generally opined that the Commission outperforms its sister state agencies and the EEOC in terms of the outcomes it achieves on behalf of its claimants, the speed at which it investigates complaints, and the sophistication of its operations. Data compiled and published by the EEOC at its 2010 Training Conference appear to validate some of those assertions.

III. COMMISSION SUCCESS STORIES

Over the years, the Commission has had a number of important success stories that demonstrate significant accomplishments on behalf of victims of discrimination.

For example, in the area of employment, the Commission has invalidated a legion of discriminatory employer wage policies,²⁶⁵ maternity programs,²⁶⁶ health plans,²⁶⁷ and disability plans.²⁶⁸

²⁶⁴ Charles Goodsell, "Welfare Waiting Rooms," *Urban Life*, Vol. 12, No. 4, (1984), 467-477, esp. 467, where Goodsell discusses the importance of appearance in the offices of governmental agencies.

²⁶⁵ See for e.g.: *Pennsylvania Human Relations Commission v. Hempfield Tp.*, 23 Pa. Commw. 351, 352 A.2d 218 (1976), which upheld a Commission order that required respondent company to

In the area of tackling discrimination in public accommodations, the Commission has ordered: cemeteries to cease and desist from discriminating in their interment policies,²⁶⁹ certain private fraternal leagues to open its doors to African Americans applicants,²⁷⁰ recreational centers to provide equal access to its swim clubs, and has invalidated sex-based admissions policies that prohibit girls from joining all boy baseball associations.²⁷¹

In the area of housing, the Commission has also required a number of housing authorities to remediate *de facto* racial segregation by directing them to stop renting

compensate female clerical employees and male road maintenance employees at an equal rate of pay.; *Allegheny County v. Wilcox*, 76 Pa. Commw. 584, 465 A.2d 47 (1983), which affirmed a commission order that required the Allegheny court system to eliminate wage disparities between female secretaries and male night clerks.

²⁶⁶ See for e.g.: *Leechburg Area School Dist. v. Pennsylvania Human Relations Commission*, 19 Pa. Commw. 614, 339 A.2d 850 (1975), which invalidated a company maternity program that required married teachers to take maternity leave after six months of pregnancy; *Pennsylvania Human Relations Commission v. Freeport Area School Dist.*, 467 Pa. 522, 359 A.2d 724 (1976), which invalidated a maternity policy that automatically and unilaterally terminated pregnant women 3 ½ months before their due date; *West Middlesex Area School Dist. v. Pennsylvania Human Relations Commission*, 39 Pa. Commw. 58, 394 A.2d 1301 (1978), which invalidated a maternity leave program that required employees to go on maternity leave for one year after the date of child birth.

²⁶⁷ *Canon-McMillan School Dist. v. Pennsylvania Human Relations Commission ex rel. Davis*, 30 Pa. Commw. 1, 372 A.2d 498 (1977), which affirmed an order of the Commission that invalidated an employer health insurance policy for discriminating against female employees where the policy only provided family health coverage if the employee was the head of the household.

²⁶⁸ See for e.g.: *Dallastown Area School Dist. v. Pennsylvania Human Relations Com'n*, 74 Pa. Commw. 560, 460 A.2d 878 (1983), which affirmed a Commission order that invalidated an employer disability plan that excluded pregnancy from coverage; *Anderson v. Upper Bucks County Area Vocational Technical School*, 30 Pa. Commw. 103, 373 A.2d 126 (1977).

²⁶⁹ See for e.g., *Pennsylvania Human Relations Commission v. Alto-Reste Park Cemetery Ass'n*, 453 Pa. 124, 306 A.2d 881 (1973), which upheld a Commission order, directing Alto Reste Park cemetery to (a) cease and desist from racial discrimination in its interment policies, (b) document and provide reasons for any future refusals to bury a decedent to both the Commission and the decedent's family, and (c) advertise its non-discrimination policy in a newspaper of general circulation.

²⁷⁰ See for e.g.: *Loyal Order of Moose Lodge No. 145 v. Pennsylvania Human Relations Commission*, 16 Pa. Commw. 433, 328 A.2d 180 (1974), which ordered the Moose Lodge to permit black children use of its bowling facilities; *Com. Human Relations Commission v. Loyal Order of Moose, Lodge No. 107*, 448 Pa. 451, 294 A.2d 594 (1972), which upheld a Commission order that required private clubs who open their doors to non-members to do so in a non-discriminatory fashion.

²⁷¹ *Pennsylvania Human Relations Commission v. Mars Community Boys Baseball Ass'n*, 488 Pa. 102, 410 A.2d 1246 (1980).

housing accommodations to families of certain races until racial imbalances are corrected.²⁷² Similarly, the Commission has issued innumerable orders over the years that require public housing authorities to rent to African American lessees.²⁷³

In the area of education, the Commission has also ordered Pennsylvania school districts to implement affirmative action plans to integrate their schools.²⁷⁴ Such litigation against individual districts has literally spanned decades and is ongoing. The Commission has also ordered districts to increase funding of female athletic programs to equalize opportunities for male and female athletes.²⁷⁵

IV. SHORTCOMINGS OF THE COMMISSION

Despite these and other notable milestones, my investigation revealed that, on the whole, these successes prove to be a product of the past. When successful results such as these do occur presently, they serve as exceptions rather than the rule.

As a general principle, individual claimants fare rather poorly before the Commission. A summary of the problems that may produce such outcomes fall into three broad categories: (1) dilatory investigations, (2) infrequent findings of discrimination, and (3) inauspicious settlements

²⁷² *Pennsylvania Human Relations Commission v. Chester Housing Authority*, 458 Pa. 67, 327 A.2d 335 (1974).

²⁷³ See for e.g.: *Midland Heights Homes v. Pennsylvania Human Relations Commission*, 17 Pa. Commw. 563, 333 A.2d 516 (1975); *Speare v. Pennsylvania Human Relations Commission*, 16 Pa. Commw. 502, 328 A.2d 570 (1974); *Pennsylvania Human Relations Commission v. Brucker*, 51 Pa. D. & C.2d 369, 1970 WL 9022 (1970); *Huber v. Pennsylvania Human Relations Commission*, 43 Pa. D. & C.2d 437, 1967 WL 5840 (1967).

²⁷⁴ *Pennsylvania Human Relations Commission v. School Dist. of Philadelphia*, 30 Pa. Commw. 644, 374 A.2d 1014 (1977); *Pennsylvania Human Relations Commission v. Uniontown Area School Dist.*, 455 Pa. 52, 313 A.2d 156 (1973), affirming order of the PaHRC, directing six Pennsylvania School Districts to implement *de facto* discrimination desegregation plans; *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A.2d 290 (1967), holding that the Commission has the power to correct *de facto* segregation and affirming issuance of Commission order, directing the Chester School District schools to desegregate its schools.

²⁷⁵ *Annual Report of the Pennsylvania Human Relations Commission, 1981-1982. Annual Report.* (Harrisburg: The Commission, 1982).

First, in regards to the length of investigations, the Commission spends an inordinately long time investigating and disposing of cases. Even though, on average, the Commission investigates complaints at a faster pace than other state fair employment practices agencies around the nation, it still proceeds at an inordinately slow pace. Second, few cases result in probable cause findings and of those few that make it to hearings, only approximately half result in awards for the complainants. Thus, it is rare for complainants to be legally vindicated before the Commission. And finally, settlements are challenging on three counts: (a) they are generally monetary in nature, (b) they generally result in small amounts, and (c) most claimants and plaintiffs' attorneys express great dissatisfaction with the case results reached before the Commission. In fact, it is rare when settlements produce any specific policy changes at the employer level. Finally, even though many commission employees recognize a number of these problems, there does not appear to be any plan in place to address these deficits. One major contributing factor to the Commission's failings is the severe budgetary constraints placed upon it by Harrisburg. Due to cuts to the Commission's budget, it simply does not have sufficient resources to adequately investigate complaints of discrimination. But I suspect that even with more resources, the improvements would still be limited due to the intrinsic difficulties of rooting out discrimination and the current legal model that we have in place for doing so.

A. Time Period to Investigate Complaints

The American Bar Association recommends that "90% of all civil cases should be ... concluded within 12 months of the date of case filing; 98% within 18 months of such filing, and the remainder within 24 months of such filing..."²⁷⁶ The 18

²⁷⁶ American Bar Association, *Standards Relating to Trial Courts, 1992 Edition* (Chicago: American Bar Association, 1992), Section 2.52.

to 24 month time frames are generally reserved for the most complex cases, such as medical malpractice, toxic tort, or complex commercial litigation matters. Executive Director Homer Floyd opined that the Commission, on average, should take six months to investigate a case where there is no probable cause and one year where probable cause exists. But the Commission is not even close to meeting these objectives. Display 16 below consists of a pie chart that shows the average shelf life for PaHRC cases during the 2007 fiscal year.

[Display 16 about here]

Approximately sixty six percent of the cases exceeded the six-month mark, roughly forty five percent exceeded the one year mark, and sixteen percent were on the docket for at least two years.

While it is clear that some of the delays are attributable to the sheer size of the caseload, some are inexplicable. One Commission officer shared a story about a disability discrimination case that he believed may have merit but has been languishing for over five years. Unfortunately, the complainant recently contracted breast cancer and may not live to see her case resolved.²⁷⁷ While such tragedies are not necessarily common, it is nonetheless true that the longer a case persists, the less likely that key witnesses will be available. More often than not, this hurts the complainant more than the respondent who has the necessary resources to track down critical witnesses. Thus, there is a direct correlation between delays in adjudication and the remediation of discrimination. When I spoke to attorneys who practice before the Commission, most of them expressed dismay and dissatisfaction with the amount of time it takes for their cases to wend their way through Commission processes.

²⁷⁷ Interview with John.

B. Probable Cause Determinations

As described in Chapter 5, after a complaint is filed, the Commission assigns an investigator or Human Resources Researcher (HRR) to investigate the allegations. Once the investigation is completed, the HRR recommends a finding of either “probable cause” or “no probable cause.” If the supervisor agrees with the probable cause determination, the legal department must then approve it. If the supervisor agrees with the no probable cause determination, then the Commission formalizes the finding and terminates the case.

In any given year, approximately 2%-3% of the cases that the Commission closes results in probable cause determinations. Below is a table that lists, by number and percentage, the respective amounts and frequencies of probable cause findings made by the Commission annually from the 2004-2008 fiscal years. Table 4 breaks down these figures by respective regional offices with the aggregate Commission total listed at the bottom of the table.

[Table 4 about here]

As the table demonstrates, on average, the Commission generally finds probable cause in approximately 2%-3.5% of its cases. It would appear that the Commission is outperforming other state Fair Employment Practices Agencies throughout the nation in the number of probable cause determinations that it issues on an annual basis. For example, between fiscal years 2005-2009, Fair Employment Practices Agencies (FEPA) across the nation closed on average approximately 1.5% of its cases by finding “probable cause.”

But despite the Commission’s relative outperformance, an important question remains. Is the 2%-3.5% rate (in any given year) for probable cause determinations

unduly low? In other words, is more discrimination taking place than the Commission is catching? Studies and the opinions of Commission personnel suggest that the answer to that question is a resounding “yes.”

As far as studies go, a significant amount of contemporary survey data demonstrates that a large number of African Americans – anywhere between 10%-40% depending upon the study in question – self-report experiences of racial discrimination in the workplace.²⁷⁸ While self-reporting is vulnerable to critiques of subjectivity, nonetheless, a number of social science studies demonstrate that African Americans suffer workplace discrimination insofar as they are less likely than whites to receive job offers and interviews even when they present equal qualifications to employers.²⁷⁹ In fact, some studies document a number of instances where employers openly express hesitancy in hiring African Americans.²⁸⁰ It is still a fact of life that African Americans generally have twice the unemployment rates as whites and still remain segregated in some of the lowest occupational rungs in corporate America.²⁸¹

²⁷⁸ Elizabeth Hirsh and Christopher Lyons, “Perceiving Discrimination On The Job: Legal Consciousness, Workplace Context, And The Construction Of Race Discrimination,” *Law & Society Review*, Vol. 44, No. 2, (June, 2010); Tom A. Smith, *Measuring Racial and Ethnic Discrimination*. (Chicago: National Opinion Research Center, Univ. of Chicago, 2002). Smith cites survey data from the 1990s and the early twenty-first century which holds that as many as 45% of African Americans claim that they have experienced some form of workplace discrimination. *See also*: Vincent J. Roscigno, *The Face of Discrimination* (Lanham, MD: Rowman and Littlefield Publishing, 2007); C. Elizabeth Hirsh, “Settling for Less? The Organizational Determinants of Discrimination-Charge Outcomes,” *Law & Society Review*, Vol. 42, No.2, (2008), which notes the disproportionate number of race discrimination complaints filed by African Americans with the EEOC in comparison to other racial groups.

²⁷⁹ Marianne Bertrand and Sendhil Mullainathan, “Are Emily and Brendan More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,” *American Economic Review*, Vol. 94, No. 4, (2004); Michael Fix and Raymond J. Struyk, *Clear and Convincing Evidence: Measurement of Discrimination in America*. (Washington, DC: The Urban Institute, 1993); Devah Pager, “The Mark of a Criminal Record,” *American Journal of Sociology*, Vol. 108, No. 5, (2003).

²⁸⁰ Joleen Kirschenman and Kathryn M. Neckerman, “‘We’d Love to Hire Them, But ...’: The Meaning of Race for Employers,” *The Urban Underclass*, edited by C. Jencks & P. E. Peterson (Washington, DC: Brookings, 1990); Philip Moss and Charles Tilly, *Stories Employers Tell* (New York: Russell Sage, 2001).

²⁸¹ Kevin Stainback and Donald Tomaskovic-Devey, “Intersection of Power and Privilege: Long-term

In addition to this data, Commission personnel themselves admitted that the Commission is underperforming in its probable cause determinations. Indeed, every Commission investigator whom I interviewed expressed a belief that their determinations do not accurately reflect real world conditions. In other words, employers discriminate at a much higher rate than the number of Commission probable cause determinations would suggest. All of the investigators stated that in cases where they issue a no cause finding, they believe that illegal discrimination is actually taking place somewhere between 10%-25% of the time, but they simply cannot prove it.

One investigator stated:

The hardest thing is proving PC [probable cause]. Where you have a gut feeling and you can't prove it. Those cases are a dime a dozen....The law doesn't care about fairness, we care about discrimination and whether [we can prove] it was illegal.²⁸²

So, what then explains the discrepancy between the ostensible discrimination that is taking place and the depressed number of probable cause findings? In some regards, it would appear that the low percentage of probable cause determinations is attributable, in part, to poor investigations. In my own review of case files and my own observations of fact finding conferences, I frequently found problems with the investigations. These problems were generally the consequence of the incomplete collection of documents, inadequate or the absence of interviews with potentially important witnesses, and cursory legal analyses.

Trends in Managerial Representation,” *American Sociological Review*, Vol. 74, No. , (2009); Donald Tomaskovic-Devey, et al. “Documenting Desegregation: Segregation in American Workplaces by Race, Ethnicity, and Sex, 1966-2003,” *American Sociological Review*, Vol. 71, No. 4, (August, 2006).

²⁸² Interview with Tamika. A number of staff attorneys also opined that the Commission is not catching all of the discrimination that is taking place. Interview with Charles Nier, Esq., supervisory attorney for the Philadelphia Office.

For example, in the area of document collection, I found it not uncommon for investigators to ask for comparative data that would only prove the absence of discrimination. To understand how that might occur, consider the following complaint. In one typical case, a black complainant alleged that his employer discriminatorily discharged him for allegedly falsifying arrival times when his white co-workers apparently engaged in identical conduct with impunity. The Commission investigator required the employer to produce a list of employees, categorized by race, who were discharged for falsification of time records. But such a request will not uncover discrimination; it can only prove the absence of it, that is, that all employees were treated equally. These types of data requests are common. At a bare minimum, the investigator should ask for a list of any employees who had been accused of falsifying time records and the punishment, if any, that they received, to show that white workers were **not** terminated for identical conduct.

One staff attorney who I interviewed excoriated the quality of investigations, opining that investigations are never thorough or complete which she defined as investigators obtaining all of the relevant documents and interviewing all of the key players and witnesses.²⁸³ Agreeing with that assessment, another investigator commented, “we don’t carry out thorough and fair investigations – it is very seldom the case that we carry out thorough and fair investigations.”²⁸⁴ Another HRR lamented that good investigators need “to think outside the box...and [most] look at the surface.”²⁸⁵ She was familiar with the quality of other investigations because of

²⁸³ Interview with Lisa Kaplan, Esq.

²⁸⁴ Interview with Thomas.

²⁸⁵ Interview with Kelly.

the number of cases that had been transferred to her to complete. A Commission's former staff attorney gave the problem some historical perspective when he said:

I found that [investigations] generally fell short [because the individuals performing them] weren't investigators, they were not hired as investigators, they were glorified social workers. I found that the people who did the best investigations were the people who had that background as investigators. I found that at least at the time and this is some years ago that the housing discrimination investigations were much better mainly because the discrimination investigators were ex cops. Our housing unit in Philadelphia was headed by an ex-cop Vince R.[]. He had a couple of ex-cops on the staff. Those people knew how to investigate. They were trained as investigators and they were crusty old white guys who didn't let anything get by them. They knew how to ask questions... On the employment side, we had people who did not have backgrounds as investigators who were basically, I call them social workers, who were basically 'do gooders' who were very well intentioned but who knew nothing about investigation and didn't get any significant investigational training when they got to the commission. They got EEO training for the EEO laws but they didn't get any investigative training so they did not know how to investigate. I suspect that it hasn't changed very much today based on a lot of what comes across my desk in terms of their findings. I don't think it's changed that much. Most of the cases I take to court are cases that were no probable cause findings but with some investigation through our routine investigative tools interrogatories and good depositions, you come up with information that they never came up with.²⁸⁶

A supervisor also commented on another problem – the pressure to close cases. He opined, “discrimination is not found because investigators are not doing the thorough investigations that they should be doing. Investigators are not going out in the fields, they are not knocking on doors...[For investigators,] it is all about how do I close this out as quickly as I can. It is about the numbers. That is why they are falling through the cracks.”²⁸⁷

As for the reasons for such poor investigations, part of it, as one staff attorney, opined, is clearly due to caseload.²⁸⁸ Currently, investigators have a caseload that ranges between 100-120 cases. But the ideal caseload to allow investigators time to complete thorough investigations, as opined by Mr. Floyd, approximates between 50-

²⁸⁶ Interview with Frank Finch, Esq.

²⁸⁷ Interview with William.

²⁸⁸ Interview with Lisa Kaplan, Esq. She also opined that investigators are inadequately trained.

70 cases.²⁸⁹ A number of investigators agreed that caseload impacts the quality of their investigations. One investigator explained current conditions as:

Right now, there are so many cases coming in that it is hard to focus on each case in detail.... With so many cases, it is hard to thoroughly investigate them. I don't want to say cases are not thoroughly investigated, but if we had more time to put into it, and if we had less cases, that could be helpful. If we had fifty cases as opposed to one hundred, things could or may be done differently.²⁹⁰

But even if investigations are less than ideal, I believe that the intrinsic difficulty in proving the existence of discrimination is the primary reason for depressed probable cause findings. That conclusion is buttressed by the fact that: (1) there is only slight variation between Commission offices in probable cause determinations, (2) while there is some variation among individual investigators in terms of probable cause findings, it generally is not a particularly large deviation, (3) there is only slight variation between outcomes for cases investigated by the PaHRC and cases investigated by other state FEPAs and by the EEOC,²⁹¹ and (4) the nature of discrimination has changed, making it much more subtle than before.

Most investigators stated that they could count on one hand the number of cases in their career where there are allegations of direct evidence of discrimination. The changing face of discrimination was reflected to me in the following comments made by Commission staff.

One supervisor, who had been at the Commission for close to thirty years, stated:

²⁸⁹ Interview with Homer Floyd.

²⁹⁰ Interview with Christina.

²⁹¹ From fiscal years 2005-2009, the EEOC closed cases with a probable cause finding approximately 5% of the time. "Title VII of the Civil Rights Act of 1964 Charges (includes concurrent charges with ADEA, ADA and EPA) FY1997-FY2011," *U.S. Equal Employment Opportunity Commission*. Accessible at: <http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm>

During my entire career, I can count on one hand the number of cases – probably less than five [of direct evidence of discrimination]. Discrimination is very subtle. Direct evidence is not out there or if it is, people are not coming in with it.²⁹²

Another Commission employee stated:

Racism has changed. People are more subtle with it. Whereas before there was direct evidence of discrimination, we aren't hiring blacks, we don't want women, now it is they make the job more uncomfortable or difficult to complete.²⁹³

Another opined:

Race [discrimination] is also hard to prove because it is very subtle. Sometimes, you have to really, really, really think and look at the evidence and really think because it is always something that you miss the first couple times you look at the case and it will be something so minute. It could be some type of document that may have been issued as a cover-up but when you start putting the pieces together, it doesn't belong in what is going on.²⁹⁴

When pressed to explain what this investigator meant when she used the word

“subtle,” she stated:

It's sly. For instance, everyone is so much aware of the trouble that can be caused by obvious discrimination. When it happens, they try to cover it up. There is a plan and the cover-up is already taking place. I mean they are taking steps to cover it up.

Q: Is it hard to catch them at the cover up?

A: Yes.²⁹⁵

In my own file review of approximately eighty cases, I found only one case where the complainant even alleged direct evidence of discrimination. Given that instances of direct discrimination are few and far between, almost all cases that the Commission investigates involve application of the *McDonnell-Douglas* legal

²⁹² Interview with William.

²⁹³ Interview with Lydia.

²⁹⁴ Interview with Sharon.

²⁹⁵ Interview with Sharon. A number of scholars have also written about the changing nature of racism. See for e.g.: Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach,” *Columbia Law Review*, Vol. 101, No. 1,(April, 2001); Elizabeth A. Deitch, et al., “Subtle yet Significant: The Existence and Impact of Everyday Racial Discrimination in the Workplace,” *Human Relations*, Vol. 56, No. 11,(2003); Tristin K. Green, “Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory,” *Harvard Civil Rights-Civil Liberties Review*, Vol. 38, No. 1,(2003).

framework as explained in Chapter 4. Under *McDonnell-Douglas*, the employee must preliminarily establish a *prima facie* case. The employer then must articulate a legitimate, nondiscriminatory reason for taking the action. Finally, the burden switches back to the employee to prove that the employer's reason(s) amount to pretext.

Many investigators with whom I spoke explained that this framework is very difficult for claimants because employers can easily articulate and provide proof of some legitimate non-discriminatory reason for treating an African American employee differently than a white employee. The burden placed upon the employee to muster sufficient evidence to prove pretext is therefore frequently insurmountable.

One investigator supported this assessment by stating:

[The McDonnell-Douglas framework] makes it too hard because we give too much credence to articulated reasons and it is too hard to prove pretext. It is too hard to prove that the articulated reason is not legitimate.²⁹⁶

Another investigator echoed this sentiment by stating:

It is easy for an employer to provide a non-discriminatory legitimate reason for the adverse employment action. There is someone's word against another. Write-ups can be fictitious.... The difficulty is usually the lack of paperwork about others. I had a case involving an LPN [licensed professional nurse) who was African American. She was written up for not completing flow charts. But if white LPNs were not written up for the same thing, how do you get a paper trail. Why should the Complainant be penalized if the employer does not have a paper trail? If it is all evidence based, and there is no paper trail, then you have nothing. You have a complainant saying 'I know X did this too.' But then when you ask the Respondent, [there is no proof of it]. Most people also don't rat on their friends – they just don't. The evidence is not there because it is not documented.²⁹⁷

When asked how the Commission addresses discrimination under those circumstances, this same investigator responded, “[t]hat is a very good question. You can't fight the omission of evidence. You need people to speak up [to] the

²⁹⁶ Interview with Christina.

²⁹⁷ Interview with Tamika.

employer.”²⁹⁸ In other words, the Commission had no systematic way to account for it.

Another investigator explained the proof problem in the following manner.

Although we request certain documentation, they [the employer or its attorneys] pick and choose what documents to give us. If we speak to employees, they can set the stage prior to us interviewing them. They may tell employees, ‘we have an investigator coming about so and so. You remember her...she used to be late all the time.’ They can coach employees. And then when I investigate them, I get the same answers. I go to one Respondent and the employees all say the same thing. They ... set that up.²⁹⁹

Another investigator stated:

[T]he Respondents are smart now, the burden of proof is on the [employee] and Respondents can shield damaging documents and say that they don’t exist, can coerce witnesses to support their position, can create documents that don’t exist and then they can treat persons in and outside protected classes the same way [after the fact] in order to say, ‘we didn’t discriminate.’ And lawyers can help them with that. [The lawyer may say,] ‘If you get rid of person “x”, you may want to get rid of person “y” so it doesn’t look like you are treating them differently.’ ... People who want to treat other people [in protected groups] differently are now thinking about how to do it without it looking like racism. It is much more cerebral and much more methodical and it is harder to find direct evidence of racism.³⁰⁰

Another investigator also expressed concern about documents not being produced.

We are at the mercy of employers and they will show us what they want us to see when we ask for all of their documents and I am not convinced that something is not taken out of they’re file. We are really at their mercy.³⁰¹

An interviewed employment defense attorney corroborated that these concerns may be valid at least some of the time.

When I get suspicious [of a client’s explanation for the discharge], I say to the client, ‘well who do you have who can testify about this?’ ...[T]hey will say, ‘we don’t have anybody but we will find somebody....[W]hen I hear that, I don’t want anything to do with it because it means something is going on and they want to create evidence so I don’t know if they are just being stupid and covering up or they are trying to cover up something they did wrong...[I]t happens with the really small employers where you have a mom and pop and one guys runs the operation and thinks that he can control

²⁹⁸ Interview with Tamika.

²⁹⁹ Interview with Lydia.

³⁰⁰ Interview with Genevieve.

³⁰¹ Interview with Wanda.

what his employees say. And frankly I don't know how to handle that. I don't know how to stop it because I say I want to interview witnesses. So I bring them in, and I interview them and [they] all say 'yes,' 'yes,' 'yes,' 'yes,' and there is not much more I can do. I think the answer is really no.³⁰²

As the reader may recall from Chapter 4, one of the standard ways of proceeding under the *McDonnell Douglas* framework is for the claimant to demonstrate that he or she was treated differently than similarly situated co-workers who are outside the claimant's racial class. Commenting on the use of such comparative evidence, one investigator stated:

We look at comparative data. ... Respondents ... know we are looking at comparative data and of course most of the cases fall into comparative cases. [But] ... [i]t is hard to show comparative evidence where similar offensive conduct by someone not in the Complainant's protected class is not documented. If there is no discipline, then it is hard to prove that there is discrimination. That is the most difficult. Respondents deny having knowledge of those other behaviors [by co-workers outside of the Complainant's protected class.] That's a real problem. Sometimes, you find Complainants who find comparators who violated different policies or committed different infractions. But they may not have comparable offenses. Then, we have to find other employees who can corroborate this behavior of other employees and that the Respondent was aware of it. Take, for example, a Complainant with a terminable offense. There may be no data from Respondent of a person in a non-protected class with similar infractions. [Then, there is no comparative data]. Let's say [you have a] class 4 infraction which warrants termination. But Complainant gives a list of employees that had class 1, 2, or 3 violations. We don't have evidence that these other [class 4] infractions occurred because they are not documented or because infractions are not in the same category. It is difficult to get comparative data for the same class of infractions that would warrant the same discipline.³⁰³

Probably the best source of comparative evidence comes from a complainant's co-worker(s) especially where, as is frequently the case, the employer has not documented the putative misconduct of employees outside the complainant's protected class. But it is rare for a co-worker to risk jeopardizing his or her job to support a complainant.³⁰⁴ Regarding this point, I asked one Commission employee:

³⁰² Interview with Larry Besnoff, Esq.

³⁰³ Interview with Albert.

³⁰⁴ *Ibid.*

Q: What percentage of cases do currently employed workers give information that is helpful or supportive of the claimant's claims?

He answered:

A: One out of seven. That is why we have a lot of settlements because employees do not believe that their co-workers will necessarily corroborate their story because of fear of jeopardizing their jobs. Employees also do not want to ask co-workers to help because it might jeopardize their relationships with them....The employer may also tell the employee that they don't have to participate so that when you contact the employee they say that they choose not to participate or 'no comment' or 'I don't recall.' When we arrange a site visit, everything is orchestrated and you won't see what C is complaining about.³⁰⁵

Clearly, one way to assess the performance of a Commission charged with remediating discrimination is to evaluate its ability to actually identify it when it occurs. Without that preliminary step, discrimination necessarily will go unaddressed. Given the low numbers of probable cause determinations, it is hard to fathom how the Commission achieves this goal.

C. Hearings

For those few cases where a probable cause finding is issued, the case proceeds to a hearing before one of two Commission hearing officers, either Philip Ayres or Carl Summerson. This assumes that the case is neither first settled nor discontinued. From fiscal years 1999-2008, the number of hearings varied between five and twenty-one.³⁰⁶ Display 17 below consists of a graph that illustrates these numbers.

[Display 17 about here]

Of these cases, approximately half resulted in awards for the complainant and the other half for the respondent.³⁰⁷ A number of Commission personnel expressed

³⁰⁵ *Ibid.*

³⁰⁶ I did not have data for the number of hearings that took place during fiscal years 2003 and 2005.

³⁰⁷ Interview with Charles Nier, Esq.

concern about one hearing officer's purported employer bias. I asked one Commission lawyer to explain any perceived rationale for favoring the employer over the complainant. She explained that her colleagues speculated that the Commission's pro-respondent bias is based upon the Commission's desire to eliminate any potentially appealable issues in order to avoid reversals by employers (who are more likely than complainants to appeal).³⁰⁸ We can therefore add the uncertainty of winning at hearing to the already highly unfavorable odds of getting a hearing in the first place.

A further problem lies in the fact that while the Commission's awards are sometimes substantial,³⁰⁹ they generally do not make Complainants whole.

Commenting on compensatory awards, one Commissioner stated to me:

If what you are really interested in is damages, the PaHRC is not necessarily the best place for you. This is one of our problem areas. ... I find that we are very thin in terms of experience in calculating damages. We are good in finding liability but in terms of calculating damages I would say that there is more that could be done to make it more systematic, fairer for all parties.³¹⁰

Indeed, the Commission cannot award complainants money for pain and suffering and rarely awards damages for front pay for discharged employees who even continue to remain unemployed long after the Commission has issued its award.³¹¹

³⁰⁸ Interview with Lisa Kaplan, Esq.

³⁰⁹ During the 2008 fiscal year, the Commission tried ten cases. Of those, five were decided in favor of the Complainant. Damage awards ranged from \$17,405 to \$161,738. During the 2007 fiscal year, awards ranged from \$3,340 to \$23,290. During the 2006 fiscal year, awards ranged from \$4,260.38 to \$55,065.81

³¹⁰ Interview with Commissioner Joel Bolstein, Esq.

³¹¹ Interview with Hearing Officer Phillip Ayres, Esq.

D. Settlements

During the course of interviews with Commission personnel, when I cited the low percentage of probable cause rates as a place where the Commission may fall short, officials offered the following plausible explanation – “good cases settle.”

It is axiomatic that good cases do settle. For both sides, settlement confers a number of benefits.³¹² First, for claimants, settlements minimize the potential risk of losing before an unpredictable third party, such as a jury, a judge, a hearing officer, or even an investigator in the event that he or she finds no cause to credit the allegations in the complaint. Second, settlements also decrease the financial and emotional burdens that litigation places upon complainants. Third, settlements also afford some immediate form of relief to a litigant. This can be particularly important for a discharged claimant who may desperately need income and can ill afford to wait the length of time inherent in litigation, which literally can span years.³¹³

For employers, settlements are also beneficial for a number of reasons. First, they limit negative publicity to the employer. Second, they minimize potentially litigation costs. Some defense attorneys advised that legal fees can reach \$300,000 to \$500,000 by the time a trial concludes.³¹⁴ Finally, as expensive as litigation may be, the potential disruption to the business of defending against such claims may prove even more costly.

³¹² Indeed, reflecting upon the value of amicable resolution, it was Abraham Lincoln who advised – “Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.” Abraham Lincoln, *Notes for Law Lecture: About July 1, 1850, in 2 Life and Works of Abraham Lincoln*, edited by Marion Mills Miller (public domain, 1907) 194, 195. Accessible at: <http://www.archive.org/details/lifeworksofabrah04linc>

³¹³ Given delays inherent in litigation and lengthy appeals processes, I have litigated cases that take years to resolve, in some cases more than five years, and in one case, close to a decade.

³¹⁴ Interview with Jane Dalton, Esq.

As for the Commission's attitude toward settlement, top personnel have openly shared its desire to resolve cases through settlement. At staff meetings, I heard both the executive director and at least one regional director stress the importance of settling cases as a way to relieve stretched resources and to provide some measure of relief for an aggrieved claimant. Investigators and supervisors reiterated that policy preference to me.

If one examines case closures over the last decade, it would appear that a whopping 45%-55% of Commission cases end up settling. On its face, this percentage is sizeable, and it is a figure over which the Commission manifests pride. Table 5 below demonstrates the number of Commission cases over the last ten years for which there have been (1) no cause determinations, (2) settlements, or (3) dismissals for either lack of jurisdiction or for other administrative reasons.³¹⁵ As Table 5 illustrates, over the last decade no cause findings have steadily increased from a rate of about 25% to about 40%, and settlements have generally accounted for between 40%-50% of cases.

[Table 5 about here]

If we compare Commission settlement rates with those achieved by other fair employment practices commissions across the nation, we see that the PaHRC is clearly settling cases at a higher rate, and therefore, achieving benefits for a larger percentage of its claimants than other Fair Employment Practices Commissions (FEPCs). Display 18 below is a chart that shows aggregate case outcomes for other state FEPCs for the fiscal years 2005-2009. Display 18 shows that these other fair employment agencies, on average, found no cause in about 60% of their cases while

³¹⁵ Cases that proceed to a public hearing generally constitute approximately or less than 1% of case closures in any given year.

only settling about 9%. Also of note is the fact that the Pennsylvania Commission is also achieving a greater percentage of settlements than the EEOC.

[Display 18 about here]

While legal experts typically consider settlement to be a preferred pathway for resolving cases, the high rate of Commission settlements raises two interrelated questions. First, are these settlements advancing the mission of the Commission? Second, are settlements providing fair relief to the complainants? Among Commission personnel, the verdict on these two questions is decidedly mixed.

1. Are Settlements Advancing The Mission Of The Commission?

As a preliminary matter, it is important to note that all settlement agreements in the employment context share several potentially troubling features. First, settlement agreements almost always contain confidentiality provisions.³¹⁶ These confidentiality provisions can prescribe significant penalties in the event of a breach.³¹⁷ While there are a number of legitimate reasons for employers to insist upon confidentiality, such clauses still may exert a chilling effect on public discourse, and as a result, on remediating systemic practices of discrimination in an employment setting. Second, employers also frequently insist on inserting a non-disparagement clause in settlement agreements. This means that an employee is prohibited from disparaging the company or its employees once the agreement is entered. Again, this can prevent employees from talking openly about systemic discriminatory issues that

³¹⁶ All defense attorneys with whom I spoke advised that they always insist on a confidentiality clause in any settlement agreement into which they have their client enter. In my own experiences, I can think of only two employment cases that I have handled where the employer did not insist on a confidentiality provision.

³¹⁷ For example, I have seen agreements where an employer will insist on particularly onerous liquidated damages clauses for violations of a confidentiality proviso. For one, in which I was a party's attorney, the agreement required an employee to pay \$5000 to the employer for each time an employee breached such a provision.

exist inside the company, and as a result, the settlement gives the appearance that the company has essentially bought the silence of a disgruntled employee. Third, in most settlements, employers almost always refuse to reinstate a discharged employee.

Because most cases involve employees suing for unlawful termination, it is a rare instance for an employee to actually be made whole. For some employees, such an agreement may prove satisfactory. But for a vast number, it does not.

As for the impact of settlements on promoting the mission of the PaHRC, one staff member had the following to say.

The commission pushes for settlement. We are a settlement-oriented process. We want to settle first and talk later. I have some concerns about that. We have had staff who are no longer here that had a reputation as a high settler but cases settled for the same amount -- \$500 and a neutral letter of reference. It was almost like "let's make a deal." In many situations, complainants got sold down the river and never had their day in court. Every case is not \$500 because when you find PC [probable cause], you try to make the person whole. This gave the settlements a nuisance factor. Here's the check and then you send them out the door. It did not make them whole. That [investigator] worked for me. It happened with other investigators. Many investigators saw the successes of this investigator and went down that road. I would find myself at unit meetings, telling them not to do what that investigator does because you are selling complainants down the river. It is an easy route to take but it is not the right thing to do. ... There are also cases where the employer can sweep [discrimination] under the door. Since we encourage predetermination settlements, the employer can often offer some small settlement and then go back to what they were doing before in terms of discrimination. If [the Commission] settle[s] every case here, then how are the laws effective because ... no one sees what the employers are doing.... I don't see that we are changing the situation because if we settle ... how [have the circumstances] changed if it has not gone to court.... If we settle all the cases or NPC [no probable cause] them because we don't have time to investigate every angle, then the employer never realizes that what they are doing is discrimination because they have never been hit with ... a PC finding that says you have to go to training because these issues exist and you were wrong for doing it and you need to be held accountable and it is not just about money.³¹⁸

One investigator echoed the sentiment that investigators are settling cases for *de minimis* amounts.

I don't think we are enforcing the act if we let the claimant walk away with nuisance value. I don't think we are eradicating discrimination when we do that and I don't think that other investigators see it that way since if you have a manager who ... does

³¹⁸ Interview with Christina.

not force them to look at their behavior and ... we sanction [the behavior] by [allowing] \$1000 ... to settle the case.³¹⁹

I think [settlements] ha[ve] a negative impact [on eliminating racism, sexism, etc.] because people come to us based on word of mouth and think that they can get money. [As a result], claimants and respondents think our primary focus is to get money from them. Because us being investigators, you have attorneys thinking that we believe that to be the ultimate goal and claimants viewing employers as having millions. It is negative because people have false impressions of what the mission should be which is finding and eradicating discrimination through trainings or publicizing what the companies are doing that would have a bigger impact and the mission is really to have all citizens who want to work and make a living for families and that is where the money part comes in. After we find they are wrong, that's when we should look at money and make the employer responsible for the impact of their actions.³²⁰

The detrimental effects of taking a settlement-based approach for the Commission as a whole were expressed by another investigator, who stated:

We are in a capitalist society. Money is everything. Sometimes, the money is an impediment to the mission of the Commission because a Respondent can get away with [discrimination]. Take complainant, Yolanda B. She got \$20,000 [in a settlement]. Did that eradicate [the racism displayed by the Respondent]? No. The Respondent did this little training that I and [the staff attorney] attended and that is it. [The complainant] is coming for the money and it is a detriment in terms of reaching the goals of the PaHRC which is eradicating racism.³²¹

When asked if he believed whether “money is buying off the complainant” at the expense of the Commission’s underlying mandates, this investigator stated, “Absolutely and everyone knows that.”³²²

One Commission staff attorney stated that she believes that sometimes settlement is driven by a desire to reduce investigator caseload and to “make numbers” regarding file closures as opposed to achieving the interests of the complainant.³²³

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ Interview with Thomas.

³²² *Ibid.*

³²³ As part of an investigator’s employee performance, he or she is supposed to close approximately eighteen to twenty cases per quarter.

I would say that part of it is that some of the investigators are more geared toward settlement. And so a lot of them will just settle a case as opposed to fully investigate and get probable cause. And those are the ones who wouldn't do a full and complete investigation and there would be issues with the investigation that they do. ... I would say [they settle to] reduce their caseload and make their numbers as opposed to helping the complainants.³²⁴

But, to be balanced, not all Commission staff expressed the same views about settling cases and some investigators opined that where settlement involves a large monetary figure, it could serve as a deterrent effect for a smart company that seeks to minimize unnecessary expenses.³²⁵ One investigator, who expressed a minority viewpoint toward settlements, stated:

I think [settlement] is important. I think it is a good way for both sides to come out feeling that they have accomplished something. A good settlement is neither side is happy but both sides can live with it.³²⁶

But even if it is true that both sides leave with “something,” generally, the settlements are not large.

2. Are Settlements Equitable To The Complainants?

Whereas during the earlier history of the Commission, most cases of race discrimination involved failure to hire, now most cases involve claims of discriminatory discharge.³²⁷ With claims of termination, the damages can be quite significant since fired employees suffer one hundred percent wage and benefits losses.

As stated above, settlements rarely permit for reinstatement. In fact, most settlement agreements contain provisions that the terminated employee will never seek reemployment with the employer or any of its affiliates. Defense attorneys

³²⁴ Interview with Lisa Kaplan, Esq.

³²⁵ Interview with Kelly.

³²⁶ Interview with Charles.

³²⁷ Interview with Homer Floyd.

explain that they insist on such provisions to eliminate the potential risk of subsequent retaliation claims by a disgruntled employee. So, unless the settlement includes both salary and lost benefits packages, it is almost always a foregone conclusion that the claimant will not be made whole. This invariably produces a great deal of dissatisfaction with the process.

The graph below shows the average settlement in dollars for Commission cases from the fiscal years 2000-2007. As one can see, in any given year, the settlements range from a couple hundred dollars to several thousand dollars.

[Display 19 about here]

During my interviews with investigators, I also asked them to characterize for me what they see as the typical settlement. Again, investigators advised that the typical settlement consists of a couple of thousand dollars. Most defense attorneys characterized a settlement of \$10,000 or less as so-called “nuisance value.” And while there are some notable exceptions,³²⁸ my review of the case files also showed that most settlements fall in that range. While for some claimants, even a small settlement amount may prove beneficial given their circumstances, especially where their claim may have no merit, such a figure seems hardly sufficient given the loss of a job and investigators’ explanations that they often push for settlement when it appears too difficult to prove the existence of discrimination. Under those circumstances, investigators opined that settlements should be higher.

In one interview I asked:

Q: Are there times when you think that the settlement amount should be higher?

The staff person answered:

³²⁸ As for notable exceptions, during the 2008 fiscal year, the highest settlement in a race discrimination lawsuit was \$82,500. During that fiscal year, only 42 race discrimination lawsuits settled for more than \$10,000.

A: Yes. The reason for that is that you have a hunch that something is there but you can't prove it so you try to take what you can get.³²⁹

Another investigator stated:

I don't think most settlements are fair because Respondent never wants to give anything close to what the employee's lost wages are and that is before PC. And why would they if the employer doesn't know how strong the case is.³³⁰

But a number of investigators also were of the view that settlements, albeit small, can still be overly excessive. Investigators stated as much when employers settled even frivolous cases for nuisance value or some nominal amount to avoid the costs of litigation.

Other investigators drew distinctions between settlements that take place before a probable cause determination and after a probable cause determination because settlements after probable cause tend to be much larger and generally require the company to institute what they characterize as important training measures. While it is true that settlements tend to be larger following probable cause findings, nonetheless, as noted above, probable cause determinations tend to be rare and the settlements still frequently amount to less than full remedy.

3. If Settlements Are Not the Answer, What Is?

A number of Commission personnel focused on training orders as the place where the Commission could make a significant difference. But interestingly, most Commission personnel with whom I spoke did not even know what the training orders involve. In fact, in many cases, the training that the Commission requires goes completely unsupervised by the Commission.

³²⁹ Interview with Albert.

³³⁰ Interview with Christina.

I don't know [what the training consists of] because they [the employer] hold the trainings themselves. At the point at which we find PC and say there has to be training, they just send us verification of the training. I have never seen an employee issued an apology and most times that is all the employee wants.³³¹

Another Commission member, when asked whether she knew what the training consisted of, answered, "No, we don't know what they [employers] do. We just get a sign in sheet that shows who participated in the training."³³² Given these inadequacies, other Commission personnel, including the supervising attorney for the Philadelphia office, expressed skepticism about the purported efficacy of training.³³³

But there are areas where training can make a difference. For example, where an employer and its employees do not realize their conduct may be illegal, training can very well serve to prevent discrimination. Obviously, all employers should be expected to know that discriminating on the basis of race is illegal. But some employers may not realize that certain policies that they have instituted may have an illegally disparate impact against protected categories. For example, the use of arrest records to make hiring decisions is generally illegal because it disparately impacts certain minority job applicants. And some employers may not realize, for example, that retaliation is illegal even if taken against individuals who file complaints that appear frivolous or vexatious.

Nonetheless, because everyone in the twenty-first century ostensibly knows that race discrimination is illegal, it is easy to imagine the limits of basic training as an impact tool.

³³¹ *Ibid.*

³³² Interview with Kelly.

³³³ Interview Charles Nier, Esq.

E. Pattern and Practices Litigation

A number of Commission personnel expressed disappointment with the Commission's failure to initiate pattern and practices litigation, that is, to initiate impact litigation that seeks systemic change. Mr. Floyd advised that when he took over the leadership of the Commission in the early 1970s, he switched the focus from persuasion to pattern and practices litigation aimed at reforming entire companies. But because pattern and practice cases took so long to litigate, the Commission started to develop a severe backlog which ultimately forced the Commission to change strategies and begin only prosecuting individual cases. According to Mr. Floyd, less than 5% of the cases on the current docket consist of impact litigation designed to tackle discriminatory corporate policies. It is hard to imagine how the Commission can make systemic changes or eradicate discrimination when it is only tackling individual cases.

In this chapter, I discussed some of the indisputable strengths and apparent limitations of the Commission. While improved Commission practices and increased resources would undoubtedly assist it in improving outcomes for complainants, it would appear that the changing face of discrimination, due in part to the historical successes of the civil rights movement, has ironically made the enforcement of discrimination laws more difficult by making discrimination harder to both detect and prove. But the figures discussed above tell only part of the story. In the next chapter, we review whether claimants, based upon their own testimonials, feel empowered by participating in the process and the measure of satisfaction they experience by filing and litigating claims.

Table 3 – PaHRC Investigators

	Years at PaHRC	Race	Gender
Airriion Bethea	8 years	Afr. Amer.	Male
Joyce Brown	3 years	Afr. Amer.	Female
Darnita Coleman	2 years	Afr. Amer.	Female
Bruce Friedman	10 years	White	Male
Shawna Haines	3 years	Afr. Amer.	Female
Lee Johnson	10 years	Afr. Amer.	Male
Cecilia Keller	10 years	Afr. Amer.	Female
Lynda Kent	2 years	Afr. Amer.	Female
Kimberly Kinsler	5 years	Afr. Amer.	Female
Suzanne Martinez	1 ½ years	White	Female
Albert Reddick	4 years	Afr. Amer.	Male
Kimberly Rothwell	5 ½ years	Afr. Amer.	Female
Luis Sanabria	2 years	Latino	Male
Abraham Shaw	11 years	Afr. Amer.	Male

DISPLAY 16 – PAHRC CASE DURATION FOR 2007 FISCAL YEAR

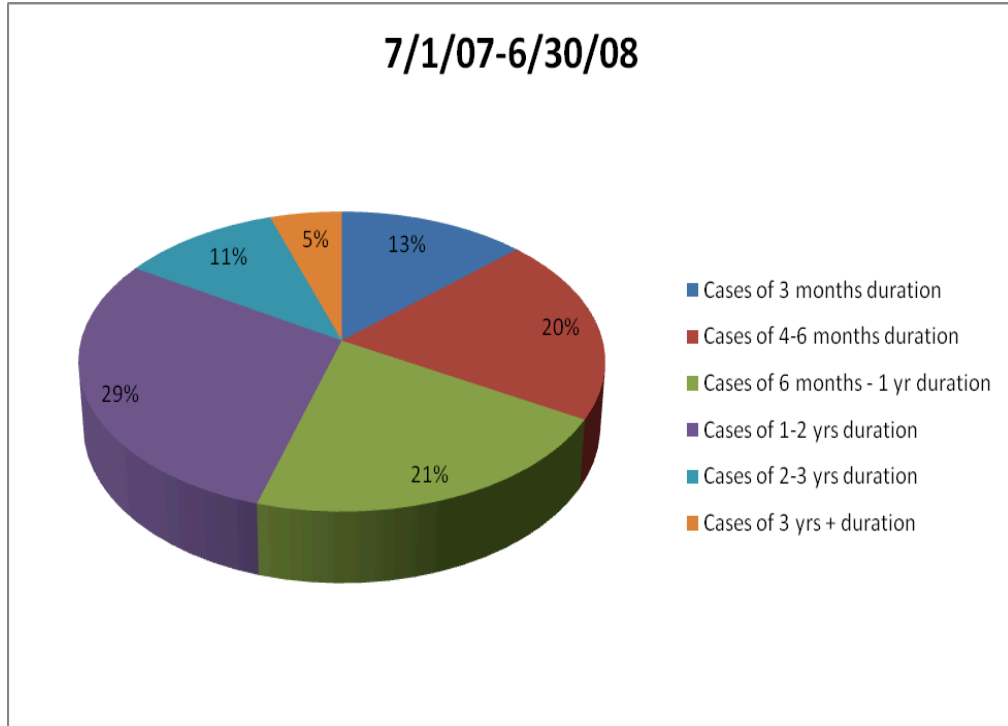


Table 4 – PaHRC Dispositions by Office from 2004-2008

	FY 2008	FY 2007	FY 2006	FY 2005	FY 2004
<u>Harrisburg Office</u>					
Cases closed	1678	1919	1799	1536	1602
Probable Cause Found	43	55	56	69	29
Percentage of Probable Cause Determinations	2.5%	3%	3%	4.5%	2%
<u>Pittsburgh Office</u>					
Cases closed	983	1038	1012	1288	1233
Probable Cause Found	8	35	12	46	28
Percentage of Probable Cause Determinations	<1%	3%	1%	3.5%	2%
<u>Philadelphia Office</u>					
Cases closed	1481	1371	1373	1614	1932
Probable Cause Found	80	67	79	31	48
Percentage of Probable Cause Determinations	5.5%	5%	5.75%	2%	2.5%
<u>Commission Totals</u>					
Cases closed	4142	4328	4184	4438	4767
Probable Cause Found	131	157	147	146	105
Percentage of Probable Cause Determinations	3%	3.5%	3.5%	3.5%	2%

DISPLAY 17 – NUMBER OF PAHRC HEARINGS FROM 1999-2008

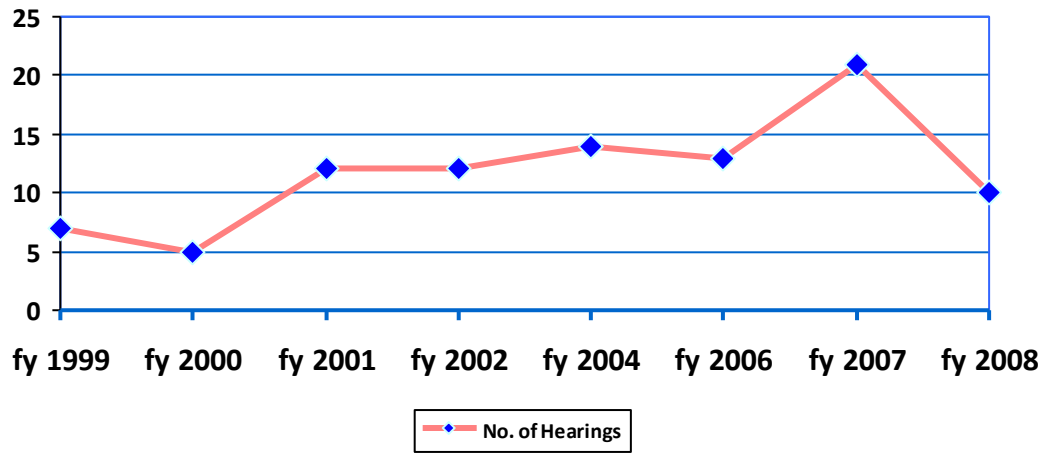
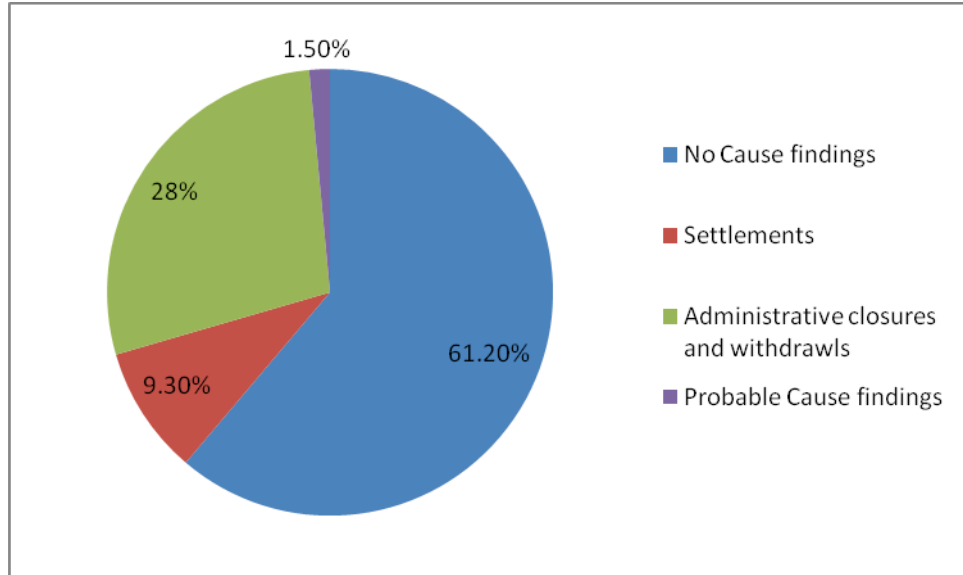


Table 5 – PaHRC Dispositions from 1999-2009*

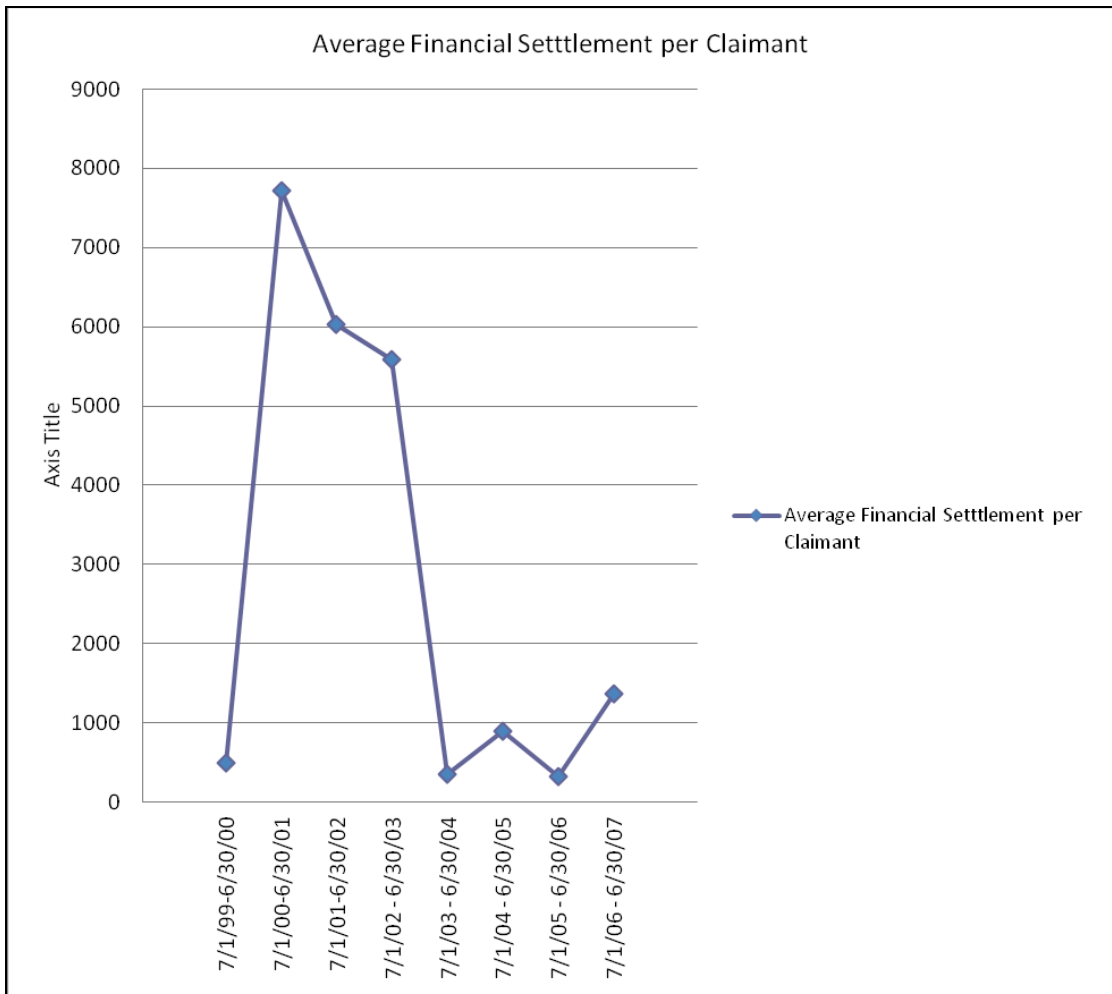
	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007	2007-2008	2008-2009
No Cause	25%	30%	22%	30%	31%	29%	27%	28%	36%	41%
Settled	50%	49%	47%	52%	51%	54%	57%	46%	48%	45%
Dismissed for lack of jurisdiction or other admin. reasons	25%	21%	31%	18%	18%	17%	16%	26%	16%	14%

* Note: Percentages in table have been rounded off.

DISPLAY 18 –NATIONWIDE FEPC CASE DISPOSITIONS FROM FY 2005-2009



DISPLAY 19 –AVERAGE FINANCIAL SETTLEMENT PER COMMISSION CLAIMANT FROM 2000-2008



I. INTRODUCTION

In Chapter 6, I examined the effectiveness of the PaHRC by examining the opinions of Commission personnel and by reviewing internal data that the Commission has compiled over the last fifty years. In this chapter, we tell the story through the voices of the claimants, another crucial actor in the institutional litigation system. In part, this chapter is simply descriptive. It aims to delineate the twin experiences of discrimination and “claiming” from the workers’ individual perspectives as they have specifically related them. In part, this chapter also seeks to understand the claiming process through three interrelated theoretical frameworks of empowerment, rights, and recognition.

In short, I argue that for most individual PaHRC claimants, the experience generally ranges from disappointment to injurious. Thus, while many see litigation as a way of advancing their rights, in reality, claim-making frequently compounds their original sense of harm. But the story is a bit more complicated. Even though claim making may indeed prove disappointing to litigants, I argue that the administrative agencies still serve important psycho-political functions for injured parties. The agency provides critical space for civil rights plaintiffs to reaffirm their essential political and civic identities. As became clear from my interviews with litigants, the process of pursuing a claim is an important performative act that not only reaffirms an essential aspect of their political, racial, and even human identities, but also connects many claimants to important movements of the past. The act of “standing up,” through claim making, can also confer a sense of dignity.

II. METHODOLOGY FOR ASSESSING CLAIMANT SATISFACTION

The empirical data for this chapter came primarily from three sources. First, I reviewed customer satisfaction surveys that the Commission routinely sends to claimants and respondents at the close of a case. Once completed and returned, the Commission compiles and organizes the data. On each questionnaire, there is an opportunity to answer open-ended questions regarding customer satisfaction. In the course of my research, I reviewed the PaHRC compilations, summarized the data and assessed some of the completed customer surveys that contained more detailed comments to some of the questions.

The second and predominant source of information that informs this chapter came from in-depth, semi-structured interviews that I conducted with fourteen claimants who described, among other matters, their experiences litigating claims before the Commission. Some months after I conducted these interviews, I attempted to contact all fourteen claimants to supplement the original interviews and to update my data. I was successful in reaching ten of them and all ten participated in a follow-up interview.

In choosing which claimants to interview, I endeavored to obtain a representative sample of claimants based on the types of race discrimination complaints that they alleged and the Commission outcomes that they received. While all complaints were based on race discrimination in the context of workplace discrimination and brought by African Americans, I wanted to speak to complainants who presented a range of claims from the legally frivolous on one end of the spectrum to meritorious claims on the other end. In the middle of this spectrum, I also interviewed several complainants who presented plausible cases but with difficult

proof issues. I also interviewed a number of complainants based on Commission dispositions, among them complainants who received: no cause determinations, settlements that are considered nuisance value (i.e., less than \$5000), settlements in excess of that amount, probable cause determinations, as well as one claimant who actually participated in a public hearing, and one claimant who received a probable cause determination but lost at a public hearing.

Given the length of time involved in the interview process – including sending out letters requesting interviews, scheduling and rescheduling cancelled interviews, participating in the question and answer session, transcribing interviews, reading through transcripts, and organizing the data into some coherent framework – as a practical matter, the number of interviews that I could feasibly conduct had to be limited.

Finally, I supplemented all of this information with my own observations and practical experiences. In having multiple data sources from which to draw information, there was the benefit of safeguarding against the potential pitfalls and limitations that may arise from the use of any one particular method to the exclusion of another.

Between these data sources, it became possible to craft a general narrative from the claimants' perspective that describes: (a) the experience of litigating a race discrimination claim before the PaHRC, (b) the level of the Commission's effectiveness in addressing and remediating individual complaints, and (c) some of the politics associated with the process.

III. THE POLITICS OF CLAIMING

The process of filing a lawsuit is unquestionably a form of political action. From *Brown v. Board of Education* to *Roe v. Wade*, groups like the NAACP and NOW have used litigation, with frequent success, to advance important political aims. Scholars from across the social science spectrum have also recognized the essential political nature of courts,³³⁴ the legal system,³³⁵ and the strategy of using broad-based impact litigation as a way of effectuating change.³³⁶ But the filing of an individual lawsuit for monetary relief has not garnered the same type of attention in the political or social science literature, most likely because such damages claims may appear ungrounded in higher social principles, politically disconnected, and/or opportunistic. As a result, the act of claiming may seem undeserving of attention as a form of political action.³³⁷

Despite this lacuna in the literature, individual – as opposed to impact – litigation also serves as a form of political action because these complainants challenge dominant power structures within an employment context that serves to

³³⁴ See for e.g., David Kairys, editor, *The Politics Of Law: A Progressive Critique*, (New York: Basic Books, 1982).

³³⁵ See for e.g.: Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice (9th Edition)* (Saddle River, NJ: Prentice Hall, 2009).

³³⁶ See for e.g.: Bryant Garth, "Power and Legal Artifice: The Federal Class Action Power and Legal Artifice: The Federal Class Action," *Law & Society Review*, Vol. 26, No. 2 (1992). Garth details class action litigation as a strategy for effectuating political change.; Clement Vose,, "NAACP Strategy in the Covenant Cases," 6 *Western Reserve Law Review* 101 (Winter, 1955). Vose details the NAACP's political strategy before the courts to hold restrictive covenants unconstitutional.; Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (New York: Random House, 1973). Meltsner describes the Legal Defense Fund's use of the courts to rule the death penalty unconstitutional.; Karen O'Connor, *Women's Organizations' Use of the Courts* (Saddle River, NJ: Prentice Hall, 1980). O'Connor describes the use of courts by woman's legal groups to challenge gender discrimination.

³³⁷ Joseph Soss, *Unwanted Claims: The Politics of Participation in the U.S. Welfare System* (Ann Arbor: University of Michigan Press, 2003), Soss writes, "[p]olitical action traditionally has been understood as a public activity in which citizens advance their interests and preferences regarding 'public issues'" 7.

dictate one's life chances through wage allocation. As contestations over power are a cornerstone of political science, the importance of recognizing the political nature of this type of claim-making should not be gainsaid.

Almost all of the claimants whom I interviewed reported that they were motivated to file in order to safeguard their civil rights. In so reporting, a number of claimants invoked the names of famous black leaders that came before them like Rosa Parks, Martin Luther King, Jr., and Malcolm X. Some saw their battle against their employers as a continuation of earlier historic civil rights struggles. In this way, they were embracing a liberal rights discourse as an essential part of their civic and racial identity.

Finally, many claimants reported that they had suffered psychic injury as a result of the discrimination. They felt that their employer had failed to recognize their essential human dignity. They resorted to the Commission as a strategy for correcting a form of racial misrecognition to which they had been subjected in the workplace.³³⁸ For them, a sense of self-respect and dignity compelled the filing, and claiming became a form of recognition politics.

IV. SURVEY DATA

Since 2006, for every case that the Commission disposes, the Commission sends a customer satisfaction survey to both the complainant and the respondent. The form poses the following six interrelated questions:

- 1) How would you rate the overall quality of service provided by the PA Human Relations Commission (PHRC) staff and/or investigator assigned to the matter in which you were a party?

³³⁸ For an early discussion that provides reasons for why individuals engage in claim-making, see Robert Redmount, "Psychological Discontinuities in the Litigation Process," *Duke Law Journal*, Vol. 1959, No. 4, (Autumn, 1959).

- 2) How would you rate the level of courtesy you received from the PHRC staff?
- 3) How would you rate the promptness of service the PHRC staff provided you?
- 4) How would you rate the clarity and quality of our formal letters and documents, as well as our communication in person and on the telephone?
- 5) How well did the staff understand the issues raised in the matter in which you were a party?
- 6) Did you feel the Commission conducted a fair and impartial investigation?

For the first five questions, a party can respond: (1) “outstanding,” (2) “commendable,” (3) “satisfactory,” (4) “needs improvement,” or (5) “unsatisfactory.”

When I spoke to commission personnel, a number of them cited the customer satisfaction survey results as proof of majority satisfaction among claimants with Commission processes even though claimants generally fared poorly in terms of case outcomes.

But, on average, only about 5% of claimants and 5% of respondents completed and returned these questionnaires. Because of the low response rate, this data cannot be given much weight as proof of general claimant satisfaction given potential non-response bias.³³⁹ Indeed, it is possible that the vast majority of claimants who return completed forms are those who are happiest with the Commission. A much larger percentage of claimants may discard the forms in disgust. But non-response bias cannot possibly account for the dramatic disparity in reported satisfaction levels between claimants and respondents, given that both groups have an equally low response rate. Indeed, the customer survey responses are telling precisely because respondent-employers generally report overall satisfaction with the Commission to a

³³⁹ For a layman’s definition of non-response bias see: http://stattrek.com/statistics/dictionary.aspx?definition=nonresponse_bias.

much greater extent than do claimant-employees. Below are graphical summaries of the parties' responses to the questions posed by the exit survey.

Display 20 illustrates that 6% percent of respondent-employers and 47% of claimant employees reported the overall quality of service provided by the PaHRC as either "unsatisfactory" or "needing improvement," representing a gulf between the two of about forty percentage points. The disparities between the parties' responses are almost equally vast in regards to the remainder of the customer survey questions.

[Display 20 about here]

Display 21 illustrates that 88% percent of respondent-employers and 50% of claimant employees reported the level of courtesy shown to them was "outstanding" or "commendable." Three percent of employers and 30% of employees stated that the courtesy shown to them was either "unsatisfactory" or "needs improvement."

[Display 21 about here]

Display 22 illustrates that 76% percent of respondent-employers as compared to 41% of claimant employees reported promptness of service by the Commission was "outstanding" or "commendable." Forty-three percent of claimants found that the level of promptness was either "unsatisfactory" or "needs improvement."

[Display 22 about here]

Display 23 illustrates that 5% percent of respondent-employers, as compared to 36% of claimant employees, reported the clarity of Commission communications was "unsatisfactory" or "needs improvement".

[Display 23 about here]

Display 24 illustrates that 84% percent of respondent-employers, as compared to 42% of claimant employees, reported the degree to which the Commission understood the issues raised by each side was "outstanding" or "commendable".

[Display 24 about here]

Display 25 illustrates that 95% percent of respondent-employers, as compared to 49% of claimant employees, reported that they believed that the Commission conducted a fair and impartial hearing. Five percent of employers and 51% of employees reported that they believed that the Commission had not.

[Display 25 about here]

Given the large disparity in satisfaction rates between claimants and respondents, the data suggests that the Commission is much better at protecting the interests of the employer than the employee. But due to first, the large non-response rate and the accompanying potential for non-response bias and second, the limited nature of the surveys, only guarded conclusions can be drawn from this data. Accordingly, I turn to the empirical data that forms the bulk of this chapter, and assess what interviewees specifically reported about the Commission and the litigation process.

V. THE INTERVIEWED CLAIMANTS

As previously stated, I interviewed fourteen claimants, all of whom self-identify as African American.³⁴⁰ During the course of the interviews, I posed questions to claimants that were designed to elicit information regarding: (A) their background; (B) their past experiences, if any, with racism and discrimination; (C) their belief systems about race in the United States; (D) their past experiences, if any, with filing discrimination claims; (E) the deliberative processes that ultimately led them to file their respective PaHRA claims; and (F) their expectations of and experiences with the Commission from intake through disposition. Table 6 charts

³⁴⁰ One claimant self-identified as multiracial (African American, European, and Native American).

some descriptive information that interviewees self-reported at the time of the first interview. Interviewees consisted of seven men and seven women. They ranged in age from 29 to 65-years-old. All but one had reported that they had voted in the last presidential election. All but two had children. All had at least a high school degree and some had varying amounts of college experience.

[Table 6 about here]

A. Interviewed Claimants' Prior Experiences of Discrimination

In speaking about the workplace, a large majority of the interviewed claimants (1) self-reported experiencing discrimination at work, (2) believed that their encounters were unexceptional, and (3) professed an opinion that African Americans generally fare worse in the workplace than their white counterparts.

Q: How do you think African Americans are treated as opposed to the whites in the workplace?

A: My main workplace is in the construction field and the construction field is horrible.³⁴¹

Q: As a general matter, how do you feel about how African Americans are treated in comparison to whites at your work place? ...

A: I think it's very unequal. I mean I look at the numbers, the numbers are very low as far as African Americans and I noticed that there's a lot more turnover of African Americans in the work place.³⁴²

Q: As a general matter, how do you feel that African Americans are treated in comparison to white people in the workplace?

A: I feel like the white people have more opportunities to go to doctors' appointments. If their dog has a stomach ache, that's ok if they are not there.

³⁴¹ Interview with Eugene C.

³⁴² Interview with Delores F.

If somebody black does it, right away you are looked at like you don't want to work, you're lazy.³⁴³

Outside the workplace, while a majority reported occasional brush-ups with discrimination, a sizeable minority reported that they have never personally experienced such discrimination.³⁴⁴ But even if some claimants may not have experienced discrimination outside the workplace, all claimants expressed a belief that racism still exists in Pennsylvania.³⁴⁵ Furthermore, a majority of claimants opined that even though black and white Americans are supposed to enjoy equal privileges under the law, in practice African Americans generally are subjected to

³⁴³ Interview with Darrell R. But in conveying a minority view, John G. stated, "I think there is little or no difference. Specifically there are pockets or situations that are old time union or father to son or individual companies that work on a contract basis those are the kinds of situations where people would encounter that kind of resistance." Natasha M. also stated, "I would say for the most part [African Americans] are treated fairly."

³⁴⁴ On this point, a typical question and answer went as follows:

Q: [I]n any type of situation, have you ever felt as though you were singled out for different treatment by anyone based on your race?

A: No I haven't.

Q: So in your life then have you ever felt as though you've been subject to racism, or experienced racism other than what you experienced at Mercy Hospital?

A: No I haven't.

Q: Growing up did you ever feel as though that you were singled out or treated any differently because you were African American?

A: No. Not at all.

See Interview of Kenneth P. *See also* Interviews with Darrell R. In interviews, Delores F., Stephanie H., and Natasha M., also stated that they have never, in their lives, experienced discrimination outside of their places of employment. For those who did identify instances of first-hand discrimination outside the workplace, a majority mentioned that the general frequency of such incidents were rare.

³⁴⁵ A number of interviewees gave examples of the ways that racism still manifests. Some mentioned subtle and not-so-subtle attitudinal biases evidenced by disparate media portrayals of blacks and whites. Others cited the Tea Party's dislike of President Obama as an example of racism. Several referenced the criminal justice system, including police misconduct and racially disparate criminal sentencing. One interviewee mentioned racist anti-immigration sentiments and accompanying public policies.

disparate treatment.³⁴⁶ Not surprisingly then, a majority of claimants reported that life is generally more challenging for black than for white Americans, using catchwords/phrases such as “emotionally harder,”³⁴⁷ “alienating,”³⁴⁸ “a struggle,” “having to work twice as hard,”³⁴⁹ etc., to describe their experiences as persons of color.³⁵⁰

³⁴⁶ On this point, Gerald S. stated:

You look at the employment rate, ok, you can travel down the highway and you notice on the construction sites you got all white men working. And on situations where they are required to have some minorities because of state and federal funding involved but what you witness is you see all Caucasian males working on the highways, you know... [I]f you walk up here to Wentworth Hospital, say I'm the only black guy, well there's another black guy who's a laborer but I'm the only other minority you'll see there. There's gotta be a hundred guys here, all white guys, so you know, that's an example of what you have throughout this country, you know, pockets of it around this country, employment in particular, there's a disparity. You know, a disparity, oh and by the way, don't be a convicted felon, ... you're really gonna have a hard time and blacks are, you know, there are a lot of blacks, man, who have that status of being a convicted felon and that works against them in terms of employment, housing, driving privileges, voting, you name it, oh yeah, and by the way, there is another thing, too, politically speaking, politicians have managed to grab a hold of issues that they know would directly affect an entire class of people for the purpose of destroying or undermining their ... right to participate in the voting process.

³⁴⁷ Interview of Adrienne L. and Jill T.

³⁴⁸ Interview of Sylvester H.

³⁴⁹ Interview of Jill T. and Darrell R.

³⁵⁰ This commonly held sentiment was expressed by one interviewee in the following discussion:

Q: Based on your experiences at work and your life experiences, how would you describe what it's like to be black in the United States today?

A: ... well let me say this, if you're a black man, my life is always in jeopardy, ok, from these hate groups, other black men, you know, employment, employment seems to always be an issue, you know, ... equal opportunity, you just have to do a little bit more than others ... to get opportunity, so as a black man, I feel like I got to do a little bit more than others, ok, or maybe much more than others to get my fair share of opportunity...

Q: ... Based on your experiences at work and your life experiences, ... what do you think it's like to be white in America today?

A: Privileged. Privileged even low class whites, they tend to look at others with a sense of empowerment, a sense of entitlement, I feel their hate because they are poor white class people who get taken advantage of as well, but they don't even see it, you know what I'm saying? They don't even see it.

B. Claimants' Expectations of the PaHRC

In filing their claims of discrimination, claimants expressed a number of expectations regarding case outcomes that generally fell into three categories.

One group of claimants reported filing for one, some or all of the following reasons: to give voice to their complaints and be heard, to hold their employer accountable, and to compel changes in employer operating practices in order to prevent others from suffering the same discrimination. For this group of claimants, compensation was not the primary aim.

Excerpts below typify responses given by claimants who fall into the first camp:

Q: What were your expectations when you first filed with the Pennsylvania Relations Commission in terms of what they would do for you?

A: Well, one, I just basically wanted somebody to listen to me.... I just needed somebody else who was unbiased who had nothing to do with anything... I really wanted somebody else to not just be on my side but hear me out and really see you know that things like this do happen. Although [my employer] is a city owned municipality it's still racism....So I just really wanted them to see like hey this really happened you know today....

Q: Did you have expectations in terms of....compensation or anything along those lines?

A: ... I wouldn't care if it was fifty cents that they had to pay me back I just wanted somebody else to know...it's like they put me on the hot seat. I wanted [the Philadelphia Gas Works to be] on the hot seat. You know, everybody has to answer to somebody, and that's what I expected the human relations to do. That's what I wanted.³⁵¹

A second group of claimants reported filing for purposes of individual remediation, such as seeking monetary compensation,³⁵² promotion(s),³⁵³

Interview with Gerald S. A minority of claimants also used a number of superlatives to describe what it is like to be black, such as "beautiful" and "great."

³⁵¹ Interview with Stephanie H.

³⁵² Interviews with Darrell R., Kenneth P., John G., Gerald S.

³⁵³ Interviews with Jill T. and Eugene C.

reinstatement,³⁵⁴ ending racial harassment,³⁵⁵ or the like. This group's general responses are typified by Gerald S.'s account below:

Q: What were your expectations when you originally filed and all through the process, what were your expectations in terms of results, what were you looking for?

A: That I would receive some type of monetary compensation....

Q: Did you have any sense of the amount of money that you would receive?

A: No, not exactly, well, at least, well back pay, compensatory. I knew this much. They couldn't get me compensatory damage because that's not what they do. But I know I couldn't get that but what I could get them to do was make a ruling you know, based on what I gave them that would allow me to pursue compensatory damages through a legal process.

Q: Right. So if you had to put some sort of range in terms of the ultimate amount of money that you thought you might be able to get from the Pennsylvania Human Relations Commission, what was it approximately?

A: I figured....about \$50,000, you know, \$50,000... I said [to the investigator] 'Go for \$50,000.' She told me she could get me, my back pay [which] was around \$30,000, somewhere around \$30,000. So, I said 'throw \$50,000 in,' and she went and talked to the [employer's] attorney and the attorney said 'no' because I already cost them a lot of money, you know, and so they weren't willing to do that.³⁵⁶

A final set of claimants expected and sought some combination of the two.

C. Claimants' Typical Experiences

For the vast majority of filers, there are three major points of contact with the Commission: (1) the intake interview, (2) the investigation, including the fact finding conference, and (3) the disposition.

³⁵⁴ Interview with Sylvester H.

³⁵⁵ Interviews with Sheila S. and Adrienne L.

³⁵⁶ Interview with Gerald S.

1. Intake

Most claimants reported that they experienced no obstacles in filing their claims.³⁵⁷ Most filed through an intake process at one of the Commission's regional offices.³⁵⁸ At the Philadelphia Office, upon arrival, a complainant would walk into a waiting room that appears clean and sufficiently spacious to accommodate approximately twenty individuals. Almost all interviewees described the office as appearing professional, which they found comforting.³⁵⁹ There are magazines to read and brochures and pamphlets to review that discuss a Pennsylvania worker's rights under the PaHRA. The waiting room walls are adorned with photographs of the Commission's executive director, an African American, the Chairperson of the Commission, a white male, and the Philadelphia regional director, a black woman. Parties appearing before the Commission report to the receptionist who sits behind a glass window. This adds an impersonal air to the experience³⁶⁰ but is generally done out of concerns for safety.

³⁵⁷ However, a small minority reported difficulty with some of the forms. *See for e.g.*: interview with Gerald S., who stated that there were "...too many forms. Some of the things that they ask on their forms you know, could be confusing, ... They ask you for particular questions right, ... some of the questions didn't apply...".

³⁵⁸ A majority of claimants reported a preference for private counsel to represent them at the start of the process. But most could not afford to retain an attorney. As a result, many of the claimants proceeded *pro se*, entrusting themselves to the Commission's competence to fully investigate and resolve their claims of discrimination.

³⁵⁹ This is important, as Goodsell explains:

Government waiting rooms of all kinds are important physical spaces because it is within them that we gain initial impressions of officialdom. The citizen is physically embraced, so to speak, by this physical setting during the often tense period after entering agency premises, but before receiving preliminary official processing. During this period, the citizen receives cues which suggest accepted agency values, desired client comportment, and the organizations own image of its clientele. These cues and the impressions they generate are of vital normative importance in a democratic society.

Charles Goodsell, "Welfare Waiting Rooms," *Urban Life*, Vol. 12, No. 4 (Jan., 1984) 467.

³⁶⁰ See Interview with Gerald S.

On average, claimants reported that the wait time to be seen felt appropriate, lasting anywhere between ten to forty minutes. Furthermore, all complainants, irrespective of case outcome, reported that the intake interview typically lasted between thirty minutes to one hour, which most opined felt appropriate.³⁶¹ A majority of claimants, regardless of ultimate case outcome, reported that the intake personnel with whom they met permitted them to fully delineate the discrimination that they experienced, using words like “attentive,”³⁶² “sympathetic,”³⁶³ “courteous,”³⁶⁴ “respectful,”³⁶⁵ and “interested”³⁶⁶ to describe them. The most negative description involved two claimants reporting that they perceived the intake process to be too impersonal.³⁶⁷ One interviewee expressed feeling rushed through the process:

Q: Did you feel as though ... you had an opportunity to at least explain to her everything that had happened?

A: No I didn't

Q: And why do you say that?

A: I guess because ... you know how some people just do this every day. It's just like yeah, yeah, yeah let me type it up and next... That's how I felt.³⁶⁸

³⁶¹ By way of contrast, in my own practice, it is rare for one of my initial interviews to last less than two hours. While I am detail-oriented, it is hard to envision a sufficiently thorough intake in less time. My review of scores of Commission generated complaints also supports the conclusion that initial interviews are somewhat cursory as these complaints are generally barebones in nature and contain only the most rudimentary information to support the legal elements of a cause of action.

³⁶² Interview with Gerald S.

³⁶³ Interviews with Kenneth P. and with Terry I., respectively.

³⁶⁴ Interview with John G.

³⁶⁵ Interview with Sylvester H.

³⁶⁶ Interviews with Sylvester H. and Jill T.

³⁶⁷ Interviews with Dallas H. and Delores F.

³⁶⁸ Interview with Stephanie H.

During the interview, a plurality of claimants expressed feelings of anger at emotionally reliving the experience of discrimination. For example, Dallas H. reported reliving “feeling cheated,” and “violated.” Terry I. stated that he was “pissed off.” When asked if he would describe his feelings in any other way, he stated:

No. Just pissed off, shocked and appalled that this company can continue to let [a co-worker use the word ‘Nigger’ in my presence]. Once and twice ok, but when you are going into three and four times with the same person I consider that insane behavior.³⁶⁹

Several claimants expressed feelings of uncertainty.³⁷⁰ And some reported an initial feeling of empowerment and/or relief when filing their respective complaints.³⁷¹

Whether or not those feelings of empowerment endured is a topic that will be explored later in this chapter.

2. Contact with the Investigator

After intake, the case is assigned to an investigator. Once assigned, the next major point of interaction with the Commission involves telephone calls, letters, and email correspondence. This is a faceless process, as the claimant generally does not personally meet with the investigator until the fact finding conference. During this process, the investigator may contact the claimant to seek clarification regarding the complaint, to ask for the names of supporting witnesses, and to obtain relevant documents.

Compared to intake, fewer claimants expressed contentment with their assigned investigators and/or the fact finding process. Claimants who received a “no cause” determination all reported dissatisfaction with their investigator. By way of

³⁶⁹ Interview with Terry I.

³⁷⁰ Interviews with Sylvester H., Darrell R., Gerald S., Adrienne L., and Natasha M.

³⁷¹ Interviews with John G., Gerald S., Natasha M., Sheila S., and Jill T..

contrast, a majority of those who received cause determinations expressed appreciation for them. The severity of dissatisfaction proved to be more pronounced depending on several exacerbating factors, including lack of investigator communication, the duration of the investigation, and the perceived lack of interest of the investigator.

Regarding lack of communication, one claimant stated:

Once it got to the investigation stage, ... speaking with [the investigator], she was kind of abrupt the one time I had a conversation with her ... I really didn't have any contact with her. She didn't speak to us... so we really had no idea as to how/what the outcome may be, how they were leaning. This went on for almost two years. The investigation took almost two years so we didn't even know that they found probable cause until we got the letters in the mail.³⁷²

Regarding the pace of the investigation, one complainant reflected:

I was hurting at the time. If I worked at the Commission I could understand why it takes so long, but as a person on the other end that is dealing with this you want to forget it but you can't forget it because you are going to be questioned about things and when the time comes you don't remember every detail. You remember what hurt you the most but you don't remember every detail cause it's so long ago.³⁷³

Another claimant reported “[e]verything is long when you’re under pressure and you’re out of work.”³⁷⁴ Furthermore, the length of time can substantively affect the outcome, as was the case for Gerald S. as witnesses became unreachable and one passed away.³⁷⁵

An additional source of frustration involved investigators who failed to compel employers to comply with Commission processes and expressed more interest in settling the case. Regarding this point, John G. recalled:

At one stage... I was told [my employer] is not responding [to the Commission's document requests.] ... [The investigator said that] if they don't respond on this third

³⁷² Interview with Adrienne L. *See also:* Interview of Sylvester H.

³⁷³ Interview with Darrell R.

³⁷⁴ Interview with Eugene C.

³⁷⁵ Interview with Gerald S.

request we are going to subpoena them. I called back two weeks later [and asked] ‘Did they respond?’ [She said,] ‘No.’ ‘Did you subpoena them?’ [She said,] ‘No, we have to wait for Harrisburg for the subpoena notice to be signed and processed.’ I called back two weeks later. ‘Did you get the subpoena? Was it signed and processed?’ ... [She said,] ‘We are giving them another chance because they said they are going to get us some information.’ ... [The Commission] never got anything back. Six weeks pass[ed] from the last phone call I got from [the investigator] and she said. ‘Do you want to settle for the original amount offering the \$5000 dollars if it’s still available?’ And I said, ‘No, Mrs. K[], please get the information ... from the [company].... These are the people that you can get it from... you need to ask these people because they will tell you if they are under oath what the truth is and how I was treated there.’...

Every conversation [with the investigator] was, ‘well, you know Mr. [G.] you’re not the only case. We have so many cases here. We can only devote so much time.’ And I said, ‘if you devote any time at all, you need to subpoena these people for these records and make them provide you with what is appropriate.’ My feeling is I was getting excuses, I was not being treated fairly, and people were not being honest with me. I was under the impression they don’t want to do this. They are told not to do this. They are being told, ‘don’t let this thing go any further. Try and get him to accept this sum and have this thing be over with.’ [But I am] ... not going away that fast.³⁷⁶

John G.’s desire to press forward ran headfirst into the Commission’s policy preference to settle cases.³⁷⁷

But not all of the claimants whom I interviewed experienced the same kinds of delays and frustrations with Commission, and some shared positive experiences with their investigators. Stephanie H., who received a cause determination, stated:

[My investigator,] Mr. Shaw listened. I called Mr. Shaw fifty million times and he listened. He never brushed me off. You know, he understood.... Mr. Shaw plays devil’s advocate, but I guess that’s what he has to do you know to make sure he understands if he has to present it to somebody else... I really do ... thank god that my case fell in his hands.

In the immediate months after the employer answers the complaint, the investigator holds a fact finding conference. During the fact finding conference, the investigator verbally reviews the complaint and the respondent’s answer with both parties, clarifying any matters contained in the formal filings. Attorneys may be

³⁷⁶ Interview with John G.

³⁷⁷ Delores F. also opined that her employer treated her filing “like a joke,” as evidenced by its apparent non-compliance with PaHRC directives.

present but they are generally not permitted to interject or otherwise talk unless given explicit permission by the investigator. One might imagine that the fact finding conference could well serve as place for empowerment or catharsis as the claimant has an opportunity to confront his or her employer. But few claimants described the fact finding conference in those terms. Instead, one claimant stated:

I am a person that needs more information. I like to know what I am getting into and I really would like to have talked to the [investigator] before I got to the meeting. I would have rather had some conversation with her so I wouldn't have to feel like ... she is going to represent me and I have no idea where this lady is coming from.... I was thrown in and she was thrown in and we didn't have a relationship. I didn't know where her head was at. She separated us, she was coming into the room and talking to me. Then, she was going into another room and talking to them and then she would come back and talk to me and I am thinking I don't know what is going on.³⁷⁸

Another complainant felt that the investigator was simply “going through the motions” during the fact finding conference and displayed marked disinterest in investigating the claims.³⁷⁹ A third also found the investigator to be cold and impersonal.

3. Disposition

Finally, there is the Commission's disposition of the complaint. Not surprisingly, there is a fairly strong correlation between fulfillment of expectations and claimants' overall satisfactions with the process. Because most of the complainants whom I interviewed received no cause findings, lost at a public hearing, or otherwise received, in their minds, insufficient settlements, most complainants who I interviewed gave the Commission an overall grade of somewhere between C and F. Only three complainants out of the fourteen, Stephanie H., Terry I., and Jill T. gave the Commission an “A” grade.

³⁷⁸ Interview with Sheila S.

³⁷⁹ Interview with Dallas H.

Stephanie H. had been fired after her employer accused her of falsifying physicians' notes that she had submitted following several absences from work. She grieved the matter through her union and her union provided evidence to prove the authenticity of the notes. As a result, her employer reinstated her but refused to compensate her for the several months of back wages. Given that her employer had accused a white co-worker of identical conduct, but the co-worker received no meaningful punishment, Stephanie H. filed a discrimination complaint with the Commission. The Commission found probable cause. The case ultimately settled when the employer agreed to compensate her for all lost wages. As a result of her complaint, Stephanie H. also opined that her employer had changed its practices regarding its investigative procedures for challenging the authenticity of doctor's notes. Thus, for her, the filing had achieved its stated aims and, as a result, she felt total vindication. Her filing and outcome proved wildly successful. While her case represents an important victory for both her and the Commission, it is an exceedingly rare success story.

Terry I. also reported satisfaction. Terry I. worked for a construction company. During his employment, co-workers used the "N-word" in his presence. His complaints to his employer fell on deaf ears. Following his complaints, these same co-workers reported that Terry had engaged in unsafe work practices, which led to his termination. He filed with the Commission and received a probable cause determination. Ultimately, Terry I. settled for a confidential amount after his attorney filed a federal complaint. While the settlement figure amounted to less than what Terry sought, he nonetheless felt very satisfied given that: (1) he had an opportunity to voice his complaint, (2) the Commission took his filing seriously, and (3) Commission personnel appropriately acted upon his filing. According to Terry I.:

[The Commission was] very thorough and they were very fair. They were very professional and they were very fast. It did not take them long to resolve the issue and even though they ruled against me on one incident that I didn't think was right because I think the company outright lied and said I violated a safety issue because I would never do what they were accusing me of doing because it's dangerous and I was thinking you have to be drunk or on drugs to do that type of thing. Overall they were fair and very professional and thorough in their investigation. They were a neutral party. They didn't take sides. They did everything to resolve the situation.³⁸⁰

For Terry I., the Commission gave him an opportunity to express his outrage and to stand up to an employer that he described as consisting of a "good ole boys network."

Jill T. is a correctional officer. She had taken a promotions test but was then passed over for promotion even though she appeared more qualified than the white male who ultimately received the promotion. She filed in 2002 and ultimately received a probable cause determination. She participated in a public hearing before the Commission in 2009. At the time of her interview with me in 2011, the Commission had still not issued a determination following the hearing. Thus, at the time of this writing, her case has been active for over nine years without any ultimate disposition. While she expressly stated her satisfaction with the Commission, when pressed about the fact that her case had been active for close to ten years, she gave life to her frustration with a sigh by explaining that "the wheels of justice are very slow." As a result, she stated that she feels "run down by the process."³⁸¹

While these three claimants expressed satisfaction, a vast majority of complainants stated that the process was a complete waste of time. When asked how they felt about the Commission, they responded in the following ways:

Q: Overall, how would you describe your encounter with the Pennsylvania Human Relations Commission, and how would you grade it from A to F?

A: An E

³⁸⁰ Interview with Terry I.

³⁸¹ Interview with Jill T.

Q: An E. Ok. And why is that?

A: It seemed like a waste of time. They were just going through the motions and didn't seem interested in trying to get anything done.³⁸²

Q: Okay, overall how would you describe your encounter with the Commission from the point at which you filed to the point at which the case was finally resolved?

A: I describe my encounter with the Human Relations [Commission] as a waste and a loss of time because they really didn't come up with no type of action for me or no type of decision for me. I just looked at that as a loss.

Q: ... In terms of a grade, if you had to grade it with A being the best and F being the worst, how would you grade the commission?

A: I would grade it F.³⁸³

Q: Overall, how would you describe your encounter with the Commission from the point at which you filed to the point at which the complaint was ultimately resolved?

A: Slim and none.

Q: Ok. So on a grade from A to F, with A being the highest and F being the lowest, how would you grade them?

A: About an F. Because I didn't get no response, I didn't get no communications back at all.³⁸⁴

Q: If you had to grade your experience with the commission from an A-F, how would you grade it so far?

A: D and the reason it's not an F is because the people were courteous and respectful.³⁸⁵

³⁸² Interview with Dallis H.

³⁸³ Interview with Kenneth P.

³⁸⁴ Interview with Sylvester H.

³⁸⁵ Interview with John G.

Q: Overall, if you had to grade the Pennsylvania Human Relations Commission, how would you grade them, from an A being the highest grade to an F being the lowest grade?

A: I'll give them a C minus.

Q: And why a C minus?

A: Why C minus, because of the outcome, I don't feel like they took all the information that I gave them and processed it right to come up with an accurate finding. I believe a lot was overlooked, man.³⁸⁶

As previously noted, a claimant's grading of their Commission experience generally correlated with whether their expectations were met. Given that most complainants have an unrealistic expectation of securing some substantive relief through the Commission, it can be safely assumed that most claimants will be disappointed with the Commission's performance.

But despite these poor grades, there is still a chance that a claimant could reap another important benefit vis-à-vis his or her filing – a sense of political or psychological empowerment. In the legal context, a number of public interest lawyers have argued that client empowerment constitutes one, if not *the*, single most important goal of public interest litigation.³⁸⁷

VI. THE POLITICS OF EMPOWERMENT

Unfortunately, in the social science literature, there is no consensus as to how to define “empowerment.” Furthermore, there is a dearth of existent scholarship that

³⁸⁶ Interview with Gerald S.

³⁸⁷ See for e.g.: Anthony Alfieri, “The Antinomies Of Poverty Law And A Theory Of Dialogic Empowerment,” *NewYorkUniversity Review Of Law & Social Change*, Vol. 16, (1988) 665. Alfieri argues that “empowering the poor should be the political object of poverty law.”; Gerald Lopez, *Rebellious Lawyering, One Chicano's Vision of Progressive Law Practice* (Boulder, CO: Westview Press, 1992).

provides heuristics for measuring gains or drops in it. Adding to the conceptual messiness, scholars from across different disciplines have deployed the term in differing ways, including political scientists,³⁸⁸ social workers,³⁸⁹ business management theorists,³⁹⁰ legal scholars,³⁹¹ feminists,³⁹² psychologists,³⁹³ educators,³⁹⁴ and self-help gurus,³⁹⁵ among others. Further complicating matters, the term is sometimes applied to individuals, geographic communities,³⁹⁶ subaltern groups of

³⁸⁸ The root of empowerment is “power” – a concept that is an analytical mainstay of political science. But while the concept of “power” has been exhaustingly analyzed, the meaning of the term “empowerment” remains much less understood. *See for e.g.:* Robert Dahl, “The Concept of Power,” *Behavioral Science*, Vol. 2, No. 3, (1957) 201-05; Nelson Polsby, “The Sociology of Community Power: A Reassessment,” *37 Social Forces* Vol. 31, No. 3 (1959) 232; Peter Bachrach and Morton S. Baratz, “Decisions and Nondecisions: An Analytical Framework,” *57 American Political Science Review*, Vol. 57, No. 3 (1963) 632; Steven Lukes, *Power: A Radical View* (New York: Palgrave Macmillan, 1974); Michel Foucault, *Two Lectures (1972-1977)*, in *Power/Knowledge: Selected Interviews and Other Writings by Michael Foucault* (New York: Pantheon Books, 1980); John Gaventa *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* (Chicago: University of Illinois Press, 1980).

³⁸⁹ Judith Lee, *The Empowerment Approach To Social Work Practice*, 2nd Ed. (New York: Columbia University Press, 2001); R.J. Parsons, “Empowerment: Purpose and practice principle in social work,” *Social Work with Groups* Vol. 14, No.2 (1991).

³⁹⁰ Scott Seibert, Seth Silver, and Alan Randolph, “Taking Empowerment to the Next Level: A Multiple-Level Model of Empowerment, Performance, and Satisfaction Taking Empowerment to the Next Level: A Multiple-Level Model of Empowerment, Performance, and Satisfaction,” *The Academy of Management Journal*, Vol. 47, No. 3 (Jun., 2004).

³⁹¹ Gerald Lopez, *Rebellious Lawyering, One Chicano’s Vision of Progressive Law Practice* (Boulder, CO: Westview Press, 1992); Daniel Shah, “Lawyering for Empowerment: Community Development and Social Change,” *Clinical Law Review* Vol. 6 (1999).

³⁹² Amy Allen, “Rethinking Power,” *Hypatia*, Vol. 13, No. 1 (Winter, 1998). Allen discusses empowerment in the context of women.; B. Solomon, *Black Empowerment: Social Work in Oppressed Communities* (New York: Columbia University Press, 1976). Solomon discusses empowerment for African Americans.; Angelo Ancheta, “Review: Community Lawyering,” *California Law Review*, Vol. 81, No. 5 (Oct., 1993), discussing empowerment for the Asian-American Community.

³⁹³ Ellen McWhirter, “Empowerment in Counseling,” *Journal of Counseling and Development* (1991) 69: 222-7.

³⁹⁴ Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum, 2007).

³⁹⁵ Anthony Robbins, *Unlimited Power: The New Science Of Personal Achievement* (New York: Simon and Schuster, 1997).

³⁹⁶ *See for e.g.*, Paul Trembley, “Counseling Community Groups,” *Clinical Law Review* Vol. 17, No. 198, (Fall, 2010). Trembley argues that in counseling and representing community groups, community lawyers should seek to increase the group’s power.

people,³⁹⁷ and/or political movements.³⁹⁸ As Rappaport summarizes the dilemma, “...empowerment is like obscenity; you have trouble defining it but you know it when you see it. It seems to be missing in people who feel helpless. Although it is easy to intuit, it is a very complex idea to define because it has components that are both psychological and political.”³⁹⁹

While definitions proliferate among these disciplines, many of them can be loosely divided into two separate classifications – one variant that involves notions of domination and oppression and a second that is more focused on productive capabilities.⁴⁰⁰ Sometimes this distinction is captured in the literature as the “power-over” versus “power-to” debate⁴⁰¹ Scholars who write about the former interpretation all appear to ascribe several shared features to their definitions of empowerment. First, for them, power is directional. Power must shift, change, or transfer from one actor to another. Under this conception, empowerment is a zero-sum game. Second, power appears to relate to one actor’s ability to secure the action or inaction of another which can take place through a variety of means, including, physical force, coercion, influence, appeals to legitimate competency or authority, manipulation, etc.⁴⁰² Third, power happens in the context of relationships. Therefore, if two

³⁹⁷ Allen, “Rethinking Power.”

³⁹⁸ Anita Hodgkiss, “Petitioning And The Empowerment Theory Of Practice,” *Yale LawJournal* Vol. 96, No. 3 (Jan. 1987). Hodgkiss writes, “Empowerment ... depends on actual participation in a political movement or some other collective activity by which people try to influence decisions that affect their lives.”

³⁹⁹ Julian Rappaport, “Collaborating for Empowerment: Creating the Language of Mutual Help,” in *The New Populism, The Politics of Empowerment*, edited by Harry Boyte and Frank Riessman, (Philadelphia, PA: Temple University Press, 1986) 69.

⁴⁰⁰ Jo Rowlands, “Empowerment Examined,” *Development in Practice*, Vol. 5, No. 2 (May, 1995).

⁴⁰¹ Allen, “Rethinking Power.”

⁴⁰² See for e.g., Thomas, E. Wartenberg, *The Forms of Power: From Domination to Transformation* (Philadelphia, PA: Temple University Press, 1990).

individuals act wholly independently of one another, neither can be said to have power over the other.

With the second type, empowerment is not zero-sum and has more profound psychological connotations. In this conception, power is often described as “productive,” “generative,” and/or “creative.”⁴⁰³ Within this framework, just the act of standing up for oneself can *feel* psychically empowering and therefore be classified as a form of empowerment. Thus, it is possible to be empowered along some dimensions and disempowered along others. For the purposes of this dissertation, I will consider both versions.

Utilizing the first purely power-derived definition of empowerment, for the vast majority of claimants before the Commission, empowerment, as a result of the claim making process, ranges from nonexistent to *de minimis*. While most claimants file for either individual remediation or for some structural transformation of their workplace, as we saw in Chapter 6, the typical case outcome involves no cause determinations or nuisance settlements. Furthermore, with extremely rare exception, there is no direct proof that any individual filing changes the racialized power dynamics of a company in any material way.⁴⁰⁴ Therefore, as a matter of extracting any real economic, financial, or political gains, individual claimants appear to materially fare rather dismally vis-à-vis their complaint.

A number of empowerment scholars have argued that empowerment can also manifest in inchoate forms through increased social and political participation on

⁴⁰³ Allen, “Rethinking Power.”

⁴⁰⁴ See for e.g.: Interviews with Natasha M., Adrienne L., etc.

social justice issues and political consciousness.⁴⁰⁵ While there may be no change in power, the seeds of change are sown. But most claimants, irrespective of how they fared before the Commission, stated that they did not become more socially or politically active as a result of their experiences before the Commission. Several expressed a lack of time for such engagement. Two claimants expressed a desire to become more active but a lack of knowledge regarding how to do it.⁴⁰⁶ Only one actually joined an organization to effect change. As for a lack of interest in becoming politically active, the following colloquy ensued with one claimant:

Q: As a result of filing a complaint did you become more politically active by voting more frequently or engaging in grass roots or community organization or protesting or serving as an advocate for others or joining in any protest groups or becoming more aware of social issues

A: I speak upon my own opinion but no active groups or active organizations and I didn't become active in socializing in any kind of political activities

Q: Is there a reason why not?

A: One reason is as far as justice is concerned that is a slow wheel and I can't take justice in my own hands. Many times I am angry and I feel like it but I never surrender to it. I am a citizen and I do respect the law and I do respect the arrangement even if I do not agree with it.

Q: So was it the case that you didn't have any more time to join these groups or was it just that there was no interest in becoming a part of the larger network that would challenge discrimination?

A: I just didn't have any interest.⁴⁰⁷

But we can see how, in what appears to be rare cases, the experience can inspire social engagement.

Q: As a result of filing your complaint regarding Red Lobster did you become more politically active or vocal in any way regarding discrimination or other social justice issues?

⁴⁰⁵ Edward Schwerin, *Mediation, Citizen Empowerment, and Transformational Politics* (Westport, CT: Praeger Publishers, 1995).

⁴⁰⁶ See for e.g., Interview of Terry I.

⁴⁰⁷ Interview with Sheila S.

A: Yes I have.... I became a member of a city organization in Lycoming County called the Lycoming County Crime Commission. What we do is, we try to set up alternatives for crime. But we also try to address any injustices that go on in the community as well....I am the Director of Information.

Q: Does it deal with any issues of discrimination?

A: Yes. The case that I am litigating now, I gave a copy to my director. He in turn showed the mayor of the county evidence [of] how ... the companies bar minorities from employment. [In] the yearlong work that I did, we were allowed to gather evidence [that] this one particular company discriminated against minorities in [the] construction industry.

Q: Why did you decide to join this civic organization as a result of your experience with the commission?

A: The job situation up here is one where the employers up here know they have an unskilled labor market. They have a system here where they hire and fire and get rid of employees often, especially in a situation where an employee works up to ninety days and once you approach the ninety days, they lay them off because once they get to the ninety days they don't have to pay them benefits. We see a lot of that going on here. So, ... workers ... don't have much protection against these employers. They control and manipulate the marketplace or the workplace. As a way of trying to combat this we ... target employers and police and anything that is involved with some type of injustice whether it's denying people of some type of justice or rights. We seek the right to expose it and let it be known that we are not going to tolerate it.⁴⁰⁸

As for the second more-psychological version of empowerment, the results were a bit more mixed. Important factors that theorists have considered in measuring for it are increased feelings of self-esteem and self-efficacy. Most claimants whom I interviewed self-reported no corresponding increase in any of these feeling states. In fact, some even reported that the act of making a claim resulted in the very opposite, giving rise to feelings such as cynicism,⁴⁰⁹ less hope, an increased sense of violation,⁴¹⁰ insult,⁴¹¹ annoyance,⁴¹² disempowerment,⁴¹³ disrespect,⁴¹⁴ decreased confidence in the ability to right a wrong,⁴¹⁵ invalidation,⁴¹⁶ and the like.⁴¹⁷

⁴⁰⁸ Interview with Gerald S.

⁴⁰⁹ Interviews with Dallas H. and Gerald S.

⁴¹⁰ Interview with Gerald S.

Q: Did your filing or the outcome of your investigation regarding your Red Lobster complaint make you more cynical about solving problems of discrimination, more optimistic or hopeful about solving problems in discrimination, both or neither?

A: I think cynical actually.

Q: Why is that?

A: Because after all the evidence that I presented they ruled against me basically saying they believed Red Lobster's claim. In spite of all the evidence that I put forth before them. I put a ton of evidence before them they never had a claimant like me with so much information. Apparently it wasn't enough. I didn't feel good about that. Even though I can still take it to court, I didn't feel good about the decision.⁴¹⁸

Q: And how did that make you feel [when the Commission failed to sustain your complaint]?

A: Like a loser, because I know what happened, I know what was said. I know how I was treated. And just because they don't have enough evidence on top of the evidence that I already submitted, you know, they can't go any farther than this.⁴¹⁹

Eugene C., who went to a public hearing and lost, reported that his outcome before the Commission left him feeling, in his words, "like I am stupid, like I am a fool."

⁴¹¹ Interview with Sylvester H.

⁴¹² Interview with John G.

⁴¹³ Interviews with Sylvester H. and John G.

⁴¹⁴ Interview with Delores F.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Ibid.*

⁴¹⁷ *See for e.g.:* Interviews with Dallas H, Delores F, Gerald S., and Sheila S.

⁴¹⁸ Interview with Gerald S.

⁴¹⁹ Interview with Natasha M.

But at the same time, some of these same individuals and others also reported that they found value in the process of voicing their complaints before an administrative agency.

Q: Did you feel like filing a claim made any difference whatsoever to you?

A: Sure it does.

Q: And how did filing a claim make a difference?

A: It gave me the opportunity to actually get my point across; even though it didn't resolve anything it still meant something to me because I did file a report and I did get to speak my voice a little bit.

Q: And that was important to you?

A: Yeah that was important.⁴²⁰

Unlike those who fared poorly, those who fared well before the Commission psychologically benefited from litigation. For them, the process generated significant feelings of empowerment.

Q: Can you describe how you think the act of filing a complaint made you feel about yourself?

A: Well, it made me feel you know that I am a strong person and I'm not afraid of anybody and I'm not afraid to go up against big companies. I mean look at David and Goliath. I mean hey if it happened that way the little guy can win and I'm not afraid of anybody and my mom taught me that, never ever let anybody tell you can't do something. I'm much stronger now than I was with [my employer]. I was very vulnerable at the time that I was going through what I was going through with that company but I rose up and I fought them and I won.

Q: And did you feel as though fighting against them gave you a sense of empowerment?

A: No, it just told me just how strong I really am. I'm not as weak as I thought I was.

Q: So then it does sound as though it gave you a sense of empowerment?

A: Yes, yes, in a way it did. I mean not in a way where oh yeah I got you guys, not like that. It's the type of empowerment where like you know what, there is somebody out there that listens to what the little guys got to say and this discrimination crap has got to stop. You know I mean it's got to stop and companies have got to be put on notice that this won't be tolerated.

⁴²⁰ Interview with Kenneth P.

Q: Do you feel like filing a complaint with the Commission had any effect on your sense of your ability to right a wrong?

A: Yeah, well, yeah, it was you know what happened to me was wrong, it was very wrong and what that company did was one of the most cruel...it was so cruel and the way it seems like they just laughed at me ... and I thought it was a great company to work for. It all turned out to be a lie. You know 'cause that is not a great company to work for, and there are some very cruel people that work for that company and all the way up into management from the workers down on the ground all the way up to the management in that company. They are very cruel.⁴²¹

Not surprisingly, a majority of claimants whom I interviewed also came away skeptical about the Commission's ability to reduce discrimination in the Commonwealth, and the law's effectiveness to hold companies accountable for illegal discrimination.⁴²² If the interviewed claimants who fared poorly are representative of the typical claimant, and I have no reason to doubt that they are, then it is likely that most claimants who file come away similarly disillusioned.⁴²³

But an important question still remains. Given that claimants generally fare poorly, why do so many file complaints? One obvious answer could be that claimants do not realize how they may fare within the system. But that can only serve as a partial explanation, as most of my interviewees indicated that they would file again, and a number of them were repeat filers. Furthermore, even those who were most disappointed with the process reported that they would have regretted a decision to forgo filing. Finally, several indicated that despite their outcome, they still encourage

⁴²¹ Interview with Terry I.

⁴²² See for e.g.: interviews with Dallas H., Eugene C., Delores F., Adrienne L, Darrell R., Jill T., John G., and Sheila M.

⁴²³ In a study of small claims court litigation that Merry conducted, she reports that the litigation process also has a disempowering effect on the plaintiffs. Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990).

colleagues and co-workers to file.⁴²⁴ What could explain their own sense of disillusionment, on the one hand, yet their willingness to invoke or recommend the litigative process, on the other hand? The interrelated politics of rights and recognition help to reveal an unstated purpose of a state fair employment practices institution, such as the PaHRC.

VII. CLAIMANTS AND THE POLITICS OF RIGHTS

In his classic 1974 book, the *Politics of Rights*, Stuart Scheingold describes how faith in both the notion of rights, as a way of securing political and social justice, and the institutional mechanism of litigation, as a way of safeguarding those rights, has served as a historical bedrock for most Americans.⁴²⁵

Scheingold is correct in this assessment; since our nation's founding, the notion of "rights" has had its own symbolic life force. It has served as one of the driving political forces in our collective consciousness, permeating our legal institutions, state apparatuses, popular discourse, educational systems, religious teachings, social movements, educational systems, and almost all other forms of American political, cultural, and social spaces. As a result, from a very early age, people are indoctrinated to believe in the primacy of rights, which helps to shape the

⁴²⁴ Interview with Delores F., wherein she stated: "I have urged [co-workers] to file."

⁴²⁵ In the *Politics of Rights*, Scheingold states, "...the principal institutional mechanism of the myth of rights is litigation, which we are encouraged to view as an effective means for obtaining declarations of rights from the courts, for assuring realization of those rights and for building a more just order." On this point, Scheingold quotes De Tocqueville as stating:

The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law which is produced in the schools and courts of justice, gradually penetrates their walls into the bosom of society, where it descends to the lowest classes, so that at last the whole people contract the habit and tastes of the judicial magistrate.

Stuart Scheingold, *The Politics of Right*, (Ann Arbor, MI: University of Michigan Press, 2004), *Ibid.*, 16.

American identity.⁴²⁶ As Louis Hartz once suggested, not only is the United States hopelessly liberal, but Americans also have had a love affair with their rights.

Akin to this rights ideology, there is also an equally powerful ethos of egalitarianism that runs through American cultural, social, and political discourse.⁴²⁷ The Declaration of Independence fused the notion of equality and rights by proclaiming that “all men are created *equal*” and that they are “endowed by their creator with certain *inalienable rights*,” among them “life,” liberty,” and the “pursuit of happiness.” De Tocqueville praised America’s culture for a land where Americans are born into a state of civil and political equality as opposed to having to become equal.⁴²⁸ Part of the zeitgeist of this nation has been America’s egalitarian idealism,

⁴²⁶ “Rights serve as potent symbols of nationhood and are central to the 'foundational myth' of the USA, and thus serve to nourish the national imaginary.” Carl Stychin, “Celebration and Consolidation: National Rituals and the Legal Construction of American Identities,” *Oxford Journal of Legal Studies* Vol. 18, No. 2 (Summer, 1998), 266-267. In fact, American colonial leaders utilized a rights-discourse as part of the justification for the revolutionary war. In the Federalist Papers, Madison and Hamilton speak repeatedly about the protection of private rights as one of the primary responsibilities of government. The Constitution’s framers then formally inscribed these rights into the Constitution through ratification of the first Ten Amendments. During this time period and well into the 19th century, this rights-centered polemic appeared in books, literary periodicals and magazines of the day, poems, oratory and speeches, pamphlets, and in various other media forms. See for e.g., Mary Wollstonecraft, *A Vindication of the Rights of Woman* (public domain); Warner, “Rights of Woman,” Boston Weekly Magazine, Oct. 30, 1802; “Rights of Woman,” Weekly Museum (New York),” pr. 25, 1795; reprinted in Philadelphia Minerva, Oct. 1795.

⁴²⁷ See for e.g., David Ingersoll and Richard Matthews, *The Philosophic Roots of Modern Ideology*, (Harlow, England: Pearson/ Longman Higher Education, 1986) 60.

The equalitarian premise of British liberalism was very much part of the intellectual tradition in the American colonies. The removal of overt distinctions between classes (titles and so forth) and the influence of British libertarian rhetoric had produced a situation where political equality was taken to be the basic presupposition of all government. One need not delve too deeply into American history to recall that this notion of political equality was more often honored in rhetoric than in practice.... Nonetheless, the acceptance of the concept of political equality as an ideal, if nothing else, is an important presupposition of any regime that deems itself democratic.

⁴²⁸ Alexis De Tocqueville, *Democracy in America, Volume 2* (Berkeley and Los Angeles: University of California Press, 1961) 122. “The equality of conditions is the fundamental fact from which all others seem to be derived, and the central point at which all my observations constantly terminated.” *Ibid.*, Volume 1, lxviii.

which served as one of the driving forces behind the 13th, 14th, and 15th amendments, the suffragist, civil rights, and labor movements, and today's contemporary politics.

Describing their original motivations for filing, many of the claimants with whom I spoke professed a talismanic belief in this traditional American liberal trifecta of: (1) rights, (2) equality, and (3) litigation. For example, Delores F. stated:

I'm a firm believer of civil rights. I was raised on that. You know my mother and father were always talking about people's civil rights. You know, they're Martin Luther King and Rosa Parks fans and ... we believe in people ... being treated equally. And that was a premise of me filing. You know, I just didn't want to be mistreated and I'm just a firm believer that everybody should be treated equally you know, women or men, black or white, and that's just the way it was.

Gerald S. described his liberal faith in this manner:

We are a country of laws and so be it. If someone breaks the law or violates my rights or whatever the case may be they need to be held to account. ... The average person, the average poor person who doesn't have much, they don't have much of a defense than the more wealthy and the stronger people. The only remedy that they do have is to file a complaint. You have jobs and businesses and people more powerful than the average person and they can make pretty much make anything go away. Unless you take them to court, you stand to have these things done to you on a regular basis. It's important to stand up for your civil rights like filing a complaint or go to the proper authorities and let people know what happened and that way you can receive justice.⁴²⁹

Sheila S. echoed these sentiments, stating, "That's why you got [civil rights]. That's why people have died for it. That's why people work for it. That's why it's there for you as your protection."⁴³⁰ Other claimants also discussed the importance of filing not only to protect their individual rights, but also those of their fellow co-workers.⁴³¹

⁴²⁹ Interview with Gerald S.

⁴³⁰ Interview with Sheila S.

⁴³¹ Q: By filing, were you fighting for your rights?

A: Of course. And for others.

Q: And was it important to you to fight for your rights and the rights of others?

A: Yes.

For many, as noted above, just the act of standing up and metaphorically fighting for their rights proved valuable to them and many of them would file again.⁴³² In filing, not only were claimants following a “rights” tradition, but their filings also served as performative acts, as they enacted and laid claim to a human, American, and, in some cases, black identity.⁴³³

Gerald S. also opined that the act of filing related to his identity as an American citizen and the civil rights movements of the past.

Q: Did the importance of fighting for your rights relate in any way of a sense of yourself as an America citizen?

A: Yes

Q: In what way?

A: We are governed by the laws of this country not by individuals and their money. As an American citizen if you feel like you have been offended or

Q: And why is that?

A: Because, you know, if we didn't, if I didn't file, and if I didn't file and follow through, then the same things would keep happening. I'm trying to stop the behavior and the stuff that's been happening, that was happening to me, stop it and to make sure it doesn't happen to others.

Interview with Delores F.

⁴³² Interview of Sylvester H.

Q: Based on your experiences with the Commission, would you file a complaint with the Commission again if you ever felt as though you were being discriminated against?

A: Yes, I would.

Q: And why is that if you felt as though they were completely unhelpful in this go-around?

A: Because I would feel that my rights were being violated when I know that I'm not wrongfully wrong.

⁴³³ For a discussion of performativity, see for e.g., Judith Butler, *Bodies that Matter. On the Discursive Limits of Sex* (London: Routledge, 1993). A number of claimants, however, eschewed the notion that their filing had anything to specifically do with a black identity, claiming it was more related to their human or American identity. On this point, Darrell R. stated that she “would hope that regardless of what race [one is] anybody and everybody would fight for their rights.”

someone violates your civil rights or you are violated criminally, you have the right to be heard in court.

Q: ...Is [it] that you see this as a nation of rights so therefore you get to exercise your rights?

A: Exactly.

Q: Would it be fair to say then that part of the identity of being an American citizen is having certain rights that you can use to protect yourself against more powerful entities?

A: Exactly.

Q: Do you feel like filing your claim was related in any way to any of the civil rights movements or struggles of the past?

A: Yes, most definitely

Q: How so?

A: When you consider the work of King and Malcolm X and all the other civil rights activists who went out and tried to represent the common people, the average people. You have the right to vote or eat at a certain restaurant or ride the buses. It's important. I grew up during that era and I understand what that means today so when I see these things happen I know that you have to stand up to these situations. Otherwise if you don't confront it now it will continue. This country has a terrible history of discrimination against people of color or their religion.

Q: Did the importance of fighting for your rights relate in any way to the fact that you identify as African American?

A: Yes, in some ways.

Q: How so?

A: Based on the history of this country and the suffering and the hardship that African Americans went through particularly after slavery, during slavery... Anytime there is an injustice or violation of the rights it has to be confronted to make sure that these types of people don't continue to get away with it.⁴³⁴

In relating her filing to the past, Delores F. stated:

...My mother and father were raised, you know, their ancestors were slaves. They were mistreated. I want everyone just to be treated equally.... that's just the way I've always been raised.... I feel it's a continuation [of the civil rights movement] because of the fact that it's an ongoing fight. I mean every time it seems like, you know, it

⁴³⁴ Interview with Gerald S.

just doesn't stop. You know, we're always in a fight for something. You know, whether it's voting or whatever. It's always something And I feel as though being a black female I have to—we have to fight to keep our job.

Adrienne L. reported that her decision to file was related not only to the civil rights movements of the past and to her “identity as an African American citizen,” as she expressly described it, but also to the formative environment of her childhood. Listening to her parents and grandparents report their own experiences of growing up in a segregated south, sitting at “colored-only” lunch counters, and attending separate schools strongly shaped her. Adrienne even retold a story of an incident that occurred when she was ten: she and her father inadvertently drove into the middle of a Ku Klux Klan rally in South Carolina where she saw a burning cross, a memory she reported will forever be etched in her mind. For her, these experiences of racism – both shared and firsthand – related in some manner to her decision to file.

A majority of claimants subscribed to the importance of rights and saw it as one of the compelling factors that drove them to file their complaint. But what specific “rights” were they fighting for? For some, it was equal pay. For others, it was equal work conditions. But undergirding much of it, a majority of claimants indicated in some form or another that they were also fighting for equal human dignity.

VIII. THE POLITICS OF RECOGNITION

While one obvious evil of discrimination is the economic stagnation or dislocation it can produce, another significant harm involves the psychic injury that it causes its victims. Dating back to the 1840s, the harm caused by racial discrimination

was referred to as the “stigma of caste.”⁴³⁵ When the Supreme Court ruled “separate but equal” unconstitutional in *Brown v. Board of Education*, it relied heavily on plaintiffs’ sociological evidence. Specifically, Kenneth Clarke’s famous doll experiments factored heavily into the Court’s conclusion that discrimination could lead its victims to internalize feelings of racial inferiority. Political theorists such as Charles Taylor, Axel Honneth, and Nancy Fraser have described this stigma as a form of oppression and have argued for a corresponding politics of recognition to remediate its effects.

Honneth writes,

... We owe our integrity ... to the receipt of approval or recognition from other persons.... When individuals who see themselves as victims of moral maltreatment describe themselves, they assign a dominant role to categories that, as with ‘insult’ or ‘degradation,’ are related to forms of disrespect, to the denial of recognition.... Such behavior is injurious because it impairs these persons in their positive understanding of self – an understanding acquired by intersubjective means.⁴³⁶

Discrimination in the workplace can be a grievous form of non- or mis-recognition, and the injury caused by it can indeed be serious.⁴³⁷ Claimants with whom I spoke used words such as “violated,” “cheated,” “angry,” “upset,”

⁴³⁵ *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1850).

⁴³⁶ See Axel Honneth, “Integrity and Disrespect,” *Political Theory*, Vol. 20, No. 2, (May, 1992), 189-190. Taylor also explained.

...Our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being... Within these perspectives, misrecognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need.

See Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994). The politics of recognition is also derived from British psychoanalytic object relations theory, as developed by the famous object-relations theorist, D.H. Winnicott.

⁴³⁷ For a discussion of race discrimination, law, and the politics of misrecognition, see generally: Adeno Addis, “Role Models and the Politics of Recognition,” *University of Pennsylvania Law Review*, Vol. 144, No. 4 (Apr., 1996), 1425-1426.

“depressed,” “embittered,” “enraged,” “deserted,” “desperate,” “humiliated,” “outraged,” “inferior,” and “embarrassed,” to describe how their workplace experiences left them feeling.⁴³⁸

Sylvester H. had worked for 7 ½ years, performing clerical work at a major law firm in Philadelphia, Pennsylvania. He had always enjoyed his job, describing it as a “great opportunity.” He reported that his employer terminated him for leaving work five minutes early one day while other white employees had engaged in identical conduct without ramification. In describing his reaction to his discharge, he stated:

A: I was real beat down because I couldn’t understand why I would be terminated. For ... leaving five minutes early when I ... know other employees that I know personally were caught leaving two hours early...

Q: And how did your experience with the discrimination make you feel and how did you deal with that emotionally?

A: Not too good. Not too good at all. Because as I said, by being a loyal worker and then you get the hammer down like that man, that can change your whole outlook, man.

Q: And did it change your outlook?

A: Yes, it did. It made me feel, sometimes it made me feel real embittered, man. And other times, man, it just, it made me like emotionally aggressive, man. In terms of not hurting, not doing bodily harm to anybody, but what type of resource out here, what type of help I could get ... for this injustice that has been applied to my determination on firing.

Q: How did you emotionally deal with the discrimination?

⁴³⁸ Often, clients will come to my office and report feelings of overwhelming stress, anxiety, sleeplessness, crying fits, weight loss and/or gain, hair loss, nausea, social withdrawal, irritability, anger, depression and the like. Clients will miss time from work, start a course of psychotropic medication, and seek counseling. Social and clinical psychologists report similar consequences. *See for e.g.,* J. A. Soto, N. A. Dawson-Andoh, and R BeLue, “The Relationship between Perceived Racial Discrimination and Generalized Anxiety Disorder among African Americans, Afro Caribbeans and Non-Hispanic Whites,” *Journal of Anxiety Disorders*, Vol. 25, (2011), 258-265. In studying effects of racial discrimination, the authors note that it can lead to mental disorders that appear similar to battle fatigue, characterized by symptoms of “chronic worry,” “intrusive thoughts,” “headaches,” “fatigue,” and the like.

A: You know, in this society where you have to have a financial income, they can make you feel... it can make you have funny things run through your head. Man, it can make you feel desperate. It can make you feel angry. You know, it can make you feel deserted. You know, the consequences is not real good, man.⁴³⁹

Gerald S. had worked in the kitchen at Red Lobster. His employer discharged him for purportedly sexually harassing a white female waitress by giving her a sexually explicit note. Because the employer failed to ever produce the note, Gerald was able to secure unemployment compensation. At Red Lobster, Gerald reported that the wait staff, who were mostly in their twenties, constantly used sexually explicit language in their communications. There was also no evidence to suggest that Gerald had engaged in any sexually inappropriate conduct. In describing his feelings upon discharge, he stated,

I was upset, I was angry, I was angry, right, because I had demonstrated to them for two years that I was a loyal employee, you know, and as soon as I was accused of something, ok, he pretty much went with the statement of the white girl and you know, he didn't look at the total picture.... You know... I never had any infractions with anybody and ... he ignored explanations given to him or reasons.... Everybody deserves a measure of respect, man, you know, and a sense of humanity, you know. Everybody deserves it. I don't care who you are. You deserve that respect and to be considered as a human being. You don't deserve to be talked down to just because you don't have much, you understand what I'm saying?⁴⁴⁰

Delores F. stated that she felt “humiliated, embarrassed, [and] enraged” and she emotionally dealt with the experiences by going to “a psychiatrist and [getting] medicated.”

Given the degree of insult and the fact that most of the claimants had lost their jobs, a number of them reported filing their complaints without much fear of retaliation or retribution. They believed that their employer had treated them

⁴³⁹ Interview with Sylvester H.

⁴⁴⁰ Interview with Gerald S.

inequitably and that they were not going to be quiescent. For them, filing became a matter of human dignity and self-worth.⁴⁴¹

Q: Suppose you had decided to not file a claim with the Commission how do you think you would have felt about your decision not to file?

A: I would have felt inadequate, disrespect.

Q: Why would you have felt disrespect if you decided not to file?

A: Me personally, I demand my respect and I give respect. In this situation this guy was totally disrespectful to me and to others. It would have been totally disrespectful to me to let this guy to get away with some of the things. It had to deal with the job. It was personal, the way he talked down to me simply because he was the manager. I would have really felt disrespected if I didn't follow through on filing a complaint.⁴⁴²

Q: Was filing of the complaint related in any way to your sense of self-respect?

A: Yes.

Q: In what way?

A: Just that it would give you a sense of dignity and know that you are human and that there are laws put in place for reasons like this.⁴⁴³

To conclude, based upon the data that I collected, the experience before the Commission proves to be a wholly positive one for only a select few complainants. For most, it would appear that not only does the process lack any such positive meaning, but also can compound the sense of insult that the claimant experienced at the workplace. Indeed, some claimants explicitly reported feeling less empowered and more frustrated as a result of their filing and the ensuing Commission investigation. Nonetheless, the Commission does provide symbolic importance for most filers. The institution can serve as a space and an instrumental tool for claimants

⁴⁴¹ See for e.g.: Interviews with Sheila S., Gerald S., Natasha M., and Delores F.

⁴⁴² Interview with Gerald S.

⁴⁴³ Interview with Natasha M.

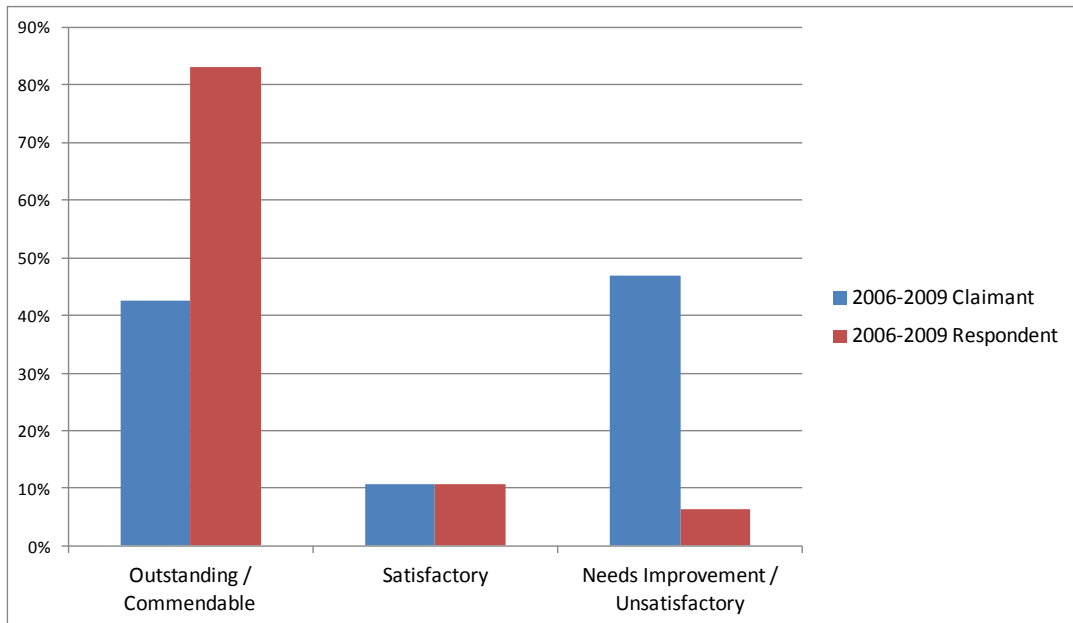
to utilize while standing up for themselves. A number of claimants extolled its importance in that respect. In that way, claimants are following a long historic American tradition of civil rights struggles. But unlike the Martin Luther King led movement of the fifties and sixties in which people came together to collectively fight for such rights, in the context of litigation, the process is atomistic. In fact, when I asked claimants to offer ways to solve the nation's racial problems, many viewed it as an individual fight. Only one suggested a way that would bring people together in some collective fashion. Without the Commission or a comparable institution to serve as safety valve for the state, what would workers do? Perhaps, there would be more collective political action seeking societal change. Ironically, the movement of the sixties, which was very social and communitarian, had an outcome that institutionalized a more individualistic approach to justice; it now may serve as an obstacle for the very broad based institutional change that it sought.

But it is important to recognize that the Commission does not necessarily serve as the last stop for those who litigate. Most claimants, regardless of outcome, can always file a federal or state lawsuit if they feel dissatisfaction with their outcome before the Commission. Thus, it is crucial to see how claimants fare once they move to the courts.

DISPLAY 20 – PAHRC CUSTOMER SERVICE QUESTIONNAIRE – QUESTION NO. 1

Question 1: How would you rate the overall quality of service provided by the PA Human Relations Commission (PaHRC) staff and or investigator assigned to the matter in which you were a party?

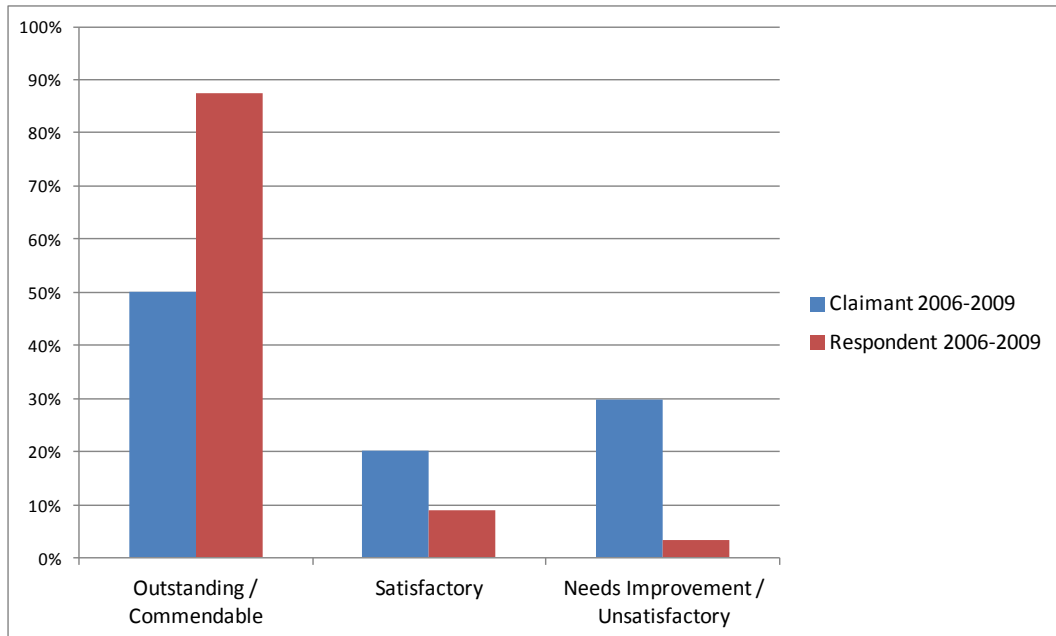
	Outstanding / Commendable	Satisfactory	Needs Improvement / Unsatisfactory
2006-2009 Claimant	43%	11%	47%
2006-2009 Respondent	83%	11%	6%



DISPLAY 21 – PAHRC CUSTOMER SERVICE QUESTIONNAIRE – QUESTION NO. 2

Question 2: How would you rate the level of courtesy you received from the PHRC staff?

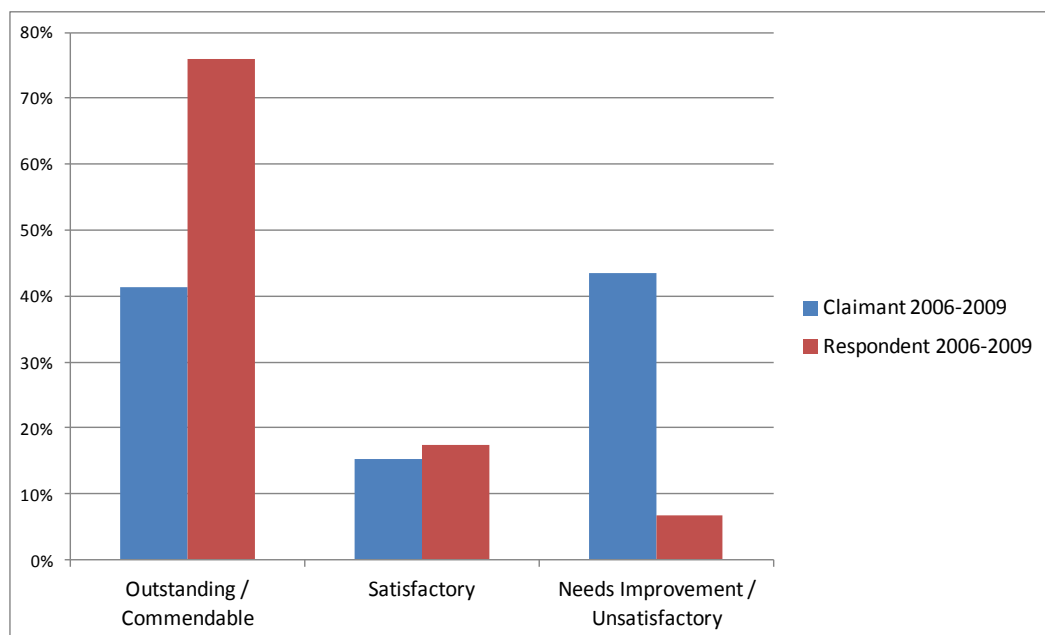
	Outstanding / Commendable	Satisfactory	Needs Improvement / Unsatisfactory
Claimant 2006-2009	50%	20%	30%
Respondent 2006-2009	88%	9%	3%



DISPLAY 22 – PAHRC CUSTOMER SERVICE QUESTIONNAIRE – QUESTION NO. 3

Question 3: How would you rate the promptness of service the PHRC staff provided you?

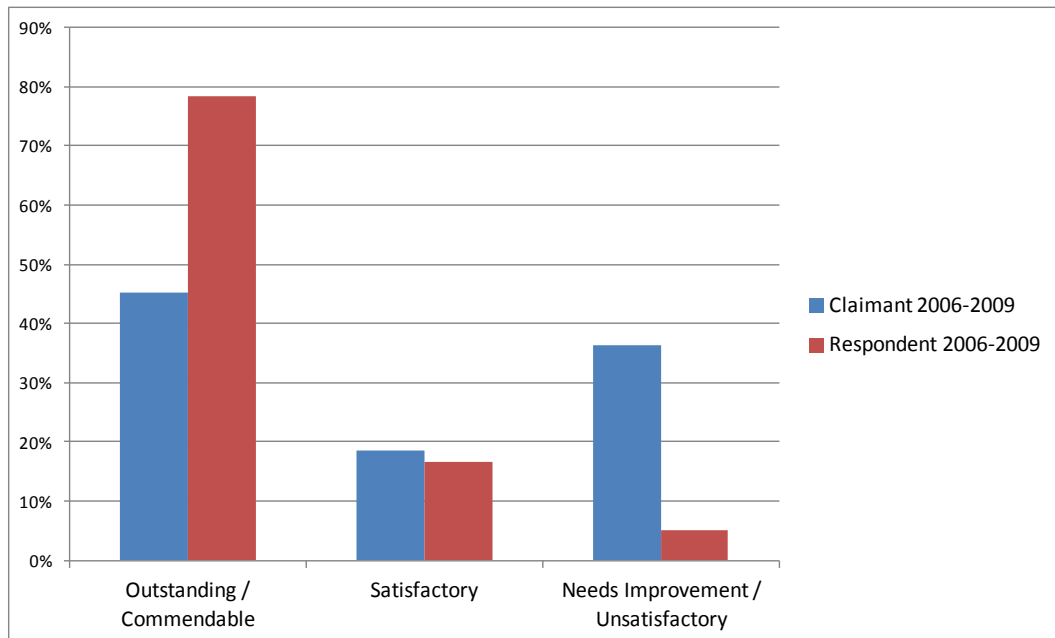
	Outstanding / Commendable	Satisfactory	Needs Improvement / Unsatisfactory
Claimant 2006-2009	41%	15%	43%
Respondent 2006-2009	76%	17%	7%



DISPLAY 23 – PAHRC CUSTOMER SERVICE QUESTIONNAIRE – QUESTION NO. 4

Question 4: How would you rate the clarity and quality of our formal letters and documents, as well as our communication in person and on the telephone?

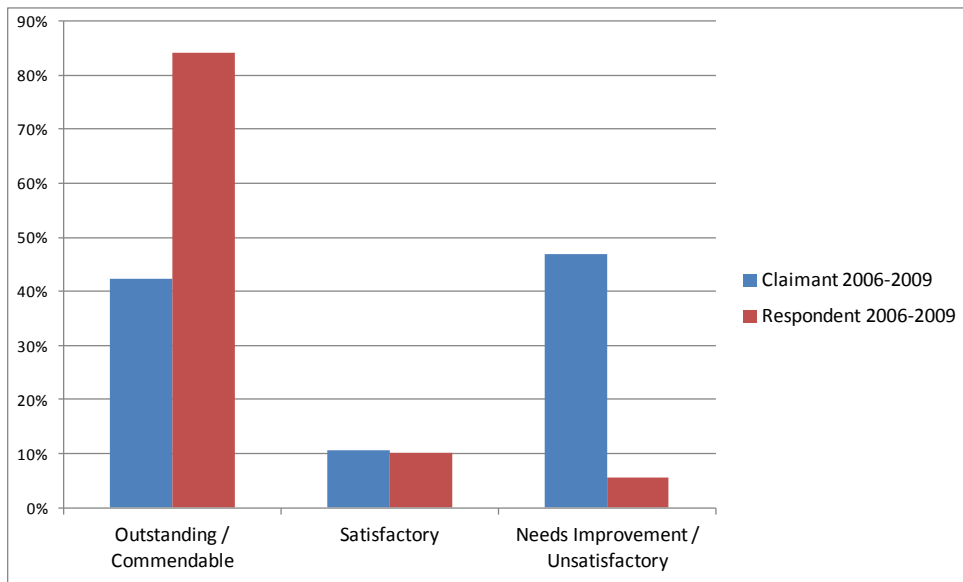
	Outstanding / Commendable	Satisfactory	Needs Improvement / Unsatisfactory
Claimant 2006-2009	45%	18%	36%
Respondent 2006-2009	78%	17%	5%



DISPLAY 24 – PAHRC CUSTOMER SERVICE QUESTIONNAIRE – QUESTION NO. 5

Question 5: How well did the staff understand the issues raised in the matter in which you were a party?

	Outstanding / Commendable	Satisfactory	Needs Improvement / Unsatisfactory
Claimant 2006-2009	42%	11%	47%
Respondent 2006-2009	84%	10%	6%



DISPLAY 25 – PAHRC CUSTOMER SERVICE QUESTIONNAIRE – QUESTION
NO. 6

Question 6: Did you feel the Commission conducted a fair and impartial investigation?

	Yes	No
Claimant 2006-2009	49%	51%
Respondent 2006-2009	95%	5%

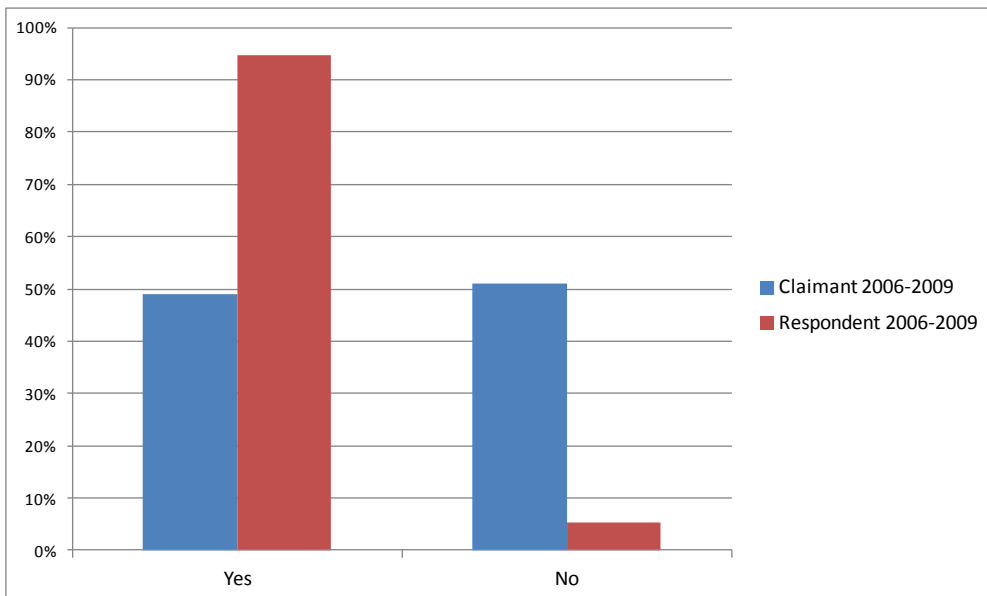


Table 6 – List of Interviewed PaHRC Claimants

<u>Cl.'s Name</u>	<u>Sex</u>	<u>Work</u>	<u>Age</u>	<u>Voted in past election</u>	<u>PaHRC outcome</u>	<u>Education</u>	<u>Marital/parental status</u>
Dallus	M	Fork lift operator	40	Yes	NPC	HS graduate	Single (4 children)
Eugene	M	Plumber	65	Yes	Lost at public hearing	HS graduate	Single (3 children)
Terry	M	Commercial driver	43	Yes	PC and settlement	Some community college	Married (2 children)
Delores	F	Correctional Officer	50	Yes	NPC	3 years college	Single (1 child)
Stephanie	F	Service Profession	36	Yes	PC and settlement for full amount of economic harm	Some college	Single (2 children)
Adrienne	F	Social worker	40	Yes	PC and settlement	BA/some graduate school	Single (1 child)
Gerald	M	Service worker	55	Yes	NPC	Associates degree	Single (7 children)
Darrell	F	Office job	40	Yes	PC and settlement	Some college	Single (0 children)
Jill	F	Correctional Lieutenant	47	Yes	PC, hearing, waiting for decision	Associates degree	Single (4 children)
John	M	Sales	65	Yes	NPC	High School	Married (3 children)
Sheila	F	School Bus Driver	58	No	Settlement	Some college	Single (0 children)
Kenneth	M	Janitorial Services	60	Yes	NPC	GED	Married (5 children)
Sylvester	M	Clerical	57	Yes	Settlement	College	Single (3 children)
Natasha	F	Admin. Assistant	29	Yes	NPC	HS	Single (2 children)

Chapter 8 – Between an Administrative Rock and a Judicial Hard Place: From the Pennsylvania Human Relations Commission to Federal Court

I. INTRODUCTION

Individuals who pursue claims under either the 1964 civil rights act or the PaHRA must preliminarily exhaust their administrative remedies. In Chapters 5, 6 and 7, we examined the effectiveness of one such agency, the PaHRC. As we saw, with some notably limited exceptions, the outcomes for most complainants before the PaHRC appear fairly bleak. But for a variety of reasons, an administrative agency is not necessarily the last stop in the litigation process. Rather, for a party intent on pursuing a claim, the complainant always has the option of proceeding to court for a *de novo* review of a “no cause” disposition.

As a result, to fully understand the usefulness of this type of civil rights litigation, it is necessary to provide some analysis regarding the typical outcomes a plaintiff may receive before the judiciary. Chapter 8 attempts to do just this by examining several factors. First, we look at the plaintiffs’ capability to meaningfully access courts of law. Second, we examine the plaintiffs’ likelihood of reaching trial. Third, we analyze the plaintiffs’ success rates at trial and the size of verdict awards. Fourth, we look at plaintiffs’ success rates on appeal. Finally, we engage in a preliminary exploration of settlement information.

Taking these criteria into account, as we will see, the story at the judicial level is a bit more complicated than the one that emerged out of the PaHRC proceedings. While historically, litigation yielded some important achievements, today, outcomes appear relatively inauspicious. First, job discrimination plaintiffs face restricted court access, as it can be extremely difficult to find an attorney willing to prosecute his/her

claims. Second, even after obtaining an attorney, these putative plaintiffs frequently face courts that are skeptical to their claims if not outright hostile. Indeed, plaintiffs lose a significant percentage of their cases through court-adjudicated, pretrial dispositions. Third, even when plaintiffs make it to trial, recent studies show that employment discrimination plaintiffs succeed only around 25% of the time, and African American race discrimination plaintiffs in the employment context fare the worst, winning about 15% of their trials. Fourth, even when federal employment discrimination plaintiffs win at trial, there appears to be a 40% chance that the appeals court will reverse their verdicts. Finally, regarding settlements, it would appear that African American race discrimination plaintiffs fare the worst, although there is insufficient empirical knowledge to draw any firm conclusions regarding the value of settlements, which comprise a large percentage of court dispositions. But among this cloudy news, there remains one important silver lining. For those few job discrimination plaintiffs who win at trial, the verdicts can be substantial.

II. METHODOLOGY

The information for this chapter comes from two primary sources. First, I reviewed existing studies that examine case outcomes in federal, and to a more limited extent, state court. Second, to further understand these outcomes, I considered data derived from semi-structured interviews that I conducted with twenty-three attorneys who specialize in the area of civil rights, and sixteen current and former federal judges.

I considered several factors in selecting attorneys to interview. First, given that I am assessing racial patterns in the United States northeast region by looking at

civil rights litigation in Philadelphia, I generally limited my interviewees to practicing Philadelphia attorneys. But, in certain circumstances, I ventured outside of Philadelphia to speak to certain litigators based upon their extensive civil rights legal experiences. These included individuals such as Jack Greenberg, Esq., formerly of the Legal Defense Fund, and Cyrus Mehri, Esq., of the law firm Mehri & Skalat. As the former director of the Legal Defense Fund, Mr. Greenberg argued forty cases before the United States Supreme Court and has litigated countless other civil rights matters throughout the United States. Mr. Mehri is considered to be one of the preeminent employment discrimination attorneys in the country, having litigated such landmark class action employment discrimination cases as the Texaco discrimination lawsuit and the Coca Cola discrimination case.

Second, I attempted to obtain a range of perspectives by speaking to both plaintiff and defense attorneys. Of the twenty-three attorneys that I interviewed, about one third of them have represented the defendants.

Third, I attempted to single out well-known employment discrimination/civil rights attorneys in the Philadelphia region. In Philadelphia, I interviewed prominent civil rights attorneys. Most of these attorneys specialize in employment discrimination work. But some practice in other civil rights areas.

David Rudovsky, for example, is a professor of law at the University of Pennsylvania Law School and considered by many to be one of the deans of Philadelphia's civil rights bar. He specializes in the area of police abuse and prisoners rights. A MacArthur Genius Grant recipient, Mr. Rudovsky has argued several civil rights cases before the United States Supreme Court. David Kairys, a Professor at Temple Law School, has written a number of important books and articles on the civil rights practice. Alan Epstein litigated the case that became the

basis for the Oscar award winning movie, *Philadelphia*, starring Tom Hanks and Denzel Washington. Barbara Ransom is a civil rights attorney, formerly with the Public Interest Law Center of Philadelphia (PILCOP), who litigates discrimination cases based primarily on race and disability. She is also a former staff attorney for the PaHRC.

I also interviewed well-known employment discrimination defense attorneys. For example, Jane Dalton is a former Chancellor of the Philadelphia Bar Association, served as the chairperson of the City of Philadelphia's Police Advisory Commission, and represents employers in employment discrimination case. Charisse Lillie, Esq., is an executive at Comcast Corporation. Before Comcast, Ms. Lillie served as chair of the employment and labor group at Ballard Spahr and was frequently discussed as a potential federal court judicial nominee.

As I conducted interviews, attorneys also suggested to me others whom I might interview, which widened my net. Of the lawyers that I interviewed, seventeen of them spend more than half of their professional time litigating in the area of employment discrimination.

In some instances, I have worked on cases with several of these attorneys. For example, I joined forces with Mr. Mehri on a putative employment discrimination class action lawsuit against Johnson & Johnson. That case alleged that Johnson and Johnson and all of its operating subsidiary companies had systematically discriminated against African Americans and Hispanics in its hiring and promotional practices. Ms. Ballard, Mr. Finch, and I, along with several other attorneys served as counsel of record in representing the Philadelphia City Council against the Commonwealth of Pennsylvania for its allegedly illegal takeover of the Philadelphia School District. Mr. Rudovsky is a former law school professor of mine and is

someone with whom I have repeatedly consulted regarding my own civil rights practice. But this was my first time meeting several of the attorneys included in the list, even though I was generally familiar with their reputation in the field. Among others, this included Sidney Gold, Esq., Alan Epstein, Esq., Stephen Gold, Esq., Stephen Console, Esq., Harold Goodman, Esq., and Kevin Lovitz, Esq.

Table 7 lists the attorneys by name, along with (1) law firm affiliations, (2) year of bar admission, (3) the side on which they practice, and (4) their race.

[Table 7 about here]

All interviews were digitally recorded. As for the substance of the interviews, I asked the following types of questions.

- What role, if any, can litigation serve to promote progressive political or social causes?
- What role, if any, can litigation serve to fight against societal racism or discrimination
- What deterrent effect can civil rights laws and litigation have?
- What are the institutional strengths and limitations of civil rights litigation to serve as a force for progressive political and social change
- What are the impediments that prevent civil rights litigation from achieving its stated aims?
- Are there ways to change the way we litigate cases so that it serves as a more effective tool?
- What impact does litigation have on your clients – both positive and negative?
- Are there other more effective ways to address discrimination?
- How do plaintiffs fare in pretrial motions?
- How do plaintiffs fare at trials?
- How do plaintiffs fare on appeal?

- How do plaintiffs fare in settlements?⁴⁴⁴

I interviewed sixteen prominent active and/or retired federal judges to assess their opinions regarding the role of courts in serving as institutions for progressive political and social change. A partial list of these judges includes: Former Chief Judge John Gibbons of the Third Circuit Court of Appeals, Former Chief Judge Dolores Sloviter of the Third Circuit Court of Appeals, Chief Judge Theodore McKee of the Third Circuit Court of Appeals, Former Judge Timothy Lewis of the Third Circuit Court of Appeals, Judge Damon Keith of the Sixth Circuit Court of Appeals, former Chief Judge Jack Weinstein of the Eastern District of New York, former Chief Judge James Giles of the Eastern District of Pennsylvania, Judges Louis Pollak, Norma Shapiro, Stewart Dalzell, Bruce Kaufman, Cynthia Rufe, and Gene Pratter of the Eastern District of Pennsylvania.

Table 8 lists the judges by name, including (1) the court on which they sit, (2) their tenure on the bench, (3) their appointing president, and (4) their race.

[Table 8 about here]

As table 8 demonstrates, of the judges that I interviewed, five either currently serve or used to serve at the federal appellate court level. Of those appellate judges, three are currently active and two are retired. Of the appellate judges, four are men and one is a woman. Of the four male appellate judges, three are African American. Of the appellate judges, two served as chief judge and one is currently serving as chief judge of the Third Circuit Court of Appeals. I also interviewed nine current or former district court judges and/or magistrate judges. Of the district court judges, two are retired. Of the judges, one is Hispanic and one is black. One of the judges served as

⁴⁴⁴ A full list of the questions that I asked can be found in the Appendix.

the former chief judge for the Eastern District of Pennsylvania and one served as the former chief judge of the Eastern District of New York. Two are current federal magistrate judges and one is a former magistrate judge who now serves as a private mediator. Three are active senior judges. Both Judges Pollak and Weinstein were part of the legal team in *Brown v. Board of Education*. Of the district court judges, two are women. My primary method for selecting judges was to send out requests to those judges on the Eastern District of Pennsylvania or to appellate judges who sat on the federal appeals court that was located in Philadelphia. I requested interviews from judges who I thought might be receptive based on their reputation and on recommendations from other judges. With the exception of Judge Shapiro and Judge Restrepo, who would not so consent, all interviews were digitally or taped recorded.

As for the judges whom I interviewed, I asked questions that were designed to primarily address the following areas of inquiry:

- What is the role of courts and the judiciary, if any, in serving as an institution for progressive political and social change?
- What types of factors prevent courts from serving in that kind of role?
- How does public sentiment impact what courts do?
- Do civil rights laws work more effectively depending upon the type of defendant involved?
- Have courts become more or less hospitable to civil rights claims or employment discrimination claims over the years?
- What is the role of the judiciary, if any, in eliminating societal racism?
- Can or should courts do more?
- Why do employment discrimination plaintiffs appear to fare so poorly in trials and on appeal?
- Are courts sufficiently diverse and if not, does that have implications for civil rights issues?

- What is the role of courts, if any, in facilitating empowerment for litigants?

III. THE EARLY DAYS OF EMPLOYMENT DISCRIMINATION LITIGATION

A distinction must be drawn between the efficacy of the early employment discrimination litigation of the 1960s, 1970s, and even 1980s and such litigation today. As noted in Chapter 3, the PaHRA and Title VII were passed against the backdrop of overt intentional discrimination. Following the passage of these laws, intentional discrimination continued to take place. But alongside it, firms around the nation began adopting a variety of facially, race-neutral policies, such as intelligence and other forms of testing, that had the effect of curtailing African American gains in hiring and in other employment opportunities.⁴⁴⁵ Some advocates claimed that occupational testing afforded employment decisions the façade of scientific legitimacy that served the twin purpose of giving the pretense that employers had hired the best workers while also seemingly insulating them from claims of discrimination.⁴⁴⁶

⁴⁴⁵ See, e.g., Barholet, Elizabeth, "Application of Title VII to Jobs in High Places," *Harvard Law Review*, Vol. 95, No. 5 (Mar., 1982), pp. 945-1027 at 983 (noting that by the early 1970s, a Senate and House report both observed that the "central problem of employment discrimination was one not of overt discrimination, but of covert bias and of systematic exclusion of blacks from certain jobs by facially neutral criteria"); Rosenthal, Albert, "Employment Discrimination and the Law," *Annals of the American Academy of Political and Social Science*, Vol. 407, Blacks and the Law (May, 1973), pp. 91-101 (noting that while overt discrimination against minorities rapidly diminished, in its place, companies adopted standardized testing which had a comparable effect in limiting employment opportunities). See also Blumrosen, Alfred, "Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination," *Michigan Law Review*, Vol. 71, No. 1 (Nov., 1972), pp. 59-110; "Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964," *Harvard Law Review*, Vol. 84, No. 5 (Mar., 1971), pp. 1109-1316 (reporting that the Psychological Corporation found that approximately 90% of Fortune 500 companies bought different types of psychological tests to administer occupationally, and that a 1963 survey found that 84% of responding firms utilized personnel tests of some sort in connection with its hiring and promotional decision-making).

⁴⁴⁶ See, e.g., "Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964," *Harvard Law Review*, Vol. 84, No. 5 (Mar., 1971), pp. 1109-1316.

Critics charged that these practices were either purposefully adopted to limit employment opportunities for African Americans or unintentionally had a discriminatory impact.⁴⁴⁷ Regardless of their motivating spirit, a body of research demonstrated that minorities tended to significantly underperform on such testing. As a result, occupational testing had the effect of stalling employment advancements for minorities.

Starting as early as the 1960s but gaining considerable steam in the 1970s, private civil rights litigators began to challenge the legality of these testing regimes under the fair employment laws.⁴⁴⁸ In Pennsylvania, a number of civil rights attorneys, such as individuals from the Public Interest Law Center of Philadelphia and Community Legal Services of Philadelphia began filing landmark lawsuits that forced both municipal and private employers to alter their employment practices to eliminate not only intentional discrimination but facially neutral policies that had a disparate impact on minority employees.⁴⁴⁹

⁴⁴⁷ See, e.g., Blumrosen, Alfred, "Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination," *Michigan Law Review*, Vol. 71, No. 1 (Nov., 1972), pp. 59-110 at 64 (noting that "[t]ests and educational requirements were adopted extensively in the early 1960's to achieve th[e] result ... [of] perpetuat[ing] the subordinate position of black workers.... The tests could be justified as 'sound' personnel practices and would also permit an employer to continue the subordination of minorities.").

⁴⁴⁸ See, e.g., Haney, Craig and Hurtado, Aida, "The Jurisprudence of Race and Meritocracy: Standardized Testing and 'Race-Neutral' Racism in the Workplace," *Law and Human Behavior*, Vol. 18, No. 3, Race, Ethnicity, and the Law (Jun., 1994), pp. 223-248 (noting that much of contemporary civil rights litigation in the employment context involved challenges to company use of testing to make employment decisions).

⁴⁴⁹ In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975), the Supreme Court held that testing, even if neutral on its face, is impermissible where it causes a disparate impact upon a protected group unless shown, by professionally acceptable methods, to be 'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" The ability to job relevancy is subject to fairly specific regulations promulgated by the EEOC, the Civil Service Commission, and the Departments of Labor and Justice. See 29 C.F.R. Section 1607 (1986). See also *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (invalidating "general intelligence" and "aptitude" testing).

The following three cases highlight the importance of civil rights litigation during this time period and what it helped to accomplish.

In 1970, the Commonwealth of Pennsylvania and the Department of Justice had issued a report demonstrating that the percentage of black appointments to the Philadelphia police department had dropped from 27.6% in 1966 to 7.7% in 1970 after hiring decisions had been transferred from the Civil Service Commission to the police department. As a result, PILCOP and others filed a class action lawsuit on behalf of the affected individuals, charging the City with racially discriminatory hiring and promotional practices in its police department.⁴⁵⁰ Ultimately, the court ruled in favor of the plaintiffs and ordered the City to take a series of remedial measures, including requiring it to adopt a minority recruitment program to increase the pool of black applicants, to consult with outside experts to ensure that certain facially neutral hiring procedures did not have a disparate impact upon black applicants, to implement other fair hiring and promotional practices, and to hire hundreds of additional black police officers to remediate the effects of past discriminatory practices. Today, the City of Philadelphia has policies in place that ban racial discrimination. As a result of this and ensuing civil rights lawsuits directed at the Philadelphia police department, African Americans now comprise 35% of the Philadelphia police force.⁴⁵¹ Further, African Americans have risen through the ranks in Philadelphia to become its “top cops.”

Another notable example illustrating what litigation has helped to accomplish involves the Pennsylvania State Police. In 1973, a class of African American applicants and state police officers filed suit against the Pennsylvania State Police,

⁴⁵⁰ See *Commonwealth of Pennsylvania v. O'Neill*, 348 F. Supp. 1084 (E.D.Pa.1972).

⁴⁵¹ http://www.cleveland.com/nation/index.ssf/2009/07/black_officers_sue_philadelphi.html.

alleging discrimination in hiring and promotions.⁴⁵² A federal district court summarized the evidence as follows:

From 1905 to 1956 the Pennsylvania State Police had no black troopers.⁴⁵³ By the time this action was commenced [in 1973], there were only sixty-two (62) minorities employed by the State Police out of a total complement of 4,173. While minorities comprised 10.8% of all employees of the Commonwealth of Pennsylvania, they constituted merely 1.48% of the Pennsylvania State Police force. Moreover, of the sixty-two minorities on the Force at the time the suit was brought, sixty were relegated to the lowest rank, that of trooper. Once additional evidence of racial discrimination was revealed by discovery, defendants stipulated that the Commonwealth was aware of the problem. The stipulation said further that certain defendants had attempted to remedy the discrimination but had encountered resistance from the State Police.⁴⁵⁴

At the conclusion of a three week trial, the court entered an order that required the Pennsylvania State Police to create and implement non-discriminatory hiring and promotions standards and policies. The court also ordered one third of each future incoming Cadet classes to be comprised of qualified minorities and for there to be one qualified minority promoted for every three white officers. Thereafter, when the State Police began to engage in obstruction, the court modified its order to require the State Police to actually employ one qualified minority for each white hire and to promote one qualified minority for every two qualified white police officers it promoted. Over time, the number of black officers comprising the State Police rose precipitously, at some point, almost matching the percentage of African Americans populating the state. Harold Goodman, Esquire, the attorney who litigated this case, opined that this lawsuit served as the catalyst in forcing the state police to hire and promote black

⁴⁵² See *Bolden v. Pennsylvania State Police*, Civ. A. No. 73-2604 (E.D. Pa. 1973).

⁴⁵³ As a testament to the importance of civil rights laws, we can see that almost immediately after the Commonwealth passed its fair employment practices act in 1955, the State Police began to integrate its force.

⁴⁵⁴ *Bolden v. Pennsylvania State Police*, Civ. A. No. 73-2604, 491 F. Supp. 958 (E.D. Pa. 1980).

officers when nothing else proved effective in overcoming its intransigence to racial integration. As Harold Goodman described it:

I brought that lawsuit in 1973. [At that time,] there were 4100 members of the PA State Police and less than 50 [of them] were black and all were [employed at] the lowest levels. So it was a public agency with a long history of race discrimination, overt race discrimination so that lawsuit was brought as a class action and it [lasted] over many years, with long trials, that alone had at least ten appeals to the Third Circuit [Court of Appeals] which we won. [We] ... ended up with roughly 600 minorities in the state police. And one of my greatest joys was [when] one of the sixteen named plaintiffs in the class action – [a] Ronald Sharp – ultimately became the first black state police commissioner of PA.

It is hard to gainsay the importance of litigation to integrating the Pennsylvania State Police Department.

In 1976, in *Green v. U.S. Steel*, Civ. A. No. 76-3673, plaintiffs brought a class action lawsuit on behalf of approximately 13,000 black job applicants against U.S. Steel, alleging, *inter alia*, race discrimination in its hiring practices in the production and maintenance department at one of its plants arising out of its allegedly overly subjective hiring practices.⁴⁵⁵ After a several month long trial, the court found in favor of the plaintiff class and awarded both injunctive relief to address the discrimination and \$42.5 million in back pay and other damages. As far as the scope of the injunctive relief was involved, the court ordered that U.S. Steel take a number of remedial measures to address racial disparities in its workforce, including publication of job notices in newspapers of general circulation and on radio, the enjoinder of subjective employee selection criteria unless validated by the Equal Employment Opportunity Commission's "Uniform Guidelines on Employee Selection Procedures 1978," fair employment practice training for the company's hiring personnel, and various other measures. To ensure defendant's accountability, the court also ordered the company to maintain hiring records for a minimum of five

⁴⁵⁵ *Green v. U.S.*, 640 F. Supp. 1521 (E.D. Pa. 1986).

years and to furnish annual reports for a ten year period to both the court and plaintiffs' counsel regarding its hiring practices, with the court maintaining jurisdiction over the case until at least 1996 to ensure compliance with its order.

It is hard to gainsay the importance of litigation in integrating these and other employment institutions both in Pennsylvania⁴⁵⁶ and more generally across the nation.⁴⁵⁷ For example, in the employment sector, between 1966 and 1978, the number of blacks and Hispanics in manufacturing rose by 82%, while total employment increased by only 10%.⁴⁵⁸ Scholars hold litigation directly responsible for some of those gains.⁴⁵⁹

The successes of these types of lawsuits remain one of the enduring legacies of employment civil rights litigation and serve to refute the claims of those who criticize litigation as ineffective. Reflecting upon how successful the civil rights laws

⁴⁵⁶ See also *Freeman v. City of Philadelphia*, 751 F. Supp. 509 (E.D.Pa.,1990) (through consent decree, court enjoined use of written examinations to hire police officers due to their racially discriminatory impact on African Americans); *Com. of Pa. v. Local Union 542, Intern. Union of Operating Engineers*, 488 F. Supp. 988 (E.D. Pa. 1979) (requiring that union that had engaged in discriminatory practices be required to admit one minority to union for each nonminority admitted until percentage of minority members in a given district equaled the percentage of minorities in the community, as well setting numerical requirements for referrals of minority workers to jobs and for the number of hours worked by minorities); *Equal Employment Opportunity Commission v. American Tel. & Tel. Co.*, 419 F. Supp. 1022 (E.D. Pa. 1976) (court validated the use of an affirmative action program to remediate past discrimination).

⁴⁵⁷ See, e.g., *Arrington v. Massachusetts Bay Transit Authority*, 306 F. Supp. 1355 (D. Mass. 1969) (invalidating the use of generalized aptitude tests by the Massachusetts Transit Department that had a disparate impact upon black applicants); *Penn v. Stumpf*, 308 F. Supp. 1238 (N.D. Cal. 1970) (questioning the validity of a test that had a differential impact upon black applicants to the Oakland Police Department); *Hicks v. Crown Zellerbach Corp*, 310 F. Supp. 536 (E.D. La. 1970) (invalidating company utilization of the Wonderlic test, an employee aptitude test); *United States v. Household Finance Corp.*, 1972 WL 143 (N.D. Ill. Feb. 29, 1972) (invalidating company's use of general intelligence and aptitude testing as a basis for employment decision-making unless "differentially validated" by the EEOC's *Guidelines on Employment Selection Procedures*); *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973) (holding as a violation of Title VII Georgia Power Company's practice of using aptitude testing where it had the effect of excluding black applicants from hiring and promotions).

⁴⁵⁸ Jonathan S. Leonard, "Antidiscrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII, and Affirmative Action on Productivity," *The Journal of Human Resources*, Vol. 19, No. 2 (Spring, 1984), 145.

⁴⁵⁹ *Ibid.*

were at diminishing the degree by which employers banned minorities from entering their workforces, one defense attorney who I interviewed, observed:

[P]rior to 1964 you could look in the ads and it would say, ‘no male black,’ ‘no female black,’ ‘no old people need apply.’ There was an amazing change that occurred overnight in 1964. Now we are X years later but people know they can’t do those things. They may still have their personal preferences but none of my clients ever say to me I don’t want any blacks here. It never happens anymore. I hear the clients always say to me this is a really dumb claim. I hired the person. I knew he was black... Her firing had nothing to do with [her] being black It’s because they came in late. They *didn’t* do their job. They stole from me [or] whatever. I think people are really aware of the law, and they try to follow it.⁴⁶⁰

In reflecting upon how civil rights litigation changed the face of discrimination, another defense attorney stated:

[T]here were companies that didn’t hire any minorities or they hired one minority ... [and] the numbers were much smaller than the applicant pool. I think there were companies that permitted explicit conduct that would be considered to be racial harassment now and I think there’s been much more sensitivity to that and so I think the number of cases where you have ... clear-cut ... acts of discrimination are less. And I’d say that’s true across the board.⁴⁶¹

In fact, in commenting upon the changing nature of employment discrimination, Homer Floyd, the Executive Director of the PaHRC, noted that in the 1960s and 1970s, the types of claims that predominated involved charges of failure to hire. But now, the primary employment discrimination claim involves discriminatory discharge. He and others have also observed that the face of discrimination has changed from blatant to subtle. While this is one of the success stories of employment discrimination, it has clearly impacted litigation’s ability to redress it.

⁴⁶⁰ Interview with Larry Besnoff, Esq.

⁴⁶¹ Interview with Jane Dalton, Esq.

IV. CONTEMPORARY EMPLOYMENT DISCRIMINATION LITIGATION

A. Access to Courts

Unlike the PaHRC both historically and today, which was structured to permit employees to proceed *pro se*, the formal judicial system is not designed for that. There are simply too many procedural pitfalls for even the most sophisticated plaintiffs, who lack the requisite legal training or experience, to successfully navigate it alone.⁴⁶² But because an employee may encounter significant difficulty in finding a willing attorney to take on his or her cause, the process of securing legal representation can serve as a major impediment, preventing upwards of 95% of potential plaintiffs from meaningfully accessing the courts.

In Philadelphia, plaintiff-side employment discrimination attorneys generally utilize some iteration of one of three fee structures in representing job discrimination plaintiffs. First, they may charge on a straight hourly basis. In Philadelphia, plaintiff attorneys can bill \$250-\$450 per hour. Generally, terminated employees cannot afford these high rates. In fact, the typical case from intake through trial could result in anywhere between \$100,000-\$300,000 in billable time and costs. As a result, only the most financially well off plaintiffs can agree to this type of arrangement.

The second fee model involves something that is purely contingent, that is, the attorney is only paid if there is a recovery through settlement, judgment, or award. In this second scenario, the attorney will front the litigation costs and will typically receive either 33% or 40% of the total monetary recovery as payment. For obvious

⁴⁶² According to Clermont and Schwab, while there has been an increase in the number of *pro se* plaintiffs over time, the overall number still remains marginal. Kevin Clermont & Stewart Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court," *Journal of Empirical Law Studies*, Vol. 1, No. 2, (2004), 455 fig.12.

reasons, this arrangement may be attractive to a potential client as there are no upfront, out-of-pocket expenses. However, under this arrangement, putative plaintiffs will face difficulty in finding an attorney to prosecute their claims unless the case is very strong – in the sense that the plaintiff has sufficient evidence to support the claim and the damages are significant to merit the attorney’s investment risk threshold. But as we have seen in earlier chapters, most race discrimination cases are anything but easy. As a result, it frequently proves difficult for potential plaintiffs to convince an attorney to take on their case, and accordingly, there is a scarcity of attorneys who are willing to represent putative plaintiffs based purely on a contingency model.⁴⁶³

Finally, the third typical fee model involves some hybrid of the first two. The benefit of such an arrangement - in which the attorney may charge, for example, a fraction of his billable rate and take a smaller percentage of the total recovery, with the client also paying for the out-of-pocket litigation costs⁴⁶⁴ -- is that it spreads the

⁴⁶³ For example, one very seasoned attorney stated that when a client cannot afford to pay, he attempts to refer the case to another attorney but that “very few lawyers ... will take a case on a contingent fee basis.” Interview with Frank Finch, Esq.

⁴⁶⁴ In typical employment discrimination cases, the litigation costs are variable but can prove costly. In any given discharge case, the plaintiff may need an economist to opine about wage loss, which in my experience, typically runs from between \$1000-\$2000 for a report. If the case proceeds to trial and the economist must testify, an additional \$1000-\$2000 can be expected. If the plaintiff suffered emotional injury, the plaintiff may also require a report from a psychologist or psychiatrist. In my experience, depending upon the expert, a report can typically cost between \$500-\$2000, depending upon if one uses the plaintiffs’ treating provider or a specially retained expert. If the case proceeds to trial and the expert must therefore testify, the cost can typically range from between \$1000-\$4000. Depositions are also costly. Typically, there may be a number of depositions, usually no less than two and frequently many more. Depositions are charged by the line and depending upon the length of the deponent’s testimony, routinely may cost anywhere from between \$200-\$500 apiece. Then, there are incidental costs. There is a charge for filing the complaint, serving the complaint, postage, copies, etc. Finally, if the case proceeds to trial and the plaintiff ends up losing, the defendant can file a bill of costs against the plaintiff for certain recoverable expenses, such as copy, postage, trial transcripts and other incidental costs. In one study, Parker found that the average bill of costs charged to losing plaintiffs in a study of 112 employment discrimination trials was approximately \$7500. Wendy Parker, “Juries, Race, And Gender: A Story Of Today's Inequality,” *Wake Forest Law Review*, Vol. 46, (2011). With electronic discovery now fashionable and defendants hiring outside firms to collect and produce such discovery, we can expect bills of costs to increase. See *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 2011 WL 1748620 (May 6, 2011 W.D.Pa.). In *Race Tires*, the court upheld a bill of costs of \$246,101.41 that was taxed against the losing party.

risk of loss between the parties. But even this arrangement may end up costing the plaintiff tens of thousands of dollars without any accompanying guarantee of success. As a result, not many plaintiffs can afford to enter into this type of fee agreement either.

One attorney related the following story regarding the potential risk involved for clients who decide to litigate their employment discrimination cases in court:

I had [a case] some years ago ... in which the Commission found no probable cause. It was a case of a woman who was head of the pre-admission testing lab at Einstein Medical Center who had a race/sex discrimination claim in terms of promotion and pay, and the Commission found against her and I took the case and I took it to [federal] court. It was before [Judge] McGlynn.⁴⁶⁵ ... I used to have some real battles with Judge McGlynn. I used to have to take him up to the Third Circuit [Court of Appeals]....[M]y client ... was paying me and in the middle of the case she ran out of money. So I said [to her] 'well you are going to run out of a lawyer [too].' So, she sold her house in order to fund the case. So there was a lot riding on this case. When the jury came in finding in her favor on all counts, I sat there and cried like a baby right in front of everybody.⁴⁶⁶

Given these realities, in my practice, I end up representing less than 5% of putative employment discrimination plaintiffs who seek to retain my services.⁴⁶⁷

Many of the remaining 95% of aspiring litigants may very well have been subjected to illegal workplace discrimination. But when I assess cases, I make a rather quick cost-risk calculation and the overwhelming majority of the time I determine that the case either appears too hard to prove or the damages are too small to merit my time.

Plaintiff attorneys with whom I spoke generally confirmed that they end up representing a comparably small percentage of the total number of inquiries that they

⁴⁶⁵ Judge Joseph McGlynn, Jr. was a Nixon appointee and earned a reputation as a conservative, defense-oriented judge.

⁴⁶⁶ Interview with Frank Finch.

⁴⁶⁷ During the first half of 2011, I received approximately 70 inquiries from potential job discrimination plaintiffs. I ended up agreeing to represent less than five of those individuals. In most of these cases, I do end up representing the client on a purely contingent basis but only because I find that they have strong cases. In fact, in employment discrimination cases filed in court, I have always received some recovery by either settlement or award and never less than \$25,000.

receive.⁴⁶⁸ Thus, for about 95% of potential plaintiffs, there is no meaningful recourse to the judicial system.⁴⁶⁹

B. PRETRIAL DISPOSITIONS

While in a number of important ways race discrimination plaintiffs make out better in court than at the administrative level, the majority of studies still show that race discrimination plaintiffs fare rather poorly at the federal level and that the material situation has grown worse in recent years.⁴⁷⁰ As discussed in Chapter 4, over the last thirty years, the federal courts have erected and deployed a number of procedural hurdles that make it harder for plaintiffs to prevail.⁴⁷¹ But do the courts' restrictions of pleading and proof standards mean less overall success for job discrimination plaintiffs? The answer would appear to be "yes."

As far as pretrial dispositions are concerned, defendant employers are proving to be very adept at convincing courts to enter judgment in their favor and against the plaintiff employees,⁴⁷² with some studies documenting a 20% pretrial disposition

⁴⁶⁸ Because I run a smaller practice, I do not aggressively market my services. As a result, other attorneys who devote their full time practice to employment discrimination may field as many as one hundred calls per week and take less than ten of those cases. *See*: Interview with Sidney Gold.

⁴⁶⁹ While some *pro se* plaintiffs will nonetheless proceed without an attorney, they notoriously receive adverse outcomes.

⁴⁷⁰ *See for e.g.*: Clermont and Schwab, "Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse," *Harvard Law & Policy Review*, Vol. 3, (2009), 116.

⁴⁷¹ *See for e.g.*: *Ashcroft v. Iqbal*, 129 S.Ct. 1373 (2009), making the pleading standard harder for civil rights plaintiffs.

⁴⁷² Patricia Hatamayar, "The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?" *American University Law Review*, Vol. 59, No. 3, (2010), 556. Hatamayar finds that courts, following the decision in *Iqbal*, have increased the rate at which they grant motions to dismiss in job discrimination cases; Joseph Seiner, "After Iqbal," *Wake Forest Law Review*, Vol. 45, No. 3, (2009), 187 & nn.70-71 (finding the same as above); Joe Cecil, Dean Miletech, & George Cort, "Trends in Summary Judgment Practice: A Preliminary Analysis," *Division of Research: Federal Judicial Center* (2001), 5, which finds that district courts, during the time period from 1975 to 2000 granted summary judgment at a higher rate in civil rights than in other case types.

rate,⁴⁷³ and others documenting a rate as high as 35%-40%.⁴⁷⁴ Obviously, an increase in pretrial judgments means that fewer race discrimination plaintiffs have their cases considered on the merits.⁴⁷⁵ An uptick in pretrial judgments also puts downward pressure on settlement outcomes, as settlement rates and amounts generally increase the further down the litigation path a plaintiff manages to travel and most certainly if a plaintiff survives a summary judgment motion.⁴⁷⁶ Thus, plaintiff attorneys may be inclined to settle cases earlier and for less value, rather than face the prospect of defending against a Motion for Summary Judgment at the close of discovery.⁴⁷⁷

Additionally, at least one study has documented that job plaintiffs win their

⁴⁷³ Clermont and Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court."

⁴⁷⁴ Laura Beth Nielsen, et al., "Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation 1987-2003," *American Bar Foundation*, (2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf; Laura Beth Nielsen, et al., "Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States," *American Bar Foundation*, Research Paper No. 08-04, (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093313. *See also*: Wendy Parker, "Juries, Race, And Gender: A Story Of Today's Inequality,"; Wendy Parker, "Lessons In Losing: Race Discrimination In Employment," *Notre Dame Law Review*, Vol. 81, No. 3, (2006), reporting that during the time period from January 1, 2003 to January 1, 2004, employment discrimination plaintiffs won any part of a motion to dismiss 42% of the time out of 74 motions to dismiss and won any part of a motion for summary judgment 25% of the time out of 393 motions for summary judgment.

⁴⁷⁵ Unsurprisingly, scholarship also demonstrates a statistically significant difference in the granting of summary judgment motions on behalf of employers depending upon the political affiliation of the president who appointed the presiding judge. *See* John Friedl and Andre Honoree, "Is Justice Blind? Examining the Relationship between Presidential Appointments of Judges and Outcomes in Employment Discrimination Cases," *Cumberland Law Review*, Vol. 38, No. 1, (2007-2008), 99. The authors state, "Our research suggests that plaintiffs in employment discrimination lawsuits have a substantially greater chance of success in the courtrooms of judges appointed by President Bill Clinton and to a slightly lesser extent, President Jimmy Carter, while defendants in such suits have a substantially greater chance of success in the courtrooms of judges appointed by Presidents George W. Bush and Ronald Reagan."

⁴⁷⁶ Minna Kotkin, "Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements," *Washington & Lee Law Review*, Vol. 63, No. 3, (2007), 149. Kotkin writes, "Median settlements are more than double those of cases resolved before a motion is made."

⁴⁷⁷ In my own experiences, it is frequently the case that a defendant will not consider settlement for any significant amount until after a court denies its motion for summary judgment. A number of plaintiff attorneys also expressed that their primary goal is to survive summary judgment because many defendants won't even consider settlement until that point.

dispositive pretrial filings only 4% of the time while other types of plaintiffs win about 22% of the time.⁴⁷⁸

All the plaintiffs' attorneys with whom I spoke generally complained about an unwarranted skepticism or an outright hostility that they believe many federal judges hold about employment discrimination cases. They lamented the fact that judges not only enter judgment for defendant employers through pretrial dispositions at disproportionately higher rates than for other types of cases, but that judges ignore binding legal standards in doing so. I know of no other practice area where attorneys so consistently and uniformly complain about an anti-plaintiff bias in the judiciary. One well respected employment discrimination attorney, voicing an opinion held by many, bemoaned:

I think that the problem has been that the federal judiciary has embraced summary judgment in employment cases in a way that they've not embraced it in any other [type of] case ... where they basically are [improperly engaging in] fact finding and saying that they're not.⁴⁷⁹ So you have cases where ... if there's an automobile accident and five witnesses say the plaintiff had the red light and the plaintiff says I had the green light, it goes to a jury. You take an employment case and you have ... five coworkers ... who say the plaintiff sucked at their job and the plaintiff says no, I was good at the job ... the court is saying 'well, you know, we're not going to act as a super HR and ... everybody says that [plaintiff] stunk so obviously [plaintiff] stunk and they grant summary judgment.... [W]e got...here because I think these cases in the early stages you had a tremendous imbalance in resources so you have [large firms like] Morgan Lewis and teams of large firms who basically convinced judges [to] get rid of these cases ... [through] ... a giant [improper] exercise of fact finding. ... [W]hen you're focusing in on the mindset of an employer who is making a termination decision, how can you grant summary judgment without observing the person testifying? ... [T]here is in our practice area unlike any other practice area that I'm aware of, in the federal courts summary judgment motions are filed probably in 95% of the cases that aren't settled at that stage of the process. Maybe more. Even in cases where it's ludicrous ... So I think that the institutional burden that the federal courts have placed on plaintiffs in employment cases has made it difficult and I think you have a very difficult practice area—an extremely costly practice area and I think

⁴⁷⁸ Clermont and Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court."

⁴⁷⁹ Under well-established legal standards, it is juries and not judges who are supposed to decide factual disputes. Thus, if there is a dispute of material fact, then as a matter of law, a court should deny an employer's motion for summary judgment and allow the case to proceed to trial.

that probably has had a significant downward impact on the valuation of these cases.⁴⁸⁰

Based upon his review of appeals of cases that judges have summarily ended in favor of the employer, Chief Judge Theodore McKee of the Third Circuit Court of Appeals opined that too many of these cases are thrown out because judges simply are not sensitive to racial issues in the same way that they may be regarding other legal matters that come before them. He stated:

There are a lot of valid [race discrimination] claims that get tossed out when they shouldn't get tossed out. I don't think the reverse is true. I don't think that there are a lot of frivolous claims, probably no frivolous claims and meritless claims that get to a successful verdict.

He further indicated that he could not imagine making that same statement in discrimination matters involving any other protected category other than race.⁴⁸¹

C. TRIAL OUTCOMES

Even if a plaintiff successfully traverses the pretrial gauntlet, the plaintiff is still much more likely to lose than win at trial.

Traditionally, job discrimination plaintiffs have fared worse than other types of federal court plaintiffs.⁴⁸² Based upon a review of data compiled by the Administrative Office of the United States Courts (AO),⁴⁸³ Clermont and Schwab show that in 1979, job plaintiffs won less than half as frequently, about 17% of the time, as other plaintiffs, who won about 40% of the time in federal court. By 2000,

⁴⁸⁰ Interview with Stephen Console.

⁴⁸¹ Interview with Chief Judge Theodore McKee of the Third Circuit Court of Appeals.

⁴⁸² Clermont and Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court."

⁴⁸³ On its website, the AO describes itself as the "central support entity for the Judicial Branch[,] providing ... a wide range of administrative, legal, financial, management, program, and information technology services to the federal courts. The AO provides support and staff counsel to the Judicial Conference of the United States and its committees, and implements and executes Judicial Conference policies, as well as applicable federal statutes and regulations." *See* Federal Courts, Administrative Office of the United States Courts, United States Courts homepage. Accessible at <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice.aspx>

that gap had narrowed considerably with job plaintiffs winning about 39.5% of the time and other plaintiffs winning about 43% of the time.⁴⁸⁴ But Clermont and Schwab's study is limited as it is now somewhat dated and it does not break out the data by specific types of job plaintiffs.

By way of contrast, in a much more recent and detailed study, Professor Wendy Parker examined outcomes of all 112 employment discrimination cases that went to trial between January 1, 2005 and December 31, 2007 in federal courts in Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco. She excluded from her study cases involving *pro se* plaintiffs. Of the 112 cases, a jury decided 102, and 10 were subject to a bench trial. Of the 102 jury trials, 63% involved race or national origin claims, 26% involved sex discrimination claims, 15% involved disability discrimination claims, 7% involved age discrimination claims, 2% involved family medical leave act (FMLA) claims, and 2% involved religious discrimination claims. Regarding the race claims, 48% were filed by African Americans, 19% by Asian Americans, 17% by Latinos, 6% by whites and the balance by other plaintiffs of unspecified national origin.

Before a jury, Parker found that plaintiffs won 50% of their FMLA, 29% of their disability discrimination, 27% of their race/national origin, 22% of their sex discrimination, 21% of their age discrimination, and zero of their religious discrimination cases.⁴⁸⁵ But drilling deeper into the race/national origin category, as

⁴⁸⁴ Clermont and Schwab, "How Employment Discrimination Plaintiffs Fare in Federal Court."

⁴⁸⁵ Parker found that employment discrimination plaintiffs won only 10% of their bench trials, that is, cases tried before a judge. As Parker notes, her study finds a lower success rate by employment discrimination plaintiffs than other studies. For example, Nielsen and Nelson found that employment discrimination plaintiffs won, on average, approximately 38% of their cases in trials that took place between 1990-2001; with a low of 35.8% in 1996 and a high of 43.6% in 1992. Laura Beth Nielsen & Robert Nelson, "Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System," *Wisconsin Law Review*, Vol. 46, No 209, (2005), 663, 674.

table 9 demonstrates, Parker found that African Americans and Latinos fared the worst out of all protected groups, with African Americans and Hispanics prevailing in 16% and 18% of their cases, respectively, and Asian Americans and Whites prevailing in 58% and 50% of their cases respectively.

[Table 9 about here]

Given that Parker's study is more recent than Clermont and Schwab's, it is tempting to conclude from her data that plaintiffs are simply encountering greater resistance from the courts. But as Parker herself notes, it is hard to compare her investigation with others due to a lack of congruence in geographic regions studied. Nonetheless, Parker's study does verify the conventional wisdom that employment discrimination plaintiffs based on race at trial generally fare poorly, and African Americans fare the worst.

Other studies confirm as much. The American Bar Foundation commissioned a study that analyzed a random sampling of employment discrimination suits that had been filed between 1988 and 2003 in the same seven districts that Parker investigated. The study found that African-American plaintiffs who claimed race-based employment discrimination fared the worst at every litigation stage, having less chance of (1) overcoming a defendant employer's dispositive pretrial motions, (2) settling their respective cases, or (3) winning at trial.⁴⁸⁶

Oppenheimer looked at 272 employment discrimination jury verdicts in the State of California that were delivered between 1998 and 1999. He also found that race discrimination plaintiffs were less likely to prevail than other employment

⁴⁸⁶ Laura Beth Nielsen, et al., "Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation"; Laura Beth Nielsen, et al., "Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States."

discrimination plaintiffs. Furthermore, he found that African American plaintiffs fared worse than white plaintiffs in their respective race discrimination lawsuits.

Similarly, in the interviews I conducted with employment discrimination attorneys and federal judges, the majority sentiment was that African American race discrimination plaintiffs have the lowest likelihood of prevailing on the merits at trial.

Judge Hart offered the following opinion.

I think the hardest cases are race discrimination cases—flat out race discrimination cases—I think the juries tend not to believe that quite so much. I think that sex discrimination is a little easier—I got a lot of women sitting in the jury—and I tell people in federal court [during settlement conferences]—just think about this for a minute—I tell the plaintiffs’ lawyers and plaintiffs—I say, “ Look, let’s imagine you’re in front of eight strangers in federal court. Where do you think they’re going to come from? Federal court in the Eastern District comprises the southeast corridor of the state of Pennsylvania. And even though most of the people live in Philadelphia, that isn’t how juries are impaneled. It’s impaneled by county. So if you live up in Schuylkill County, you have a better chance of getting called for jury duty because there’s less of you.’ So I’ll go into a voir dire, and ... I’ll ask for maybe thirty people to come in and I’ll end up with eight of them. It’s often the fact that the eight I have in the box, there’s nobody I have from Philadelphia. And there’s nobody African-American.

Judge Dalzell also opined that race discrimination cases are the hardest to win.

... [I]n the year 2010, to ask a jury ... to say that a decision maker made an adverse employment decision based on race is asking a lot because the term ‘racist’ has such opprobrium socially. Now nobody wants to be called [a racist]. And also, I suspect some members of the jury might think to themselves, ‘God, if we hold for this guy, this [other] guy is going to lose his job.’ Because it would be untenable to be in a business and a jury has found that you are racially motivated in making ... [this] adverse employment [decision] [Motivation is] a very tough question to ask. We don’t ask why people go in and rob a particular bank. Did race have anything to do with it? Of course, we don’t [ask that]. No, [we ask,] “Did they rob the bank?” In an employment area, you are asking a question that none of us can answer in our everyday life which is why exactly did someone do what they did. Take the ... people who are closest to you in your life – your parents, your spouse, your significant other, your children. How many times do you ask yourself why did they do what they did? And you can’t answer that question. Well, how are eight people who are total strangers to the parties how are they going to answer that question? It’s a very tough question to answer, motivation is very tough. I think it explains in a nutshell why, of the cases that get tried, why defendants win.... That’s the reason because you are asking a jury a question that we often can’t answer of people we know intimately – of motivation. It’s very tough and to be sure nobody that I see in the year 2010 is going to make an overt statement that, you know, ‘I hate those niggers.’ Are you kidding me? In the workplace, nobody is going to say that. They might think it... That’s the problem that plaintiffs have in these cases, and in fairness to the plaintiffs’ lawyers in these cases, this is why I think [that] the great majority of

cases plaintiffs lawyers are willing to settle because they recognize this fundamental problem of proof. This barrier of proving motivation – what is the determinative or motivating factor is so difficult

While race based discriminations cases are considered to be the most difficult, the vast majority of interviewees opined that holding all of the factors, other than protected category, the same, age discrimination cases are the easiest to win.

Q: Holding all factors of the same with the exception of the protected class what do you consider are the easier for the plaintiffs?

A: Age, by far the easiest.

Q: Why do you say that?

A: Everybody gets older. You have a panel of eight or twelve of our fellow citizens picked at random, you are going to have people who are older on that jury or people who know what happened to either a neighbor or family member and they are sensitive to age and I think they can relate to the age discrimination plaintiff.⁴⁸⁷

Judge Hart also commented that age discrimination was the easiest because “I will never become African-American and I will never become a woman but I have become old. As long as you live long enough, you get into that class.”

But in a sea of dismal information, there is a ripple of good news for African American job plaintiffs: when plaintiffs win, their victories are substantial. In Parker’s study, a plaintiff’s mean verdict for 102 jury trials was \$493,080. As Table 10 indicates, in race/national origin discrimination cases, the mean jury award was significantly lower but still quite significant at \$244,347.

[Table 10 about here]

As Table 11 indicates, African Americans in race discrimination cases had the highest mean jury award at \$347,482.

[Table 11 about here]

⁴⁸⁷ Interview with Judge Stewart Dalzell.

Clearly, if a job discrimination plaintiff wins, the awards can be considerable,⁴⁸⁸ an outcome that both attorneys and judges with whom I spoke affirmed. These types of cases also permit the award of statutory attorney's fees. Thus, even if a jury renders a small verdict, like \$10,000, the plaintiff's attorney is then entitled to statutory legal fees, which frequently veer into the six figures. But when the plaintiff loses, the plaintiff is also responsible for certain litigation expenses that the employer incurred. Parker found that in the thirty one cases where the plaintiff lost, the plaintiff, on average, was ordered to pay \$7,678 in defendant's litigation costs. Thus, filing a lawsuit in federal court entails significant risks. When my clients who, in my opinion, unadvisedly wish to reject a significant settlement offer, I counsel them that they have a better chance of multiplying the money by risking it at Harrah's in Atlantic City rather than by gambling it at trial. That piece of counseling usually serves to settle the case.

D. APPEALS

Finally, even when the employment discrimination plaintiff wins at trial, there is a good, and by some estimates, almost a 40% chance, that their victory will be reversed on appeal. Thus, the chance of reversal is almost a coin flip. In contrast, plaintiffs are successful in reversing only 10% of cases in which the defendant

⁴⁸⁸ Nielsen and Nelson also found that the average annual median trial award in employment discrimination cases from the time period of 1990-2002 was approximately \$135,000 with a high median amount of \$248,500 in 1990 and a low median amount of \$62,000 in 1993. But they themselves disclaimed that coding errors may overstate the awards. Apparently, in the data they reviewed, attorneys were asked to report verdicts in the thousands, so that an award of \$9,000 would be reported by an attorney as \$9T. Accordingly, if the attorney miscodes the verdict as \$9,000T, the AO actually records it as \$9,000,000. "Contesting Workplace Discrimination in Court: Characteristics and Outcomes of Federal Employment Discrimination Litigation."

employer wins at trial.⁴⁸⁹ Part of the problem may lie in the fact that there is a lack of diversity among the appellate judiciary.

Judge McKee offered some insights into the appellate process and opined that he had sensed discomfort among his fellow appellate judges when race is raised as an issue in case conferences. He also opined that the lack of diversity of judges does affect the quality of justice on appeal, especially in race discrimination cases. When I asked him whether his fellow judges discuss these types of topics, Chief Judge McKee stated:

No, not while I am there. Maybe they are when I am not in the room. I wish they did. One, they get really uncomfortable. I remember when we had our biased task force and we were trying to set up a permanent committee to implement the recommendations of the biased task force and one of the judges in the room, a very well respected judge, a circuit judge said to me ‘What is it that you want to get out of this?’ And I said, ‘At the very least it will sensitize people to their own bias.’ And his response was, ‘I don’t need to be sensitized.’ And I told my wife when I got home, and she [sarcastically] said, ‘You know, there is always somebody else who [is the one who] needs to be sensitized.’ I say that to suggest there’s not a lot of introspection that goes on. Between Article III [of the constitution] and egos involved and maybe the power on top of that, there is not a lot of inspection that occurs [among the judges]. ... It is frightening and disheartening too.... If I got the right fact pattern and the right case depending on who was on that conference I could see pushing it. There are a couple of judges who I really respect. Brooks [Smith] is one of them from Pittsburgh. I don’t see him as evidencing any of this kind of subliminal racism. But again, we all have it including myself, so I know it’s there. If I was in a situation say with a Title VII [claim] and there are little traces of bias on the part of the employer and I thought he was missing it, I would probably have the discussion with him. But I would want to have it over a beer rather than in the conference. [But] I don’t know who the third judge [is on the panel] and [that could]... throw a monkey wrench into [it if] ... the third judge ... is like the ultimate Holocaust denier...[then it] ... is going to go nowhere. But we don’t have those discussions unless it’s a formal program to get into it and those are like pulling teeth because nobody likes to do it. And ... [they think that they don’t] need to be sensitized and the discussions don’t happen very often at all.⁴⁹⁰

E. SETTLEMENTS

Finally, settlement is another important category of dispositions that must be

⁴⁸⁹ Clermont and Schwab, “Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?”

⁴⁹⁰ Interview with Judge Theodore McKee.

considered. According to Clermont and Schwab, almost 70% of employment discrimination cases settle.⁴⁹¹ That means only a tiny percentage of them actually proceed to trial. This holds true both in state and federal court. One study found that in state courts in twenty-two jurisdictions around the nation, the percentage of trials decreased from 36.1% in 1976 to 15.8% in 2002.⁴⁹² As for federal court, in 1962, approximately 11.5% of cases were adjudicated by trial. By 2002, that number had dropped to 1.8%. Table 12 illustrates the number of civil trials in federal court at ten-year intervals from 1962 to 2002.⁴⁹³

As one can see, civil rights trials have dropped from a high of 16.7% of case dispositions in 1962 to a low of 3.7% in 2002. Settlements appear to be taking their place.

[Table 12 about here]

Given that some commentators have asserted that close to 70% of cases settle, it is problematic that so little is known about settlement outcomes.⁴⁹⁴ But the data is almost impossible to obtain because the majority of all settlement agreements in the employment context contain strict confidentiality provisions. As a result, historical information regarding the value of settlements in the employment discrimination context has remained practically nonexistent. This has also hampered the ability of judges to settle cases, as there is no available matrix of cases that can be used for

⁴⁹¹ Clermont and Schwab, “How Employment Discrimination Plaintiffs Fare in Federal Court.”

⁴⁹² Brian Ostrom, Shauna Strickland & Paula Hannaford, “Examining Trial Trends in State Courts: 1976–2002,” *Journal of Empirical Legal Studies*, Vol. 1, No. 3, (2004), 755. Of trials that took place, approximately 95% were bench trials.

⁴⁹³ This excerpted table comes from Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” *Journal of Empirical Legal Studies*, Vol. 1, No. 3, (2004), 459.

⁴⁹⁴ Stewart Schwab & Michael Heisse, “Splitting Logs: An Empirical Perspective On Employment Discrimination Settlements,” *Cornell Law Review*, Vol. 96, No. 4, (May, 2011), 931.

evaluative purposes.

To address this lacuna, in 1999, magistrate judges from the United States District Court for the Northern District of Illinois, which is situated in Chicago, initiated a project to create a database of settlement information to assist other judges in facilitating settlements. The database provided a rich set of information, including case category, type of adverse employment action suffered by the plaintiff, the plaintiff's claimed damages, the plaintiff's initial demand and defendant's initial offer, the stage at which the case settled, and the final settlement figure. The data was collected for 1170 cases settled between the years 1999 to 2005. Of those cases, 472 or 40.3% constituted employment discrimination matters. Of those 472, 153 were race discrimination cases. As with the PaHRC, most cases, that is, over 70%, involved discharge.

Minna Kotkin was the first to review, analyze and write about this data. Regarding all employment discrimination cases that she reviewed, Kotkin computed that the mean and median settlement amounts were \$54,651 and about \$30,000, respectively.⁴⁹⁵ Kotkin found that the mean settlement amount for race cases was about \$40,000 and the median settlement figure was slightly over \$20,000.⁴⁹⁶ But in race cases where the plaintiff was identified as white, the median settlement was significantly higher at around \$50,000. Kotkin also found that injunctive relief in the form of reinstatement or promotions was rare, occurring 2.8% of the time, which is consistent with outcomes found before the PaHRC.

While this information only represents one data set, nonetheless, settlements at

⁴⁹⁵ Kotkin, "Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements," 144. Interestingly, in the personal injury category of cases, the median settlement amount was \$181,500.

⁴⁹⁶ *Ibid.*, 157; *see also* fig.12, 148, comparing settlement amounts by type of claim.

the federal court level are significantly higher than before the PaHRC as one would naturally expect given the filtering process that takes place before counsel agrees to represent a plaintiff in federal court.

Among the judges and attorneys whom I interviewed, there were mixed opinions as to whether race discrimination cases are inherently worth less because they are so difficult to win. Some judges and practitioners clearly felt that they have less settlement value just by virtue of the fact that the plaintiff is African American.

Q: In terms of race cases being the hardest and age cases and retaliation cases being the easiest, does that also affect, do you think, settlement value of the cases?

A: Oh, yeah. Absolutely.

Q: So, comparatively speaking, race cases will settle [for] less?

A: They'll settle for less because even the plaintiffs know they're harder to win.⁴⁹⁷

Other practitioners and judges opined that the only reason that these cases settle for less is because wage loss, which generally drives settlement values, is comparatively lower on average for African American plaintiffs and therefore typically amounts to less.

Furthermore, as attested to by interviewed judges and attorneys, and as we saw with the PaHRC, these settlement agreements typically contain confidentiality provisions, non-disparagement clauses, do not afford reinstatement for the terminated employee, and only rarely mandate any type of policy changes or training for the employer.

F. EMPOWERMENT/DISEMPOWERMENT

And lest one think that litigants may derive a sense of empowerment at the

⁴⁹⁷ Interview with Judge Dalzell.

federal court level, according to most, but not all, of the attorneys I interviewed, this does not occur. First, most federal judges indicated that they do not even view the proceedings before them through any framework of empowerment. In other words, for them, litigation does not serve the explicit purpose of empowering litigants. Second, most attorneys stated that rather than empowerment, most plaintiffs come away feeling frustrated by the process.

In sum, given the above discussion, even though federal court plaintiffs tend to have better outcomes than their PaHRC counterparts, it is not surprising that many of these plaintiffs also end up feeling great dissatisfaction with the litigation process. One plaintiffs' attorney summarized his experiences with his clients in the following way.

I would say that for the most part clients are dissatisfied with the process because they learn things through the process that they didn't think were true and that they didn't know about before and they come away from the process rather bitter. They have preconceived notions about their entitlement and what the laws are all about that I disabuse them of when they come in to see me and they become more disabused of during the process and most clients come away from the process bitter and dissatisfied not because of me but because of the education they receive. The first piece of bad news they get is during the initial consultation when I tell a person, when they are talking about I lost my job and this was my job and how could they bring somebody else in to do my job. I tell them: 'It was never your job, yes, you were there for twenty-four years, yes you gave your blood, yes you worked at home, yes you worked on weekends for nothing, yes you worked during that period of downsizing when the employer wasn't paying you, yes you did this and that, but it was never your job, it was the employer's job that the employer permitted you to do for twenty-four years.' And they look at me like I am crazy when I say it was never your job. ... That is the first piece of bad news they get. The next piece of bad news they get is when I tell them that you got to have some evidence to make a discrimination case that it has to be more than just a feeling. It has to be more than just the fact that you're black and he was white and he got the job. And they look at me like I am crazy. 'What are you talking about? Of course that is discrimination. I am black and he is white or I am a female and he is a male and they promoted him instead of me despite my qualifications.' And I say, 'Where is your evidence?' 'Evidence,' that is the second piece of bad news that they get, and that education makes them bitter about the discrimination laws in general and it's not just the race discrimination laws it's all the discrimination laws. [Third,] ... most people feel...that the employer needs to have just cause in order to terminate their employment, and they cannot understand that an employer can terminate their employment for any reason whatsoever, that the employer can effectively make up a reason. They don't believe that that is the law. And when they find out from me that that is the law, they become very bitter, very disheartened, very discouraged and very

angry. [Finally,] I think most cases were settled for much less than [my clients] thought they were going to get.... there is dissatisfaction. Most people thought that they were going to end up with a lot more when they first came to my office some years [earlier].⁴⁹⁸

One plaintiff attorney described his clients' experiences in the following terms.

Litigation is painful for clients regardless of the outcome even after a substantial win. Plaintiffs remained scarred by the underlying issues and the litigation itself. It is a difficult, emotional, gut-wrenching, situation. The only people who should feel comfortable in litigation mode are lawyers and judges. I think [plaintiffs] can be satisfied with your representation. I think that they can be satisfied that they have done all they possibly can to make a wrong into a right. [But] I think that there is no client who goes through litigation who feels that litigation was a satisfying process. ... It is tedious. It is expensive. And in very simple terms it is not fun. Professionals do [the] wors[t] because they can never get their reputation back....[The higher the employee is on the corporate ladder], ... the more ... disempowered or disadvantaged [they are] for a long time in their careers. For example, they find themselves very often out on the street or losing their homes. Even if they make a large recovery, they will tell you that if they had to do it over again [they wouldn't even though] it was a wonderful result and it was something they had to do... Some of them will tell you horror stories about losing their jobs, losing their families, losing their house, the pain they went through, the difficulty they had to get back in the workplace [and] the stories are horrific.⁴⁹⁹

A number of attorneys complained that because employment discrimination is essentially viewed through the lens of tort law, employment discrimination litigation has been reduced to monetary ends and therefore, by its nature cannot fully and wholly remediate its victims because litigation can be so devaluing.⁵⁰⁰

⁴⁹⁸ Interview with Frank Finch.

⁴⁹⁹ Interview with Alan Epstein.

⁵⁰⁰ Making the plaintiff "whole" has always been a central purpose of the fair employment laws. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Because a variety of interest groups viewed the damages that courts were permitting as inadequate to compensate victims for the significant harms that they had suffered, they urged Congress to expand the remedies available under Title VII which Congress did through passage of the 1991 amendments to Title VII. Given the expanded remedies under the amendments, Title VII began to resemble something akin to a federal tort. *See for e.g.*, David Oppenheimer, "Negligent Discrimination," *University of Pennsylvania Law Review*, Vol. 141, No. 3 (Jan., 1993), 918. Under tort theory, both distributive and retributive notions of justice demand that the tortfeasor make her victim whole. But because there is no way to undo the harm, money essentially serves as a proxy. The idea of designating money as the currency of the institutional process also had great appeal to the plaintiffs' bar. Plaintiffs' attorneys were paid, at least in part, by receiving a percentage of any damages award. The courts also embraced such a framework because of historical Supreme Court precedent that had held that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any

A defense attorney lamented about the process not only from the potential perspective of the employee but also from the perspective of the employer.

Well you can make them whole financially; you can do a good job at that. They can't make them whole to getting their job back or give them their career back that is gone. Every plaintiff has to understand that that the minute that they file they are history at that company and maybe in that industry. It doesn't do a good job at all for that. I have some cases where I say would you take this person back and they say sure they are a good person and they go back but in 98% of the cases that never happens. They say we never want to see this person again. The whole system fails in that regard.⁵⁰¹

Additionally, for those terminated employees, because they so rarely ever get their job back, litigation may serve to destroy their careers. For that reason, one federal judge, who asked not to be named, stated that she would never advise her own child to file an employment discrimination lawsuit. Further, even though many plaintiffs bring lawsuits to reform the system and to see positive change from their employer, settlement agreements generally never contain training requirements or any other explicit provisions directed at altering the workplace environment.

As a result, litigation can be a very disheartening process for even the emotionally heartiest of individuals.

G. CLASS ACTION LAWSUITS

Thus far, we have only discussed individual race discrimination claims. But what about class action litigation case models that seek to systematically reform an employer's entire mode of operations? Historically, plaintiffs' attorneys have brought class action lawsuits for that purpose.⁵⁰² Class action litigation serves a number of practical advantages over individual cases. First, the threat of a class action lawsuit

available remedy to make good the wrong done." See for e.g., *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), citing *Bell v. Hood*, 327 U.S. 678, 684 (1946).

⁵⁰¹ Interview with Larry Besnoff.

⁵⁰² See, e.g., *Brown v. Board of Education*, 349 U.S. 294 (1955); *Griggs v. Duke Power Co.*, 292 F. Supp. 243, 247 (M.D.N.C. 1968), modified, 420 F.2d 1225 (4th Cir. 1970), rev'd., 401 U.S. 424 (1971).

can frequently provide leverage to force defendants to settle due to the potential risks in both time and money involved in defending against such suits.⁵⁰³ Second, individual claims may prove impossible to bring, and therefore, unless aggregated through class treatment may never see the light of day. Third, many litigants would never agree to file individual claims out of fear of retaliation. Fourth, a number of proof problems presented in individual cases may very well be mitigated through a class action device.

As noted in Chapter 4, lawsuits can allege disparate treatment, disparate impact, or a combination of the two. A classic example of a class action lawsuit alleging disparate treatment may involve a lawsuit against the Philadelphia Police Department for refusing to integrate its forces. A classic example of a disparate impact case may involve an employer making employment decisions based upon facially neutral testing that disproportionately impacts a protected group of individuals. Given the historic success of these types of lawsuits, most employers generally no longer engage in these types of discriminatory practices. Instead, the more typical case now involves a company that disproportionately promotes more white than African American employees through some subjective decision-making process such as the use of yearly performance evaluations.

Cyrus Mehri, Esq., is an attorney who has litigated a number of well known race discrimination class action lawsuits in the nation, including *Roberts v. Texaco*, *Adballah et al. v. Coca Cola, Inc.*, *Robinson v. Ford Motor Company*, etc. According to Mr. Mehri, some of these lawsuits have had a profound impact in reforming the

⁵⁰³ Gary M. Kramer, “No Class: Post-1991 Barriers to Rule 23 Certification of Across-The-Board Employment Discrimination Cases,” *Labor Lawyer*, Vol. 15, No. 3, (Winter/Spring, 2000); Samuel Estreicher & Sam Shaulson, “New Weapon to Fight Employment Discrimination Class Action Suits,” *New York Law Journal*, (July 13, 1999), 1. Estreicher and Shaulson report that risks associated with defending against the class action lawsuit will often “leave the employers with little choice but to raise the white flag and settle.”

employment practices of various major United States companies.

For example, in the Coca Cola lawsuit, four employees, on behalf of 2,200 current and former salaried African-American workers, alleged racial discrimination in job assignments, pay, and promotions. In June, 2001, the parties reached a historic settlement, that contained, among other items of relief, \$192 million on behalf of the class, the adoption of recommendations by a team of industrial psychologists that would diminish the subjectivity of the company's employee evaluation process, mandatory job posting requirements, the implementation of a policy requiring racially diverse slates of candidates for all upper level corporate positions, and the creation of a task force (comprised of individuals like former Secretary of Labor, Alexis Herman, former assistant Attorney General Bill Lann Lee, and others) with authority to propose changes to the company's hiring, evaluation, and promotions processes over a multi-year period which the company was bound to accept unless excused by court order. According to Mehri, the settlement more than financially made the class whole. Additionally, according to Mehri, the settlement forced Coca Cola to "change [from] top to bottom ... all [of its] ... human resource policies ... from being a disaster ... for Coke ... to becom[ing] one of the top two companies ... in the country ... when it comes to diversity and inclusion, using the most state of the art practices."⁵⁰⁴

However, Mehri also stated that there are only a handful of firms in the entire nation who specialize in litigating these types of class action cases. Given the cost of these lawsuits, some of the difficult proof problems, and the hostility that courts generally display toward them, these types of cases are becoming much rarer.

⁵⁰⁴ Interview with Cyrus Mehri.

Regarding expenses, Mehri explained that the entry cost is almost prohibitive, amounting to hundreds of thousands, if not millions, of dollars. As for the judiciary, Mehri further explained that there are whole geographic regions in the nation where attorneys cannot even bring these types of actions because the case law is too hostile in the circuit courts that govern those areas – including in the 4th, 5th, 6th, and 11th circuits that cover most of the American south. In terms of convincing courts to certify employment discrimination cases as class action lawsuits, Mehri unequivocally opined that courts exhibit the most hostility to claims that are brought by African American plaintiffs.⁵⁰⁵ Judges who also stated that class action race discrimination cases have all but disappeared support Mehri’s opinion. For example, Judge Giles stated, “class claims [involving race discrimination] were dominating early on in the eighties and then I think by, you know, if I were to look at the last five years of being on the bench,⁵⁰⁶ most of the race claims were individual claims. There were more class cases or class action type cases involving sex discrimination than race discrimination.”⁵⁰⁷ The statistics certainly appear to support these anecdotal conclusions. For example, one commentator reported that employment discrimination class action filings have decreased from a high of 1174 during the 1976 fiscal year to a low of 56 in 1994, with only a slight increase since then.⁵⁰⁸

⁵⁰⁵ Ironically, at a time when courts are becoming more hostile to race discrimination lawsuits brought by African American plaintiffs, Mehri believes that the confidential data that he sees in the course of litigating these lawsuits, such as performance evaluations which frequently drive pay and promotional decisions, demonstrate a larger gap between African American and white workers than between any other traditionally disadvantaged and dominant group in corporate America.

⁵⁰⁶ Judge Giles assumed the bench in 1979 and stayed on for close to thirty years.

⁵⁰⁷ Interview with Judge Giles.

⁵⁰⁸ Julie Davies, “Federal Civil Rights Practice in the 1990’s: The Dichotomy Between Reality and Theory,” *Hastings Law Journal*, Vol. 48, No. 2, (1997), 238 n.235. See also: John Donohue, and Peter Siegelman, “The Changing Nature of Employment Discrimination Litigation,” *Stanford Law Review*, Vol. 43, No. 5 (May, 1991), 984. Donohue and Siegelman report that “the class action, once a key

As a result of the aforementioned conditions, Mehri sees the potential for future class action employment discrimination lawsuits in limited terms.

IV. CONCLUSION

Based upon the examined data, the results in federal court are a bit more auspicious than what is generally achieved before the PaHRC. Nonetheless, federal court plaintiffs still face a very difficult road. First, most job discrimination claimants will never file, as they will most likely be unable to find an attorney to litigate their cases. Second, of those who do manage to file, they frequently face skeptical or hostile courts. Third, juries more often than not find in favor of the employer, with one study showing that African American race discrimination plaintiffs fare the worst. Almost all of the interviewed judges and attorneys agreed with this assessment. While job discrimination claimants, including African Americans plaintiffs, do recover substantial verdicts, almost half of the time their victories are short lived due to reversals on appeal. Finally, regarding settlements, while there still remains insufficient empirical data to draw any firm conclusions, of the data that we do have, it would appear that while African American race discrimination plaintiffs do recover more than nominal amounts, they still fare worse than all other types of job discrimination plaintiffs, and settlements rarely mandate changes to corporate policies.

aspect of the fight for civil rights in the work place, has withered,” with over 1100 filed in 1975 as compared to only 51 in fiscal year 1989, and even fewer to be certified by the courts.

Table 7 – List of Interviewed Attorneys

<u>Attorney Name</u>	<u>Last Firm/Legal Organization</u>	<u>Bar Admission</u>	<u>Plaintiff-side or Defense-side</u>	<u>Race</u>
Alice Ballard	Law Offices of Alice Ballard	1972	Plaintiff	White
James Bell	Bell & Bell	1997	Plaintiff and Defense	White
Lawrence Besnoff	Obermeyer, Reibman, Maxwell, and Hippel	1977	Defense	White
William Braveman	Law Offices of William Braveman	1995	Plaintiff & Defense	White
Stephen Console	Console Law Offices	1982	Plaintiff	White
Jane Dalton	Duane Morris	1971	Defense	White
Alan Epstein	Spector, Gadon & Rosen	1969	Plaintiff & Defense	White
Frank Finch	Law Offices of Frank Finch	1972	Plaintiff	AA
Sidney Gold	Sidney Gold & Associates	1975	Plaintiff	White
Stephen Gold	Law Offices of Stephen Gold	1971	Plaintiff	White
Harold Goodman	Raynes McCarty	1969	Plaintiff	White
Jack Greenberg	Legal Defense Fund	1951	Plaintiff	White
Ryan Hancock	PaHRC	2004	n/a	White
Michael Hardiman	PaHRC	1978	n/a	White
David Kairys	Kairys, Rudovsky et al. and Temple Law School	1968	Plaintiff	White
Lisa Kaplan	PaHRC		n/a	White
Charisse Lillie	Comcast	1976	Defense	AA
Kevin Lovitz	Lovitz Law Firm	1993	Plaintiff	White
Cyrus Mehri	Mehri & Skalat	1988	Plaintiff	White
Charles Nier	PaHRC	1994	n/a	White
Michael Ossip	Morgan, Lewis	1979	Defense	White
Barbara Ransom	Public Interest Law Center of Philadelphia	1990	Plaintiff	AA
David Rudovsky	Kairys, Rudovsky, et al.	1968	Plaintiff	White

Table 8 – List of Interviewed Federal Judges

Judge	Court	Appted by	Tenure	Race
John Gibbons Chief Judge – 1987-1990	Third Circuit	Nixon	1969-1990	White
Delores Sloviter Chief Judge – 1991-1998	Third Circuit	Carter	1979-present	White
Theodore McKee Chief Judge, 2010-present	Court of Common Pleas Third Circuit	Elected Clinton	1984-1994 1994- present	AA
Damon Keith	E.D. Mi Sixth Circuit	Johnson Carter	1967-1977 1977-present	AA
Timothy Lewis	W.D. Pa Third Circuit	Bush I Bush I	1991-1992 1992-1999	AA
James Giles Chief Judge – 1999-2005	E.D. Pa.	Carter	1979-2008	AA
Jack Weinstein Chief Judge – 1980-1988	E.D.N.Y	Johnson	1967-present	White
Stewart Dalzell	E.D. Pa.	Bush I	1991-present	White
J. William Ditter, Jr.	E.D. Pa.	Nixon	1970-present	White
Bruce Kaufman	PA S. Ct. E.D. Pa.	Appointed Clinton	1980-1982 1997-2009	White
Louis Pollak	E.D. Pa.	Carter	1978-present	White
Gene Pratter	E.D. Pa.	Bush II	2003-present	White
Cynthia Rufe	Court of Common Pleas E.D. Pa.	Elected Bush II	1994-2002 2002-present	White
Norma Shapiro	E.D. Pa.	Carter	1978-present	White
L. Felipe Restrepo Magistrate Judge	E.D. Pa.	n/a	2006-present	Latino
Jacob Hart Magistrate Judge	E.D. Pa.	n/a	1997-present	White
Diane Welsh Magistrate Judge	E.D. Pa.	n/a	1994-2005	White

Table 9 – Employment Discrimination Trial Outcomes in Select Federal Jurisdictions from 2005-2007

<u>Race/national origin</u>	<u>Number of jury trials</u>	<u>Plaintiff wins</u>	<u>Plaintiffs' winning percentage</u>
African American	31	5	16%
Asian American	12	7	58%
Latino	11	2	18%
White	4	2	50%
Other	6	1	17%

Table 10 – Mean Jury Awards for Employment Discrimination Trials, by Case Type, in Select Federal Jurisdictions from 2005-2007

<u>Case Type</u>	<u>Mean Jury Award</u>
Age	\$1,917,872
Disability	\$1,458,667
Race/National Origin	\$244,347
Sex	\$229,884
FMLA	\$11,145
Religion	\$0

Table 11 – Mean Jury Awards for Employment Discrimination Trials, by Plaintiff’s Race, in Select Federal Jurisdictions from 2005-2007

<u>Race/National Origin</u>	<u>Mean jury award</u>
African American	\$347,482
White	\$300,000
Asian American	\$233,946
Other	\$67,088
Latino	\$55,887

Table 12 – Frequency of Federal Court Trials

<u>Case Category</u>	<u>Disposition</u>	<u>Number of trials</u>	<u>Trials as a percentage of disposition</u>
1962			
All Civil Cases	50,320	5,802	11.5%
Civil Rights Cases	317	53	16.7%
1972			
All Civil Cases	90,177	8168	9.1%
Civil Rights Cases	5,023	767	15.3%
1982			
All Civil Cases	184,835	11280	6.1%
Civil Rights Cases	14,821	1456	14.6%
1992			
All Civil Cases	230,171	8029	3.5%
Civil Rights Cases	21,136	1661	7.9%
2002			
All Civil Cases	258,876	4569	1.8%
Civil Rights Cases	40,881	1524	3.7%

I. INTRODUCTION

This chapter returns to the basic inquiry that motivated this research: what role can civil rights litigation play in serving as a force for progressive, socio-political change? I addressed this question via an important area—fair employment laws and litigation on behalf of African Americans claiming workplace discrimination. I considered whether civil rights laws and litigation can make a difference in promoting racial equality in the workplace and what litigation means to those who engage in it.

One conventional view has been that civil rights litigation and the judiciary can have dramatic effects, through high-impact cases such as *Brown v. Board of Education*. Critics of this view have argued that litigation has made little systemic difference and can even prove harmful to progressive causes.⁵⁰⁹

But unlike the dim views advanced by litigation critics, I found that civil rights litigation in the employment context has proven instrumental in promoting equal employment opportunities for African Americans.⁵¹⁰ Further, in contrast to the rosy views of the litigation advocates who tend to overstate its potential, I contend that civil rights litigation to promote racial reforms in employment also faces significant limitations.

⁵⁰⁹ A third, less frequently articulated view holds that the efficacy of litigation is highly dependent upon context and circumstances. See, e.g.: Susan Sturm, “The Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review*, Vol. 142, No. 2 (1993), 639-738.

⁵¹⁰ Not to mention for other protected groups, such as women, the disabled, religious minorities, etc.

To summarize my arguments, I contend that civil rights laws and litigation have been effective at overcoming certain overt “first-generation” forms⁵¹¹ of discrimination; including where (1) businesses had a stated policy of refusing to hire and promote minorities in the workplace, (2) blatant segregated workplaces existed and (3) racial harassment was open and obvious. Civil rights litigation has also proven effective at enjoining a series of facially neutral policies, such as testing regimens that had a racially disparate impact upon African Americans.

However, I contend that litigation, as a way of redressing systemic discrimination in the workplace, now faces serious limitations and has probably long exceeded its optimization point. First, the conservative turn of the courts has led to the establishment of procedural and substantive hurdles that are difficult for claimants to overcome. Second, the very successes that litigation has achieved for minorities in the workplace have led to the creation of an environment where discrimination has become much more subtle. This development has rendered the litigation paradigm less suitable because litigation is not well designed to address more elusive iterations of discrimination that now comprise the vast majority of today’s filings.

II. OPERATIONALIZING THE RESEARCH

As noted in Chapter 1, to operationalize my research, I studied the following three interrelated questions. First, how effective are current equal employment laws in curtailing racially disparate treatment in the workplace? Second, how effective are our civil rights laws in remediating claims of racial discrimination in employment?

⁵¹¹ Sturm coined the phrase “first generation” discrimination to refer to a “workplace characterized by [d]ominant individuals and groups deliberately exclud[ing] or subordinat[ing] women and people of color.” Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach,” *Columbia Law Review*, Vol. 101, No. 3 (2001), 465-66.

Finally, how does the process of civil rights claim-making in this context affect individual conceptions of race, identity, and citizenship?

In examining these questions, I employed a methodological approach that was informed by political ethnography by (1) studying the processes of a governmental agency charged with enforcing civil rights laws, (2) interviewing many of the major participants in the civil rights litigation system, including the claimants who file civil rights claims, the attorneys who litigate their causes, and the judges who adjudicate their disputes, and (3) reviewing outcomes of employment discrimination cases litigated in the courts. As part of my research, I naturally drew upon my practical experiences as a civil rights attorney working in the field for the past twenty years.

III. HISTORY INFORMS THE STRATEGY

As noted in Chapter 2, the early history of civil rights litigation and the century-old debate regarding its effectiveness served as a backdrop for my investigation and informed much of my research.

As stated in Chapter 2, civil rights litigation originally grew out of the conflict between the reconstruction era amendments/federal laws that were designed to protect racial minorities and the Black Codes that were enacted by regressive forces to preserve the antebellum status quo. The Supreme Court decided most of those early battles in favor of the Black Codes, giving legitimacy to the position advanced by those who argued that the indeterminacy of rights made litigation inherently unreliable. At the turn of the twentieth century, a number of circumstances changed that made the courts a more attractive venue for attacking the Codes. These factors included a shift in jurisprudential theories of the day, the rise of some progressive

jurists, and the emergence of a vanguard of civil rights attorneys dedicated to the cause of racial reconciliation through a litigation-based model.

But even as litigation took on a more prominent role in the overall civil rights scheme, the strategy still had plenty of detractors. As the critical legal scholars would contend fifty years later, some argued that because constitutional rights are infinitely malleable, they will end up reflecting the interests of the nation's controlling elite. Such a development seemingly came to pass as a result of a number of Supreme Court decisions issued during the progressive era, including *Plessy v. Ferguson*. Still other litigation critics postulated that court action would prove ineffective due to the intractable mass resistance that it would engender.

But those who put forth a litigation-based strategy never viewed it in isolation. Rather, they saw court action as one of many potential political levers that could be pulled to effectuate change. In an interview with Jack Greenberg, Esq., he affirmed as much, stating that court action was never viewed as an exclusive instrument but was rather imagined as one political weapon among many in the fight to overcome the tide of racial oppression.⁵¹²

Through the early era of the civil rights movement, the NAACP continued to utilize litigation and won some early important legal battles, culminating with *Brown v. Board of Education*. As a result of these successes and the ongoing receptiveness of the judiciary, litigation took on a privileged place in the 1950s and 1960s as an essential part of various progressive political movements.

But irrespective of the NAACP's victories, litigation's power to reach private conduct was seemingly limited because the Supreme Court had read the

⁵¹² Interview with Jack Greenberg, Esq.

reconstruction amendments and civil rights statutes to apply only to state action.⁵¹³

For labor proponents, this proved vexing given that private employers routinely discriminated against minorities. As a result, a fair employment practices movement started, seeking legislation that would outlaw racial discrimination in the workplace. These movements led to the passage of various state human relations acts. Finally, as part of the larger civil rights movement, Title VII of the 1964 Civil Rights Act was signed into law.

It is important to reiterate that both the PaHRA and Title VII were passed against the backdrop of ongoing *overt* iterations of discrimination. For example, three years prior to the passage of the PaHRA, the Pennsylvania Governor's Commission on Industrial Race Relations conducted a broad survey of workplaces and found explicit and widespread discrimination faced by a variety of ethnic, racial, and religious groups across the state.⁵¹⁴ Those findings loosely tracked national sentiments.⁵¹⁵ In Pennsylvania, newspapers ran job ads on behalf of employers that asked only for white applicants.⁵¹⁶ Employers utilized job questionnaires that inquired about the applicant's race.⁵¹⁷ Businesses requested that employment

⁵¹³ See *Cruikshank*, 92 U.S. 542 (1875) and the *Civil Rights Cases* of 1888.

⁵¹⁴ See *First Annual Report of the Pennsylvania Human Relations Commission, 1955-1956. Annual Report.* (Harrisburg: The Commission, 1956). It has also been reported elsewhere that 67% of all Pennsylvania firms indicated that they would not hire blacks into skilled positions. Smith & Wolensky, "A Novel Public Policy: Pennsylvania's Fair Employment Practices Act of 1955," *Pennsylvania History*, Vol. 69, (Fall 2002). This barred a large percentage of African Americans from serving in sales, engineering, and in supervisory positions. As a result, black women generally worked as domestics and black men generally worked as unskilled manual laborers. *Ibid.*

⁵¹⁵ See, e.g., Howard Schuman et al., *Racial Attitudes In America: Trends And Interpretations* 71-138 (1988) (citing a National Opinion Research Center study from the mid-forties that 55% of white respondents disagreed with the sentiment that "Negroes should have as good a chance as white people to get any kind of job.").

⁵¹⁶ See *Fifth Annual Report of the Pennsylvania Human Relations Commission, 1961. Annual Report.* (Harrisburg: The Commission, 1961).

⁵¹⁷ *Ibid.*

agencies refer only workers of a particular race.⁵¹⁸ Unions also discriminated by passing bylaws that precluded black membership.⁵¹⁹ In short, explicit exclusion was routine. As a result, the fair employment laws were contemplated to redress blatant discrimination.

Given the overt nature of the discrimination, both Courts and the Commission resorted to these statutes to remediate certain forms of “first-generation” discrimination, where employers had a policy of discrimination against minorities in hiring, pay, promotions and other conditions of employment.

In the immediate aftermath of the passage of Pennsylvania’s fair employment laws, the Commission worked to eliminate some of the most egregious employment practices that existed in the Commonwealth. In its fifth annual report, the Commission observed:

After five years we find that application forms used by employers now comply with the Fair Employment Practices Act, in that only questions relating to the applicant’s ability to do the jobs are listed in the vast majority of instances. Questions about race... have been removed, oftentimes voluntarily, but other times by action of the Commission.

Newspaper advertisements for employment now are strikingly in compliance with the Pennsylvania Fair Employment Practices Act. The cooperation of newspapers with the Commission has been excellent.⁵²⁰

⁵¹⁸ *Ibid.*

⁵¹⁹ Such unions included the Air Line Dispatchers Association; Machinists, International Association of Railroad Telegraphers; Switchmen's Union of North America; American Wire Weavers' Protective Association; Brotherhood of Locomotive Engineers; Brotherhood of Locomotive Firemen and Enginemen; Brotherhood of Railroad Trainmen; Railroad Yardmasters of America; Railroad Yardmasters of North America; Order of Railway Conductors; American Train Dispatchers' Association. Scholarship reports that enforcement efforts of fair employment laws had the effect of eliminating such statements from bylaws. See, e.g., Lloyd Bailer, “Organized Labor and Racial Minorities,” *Annals of the American Academy of Political and Social Science*, Vol. 274 (Mar., 1951), 101-107.

⁵²⁰ In its First Annual Report, the Commission observed that in its inaugural year of operation, thirty-seven complaints were filed, alleging the publication of discriminatory advertisements. According to Commission, “when [newspapers’ [were] informed that advertisements [were] unlawful, [they] ... stated immediately that their staff would be informed not to accept [them] in the future.” See *First*

In the case of employer job orders to employment agencies, it is more difficult to check on the effectiveness of the Law. However, in the instance of a number of employment agencies found to be processing unlawful job orders, a review of job orders on file six months later showed that the agencies then were in compliance with the Act.⁵²¹

As noted, this is not to say that the laws were solely responsible for the elimination of overt practices of bigotry as other factors undoubtedly contributed, including evolving attitudes about race,⁵²² grass roots civil rights organizing,⁵²³ and changing business considerations. But these contributing factors did not happen in isolation as protesters invoked a rights rhetoric that was at least partially based upon the existence of the fair employment laws and court/agency adjudications regarding those laws.⁵²⁴

Annual Report of the Pennsylvania Human Relations Commission, 1955-1956. Annual Report. (Harrisburg: The Commission, 1956).

⁵²¹ See *Fifth Annual Report of the Pennsylvania Human Relations Commission, 1961. Annual Report.* (Harrisburg: The Commission, 1961) The Report also cites a case involving a garment plant that had refused to employ black women as machine operators. The Commission became involved and brokered a resolution. In a follow-up survey two years following resolution, it was found that twenty black women were employed as operators. In these early annual reports, the Commission cites a multitude of instances where it successfully remediated cases of discrimination by facilitating racial integration of companies through hiring, promotions, and eliminating segregated work spaces, including at (1) a large Pennsylvania distillery that had failed to promote blacks into skilled positions, (2) a construction firm that denied employment to a black bricklayer, (3) department stores that refused to hire African Americans as sales clerks, (4) a nursing home that discharged a nurse because she was black, (5) steel manufacturers that maintained segregated locker rooms, (6) utility firms that had failed to hire blacks, (7) schools that refused to hire qualified black teachers, (8) a drug store company that denied employment to a qualified black pharmacist, (9) craft trade unions that refused membership and apprentice training to African Americans, (10) a gasoline service station that refused to hire African Americans, and so on.

⁵²² See, e.g., Thernstrom & Thernstrom, *America in Black and White: One Nation, Indivisible* (New York, New York: Simon & Schuster, 1997).

⁵²³ See, e.g., Thomas Sugrue, "Affirmative Action from Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945-1969," *The Journal of American History*, Vol. 91, No. 1 (June, 2004), 145-173 for a discussion of the protest movement in the urban north.

⁵²⁴ Legal rules also have a tendency to impact the values of a given society. Cass Sunstein, "On the Expressive Function of Law," *University of Pennsylvania Law Review*, Vol. 144 (1996), 2031 (arguing that the expressive function of law can construct community norms by giving state imprimatur to what constitutes "appropriate behavior").

But within a short span of time following the enactment of these statutes, Pennsylvania employers, like other firms around the nation, began adopting a variety of facially, race-neutral policies, such as “intelligence testing,” that had the effect of jeopardizing African American job gains who were underperforming on these tests.⁵²⁵

To address these practices, starting in the 1960s, civil rights organizations began instituting legal challenges to testing on the grounds that they bore no correlation to job performance.⁵²⁶ At the same time, and frequently as part of the same lawsuit, these actions also charged the employer with intentional discriminatory conduct. These lawsuits proved important on a number of fronts. Courts invalidated a multitude of testing requirements and subjected a range of employers to far reaching reforms, including mandating explicit hiring and promotions of qualified minorities so that their ranks would reflect the demographics of the relevant labor market.

Scholarship demonstrates that these lawsuits led to increased employment advancements for minorities during the 1960s and 1970s.⁵²⁷ Attorneys who I

⁵²⁵ See, e.g., Elizabeth Barholet, “Application of Title VII to Jobs in High Places,” *Harvard Law Review*, Vol. 95, No. 5 (1982), 983 (noting that by the early 1970s, a Senate and House report both observed that the “central problem of employment discrimination was one not of overt discrimination, but of covert bias and of systematic exclusion of blacks from certain jobs by facially neutral criteria”); Albert Rosenthal, “Employment Discrimination and the Law,” *Annals of the American Academy of Political and Social Science*, Vol. 407 (1973), 91-101 (noting that while overt discrimination against minorities rapidly diminished, in its place, companies adopted standardized testing which had a comparable effect in limiting employment opportunities). See also Alfred Blumrosen, “Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination,” *Michigan Law Review*, Vol. 71, No. 1 (1972), 59-110; “Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,” *Harvard Law Review*, Vol. 84, No. 5 (1971), 1109-1316 (reporting that the Psychological Corporation found that approximately 90% of Fortune 500 companies bought different types of psychological tests to administer occupationally, and that a 1963 survey found that 84% of responding firms utilized personnel tests of some sort in connection with its hiring and promotional decision-making).

⁵²⁶ See, e.g., Craig Haney & Aida Hurtado, “The Jurisprudence of Race and Meritocracy: Standardized Testing and ‘Race-Neutral’ Racism in the Workplace,” *Law and Human Behavior*, Vol. 18, No. 3 (1994), 223-248 (discussing the role of civil rights litigation in challenging the use of testing to make employment decisions).

⁵²⁷ Jonathan S. Leonard, “Antidiscrimination or Reverse Discrimination: The Impact of Changing Demographics, Title VII, and Affirmative Action on Productivity,” *The Journal of Human Resources*, Vol. 19, No. 2 (Spring, 1984), 145.

interviewed also opined that these lawsuits were directly responsible for integrating a variety of employers. Such employers included, but were not limited to, municipal police and fire departments, manufacturing firms, service industries and so on. In the ongoing debate between the pro and anti-litigation forces, these outcomes gave the litigation advocates the upper hand.

IV. THE DECLINING INFLUENCE OF CIVIL RIGHTS LITIGATION IN THE EMPLOYMENT CONTEXT

Two circumstances arose that led to the declining influence of civil rights litigation in yielding tangible reforms in the workplace. First, there was a conservative turn to the bench. As discussed in Chapters 3 and 4, Richard Nixon, and then Ronald Reagan, mounted attacks on the judiciary with the aim of appointing conservative jurists not only to the United States Supreme Court but also to the lower federal bench where 99% of the litigation actually takes place.⁵²⁸ Many of the newly appointed judges reflected pro-business biases and appeared skeptical if not outright hostile to civil rights suits. These developments lent support to the concerns advanced by scholars like Ralph Bunche who had originally argued that court adjudications will ultimately reflect the interests of the privileged class.

Given the explicit politicization of the bench, it is not surprising that judges began interpreting Title VII in very restrictive ways, exponentially increasing the difficulty for plaintiffs. In *McDonnell-Douglas* type cases, the courts began mandating unusually high hurdles for stating claims, for surviving summary judgment motions, and for proving illegal discrimination at trial. Almost all plaintiff attorneys with whom I spoke opined that these court-manufactured obstacles have impeded the

⁵²⁸ McMahon, Kevin J., *Nixon's Court*, (Chicago: The University of Chicago Press, 2011).

effectiveness of litigation as a tool for remediating inequality in the workplace. While there has been pushback from Congress on some of the more extreme court developments, the case law still remains very restrictive.

The second major circumstance that impacted the effectiveness of employment litigation ironically arises out of the very successes that civil rights litigators experienced in tackling first generation forms of discrimination. On one hand, litigation led to a decrease in the amount of blatant bigotry happening on job sites.⁵²⁹ At the same time, due to the financial costs of lawsuits,⁵³⁰ employers were incentivized to address these more blatant expressions of bigotry through the institutionalization of fair employment practices.⁵³¹ For large employers, such systemization included the adoption of anti-discrimination policies, the creation of human resource departments, EEO training, the development of discrimination complaint procedures, the appointment of diversity officers and consultants, and the use of internal accountability rules to safeguard against discrimination.⁵³² According to some studies, over two thirds of employees work in organizations that have written

⁵²⁹ In an interview, Larry Besnoff, Esq. stated “You don’t see the nooses, you don’t see the ‘nigger go home’, ... and you don’t see any direct evidence [of discrimination anymore].”

⁵³⁰ See Michael M. Selmi, “The Price of Discrimination: The Nature of Class-Action Employment Discrimination Litigation, and its Effects,” *Texas Law Review*, Vol 81 (2003), 1249, reporting that the average cost to an employer defending a class action lawsuit in the 1990s exceeded \$44 million. Defense attorneys advised that the legal bills generated to defend a single-plaintiff case run as high as \$300,000. Interview with Jane Dalton, Esq.

⁵³¹ Donald Tomaskovic-Devey & Kevin Stainback, “Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces since the Civil Rights Act,” *Annals of the American Academy of Political and Social Science*, Vol. 609, (Jan., 2007), 61 (“It is fairly clear that EEO law has encouraged the adoption of formalized human resource practices to demonstrate compliance with those laws.”); Lauren Edelman et al., “Diversity Rhetoric and the Managerialization of Law,” *American Journal of Sociology*, Vol. 106, No. 6 (2001), 1589-1641.

⁵³² See, e.g., Frank Dobbin, et al., “Equal Opportunity Law and the Construction of Internal Labor Markets,” *American Journal of Sociology*, Vol. 99, No. 2 (1993), 396-427 (noting that human resource departments developed as a market response to EEO mandates); Susan Sturm, “Second Generation Employment Discrimination: A Structural Approach,” *Columbia Law Review*, Vol. 101, No. 3 (Apr., 2001), 458-568 (noting that the legal incentives created by EEO laws and enforcement actions helped to create dynamic employer anti-discrimination policies and practices in certain companies).

policies that mandate EEO compliant policies for hiring, promotions, and terminations.⁵³³

As a result, over time, expressions of racial bias by lower level employees became more covert and comprise the vast majority of complaints in filings today.⁵³⁴ Additionally, employers became particularly adept at instituting practices that would assist in defending against lawsuits. The bulk of my research necessarily examined litigation's ability to remediate these more subtle forms of discrimination. My investigation demonstrated that litigation is not well suited for addressing this type of discrimination.

Under our enforcement scheme, plaintiff employees generally must first file their claims with an administrative agency. In fact, most complaints never proceed past the administrative level. As a result, I undertook to study the operations of an agency charged with enforcing our anti-discrimination laws. The PaHRC seemed well suited for such an investigation given its size and its history.

In examining the efficacy of the Commission, I spent roughly six months observing its processes. During that time period, I reviewed five decades worth of Commission-generated annual reports. The annual reports contain a wealth of data including statistics on the volume and type of discrimination complaints filed and closed in Pennsylvania each year, the manner of disposition, the average length of case duration, the racial identities of complainants, the total number of inquiries received by the Commission and settlement data. I also interviewed key agency

⁵³³ Peter Marsden, et al., "Bureaucratic Structures for Coordination and Control," in *Organizations in America: Analyzing Their Structures and Human Resource Practices*, ed. by Arne L. Kalleberg, David Knoke, Peter V. Marsden, and Joe L. Spaeth. (1996).

⁵³⁴ See, e.g., Susan, Bisom-Rapp, "Bulletproofing the Workplace: Symbol and Substance in Employment Discrimination Law Practice," *Florida State University Law Review*, Vol. 26 (1999) (noting that empirical evidence indicates that discrimination is not as overt as it was in the past).

stakeholders, such as Commission staff members, private attorneys and litigants. Commission staff members included the executive director, commissioners, current and former staff attorneys, investigators, a hearing examiner and others. I also reviewed approximately 80 case files.

Based upon my interviews and the review of the data, I noticed the following historical trends. First, I noticed that the number of complaints have steadily increased from the Commission's inception to the year 2000. Since the year 2000, the number of complaints brought has annually ranged from somewhere between three to five thousand filings. From inception to the year 2000, the number of complaints alleging race discrimination has also steadily increased. For the last decade, the number of such claims has hovered around one thousand filings annually. Clearly, people find value in filing complaints of discrimination. Roughly, 90% of those complaints are filed by African Americans. Further, of the cases that are filed with the Commission, somewhere between 80%-90% involve claims of employment discrimination. But notably, less than one percent of them make it to a public hearing. They are settled, dismissed for lack of probable cause, or closed administratively due to claimant request.

As one can see, the Commission starts with a very high volume of cases that it must investigate in any given year. But only a tiny fraction of those filings actually make their way to a hearing. Thus, most of the Commission's work takes place behind closed doors.

In considering the efficacy of the Commission, I compared its performance against the aims of employment discrimination laws generally: in (1) eradicating discrimination and (2) making the victims of employment discrimination whole. I also examined claimant satisfaction with the litigation process.

Despite some of the important successes that the Commission has historically had in advancing minority interests, my investigation revealed the following. First, on the whole, individual claimants currently fare rather poorly before the Commission even while exceptions exist. This is due to (a) dilatory investigations, (b) infrequent findings of employer discrimination, and (c) inauspicious settlements. Second, it is rare where the Commission now mandates and successfully reforms an institution of employment. Finally, with limited exception, most claimants who I interviewed reported deep dissatisfaction with their experiences before the Commission.

As for the time period it takes the Commission to investigate complaints, Executive Director Homer Floyd opined that the Commission, on average, should take six months to investigate a case where there is no probable cause and one year where probable cause exists. But according to the most recent annual report available at the time of my investigation, roughly 66% of the cases exceed the six-month mark, roughly 45% exceed the one year mark, and 16% were on the docket for at least two years. One claimant at the time I interviewed her reported that her case had been ongoing for over nine years without disposition. These delays hurt complainants not only because they stall an adjudication of their rights but because it is hard to maintain evidence for such extended periods of time. Critical witnesses may move away or die. Interviewees confirmed as much. Thus, there is a direct correlation between delays in adjudication and the remediation of discrimination.

Understandably, attorneys whom I interviewed expressed dismay with the amount of time it takes for the Commission to investigate complaints.

As for findings of probable cause, the Commission typically only finds probable cause in 2%-3% of its cases. Yet every Commission investigator with whom I spoke reported that they believe that they are reporting false negatives for probable

cause, on average, 10%-25% of the time. Part of the explanation for the absence of probable cause determinations is undoubtedly due to inadequate investigations caused by large caseloads. Currently, investigators have between 100-120 assigned cases when the ideal number ranges somewhere between 50-70 cases.⁵³⁵

But even if investigations are less than ideal, it would appear that the intrinsic difficulty in proving the existence of discrimination is one of the primary reasons for depressed probable cause rates. Confirming what the research suggests, every investigator with whom I spoke attested that the nature of discrimination has changed rather dramatically by becoming much more subtle over the years. Investigators also reported that these subtleties have made it exceedingly difficult to catch employers who engage in illegal conduct. For example, it has become much easier for employers to escape liability by articulating and providing some scintilla of evidence of a legitimate, non-discriminatory reason as to why it took an adverse employment action against an employee under *McDonell-Douglas*. It has also become exceedingly difficult for the employee to rebut the non-discriminatory reasons proffered by the employer. If the Commission is underperforming in identifying discrimination, which its investigators readily admit, then the Commission is incapable of effectively redressing race discrimination more broadly.

As far as settlements go, the Commission does outperform its sister state agencies in resolving cases amicably, enjoying a rate that ranges between 40%-50% of dispositions. But there are a number of pitfalls to such high resolution rates. First, my research shows that the typical settlement generally settles for “nuisance” value, making it unlikely that claimants are “made whole” for their injuries. Second, the

⁵³⁵ Interview with Homer Floyd.

settlements generally do not require employers to revise any discriminatory employment practices. Even when settlements do require training of some sort, there is a notable absence of clarity regarding what that training is supposed to entail. Third, settlements are always confidential, and as a result, ongoing employment practices remain hidden from public scrutiny.

The Commission also has moved away from litigating “pattern and practices” cases. More prominent in the 1970s, the Commission rarely files these types of cases nowadays due to limited resources. Given that restriction, it is hard to conceive of a Commission making systemic changes when it predominantly chooses to tackle individual cases.

But irrespective of what the Commission generally achieves, it was still important to obtain complainant reactions to the process to measure their level of satisfaction. To that end, I interviewed fourteen complainants. In speaking with them, it became apparent that some complainants filed for some combination of the following reasons: (1) to secure workplace reforms, (2) to obtain some tangible personal relief such as reinstatement, a promotion, or compensation and/or (3) to remediate some racial indignities that they had suffered at the hands of their employer that they thought the Commission could remediate. Most complainants reported high levels of dissatisfaction with the process.

In addition to dissatisfaction, it became increasingly clear that most complainants also experienced the Commission process as highly disempowering. For example, almost all claimants had failed to achieve the workplace reforms that they had originally sought. In fact, both the Commission and the employer had converted their claims into a financial language of remuneration which only served to further alienate them from their grievances.

As for those claimants who did file for purposes of obtaining financial compensation, there were few instances where filings extracted any real economic gains for them. This was due to the fact that most complainants received “no cause” dispositions, lost at a public hearing, or otherwise garnered, in their minds, insufficient settlements.

Finally, for those who sought to repair some racial insult, filing became a form of recognition politics. For them, a finding or admission of wrongdoing would have gone a long way to fixing the damage that they had suffered. But the Commission simply proved incapable of processing their claims to restore whatever they had felt they had lost as a result of the discrimination. Consequently, the complainants’ feelings of misrecognition became compounded. Court plaintiffs frequently fare no better as judges employ a language that is foreign to litigants which then can serve to further estrange them from their own experiences. As a result, my research generally showed that litigation is ill-equipped to repair an injured sense of racial identity. Of course, there were a small number of claimants who I interviewed who felt vindicated by the process. But they proved the exception rather than the rule.

Nonetheless, even for those claimants who felt disempowered by the process, a number of filers did report value from it. Many of these complainants contended that they would have filed again if presented with the opportunity even knowing that the outcome would prove dissatisfying. Their insistence on so doing can be understood through a politics of rights lens. For them, filing functioned as a political act of assertion in which they were standing up for important principles. The Commission provided symbolic space for them to engage in acts of self-advocacy and formalized resistance to racial injustice. In filing, not only were claimants engaging in performative acts as they laid claim to a human and, in some cases, black identity,

but they were also following a uniquely American “rights” tradition of petitioning the state for redress of their grievances. On those infrequent occasions where the outcome felt satisfactory to the complainant, the process proved quite gratifying. But notably, unlike the Martin Luther King led movement of the 1950s and 1960s in which people collectively moved the state for recognition of their rights, the litigation process proved highly atomistic, generally undermining notions of group action. Ironically, the very struggle of the 1950s and 1960s to obtain civil rights for black Americans has seemingly limited the expression of group protest by siphoning it through an individualistic, highly formalized litigation mechanism.

After exhausting administrative remedies, parties then have the opportunity to file in court. But unfortunately, court successes now are also relatively rare. The first impediment for potential filers involves the difficulty in finding an attorney to provide legal representation. My research suggests that only around 5% of would-be plaintiffs are able to retain legal counsel. Because *pro se* plaintiffs cannot meaningfully litigate cases, this means that for 95% of potential plaintiffs, there is no real recourse to the courts. Further, because race cases appear the hardest in which to prevail, attorneys are taking fewer of them. One prominent employment discrimination lawyer stated: “The number of pure race discrimination cases [that I am taking] are becoming fewer ... because they are becoming too hard to win.”⁵³⁶

The second major problem is that courts appear hostile to plaintiff claims. The research tends to show that courts appear to enter pretrial judgments in favor of the defendant in a significant percentage of cases.

⁵³⁶ Interview with Frank Finch, Esq.

Third, even when plaintiffs ultimately do make it to trial, studies show that African American plaintiffs in race discrimination cases fare poorly. In one recent study, black plaintiffs fared the worst, winning their trials about 16% of the time. Judges and attorneys with whom I spoke generally confirmed that race discrimination cases are the hardest on which to prevail as juries are skeptical of their claims. This is significant because the damages that employees suffer can be quite high. Indeed, in those cases where African Americans did prevail, the mean jury award was about \$350,000.

Fourth, even where the plaintiff does succeed at trial, statistics demonstrate that there is roughly a 40% chance that their outcome will be reversed on appeal.

Finally, regarding settlements, while there still remains insufficient empirical data to draw any firm conclusions, of the data that we do have, it would appear that while African American race discrimination plaintiffs do recover more than nominal amounts, they still fare worse than other types of job discrimination plaintiffs, and settlements rarely mandate changes to corporate policies.

Given these limitations to the litigation model, it is not surprising that litigation has failed to successfully redress ongoing income and employment disparities and segregation in the workplace.

One of the primary purposes of the civil rights laws was to end gaps in income and employment opportunities that existed between black and white workers.⁵³⁷ But

⁵³⁷ “Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964,” *Harvard Law Review*, Vol. 84, No. 5 (Mar., 1971), 1113 (“Chief among the complex of motives underlying the equal employment opportunity provisions of the Civil Rights Act of 1964 was doubtless a desire to enhance the relative social and economic position of the American black community.”)

as scholars have reiterated, inequality plainly remains.⁵³⁸ Black Americans earn approximately eighty cents for every dollar that white Americans earn even when controlling for educational degrees.⁵³⁹ Median household income for black is approximately 62% of white families.⁵⁴⁰ United States Department of Labor, Bureau of Labor Statistics establishes that the current unemployment rate for black Americans is about twice as high as for white Americans.⁵⁴¹ “In 1972, according to the earliest data from the Bureau of Labor Statistics, average labor-force participation for African Americans was 60%, the majority of whom were employed in low wage work. By 1999, that number had peaked at just 66%, and it recently slid to 62%, due mostly to the recession.”⁵⁴²

Work spaces inside employers also remain highly segregated. For example, in 1966, measuring segregation in occupations within workplaces with the conventional index of dissimilarity (D) where an index of one hundred means complete segregation and zero means even distribution, segregation by occupation was 69% between black and white men in 1966 and was around 55% by 2002.⁵⁴³ This means that almost 55% of the members of one racial group would have had to switch positions with members

⁵³⁸ See, e.g., Craig Haney & Aida Hurtado, “The Jurisprudence of Race and Meritocracy: Standardized Testing and ‘Race-Neutral’ Racism in the Workplace,” *Law and Human Behavior*, Vol. 18, No. 3 (1994), 223-248.

⁵³⁹ US Census Bureau. (2006). People (Both Sexes Combined – All Races) by Median and Mean Income: 1974 to 2005.

⁵⁴⁰ *Ibid.*

⁵⁴¹ <http://www.bls.gov/news.release/empsit.t02.htm>

⁵⁴² <http://prospect.org/article/segregated-workplace>

⁵⁴³ Donald Tomaskovic-Devey & Kevin Stainback, “Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces since the Civil Rights Act,” *Annals of the American Academy of Political and Social Science*, Vol. 609, (Jan., 2007), 67

from the other in order to achieve equal racial distribution across job categories.⁵⁴⁴

But despite these racial disparities, as the aforementioned discussion demonstrates, it is clear that litigation did contribute to the integration of American businesses. It is also clear from both plaintiff and defense attorneys alike that these laws and the threat of litigation also serve as ongoing deterrents to workplace discrimination.⁵⁴⁵ As one plaintiffs' attorney stated, it simply "is not cost effective to discriminate."⁵⁴⁶ Indeed, even if the employer ultimately prevails in a lawsuit, the legal bills generated to simply defend the case can run as high as \$300,000.⁵⁴⁷ Should the defendant lose, not only does the defendant have to pay its legal bills, but it also must satisfy the monetary judgment and the plaintiffs' attorney's fees. Given the potential monetary exposure, all defense attorneys, who I interviewed, indicated, in some form or manner that the cost associated with these lawsuits serves as a huge incentive for companies to root out and prevent at least blatant forms of discrimination from taking place on their premises. Consequently, for those companies that understand the business imperative of observing the equal employment laws and have the resources to devote to it, the laws have proven effective to some degree.

⁵⁴⁴ *Ibid.*

⁵⁴⁵ As a number of scholars have argued, "antidiscrimination laws affect employer behavior by making actions branded as discriminatory more costly through actual (and anticipated) litigation costs and damage awards." Thomas Abram, "The Law, Its Interpretation, Levels of Enforcement Activity, and Effect on Employer Behavior," *The American Economic Review*, Vol. 83, No. 2, Papers and Proceedings of the Hundred and Fifth Annual Meeting of the American Economic Association (May, 1993), 64.

⁵⁴⁶ Interview with Stephen Console, Esq.

⁵⁴⁷ Interview with Jane Dalton, Esq.

Reflecting upon some of the successes of the fair employment laws, one former federal magistrate judge, who has mediated thousands of employment discrimination cases, asserted the following:

I think the laws have been effective in educating and sensitizing employers and the workforce. ... [E]mployers [are] being ... motivate[ed] ... [by] their own litigation avoidance. But because they have set up ... policies and training, ... they have encouraged diversity...[A]nd they've ... [adopted policies] of zero tolerance. I do think that the quality of the workforces in terms of ... direct ... discrimination is better and that the education that has occurred through litigation and the laws has made a difference in the quality of the workforce...I absolutely believe that. But I'm not naïve to think that ... more subtle forms of discrimination don't still exist.⁵⁴⁸

Statistics also establish advancement in African American opportunities in the workplace since the passage of these anti-discrimination laws. In 1966, of those employers who were legally required to report EEO1 data to the EEOC, over 50% indicated that they had no black male employees and over 70% confirmed that they had no black female workers.⁵⁴⁹ In contrast, over 95% of employers had a white male worker and almost 90% reported that they had at least one female white employee.⁵⁵⁰ By 2002, the percentage of employers reporting they did not have an African American male or female employee working for them had been cut by more than half, with only 21% reporting that they had no black male employees and only 28% reporting that they had no black female employees.⁵⁵¹ Thus, the complete exclusion of minority workers has reversed itself. Unfortunately, for the reasons explained, it is hard to imagine civil rights litigation continuing to make a difference in promoting significant systemic transformations in workplace practices.

⁵⁴⁸ Interview with Honorable Diane Welsh.

⁵⁴⁹ Donald Tomaskovic-Devey and Kevin Stainback, "Discrimination and Desegregation: Equal Opportunity Progress in U.S. Private Sector Workplaces since the Civil Rights Act," *Annals of the American Academy of Political and Social Science*, Vol. 609, Race, Ethnicity, and Inequality in the U.S. Labor Market: Critical Issues in the New Millennium (Jan., 2007), 49-84.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

V. THE FUTURE OF CIVIL RIGHTS LITIGATION

Notably, the purpose of this dissertation was not simply to identify the successes and failures of anti-discrimination litigation in the employment context, but also to gauge how those outcomes more broadly inform us about the efficacy of civil rights litigation in general. I turn to that topic in this final section.

In the course of conducting research, I had the opportunity to interview three prominent members from the *Brown v. Board of Education* legal team. They are federal district court judges Jack Weinstein and Louis Pollak, and civil rights litigator, Jack Greenberg, Esq. Because for many, *Brown v. Board of Education* is considered a watershed moment in the history of civil rights litigation, I specifically wanted to interview them because their opinions could provide valuable insights regarding the effectiveness of civil rights litigation as a force for progressive change.

Judge Pollak was one of the principal writers of the legal brief in *Brown*. In 1978, he was appointed to the federal bench. Before joining the bench, he served as both the dean of the Yale and the University of Pennsylvania law schools. Judge Weinstein has been on the federal bench for close to forty five years and is a prolific writer on legal procedure and the rules of evidence. Both judges are considered to be luminaries of the federal bench. Jack Greenberg, Esq. served as the executive director of LDF for close to twenty-five years. During the course of his career, he argued forty cases before the United States Supreme Court. It is notable that all three of these men recognized some of the built-in but frequently unstated limitations that litigation faces in advancing any socio-political cause.

In giving some historical perspective to what civil rights litigators believed possible back in the 1950s and 1960s, Judge Pollak stated, “[w]e had some expansive

thoughts and notions during the Warren years that I think were shortsighted.... [But] even with “[c]ourts ... staffed with ... clones of Thurgood Marshall... the results are modest.” In reflecting upon the legacy of *Brown*, Judge Weinstein opined that *Brown* failed in its purpose to “equalize educational opportunities” for African Americans. As a result, he stated he believed that its ultimate legacy was disappointing to the *Brown* litigation team.

Both Judge Pollak and Judge Weinstein cited two factors that severely constrain what the best-intentioned courts can accomplish: (1) they lack the “power of the purse” and (2) they are circumscribed by public sentiment. A number of judges who I interviewed expressed similar concerns. Chief Judge Theodore McKee of the Third Circuit Court of Appeals, a Clinton appointee, wistfully and rather candidly stated that courts are necessarily conservative bodies because they can never move too far ahead of public opinion lest they risk loss of credibility and authority. And with the exception of Judge Weinstein, the judges who I asked, even those with liberal reputations, generally affirmed the impropriety of “judicial activism.” These sentiments seemingly sound the death knell for the traditional liberal narrative that views courts as trailblazers for progressive causes.

But there are instances where civil rights litigation and courts clearly have served as fundamental agents of change. Jack Greenberg, Esq. opined as much, stating that courts are one potential political tool in any movement. So, given the above-described constraints on courts and the knowledge that courts have, at times, been the only institution that could effectuate progressive change, the purpose of this final section is to identify several factors that contribute to litigation’s potential for success. This sketch is necessarily tentative and future research will be needed to

further identify, develop, clarify, and critique these factors so that “cause lawyers”⁵⁵² may have a better sense of when and under what circumstances legal activists should resort to litigation as a strategy for change. Obviously, if courts continue to grow more conservative over time, this approach will have to be reconsidered.

A. The Type of Relief Requested

The first factor that may tend to circumscribe the potential for civil rights litigation to serve as a force for progressive political change involves the type of relief requested. Courts are simply better suited to provide a one-time adjudication and generally do not relish the opportunity to serve as superintendents over the operations of some large institution.⁵⁵³ In the employment context, for example, courts do not want to serve as a judicial human resources department managing corporate internal affairs. In echoing this sentiment, Judge Pratter stated, “[w]e like to see the cases come to an end; we don’t like to keep jurisdiction.”⁵⁵⁴ That does not mean that the courts will refuse to enter into consent decrees or engage in long term monitoring efforts. But when they do, defendants can engage in a variety of resistive measures, including, but not limited to, subterfuge, foot-dragging, and other tactics that can thwart court-ordered reforms.⁵⁵⁵ Judges who I interviewed acknowledged as much. As a result, a request for a one-time adjudication by a court generally is easier to

⁵⁵² Austin Sarat and Stuart Scheingold coined the phrase “cause lawyering,” in their book, *Something To Believe In: Politics, Professionalism, And Cause Lawyering*. Scheingold, Stuart & Sarat, Austin, *Something To Believe In: Politics, Professionalism, And Cause Lawyering* (Stanford: Stanford University Press, 2004).

⁵⁵³ See, e.g., Susan Sturm, “The Legacy and Future of Corrections Litigation,” *University of Pennsylvania Law Review*, Vol. 142, No. 2, (1993), 641 (noting that courts reluctantly “police[]... our nation’s correctional institutions”)

⁵⁵⁴ Interview with Honorable Gene Pratter.

⁵⁵⁵ See, e.g., Susan Sturm, “A Normative Theory of Public Law Remedies,” *Georgetown Law Journal*. Vol. 79, (1991), 1355, 1412-1413 1427-1428 (noting that remedies imposed by judges and other external authorities engender backlash, resentment, and resistance).

implement.

There are generally two types of relief that courts order: equitable and monetary damages. Courts are well-suited to order compensation for violations of civil rights. As discussed above, for *rational* defendants, the potential for significant financial exposure serves as an incentive for institutional reform. In the employment context, economically-rational, forward looking companies have leveraged the threat of legal liability as an opportunity to safeguard against the most blatant acts of discrimination. The threat of financial liability has caused defendants in a host of areas to modify their conduct to avoid exposure. In the context of tort law, for example, legal liability has helped consumer advocacy groups advance their causes by incentivizing manufacturers to adopt safety measures to minimize potential injuries arising from use of their products.⁵⁵⁶ Thus, monetary relief does serve an important function in not only compensating victims but also in promoting institutional reforms.

In addition to monetary relief, injunctive relief is another area where courts can impact change. Landmark cases that fall into this category are too numerous to list but identifying several serve to illustrate the point. For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court decriminalized anti-contraceptive devices. In *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court struck down anti-miscegenation laws. In *Tinker v. Des Moines*, 393 U.S. 503 (1969), the Supreme Court protected a student's rights to expression. Obviously, in these cases, court decisions had a huge impact on society and individual life choices. But the more complex the relief requested, the harder it is for civil rights litigation to

⁵⁵⁶ See, e.g., James March & Zur Shapira, "Managerial Perspectives on Risk and Risk Taking," *Management Science* Vol. 33, (1987), 1404-18 (documenting, through interviews of business executives, the lengths that companies are willing to go to reform practices in an effort to avoid exposure to potential legal liability). See also Robert Cooter, "Economic Theories of Legal Liability," *Journal of Economic Perspectives*, Vol. 5 (1991).

directly serve as a catalyst for change.

B. Violations are Open and Obvious and Transgress Some Accepted Community Norms of Behavior

Where a civil rights plaintiff brings litigation for purposes of reforming the operations of some large institution, such as an American employer, the odds of the litigation achieving the desired outcome increases where the violations are open and obvious and where the defendant's conduct violates some community standards of acceptable moral behavior.⁵⁵⁷ Under those circumstances, courts seem much more willing and able to effectively oversee changes to the institution.

But as with employment, when purported violations become more subtle, courts are less likely to take up the issue. Cases that fit this description include those that involved efforts to reform prisons,⁵⁵⁸ psychiatric facilities,⁵⁵⁹ and residential homes for children with disabilities.⁵⁶⁰ Even though in some instances, such as prisons, the plaintiffs were largely unsympathetic, nevertheless, the alleged violations were so severe and the violations were so open and obvious that judges were moved by the abysmal conditions to intervene and issue extensive remedial measures that required considerable follow-up and supervision. A number of commentators have documented that the judiciary served as an important catalyst for transforming

⁵⁵⁷ See also Susan Sturm, "The Legacy and Future of Corrections Litigation," *University of Pennsylvania Law Review*, Vol. 142, No. 2 (1993), 683 (opining that "litigation may be most effective in transforming institutions that deviate from a widely shared professional and social norm").

⁵⁵⁸ *Ibid*, 662 & 670 (concluding after a review of the existing body of case studies that "litigation has profoundly changed the conditions and practices in correctional institution.... In sum, litigation has had a considerable effect on the organization, leadership, and structure of corrections institutions. It has fostered the acceptance of norms and standards governing correctional institutions, contributed to the professionalization of corrections leadership, prompted the rationalization and formalization of correctional institutions, and increased their visibility and accountability.").

⁵⁵⁹ *Davis v. Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974) (holding that patients have a right to be assessed for release, to individualized medical care, to personal property, and to privacy).

⁵⁶⁰ *Halderman v. Pennhurst State Sch. & Hosp.*, 446 F. Supp. 1295, 1299 (E.D. Pa. 1977).

institutions in these areas of litigation.⁵⁶¹

C. Exogenous factors over which Courts have little control

Sometimes, there are also sociological and political factors over which courts exercise little control that contribute to the inequalities that are sought to be rectified through litigation. When this happens, litigation, by itself, may have little power to force change. An illustration of this point arises in the context of educational institutions. In *Brown* and other school desegregation cases, litigation was aimed at equalizing educational opportunities for African Americans.⁵⁶² But attorneys who litigated school desegregation lawsuits opined that school desegregation litigation failed in that stated aim.⁵⁶³

Michael Hardiman, Chief Counsel for the PaHRC, who has litigated school desegregation cases for several decades, reflected upon the mixed results of school desegregation cases in Pennsylvania. On one hand, the litigation was successful because it forced school districts to spend more resources on those schools with disproportionately higher needs that tend to be predominantly populated with minority students. As a result, the achievement gap between minority and white students has narrowed. But on the other hand, the narrowing appears modest.⁵⁶⁴ The reason that the narrowing is modest is because there are other contributing structural factors over which courts exercise little control such as prenatal health, early childhood development, issues of poverty, violence in the homes and neighborhoods, nutrition,

⁵⁶¹ See, e.g., Colin Diver, “The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions,” *Virginia Law Review*, Vol. 65, No. 1 (1979), 43-106.

⁵⁶² Interview with Honorable Jack Weinstein. Interview with Michael Hardiman, Esq.

⁵⁶³ Interview with Honorable Jack Weinstein.

⁵⁶⁴ When commenting upon the racial disparity in academic achievement, Mr. Hardiman reported: “you are beginning to see a narrowing – not much – but some of the differential in academic achievement between white and non-white students. That’s progress.”

and so on that also influence educational opportunities and achievement and circumscribe what any tribunal can do.⁵⁶⁵

D. Applying These Factors to A Contemporary Civil Rights Issue

During my interviews, I asked a number of attorneys to opine about the future of civil rights litigation. While a number of them appeared pessimistic about the utility of litigation to systematically advance racial causes, some cited the potential promise that litigation may hold for “gay rights.” Take the issue of same-sex marriage as an example. In applying the aforementioned factors, it would appear that litigation could have some real potential to advance this cause.⁵⁶⁶ As for the first aforementioned factor, an adjudication enjoining laws that ban same-sex marriage should not require any real ongoing supervision. As for the second aforementioned factor, laws that ban same-sex marriage are overt and clearly run afoul of American community norms of equality and liberty. As for the third factor, there are no obvious exogenous variables that will interfere with court-ordered relief. As a result, a court adjudication that enjoins same-sex marriage proscriptions should have an immediate impact in achieving what litigants seek. In addition, the expressive function of law in adjudicating against heterosexism could also serve an important purpose in undermining exclusionary heterosexist norms.

⁵⁶⁵ Interview with Michael Hardiman, Esq.; Coleman, James, *Equality of Educational Opportunity*, (1966).

⁵⁶⁶ Notably, marriage has far-reaching consequences. It impacts employment benefits, family medical leave rights, worker’s compensation and retirement plans, bereavement benefits, hospital visitation rights, medical decisions on behalf of a spouse, spousal and child support, visitation rights, in the case of divorce, etc. A court adjudication enjoining discriminatory conduct by states in outlawing the existence of same-sex marriage should instantaneously equalize these rights between heterosexual and same-sex couples.

VI. CONCLUSION

The civil rights laws were designed to address blatant forms of discrimination in the workplace. While litigation at both the administrative and court levels proved fairly effective at forcing companies to address the worst offenses, it has had far less impact in reforming more subtle expressions of bias. As stated, the conservative turn to the courts has contributed to the ineffectiveness of litigation. But that cannot explain all of the difficulty as the PaHRC is a much more liberal venue for prosecution of these cases. Yet, outcomes there are also generally disappointing. Predictably, one could contend that the Commission's lack of success is due to a number of idiosyncratic burdens that the Commission faces, including scarce resources, deficient investigations, and inadequate training. These factors plainly explain some of the shortfalls. But my research also suggests that the changing face of racism in the workplace, what Sturm described as "second-generation" discrimination, has made it much more difficult for the prosecutorial mode of litigation to function to remediate employer bias.

Commenting on the historic sweep and effectiveness of employment discrimination laws to achieve equal employment opportunities, Frank Finch, an attorney with close to forty years of experience, stated:

Well, if I take my career as a whole, I would say [that litigation has had] a very positive [effect] despite my bitterness in the way things have turned [out] in the past fifteen to twenty years. As a whole, looking back at everything I have been involved in, I would say that it has had a positive benefit. I don't think [women] would have been walking the street as police officers as early as they did if it had not been for litigation. I don't know if we would have a black police commissioner today if we weren't able to put black officers on the street and into the normal promotional lines at the point we did. I don't know that we would have a black fire fighter fire chief today if we didn't break down the awful resistance to even hiring black officers through litigation. The laws are the same. It's the litigation that forced that change and brought about some of the progress that we have seen today, and I would say that it has had a very positive effect. Whenever I walk down the street and I see a woman in a uniform walking down the street, I wonder if she knows how she got there. I

know that the black fire chief knows how he got there because he was working with me at the time all this started. And there was the former deputy chief of the police department [who] was a woman [who] knows how she got there because she was one of the test police women back during the litigation in that case.... Certain people know how they got to be where they are today and that is a result of litigation. It wasn't a result of politics. It wasn't a result of the legislature although those cases were based on legislation. It wasn't the legislation that compelled people to do the right thing. It was the litigation. And so I would say, overall, looking at the totality of the things that I have been involved in, the litigation has had a very positive impact....⁵⁶⁷

But when asked to assess the future of civil rights litigation, he opined:

I think that the future is dim, very dim.... It's now too difficult for litigation to be successful in the race area, in particular, much more difficult than it was in the seventies and eighties because the burdens of proof are much different and the courts are much different ... [Racism has] become more subtle and it's become much more difficult to find and to prove. It's still there, but it's much better hidden than it was before because of the sophistication of employers and other entities. They spend lots of money and they make sophisticated efforts to hide what they are doing and they didn't do that before. It was more overt before....⁵⁶⁸

While he may not have intended his comments to suggest a "life cycle" to race-related, employment discrimination litigation, it is hard not to think of job-rights litigation as having peaked in its broader social and political implications in the 1970s and 1980s and having since declined.⁵⁶⁹

Institutional changes will have to be made in order for workplace race discrimination litigation to have ongoing relevance in the future. Some have proposed a number of interesting ideas on the role that courts can serve to further facilitate ongoing efforts to reform workplaces in racially progressive ways.⁵⁷⁰

However, commenting on such a project exceeds the scope of this dissertation. But importantly, even though race-related civil rights employment discrimination

⁵⁶⁷ Interview with Frank Finch, Esq.

⁵⁶⁸ Interview with Frank Finch, Esq.

⁵⁶⁹ See also Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach," *Columbia Law Review*, Vol. 101, No. 3 (2001), suggesting a life cycle to traditional employment discrimination litigation.

⁵⁷⁰ See, e.g., Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach," *Columbia Law Review*, Vol. 101, No. 3 (2001), 458-568.

litigation may have peaked, it does not invalidate, as some might suggest, the potential utility of civil rights litigation in other contexts. Indeed, in the history of civil rights litigation, some attorneys have initiated incredible political changes that litigation has helped to produce. As this dissertation attempts to show, the early history of employment discrimination litigation serves as one example. Ultimately, future scholarship will need to more fully flesh out those particular circumstances under which civil rights litigation in contexts other than race discrimination in the workplace will prove to be a fruitful or feckless endeavor to advance important socially progressive causes.

APPENDIX A

Interview Questions for PaHRC Complainants– First Set

- I. Background Questions
 1. What is your age?
 2. What is your date of birth?
 3. What is your current marital status?
 4. Do you have children, and if so, how many?
 5. What is your highest level of education?
 6. How do you racially self-identify?
- II. Background with justice system
 1. Have you ever filed any prior claims of discrimination before with your job or with a governmental agency?
 2. Have you ever felt as though you were racially discriminated against even if you never filed a claim?
 3. Have you ever felt as though you were singled out for different treatment by anyone based on your race? If so, how frequently? Weekly, monthly, yearly, on one occasion, etc.?
 - a. Describe the incidents
 4. If you have ever filed a claim for discrimination before the instant one, please generally describe the experience. May explore the following points:
 - a. What were your expectations?
 - b. Did the experience match your expectations?
 - c. Was it a good experience, bad experience, or mixed experience?
 - d. How long did it take from start to finish?
 - e. Describe what you remember about it.
 - f. What was the outcome?
 - g. Did you feel as though you were treated fairly?
 - h. Were you satisfied with the outcome and the overall experience?

5. For instances where they have not previously filed but felt as though they were singled out for different treatment based on race, ask why they did not file in the past. Prompt with the following questions.
 - a. Not worth the bother?
 - b. Fear of retaliation?
 - c. Not certain how to go about doing it?
 - d. Other reasons?

III. Reasons for filing this time

1. Why did you file a claim? Follow-up questions to ask:
 - a. Was it for financial reasons?
 - b. Was it because you felt it was just?
 - c. Was it out of a sense of moral obligation?
 - d. Was it because of an obligation to your family?
2. When did you file your claim?
3. Where did you file your claim?
4. How much time elapsed between the perceived discrimination and the point at which you filed?
5. Were you represented by an attorney when you filed your claim? Did you look for an attorney? Why or why not?
6. What considerations, if any, did you think about before you decided to file?
7. Did anyone encourage you to file? Did you speak to people about filing? Examine whether claimant had a social support network.
8. Did you have any concerns or fears in filing?
 - a. Did you have any concerns about being considered a whiner?
 - b. Did you have any concerns about being perceived as too sensitive about racial issues?
 - c. Did you have any concerns about employer retaliation?
 - d. Any other concerns?
 - e. How significant were those concerns in terms of being obstacles to your filing?
9. If you had doubts about filing, what made you decide to file anyway?
10. Did you experience any obstacles in making a claim?

- a. Did you experience any pressures from significant other(s) about being litigious?
- b. Did you experience any obstacles in physically getting to the agency?
- c. Did you find the filing requirements confusing in any way?
- d. How did you know where to file?
- e. Were the agency workers courteous, helpful, difficult, rude, interested, compassionate, etc.?

11. Did you apply by telephone or in person?

IV. Encounter with the PaHRC

- 1. Could you tell me what happened the first day when you filed your complaint?
 - a. How long did you wait to be seen?
 - b. Was that acceptable to you? Did it seem like a short or long time?
 - c. How long did it take you to get an appointment?
 - d. How long did the whole process last?
 - e. Was that acceptable to you? Did it seem like a short or long time?
 - f. Were you asked any questions that you did not want to answer?
 - g. Did you feel as though you got to tell your entire story?
 - h. Did you feel as though the people who heard your stories cared?
 - i. Did they seem interested or did they just take down the information?
 - j. How long did you meet with someone for?
 - k. Was that person sympathetic, attentive, condescending, quick, etc.
 - l. Did you give thought to how you were dressed, i.e., business like, etc. Why or why not?
 - m. How did you feel emotionally?

V. Overall Reactions to the Experience

- 1. What were your expectations in terms of results? Were your expectations met? What actions did you feel as though they would take on your behalf?
- 2. How would you rate your investigator?
 - a. Why?
- 3. What was your experience of the fact finding conference? What did you take from that?

4. Overall, how would you describe your encounter with the PaHRC from the point at which you filed to the point at which the case was resolved?
5. How would you grade the PaHRC from A-F?
6. Do you think you were treated fairly?
7. Do you think you were treated with respect?
8. Do you think that people who you interacted with listened to your concerns?
9. If you could change any one thing about the process, what would it be?
10. In what ways?
11. Do you feel like your experiences with the PaHRC was disappointing or disempowering or power was taken away from you? Did the Commission add insult to injury?
12. Did you feel any bad consequences at work as a result of filing, i.e., retaliation?
13. Based upon your experience, would you file again?
14. Do you think that the laws are effective in making sure that whites and blacks are treated equally in the workplace?
15. Describe your complaint.
16. Before filing your claim, did you feel as though you had less power and less of a voice at work than white co-workers?
17. In what ways?
18. Do you feel as though filing a claim with the Commission changed that power dynamic?
19. Do you feel like you filing a claim made a difference?
20. How did your experiences at work make you feel emotionally?
21. How do you emotionally deal with racist experiences?
22. Did you find that effective?

VI. Broader Political and social questions

1. Do you feel that racism still exists in the United States? In Pennsylvania?
2. In what ways?
3. Do you feel like there are effective ways for people to fight or counter racism in the United States or Pennsylvania?
4. How so?
5. As a general matter, how do you feel that African Americans are treated in comparison to whites at your workplace?
6. As a general matter, how do you feel that African Americans are treated in comparison to whites in the country?
7. Given your experiences, do you think it is good to have laws on the books that make race discrimination illegal?
8. Do you think it would be more effective for people to form a group or a movement to challenge or protest discrimination than to individually file a claim or complaint?
9. Are there other ways that you believe that people can challenge and solve racial problems in this country? If so, what?
10. Based on your experiences at work and your life experiences, how would you describe what is it like to be black in America today?
11. Has that changed over time or location?
12. Based on your experiences at work and your life experiences, what do you think it is like to be white in America today?
13. By law, blacks and white have equal status as citizens of the US. Do you think in practice, blacks and whites are equally treated as citizens?
14. Why do you say that?
15. Do you generally vote in elections?
16. Anything else that you care to share that you think would be helpful?

Interview Questions for Claimants – Second Set

VII. Part II questions

1. Did you get an opportunity to fully explain the discrimination you experienced at work to the PaHRC?
2. How important was that to you?
3. Why?
4. Did you feel as though the waiting room area and the offices looked professional to you?
5. Was that important to you?
6. Were you satisfied with the degree to which you got to participate in the Commission's process in investigating? If not, what else would you have liked to have done? Would you liked to have more input or say-so in the process? Did you try to participate more? Were they receptive to that?
7. Did you feel like you had the ability to influence the investigation and decision-making process?
8. Were you able to effectively challenge decisions that you found objectionable?
9. What if anything did you learn by filing a complaint? What were the takeaways? Did you learn anything about:
 - a. i.e., the nature of discrimination
 - b. the difficulty or ease on how to challenge or change a system of injustice?
 - c. more knowledgeable regarding the PaHRC,
 - d. the effectiveness or uselessness of filing a claim, etc.
10. Did you find any of that learning to be a valuable thing?
11. As a result of filing a complaint, did you become more politically active or vocal in any way regarding discrimination or other social justice issues?
 - a. vote more frequently,
 - b. engage in grassroots or community organizing
 - c. protest
 - d. serve as an advocate for others
 - e. join any community or protest groups
 - f. becoming more aware of or vocal about social issues, etc.

12. Why or why not?
13. Why did you not go to the NAACP or to some other civil rights organization about the treatment you received?
14. When you filed your complaint, what, if anything, made you think it would be worth the time and effort?
15. Did your filing or the outcome of the investigation make you more cynical about solving problems of discrimination, more optimistic or hopeful about solving such problems, both or neither?
16. Do you feel as though the Commission was neutral or possessed biases in favor of you or your employer?
17. How important was it to you that the Commission make a finding for you that your employer did discriminate against you?
18. Why was that important? What would it have meant to you? Would you have felt validated with it? Would you have felt invalidated without it?
19. How would you have felt if the Commission had made a mistake and ruled against you?
20. What did it feel like when the Commission did or did not rule in your favor? If ruled against, did it feel insulting? If so, how?
21. Can you describe what effect, if any, did the act of filing a complaint have on how you felt about yourself?
22. Do you feel like filing a complaint with the Commission had any effect on your
 - a. Sense of your ability to right a wrong?
 - b. Sense of your ability to stand up for yourself, etc.?
 - c. Sense of your confidence
 - d. Sense of self esteem or self-worth
23. Do you feel like filing a complaint made you feel more or less capable?
24. Was filing the complaint related in any way to your sense of self-respect or dignity?
 - a. How so?
25. Suppose you had decided to forgo filing a complaint with the Commission, how do you think you would have felt about your decision not to file?

- a. Would you have felt regret, shame, embarrassment, humiliation, defeat, dishonor, indifference, the same, satisfied, or any other way had you not filed?
26. By filing, were you fighting for your civil rights?
 - a. If so, was it important to you to fight for your rights?
 - b. Why is that?
 27. Did filing make you feel emotionally vulnerable in any way?
 28. Do you think it is important for an individual to exercise his or her civil rights?
 - a. If yes, why?
 - 29.
 30. Did you feel like filing your complaint was related, in any way, to any of the civil rights movements or struggles of the past?
 31. Did the importance of fighting for your rights relate in any way to your sense of yourself as an American citizen?
 - a. Why or why not?
 32. Did the importance of fighting for your rights relate in any way to the fact that you identify as African American?
 33. Why or why not?
 34. Was filing related in any way to protecting your own economic security?
 35. How so?
 36. Were you hopeful when you filed?
 37. Were your hopes realized or do you think the commission provided a false hope to you.
 38. Based upon your experiences, do you think that the PaHRC can eliminate or reduce racial discrimination in Commonwealth of Pa. ?
 39. What do your experiences with the Pa HRC tell you about the effectiveness of filing claims as a way of fighting racial discrimination?

APPENDIX B

Interview Questions for Attorneys

1. How old are you?
2. How long have you been practicing law?
3. Where did you go to law school and what year did you graduate?
4. Can you briefly take me through your work history as an attorney?
5. Why did you ultimately specialize in _____ (employment law, public interest law, civil rights law, etc.,)
6. Were there any other motivating factors that caused you to concentrate your practice in this area? , i.e., financial considerations, job market, etc.
7. If not specifically mentioned, ask – Was the idea of promoting a certain vision of social justice a motivating factor for your area of concentration?
8. Are there any particular cases that you have worked on that you are particularly proud of in terms of what you accomplished?
9. What cases? What did you achieve?
10. Are there any cases that have been disappointing in terms of the results?
11. Which ones and why were they disappointing?
12. If part of the purpose of the anti-discrimination laws is to deter discrimination from happening in the first place, how effective are the laws at doing that?
13. If part of the purpose of the anti-discrimination laws is to deter discrimination from happening in the first place, are there particular circumstances where the laws are more effective at accomplishing those aims?
 - a. Big employer/small employer/mom and pop
 - b. Governmental entity/non-governmental entity
 - c. Particular types of industries
 - d. Regional differences
 - e. Type of discrimination alleged

14. If part of the purpose of the anti-discrimination laws is to compensate victims to make them whole, how effective are the laws at doing that?
15. If part of the purpose of the anti-discrimination laws is to compensate victims to make them whole, are there particular circumstances where the laws are more effective at accomplishing those aims.
16. In the employment realm, do you find particular types of cases harder?
17. How would you characterize the level of difficulty in winning employment discrimination cases by going to verdict?
18. How would you characterize the level of difficulty in winning a race discrimination case by going to verdict?
19. Has that changed over time?
20. Of the total calls or contacts you receive, what percentage of cases do you sign up?
21. Is that the same in the context of race discrimination?
22. In terms of settlement value, if full remedy is one hundred cents on the dollar, how many cents on the dollar do you generally see in your employment discrimination cases, if you can give me a range?
23. In terms of settlement value, if full remedy is one hundred cents on the dollar, how many cents on the dollar do you generally see in your race discrimination cases, if you can give me a range?
24. Has that changed over time?
25. What percentage of your current employment caseload involves claims of race discrimination by an African American?
26. What percentage of those cases involve evidence of direct discrimination?
27. What does that tell you, if anything, about the statutes and their effectiveness?
28. What do you do to value an employment discrimination case?
29. What kind of fee structure do you employ?
30. Do you find that that discourages plaintiffs?
31. How often do you litigate class action employment discrimination cases?

32. How often do you litigate disparate impact claims?
33. Tell me about the burden on race discrimination plaintiffs, do you think it is too hard or burdensome, too easy or just right?
34. Why do you say that?
35. As a practical matter, do you believe that when you litigate cases under Title VII and the PaHRC, you are generally able to make the client whole?
36. Based on your years of experience as an attorney, what role, if any, do you believe litigation can serve to promote progressive political or social causes?
37. How effective is litigation in that role?
 - a. Why?
38. Based on your experiences, what role, if any, do you believe litigation can serve to fight against societal racism or discrimination?
39. How effective is litigation in that role?
 - a. Why?
40. Based on your experiences, what value does litigation serve to remediate individual claims of racial injustice in distinction to societal racism?
41. As far as promoting social causes, do you think litigation is the best device or the primary device in doing that or are there other more effective ways in promoting social causes?
 - a. i.e., grass roots organizing, electoral politics, etc.
 - b. Please explain
42. What are the impediments to making litigation work and are there any ways to change the way we litigate cases so that it serves as a more effective tool?
 - a. Unconscious biases?
 - b. Conservative nature of courts
 - c. Impossible for courts to enforce large scale orders
 - d. Impossible for courts because they cannot appropriate money
 - e. Difficult for courts due to lack of public support

43. Other than litigation, are there other ways that you believe that people can challenge and solve racial discrimination in this country? If so, what?
44. How often are you in front of the PaHRC?
45. How effective is the PaHRC?
46. What do you see for the future of employment discrimination litigation generally and race discrimination litigation in particular?
47. Have you ever asked your clients whether they are satisfied with the results that you have achieved on their behalf?
48. Are they?
49. How do you believe litigation generally affects your clients – both the positives and the negatives?
50. Is there a connection between litigation and empowerment or disempowerment and your client?
51. Do you think it would be more effective for people to form a group or a movement to challenge or protest discrimination than to use the courts?

APPENDIX C

Interview Questions for Judges

1. When did you graduate from law school?
2. What type of work did you do in private practice?
3. Prior to joining the bench, did you ever do any civil rights/employment discrimination work?
4. When did you join the bench?
5. During your time on the bench, are there any particular cases that you worked on that involved issues of race that affected the way you subsequently considered cases over which you presided?
6. Do you have any sense as to what percentage of your docket comprises employment discrimination cases?
7. What percentage involve race discrimination cases?
8. How frequently are those cases litigated pro se?
9. Of race discrimination cases, what percentage would you say are meritorious in the sense that you believed that what plaintiff was alleging really happened?
10. In the context of employment discrimination cases, do you think certain cases are easier or harder for plaintiffs before a jury, holding all factors the same, other than protected class?
11. Has that changed over time?
12. Are you made aware of what cases settle for?
13. In the context of employment discrimination cases, do you think certain cases are easier to settle for higher value, holding all factors the same, other than protected class?
14. In the race discrimination employment context, if full remedy is one hundred cents on the dollar, do you have any sense of what the median range is for cases that settle before you?
15. Has that changed over time?
16. Do you ever see reinstatement?

17. During the Warren court era, Thurgood Marshall and other civil rights pioneers used the courts and litigation as a way of promoting transformative social and political changes in the United States. What do you believe is the role of courts and the judiciary, if any, in serving as an institution for that type of change?
18. Why?
19. What limits the courts in terms of their ability to serve as an institution for that type of progressive change?
20. Do you have an opinion on whether public sentiment can undermine and therefore limit what courts do?
21. Do you have an opinion on whether the inability to allocate financial resources also can limit what a court can do?
22. Do you have an opinion on whether courts are limited in what they can do by a lack of resources?
23. If part of the goal of the employment discrimination laws are to prevent discrimination from happening in the first place, do you have an opinion as to whether the laws are effective?
24. Are there certain contexts where you believe the laws are more effective, i.e., big company versus small company, governmental employer versus non-governmental employer, etc.?
25. If part of the goal of employment discrimination laws are to compensate an individual fully for the harms that they suffered as a result of some illegal conduct in the workplace, do you have an opinion as to whether the laws are effective in that regard?
26. Are there certain contexts where you believe the laws are more effective in that regard? i.e., big company versus small company, governmental employer versus non-governmental employer, etc.?
27. Back in the 1960s and early 1970s, many civil rights practitioners saw the courts as a hospitable forum for bringing civil rights lawsuits. Do you think the federal courts are as hospitable today as they used to be?
28. If there has been a change, what explains the change?
29. Obviously, the courts are supposed to enforce the nation's civil rights laws, i.e., 14th amendment, Title VII, etc. What do you believe is the role of the judiciary, if any, in eliminating or decreasing societal racism in general that people of color face?
 - a. Why?

30. Do you believe courts can change attitudes which frequently lead to racialized if not flat out bigoted conduct. What role do courts play, if any, in changing attitudes? What are your thoughts on the ability of courts to change attitudes?
31. Do you wish that courts could do more or are you satisfied with their role?
32. I recently read an article by two Cornell Law Professors that appeared in the Harvard Law and Policy Review that looked at data from the Administrative Office of the US Courts to investigate the success of employment discrimination plaintiffs at trials and on appeal. At trials, the plaintiffs win only 10% of the time. On appeal, those outcomes are reversed around 40% of the time. In contrast, defendants wins amount to 90% of the time and they are reversed, on average around 10% of the time. Do you have any thoughts on why employment discrimination plaintiffs apparently fair so poorly both at a trial level and an appellate level?
33. Do you think that the legal system imposes to heavy a burden on civil rights plaintiffs?
34. If so, is that concerning from a civil rights perspective?
35. Do you have any thoughts on why employment discrimination plaintiffs fair so poorly?
36. Is there anything the court system can do to address that?
37. Do you think there is a lack of racial diversity in the courts?
38. If so, is that concerning in the context of civil rights?
39. Why?
40. Do you believe that there is a lack of racial diversity on juries?
41. If so, is that concerning from a civil rights perspective?
42. If so, why?
43. Do you believe that individual jurors, who are selected to hear trials, may sometimes privately harbor racial biases that prevent them from being fair?
44. Does that raise concerns for you from the perspective of ensuring the fairness of civil rights trials? If so, do you have an opinion or any

thoughts on how, from a public policy perspective, we can or should effectively address that?

45. Whenever you presided over a civil rights or employment discrimination case, did you ever consider your legal decisions, or how you conducted your trials or how you presided over settlement discussions from the perspective of how it might empower or disempower the litigants who appeared in front of you?
46. Do you know if your colleagues ever considered their conduct from the perspective of how it might empower or disempower litigants?
47. Is there anything else that we have not covered that you think would be important?

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Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40 (1st Cir. 2002).

III. STATUTES AND REGULATIONS

29 C.F.R. § 1607.

43 Pa.C.S.A. §§ 951—963.

8 U.S.C. § 1324A.

20 U.S.C. §§ 1400 et seq.

20 U.S.C. §§ 1681-1686.

29 U.S.C. § 206(d).

29 U.S.C. § 2601.

29 U.S.C. § 794.

42 U.S.C. §§ 1681-1686.

42 U.S.C. §§ 1973 to 1973aa-6.

42 U.S.C. § 1982.

42 U.S.C. § 1971.

42 U.S.C. § 1981.

42 U.S.C. § 1983.

42 U.S.C. § 2000d-e.

42 U.S.C. §§ 12101 et seq.

IV. INTERVIEWS (interviews and interview notes on file with the author)

Public Interest or Private Practicing Attorneys

Ballard, Alice in Philadelphia, PA (March 15, 2010).
Bell, James in Philadelphia, PA (March 24, 2010).
Besnoff, Lawrence in Philadelphia, PA (April 21, 2010).
Braveman, William in Philadelphia, PA (April 16, 2010).
Console, Stephen in Philadelphia, PA (March 25, 2010).
Dalton, Jane in Philadelphia, PA (April 26, 2010).
Epstein, Alan in Philadelphia, PA (March 24, 2010).
Finch, Frank in Philadelphia, PA (March 23, 2010).
Gold, Sidney in Philadelphia, PA (March 11, 2010).
Gold, Stephen in Philadelphia, PA (April 14, 2010).
Goodman, Harold in Philadelphia, PA (April 9, 2010).
Greenberg, Jack in New York, NY (December 16, 2009).
Kairys, David in Philadelphia, PA (November 5, 2010).
Lillie, Charisse in Philadelphia, PA (May 6, 2010).
Lovitz, Kevin in Philadelphia, PA (April 16, 2010).
Mehri, Cyrus in Washington, DC (March 10, 2010).
Ossip, Michael in Philadelphia, PA (April 20, 2010).
Ransom, Barbara in Philadelphia, PA (March 4, 2010).
Rudovsky, David in Philadelphia, PA (March 9, 2010).

Judges

Honorable Stewart Dalzell in Philadelphia, PA (March 26, 2010).
Honorable J. Williams Ditter, Jr. in Philadelphia, PA (April 20, 2010).
Honorable John Gibbons in Newark, NJ (January 19, 2010).
Honorable James Giles in Philadelphia, PA (March 11, 2010).
Honorable Jacob Hart in Philadelphia, PA (April 15, 2010).
Honorable Bruce Kaufman in Philadelphia, PA (December 7, 2009).
Honorable Damon Keith in Detroit, MI (January 7, 2010).
Honorable Timothy Lewis in Washington, DC (March 10, 2010).
Honorable Theodore McKee in Philadelphia, PA (January 15, 2010).
Honorable Louis Pollak in Philadelphia, PA (November 23, 2009).
Honorable Gene Pratter in Philadelphia, PA (April 26, 2010).
Honorable L. Felipe Restrepo in Philadelphia, PA (January 20, 2010).
Honorable Cynthia Rufe in Philadelphia, PA (January 8, 2010).
Honorable Norma Shapiro in Philadelphia, PA (January 14, 2010).
Honorable Delores Sloviter in Philadelphia, PA (November 29, 2010).
Honorable Jack Weinstein in New York, NY (January 11, 2010).
Honorable Diane Welsh in Philadelphia, PA (April 12, 2010).

PaHRC Complainants

Adrienne L. in Philadelphia, PA (September 27, 2010, July 18, 2011).
Dallus H. in Philadelphia, PA (August, 2010, June 22, 2011).
Darrell R. in Philadelphia, PA (November 11, 2010, June 23, 2011).

Delores F. in Philadelphia, PA (November 5, 2010, June 23, 2011).
Eugene C. in Philadelphia, PA (August 25, 2010).
Gerald S. in Philadelphia, PA (August, 2010, June 23, 2011).
Jill T. in Philadelphia, PA (August 19, 2010, June 24, 2011).
John G. in Philadelphia, PA (August 14, 2010).
Kenneth P. in Philadelphia, PA (November 2, 2010).
Natasha M. in Philadelphia, PA (November 8, 2010, June 23, 2011).
Sheila M. in Philadelphia, PA (November 19, 2010, June 22, 2011).
Stephanie H. in Philadelphia, PA (August 12, 2010, June 22, 2011).
Sylvester H. in Philadelphia, PA (November 11, 2010).
Terry I. in Philadelphia, PA (August 12, 2010, June 22, 2011).

PaHRC Officials and Personnel

Ayres, Phillip in Harrisburg, PA (June 14, 2010).
Betha, Airrion in Philadelphia, PA (December 22, 2009).
Barrett, Ernesto in Philadelphia, PA (January 28, 2010).
Bolstein, Joel in Philadelphia, PA (November 22, 2010).
Brown, Joyce in Philadelphia, PA (January 12, 2010).
Coleman, Darnita in Philadelphia, PA (December 3, 2009).
Floyd, Homer in Harrisburg, PA (June 14, 2010, July 1, 2010).
Friedman, Bruce in Philadelphia, PA (February 1, 2010).
Glassman, Stephen in Philadelphia, PA (November 23, 2010).
Haines, Shawna in Philadelphia, PA (January 4, 2010).
Hancock, Ryan in Philadelphia, PA (March 4, 2010).
Hardiman, Michael in Philadelphia, PA (March 22, 2010, April 20, 2010).
Holt, James in Philadelphia, PA (June 14, 2010).
Johnson, Lee in Philadelphia, PA (December 22, 2009).
Kaplan, Lisa, Esq. in Philadelphia, PA (March 9, 2010).
Keller, Cecilia in Philadelphia, PA (March 5, 2010).
Kent, Lynda in Philadelphia, PA (January 6, 2010).
Kinsler, Kimberly in Philadelphia, PA (February 19, 2010).
Martinez, Suzanne in Philadelphia, PA (December 4, 2009).
Nier, Charles in Philadelphia, PA (March 9, 2010).
Reddick, Albert in Philadelphia, PA (January 13, 2010).
Rothwell, Kimberly in Philadelphia, PA (December 21, 2009).
Sanabria, Luis in Philadelphia, PA (January 29, 2010).
Shaw, Abraham in Philadelphia, PA (January 27, 2010).