

# **Rights on Trial**

*How Workplace Discrimination Law  
Perpetuates Inequality*

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# Introduction

## *Putting Rights on Trial*

### **Plaintiffs' Stories**

*Gerry Handley's Case against Manufacturing, Inc.*

**G**erry Handley (P14),<sup>1</sup> a thirty-four-year-old African American computer operator, had worked for a large manufacturing company for nine years when, after being assigned to a new unit, he began to receive what he perceived as racial harassment from his supervisor and coworkers. He told us:

 We worked in this big computer, like a lab. They had these big computers and every day, you know, we would run and maintain these computers like 24 hours, 7 days a week, and they had like a main console. And these guys that were like our supervisors, you know, you'd come in and they might, almost like on the board. . . . They'd have a picture of a black man eating like ribs, and he'd have like all types of sauce on his face, you know. And they would just all the time say stuff like the KKK, and just to me it was like a poisoned environment.

Mr. Handley said he suffered such treatment for three years before he complained to the Equal Employment Opportunity Commission (EEOC). We asked what finally led him to file a formal complaint:

 GH: They would like always bring up these racial conversations and make these racial jokes. What I would do is I'd just ignore them. I wouldn't laugh or I wouldn't listen in, I would just sit there and they would try to pull me

into the conversation asking me questions. They started talking about incest, and they started talking about blacks from slavery time, you know, they bred them and sold them, and they inbred them down in the south. And I'm from down south, and so they asked me, they told me a lot of the blacks had sex with their daughters and stuff like that, way back from the Caribbeans. And I would just sit there listening like, "Oh my God, I know they're not saying this." And the guy asked me, he said, did I ever have sex with my daughter. And so . . .

LBN: He asked you if you had sex with your daughter?

GH: Yeah.

LBN: And this is your boss or your manager?

GH: He was like my lead.

Mr. Handley's case is unusual among employment discrimination lawsuits along several dimensions. First, he was joined by two other plaintiffs. Among federal discrimination claims, 90% are made by a single plaintiff. Second, Mr. Handley experienced overtly racist harassment that was well documented by fellow workers; his own records provided an unusually strong legal claim. Third, he ended up, according to official records, a "winner" at law. He settled with the manufacturer for \$50,000, substantially higher than the median settlement (\$30,000) in employment civil rights cases. Finally, Mr. Handley's case is unusual in that he maintained his job with his employer and even won back the position from which he had been transferred when he complained.

Yet in other respects, Mr. Handley's case was typical. He suffered many of the harms that other plaintiffs have incurred over the course of litigation. Tensions surrounding the lawsuit led to a divorce from his wife (who was white), and Mr. Handley lived out of his car during the course of the lawsuit. He did not trust his lawyer and felt shortchanged in the settlement, but he felt he had no choice but to accept it. Mr. Handley had to pay 20% of his settlement to his attorney, and his ex-wife claimed one-half of the remainder. While he regained his old job, he suffered a loss in job seniority, which may have contributed to his layoff just a year later during a major "downsizing."

We asked whether Mr. Handley felt like anyone in the company supported him:

 GH: These ten people that were supporting me in the department, they like ruined their lives. They like had to move and lost their jobs and had

to relocate, and I could tell you, it was just horrible. It poisoned the whole environment. If I had to do it over again, I wouldn't do it because I lost everything.

LBN: So what would you do if you had to do it over again?

GH: I would have took it. When he said that, you know, about my daughter, I would have just took it and kept my mouth shut and not tell anybody. Keep your mouth shut and just take it, you know, because if you fight back, it ain't worth it. The legal system and the justice, it ain't there.

Gerry Handley exemplifies the burdens that many plaintiffs bear in employment civil rights litigation. Despite several advantages, the Handley case illustrates plaintiffs' personal risks in the contemporary American approach to workplace discrimination. The United States' employment civil rights system is extensive and complex. It rests on constitutional protections, as well as on statutory prohibitions of discrimination. Those prohibitions were elaborated first by Title VII of the US Civil Rights Act of 1964—which prohibited discriminatory employment decisions based on race, sex, color, religion, or national origin—and later extended to include, significantly, disability and age as well as sexual harassment. Enforcement of these rights depends on regulation and litigation brought by those who believe they have been the targets of discrimination. These rights are intended to dismantle workplace discrimination across multiple hierarchies, the most notable of which, today, are race, sex, disability, and age.

As evident in Mr. Handley's experience, the adversarial character of the antidiscrimination regime imposes considerable personal and financial costs upon individual plaintiffs. These costs appear to be especially high for African Americans and other people of color who bring claims of racial discrimination. Ironically, then, the groups for whom civil rights legislation was first and most urgently sought may now experience a unique form of inequality within the system of employment civil rights litigation.

### *Kristen Baker's Case against GCo*

Kristen Baker (P<sub>34</sub>), a thirty-three-year-old white woman, worked as an assistant buyer in the sales division of GCo, a relatively small, family-owned company that manufactures components for cars and other machinery. As Ms. Baker told us, in her first four years of employment she

worked hard, took classes, and earned a certificate of expertise relevant to the work. In her fifth year, Daniel Miller, a male employee with six months longer tenure in the same job, was promoted to salesman despite the extra efforts Ms. Baker believed Mr. Miller had not undertaken. Ms. Baker approached the vice president with whom she had been working. As she recalled, he told her, “Daniel is a guy and he’s got three kids and a wife, and you are a girl and you married a doctor, so you obviously don’t need the income.” Although she thought this was not fair, she made the best decision for her and her family, which was to continue working at the manufacturing plant.

Ms. Baker says she knew from the moment she was hired that the work environment might be, in her words, somewhat “salty.” She remembered being told that “the salesmen are *men*, and they are busy people and there is some cussing and stuff that goes on.’ And I said, ‘Well that’s fine, I can handle that. I can dish it out too.’ . . . It didn’t bother me, because it wasn’t about me.”

According to Ms. Baker, the workplace was increasingly professionalized when GCo was sold to a larger company. Ironically, though, the introduction of more formal human resources (HR) practices resulted in a rise of unprofessional behavior. The norms that were carefully policed when the company was family-run were harder to enforce in the new bureaucratic structure. Soon, the salesmen generally, and Mr. Miller in particular, were swearing more. And it was not just about venting frustration; what once could be explained away as rude or bawdy became obscene. Ms. Baker came to believe that the sexualized teasing was ruining her credibility with her vendors and clients.

Mr. Miller began bringing pornographic magazines and movies to work, Ms. Baker told us. He facilitated and even charged admission for pornography viewing sessions in the conference room at lunch. He showed Ms. Baker pictures of pornography depicting bestiality. She utilized the new HR policies and complained to her manager, documenting multiple complaints. There were other women in the department, but the ethic was one of gendered toughness and, while they would express frustration privately to Ms. Baker, they did not make formal complaints. Ms. Baker described what led her to take formal action outside the company:

 There were two final straws. One of them was when he [had] a pornographic picture of a woman who had a watermelon shoved into her vagina. And [the woman in the photograph] was on a bed, and [she] had stiletto heels

on. . . Daniel took it in front of a group of my peers and said, “Oh, look Kristen, we would recognize you anywhere with those heels on.” I was humiliated, just humiliated and then reported it.

Shortly thereafter, in front of a client:

 Daniel went in a room and pulled out this tray of chocolate dildos and took out one, a big one, and stuck it in my face, in my mouth, and said, “Here I know you like to suck on these. Suck on this.” And I just [said], “I can’t do this anymore.”

The facts of Ms. Baker’s situation are extreme. Although blatant discrimination may be more common than a number of modern commentators and scholars suggest, this case is one of the more outrageous examples of obvious sex discrimination in our data. Ms. Baker took all of the appropriate steps to stop the discrimination, making repeated reports to the appropriate workplace representatives, but nothing happened. After the chocolate dildo incident, she told us that she told her boss:

 “Look: if this does not stop, if some action is not taken, I will file a lawsuit.” What wound up happening is that I just kept threatening and threatening and threatening. . . I said, “You know, I keep talking to you about what is going on, he is now the vice president, nothing has changed, and I am going to talk to an attorney.” I really wasn’t going to at that time. I just wanted him to stop so that I could just do my job without having to be nervous about staying late, about being there alone with him because he was a sexual pervert.

The company did nothing to try to remedy the situation, and a friend encouraged Ms. Baker to speak with an attorney. As she recounted, her attorney told her, “You know, I don’t normally take noncorporate clients . . . [but] I have to take this case, because you really were treated inhumanely.” Ms. Baker said her attorney informed her “that it wasn’t a million dollar case.” This was not important to her, she told us: “It was never about money, so we [demanded] a simple [settlement] of just \$100,000 . . . and then an apology.” And she wanted to keep her job because it provided her family’s health insurance (her husband had a chronic illness that required ongoing medical attention).

Ms. Baker described how the new owner of the company reacted to notice of the suit: “[He] just laughed and said to my face, ‘I’ve had

numerous lawsuits against me in companies that I have owned.’ And he is a very rich, pompous man, and he said, ‘I have never lost one yet.’” Ms. Baker recalled:

 The owner truly believed that I made all of this stuff up just to get money. And because I could get no one—literally no one—to corroborate any of my stories except my manager, they really believed that the two of us were trying to rip off the company.

As the case proceeded, Mr. Miller eventually was forced to give a deposition in which he denied the most outrageous accusations and sugar-coated others. Shortly after his deposition, the company’s owner asked a respected former employee, Tim Fligstein, what he saw when he worked with Mr. Miller and Ms. Baker. With nothing to lose now that he worked for another company, Mr. Fligstein answered honestly. In Ms. Baker’s words, he told the owner what happened, “word for word.” Ms. Baker cried as she told us, “That is when they decided to drop the suit because they knew that they were wrong.”

After the owner heard the truth from someone he apparently valued (a man), GCo decided to settle the lawsuit. The company’s first offer was \$10,000 for Ms. Baker’s attorney’s fees and a confidentiality clause. She would not receive health insurance, and she was bothered that the settlement “would have to go down in [*sic*] record that I lost the lawsuit and I said, ‘No. I can’t do that.’” After a month of negotiations, she would have settled for a public apology, one dollar, and to keep her job. GCo wanted a private apology, some cash settlement, and for Ms. Baker to leave the company. She recounted her feelings:

 I am not leaving the company. I didn’t do anything wrong. If I leave at this point then I am the guilty party because then it looks like I just wanted it for the money. . . . And it had absolutely not one thing to do with the money. It had to do with my integrity and who I am.

Ms. Baker dropped the lawsuit, keeping her job and benefits in exchange for the following concessions: apologies from Mr. Miller, as well as from the past and current presidents of GCo in front of all of GCo’s executive management; one dollar (that was not recorded in any settlement documents); a stipulation that the case would neither be characterized as a “loss” for Ms. Baker nor could GCo’s owner ever claim that

he “always won lawsuits”; that Mr. Miller could never advance in management; and that the company start a sexual harassment program that month. Ms. Baker enjoyed a seventeen-year career at GCo after the lawsuit. Mr. Miller eventually was fired or quit (no one we interviewed was exactly sure which).

It may be difficult to believe that discrimination this blatant and offensive still occurs in American workplaces every day, but it does. It may be surprising that those who suffer this kind of treatment often are abandoned and even persecuted by the very HR departments that are supposed to help resolve such matters, but they are. And it may be shocking that the legal system is so difficult to navigate and so loaded with steep personal costs, but it is. Finally, it may be alarming to believe, in the era of media accounts that portray “greedy plaintiffs,” “runaway juries,” and a litigation “explosion,” that even proverbial “winners” in the employment discrimination system receive only modest awards, if any. But they do.

The system of employment civil rights litigation reflects a paradox in American society. At some level, America’s commitment to workplace fairness has never seemed so obvious. As Berrey, Dobbin, and Skrentny each suggests, government, business, universities—indeed, a whole professional subgroup of equal employment officers—articulate a normative commitment to equal opportunity and inclusion across a range of traditionally disadvantaged groups.<sup>2</sup> For over five decades, employment civil rights litigation has been seen as an instrument to achieve greater workplace opportunity—first for people of color and women, and more recently for the aged and those with disabilities. The 1991 Civil Rights Act reflected this ongoing commitment to litigation as a vehicle for change. The 1990s saw a dramatic increase in the number of discrimination lawsuits filed in federal court, before the number of lawsuits flattened and declined in the 2000s. Recent calls to expand employment discrimination protection to lesbian, gay, bisexual, transgender, and queer individuals are another indication of at least some groups’ faith in legally enforceable rights as a tool to bring about social change.

Yet we also see stalled progress (if not retrenchment) on the ladder to more influential and better paying jobs for disadvantaged groups, as well as signs of growing economic inequality in the American workplace. We continue to see attacks on employment civil rights litigation from critics who decry such litigation as a frivolous, costly, excuse factory.<sup>3</sup>

A paradox posed by this system is that American society reverses

rights and considers some individuals who have asserted their rights heroes—Rosa Parks, Martin Luther King, Jr., and César Chávez, to name a few. But psychological literature demonstrates that in the workplace, we regard those who claim to be the victim of discrimination with suspicion and tend to denigrate them.<sup>4</sup>

What, then is the role of employment civil rights litigation in dismantling barriers to equal employment opportunity for traditionally disadvantaged groups? To address that fundamental question, we must look at how employment civil rights litigation works in practice. Despite considerable research on various aspects of employment discrimination and its treatment by law, there has been no comprehensive analysis of this system and its consequences for parties to litigation.

## **Rights on Trial**

This book puts rights on trial in two ways. First, we document the process through which plaintiffs in employment civil rights cases put forth their claim in law. Plaintiffs literally must put their rights on trial. As their relationships with their employers change from employees to litigants, the workers are put on trial. Their loyalty, credibility, and competence are scrutinized and often attacked. Defendants, too, have rights—namely, to defend themselves against charges of violating civil rights laws through the legal process. We ask: What is the experience of litigation for these parties and their attorneys? How do they understand litigation and its outcomes?

Second, we put the system of employment civil rights litigation on trial, or at least under empirical scrutiny, by examining how it works. We ask: What does it mean to have civil rights at work? Are these rights meaningful if exercising them is expensive and difficult? What is the role and obligation of the legal profession in ensuring these rights? How has law helped or hurt the struggle for workplace equality? If rights are the lynchpin to fairness in the workplace, who bears the burden of exercising the right to help us all achieve that social goal?

Using an original, comprehensive mixed-methods research design that combines a large quantitative sample of almost 1,800 court filings across the country with one hundred in-depth interviews of parties and their attorneys, we investigate how rights-based litigation actually operates. Our approach enables us to explore both the general dynamics

of an adversarial legal system of employment civil rights and the system's consequences for the ordinary citizens, corporate representatives, and lawyers who navigate it. Our analysis exposes the strengths and weaknesses of the system and the complex ways that the *vindication* of rights—necessary in any system of rights—is perceived by those who use the structures and processes necessary for enforcing employment civil rights.

Although antidiscrimination law holds employers legally accountable by forbidding workplace discrimination, we find that the system of employment civil rights litigation is substantially controlled by employers. The law functions to preserve managerial authority on personnel matters in ways both subtle and direct. Government data make abundantly clear that the American workplace consists of organizational hierarchies that are raced, gendered, abled, and aged. Despite four decades of antidiscrimination enforcement and some modest gains by women and minorities, white men predominate in management positions.<sup>5</sup> The ostensibly neutral policy of deferring to managerial authority, sustained throughout the legal system, functions to reproduce these status hierarchies. Such deference is part of the broader phenomenon of *reinscription* that we elaborate throughout this book: the processes by which the ascriptive hierarchies that the law is intended to disrupt are reified and rearticulated through law in the workplace and in court.

The broad theoretical question we engage in this book is about the utility of rights, as a form of law, for dismantling hierarchies of unearned privilege in the United States. Though we remain close to the empirical example of employment civil rights, the questions that animate this research emerge from the theoretical, empirical, and critical study of rights across various decades, disciplines, and locales. We see the role of antidiscrimination law in the American system of inequality as deriving from the relationships between rights, law, and hierarchy.

### *Rights*

This book builds on the scholarship that demonstrates that, in the United States, we use rights—often conferred as individual rights—to achieve important social goals.<sup>6</sup> Rights are significant sources of power because we construe them to (at least formally) be available equally to everyone, neutral, and backed by the legitimate authority of the state.<sup>7</sup> When rights are vindicated in courts, social actors are expected to take notice and

implement changes (for example, in workplace policies) to achieve social change. Yet both empirical social scientists and theoretically minded critical legal scholars note many problems in relying upon rights-based litigation to effect social change: many people whose rights have been violated do nothing to vindicate them, rights are not self-enforcing, rights are enforced differently based on the relationships of the parties involved, and rights may inappropriately introduce politics into law.<sup>8</sup>

These critiques have generated new interest in theoretical and empirical studies of rights among scholars in various disciplines. The renewed interest, which focuses as much outside as inside the context of litigation, shows how rights can be mobilized formally and informally in very different ways. This focus shows much to be optimistic about in the study of rights because in addition to the material effects that rights may have, symbolic effects can be similarly meaningful.<sup>9</sup> Rights can affect social movements and social movement actors' strategic decisions.<sup>10</sup> Rights discourse may not have material effects but, even without resorting to litigation, simply knowing one *has* rights can dramatically improve the lived experience of individuals.<sup>11</sup> Law is a rhetorical toolkit, a source of symbolic power, and a bargaining chip that can determine whether people who need family leave can actually keep a job and meet the caregiving needs of their family.

Further decentering litigation, some scholars demonstrate that, even in the absence of lawsuits, decisions by administrative and bureaucratic experts who act to enforce rights in society contribute to systems of "legalized accountability" or "managerialized authority."<sup>12</sup> And finally, we know that rights can shape legal consciousness, which forms the essential backdrop to how individuals relate to the law.<sup>13</sup>

Other scholars are more skeptical about the capacity of rights discourses, litigation, and rights awareness to redress inequalities in the workplace. They note that the antidiscrimination law model requires targets of discrimination to define themselves as "victims";<sup>14</sup> they fear that recourse to law using the current "discrimination frame" will create more problems than it will solve,<sup>15</sup> and they argue that the current model of discrimination focuses on individual harms rather than on more fundamental inequalities of race and gender. Many suggest that more fundamental social interventions are required to address those inequalities.<sup>16</sup> Some scholars decry the increasing tendency to treat inequality and discrimination as "interpersonal problems" or questions of "mismanage-

ment” because it recasts employer-organizations as mere onlookers to discrimination or even victims themselves, rather than as sources of discrimination that should be held legally accountable.<sup>17</sup>

These are just some of the contrasting assessments of rights and rights-based models with which this book converses. We look not just to court outcomes but to the personal, social, and financial costs of fully enforcing a right. We also examine how representatives of employer organizations think of these disputes, the costs for business, and the legal consciousness of the parties post dispute.

Law and society scholarship illuminates how law-in-action, as opposed to law-on-the-books, shapes the realization of rights. Our findings on employment civil rights litigation as a system of dispute resolution echo the general findings of the law and society literature. For example, we estimate in chapter 2 that only a tiny fraction of possible targets of workplace discrimination take formal action before the EEOC, the federal agency charged with investigating discrimination, and the courts. When targets do sue, they are likely to settle or lose. Only a small percentage of cases (6%) reach trial. And plaintiffs, as “one-shotters,” challenge defendant employers, “repeat players.” This disparity in legal experience puts plaintiffs at a distinct disadvantage at virtually every stage of the dispute. Many plaintiffs do not get lawyers. If they do, the lawyer generally controls how the case is litigated and often insists on settlement. Defendants, by contrast, always have legal representation and considerable control over litigation decisions. In short, the formally neutral system of adversarial justice in the United States favors the haves over the have-nots.<sup>18</sup>

Our data on employment civil rights litigation go much deeper than just to show *how* the law works in this particular institutional context where law, the workplace, and social hierarchies intersect. Our data reveal that employment civil rights law *reinscribes* hierarchies by challenging and containing discrimination claims. We elaborate specific mechanisms of reinscription, including employers’ tactics for preventing workplace disputes from transforming into legal disputes, the often-failed attempts by plaintiffs to get legal representation, the dramatic differences in lawyer-client relationships for plaintiffs and defendants, employers’ strategy of settling at modest costs, and the persistence of nefarious stereotypes of disadvantaged groups. At the intersection of rights, law and hierarchy, we find the conflicting ideologies that plain-

tiffs and defendant employers bring to these cases and their outcomes. At this intersection, from these grounded analyses of law-in-action, we see the myriad ways that the adversarial system exacerbates workplace conflicts.

### *Law*

Rights are defined by law and shaped by the features of the bureaucratic, regulatory, and judicial systems through which rights are asserted. Employment civil rights, in the contemporary era, have been formed both by changes in formal law and regulatory practice and by general aspects of the American adversarial process.

In recent decades, statutory law and judicial interpretations have both expanded and restricted possibilities for using the law to advance employment civil rights. The passage of the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act in 1990 added two major groups to those legally protected in employment. The Supreme Court recognized sexual harassment as a form of sex discrimination in 1986, establishing a new theory of liability under Title VII.<sup>19</sup> Congress also has sometimes acted to overrule Supreme Court rulings that limit the scope of discrimination law. The Civil Rights Act of 1991 was a congressional response to the *Wards Cove* case, a ruling that limited the application of the disparate impact theory of discrimination.<sup>20</sup> The 1991 act not only restored disparate impact as a theory of discrimination; it also expanded the right to jury trials and the possibility of punitive damages in Title VII cases.

The Civil Rights Act of 1991 resulted in a brief but substantial increase in filings. But the number of discrimination filings receded quickly. By allowing punitive damages in employment civil rights cases, the 1991 act had the unintended effect of undercutting the likelihood of plaintiffs' obtaining class certification in discrimination cases, because punitive damages necessarily vary by individual. Thus, courts have been less willing to grant class certifications when punitive damages are sought. Congress also expanded employment civil rights with the Lilly Ledbetter Fair Pay Act of 2009, which overturned the 2007 *Ledbetter* decision.<sup>21</sup> As a result, pay discrimination claims can reach back to the time that discrimination took place, rather than being limited to the time when discrimination was discovered by the plaintiff.

Yet court rulings also have limited the pursuit of employment civil

rights claims in court. As Burbank and Farhang demonstrate, many of these rulings have come in the form of procedural rulings that do not garner much media attention.<sup>22</sup> In chapter 3 we demonstrate the importance of collective action—including class action cases—to the success of employment discrimination claims. In *Wal-Mart v. Dukes* the Supreme Court rejected the certification of what would have been the largest class ever certified in an employment discrimination lawsuit.<sup>23</sup> Other Supreme Court cases have made it easier for defendants to win motions for summary judgment, which, we will see, are a key strategy that employers use to limit their exposure in employment discrimination litigation. Edelman and colleagues document a trend in which courts have excused employers from liability if employers have adopted policies designed to prevent discrimination from occurring, even when the policy may not actually be effective.<sup>24</sup> As we have argued elsewhere, the courts over the past two decades have embraced a perpetrator model that construes discrimination as purposeful and discrete acts of animus, looking for the proverbial smoking gun as acceptable evidence.<sup>25</sup>

We detail many of these changes in chapters 2 and 3, but a broad perspective shows that courts have narrowed the basis for plaintiffs seeking systemic remedies (through class action lawsuits and disparate impact claims) and made it more difficult for employers to use affirmative action to redress systemic unbalances in the demographic composition of their workforces. What results is a system of employment civil rights litigation overwhelmingly dominated by disparate treatment claims by individual plaintiffs. Only 1% of cases today seek class action certification, 93% of claims are made by one plaintiff, and 93% of claims only involve an allegation of disparate treatment (rather than or in addition to disparate impact). We argue that the courts have moved in the direction of treating employment discrimination as a set of individual cases of intentional misbehavior, while the social science literature on discrimination increasingly points to the widespread, systemic character of bias in the organization of workplaces.<sup>26</sup>

### *Hierarchy*

Social hierarchies are the foundation of social stratification. In the United States, race, gender, and class—as well as statuses such as (dis)ability, age, ethnicity, and sexual orientation—are profoundly salient and pervasive social categories.<sup>27</sup> So-called majority groups, such as

men or white people, are deemed normal, typical, and desirable. Those in the minority are stigmatized and degraded. The pervasiveness of shared norms can render these hierarchies barely visible,<sup>28</sup> even as these distinctions shape groups' access to wealth, opportunities, prestige, and other goods of society.<sup>29</sup> The ability to impose an external category on someone and withhold or provide resources based on that category is an exercise of power.

Race, sex, disability, and age are all categories that form the basis of ascriptive hierarchies, as they are all beyond an individual's control, and in one form or another, they are all embodied. Yet they do not operate the same way in daily life or in the workplace.<sup>30</sup> Race serves primarily as an explanation for racist economic, political, and legal relationships. Behaviors, attitudes, and assumptions involving race are layered onto objectively arbitrary physical characteristics such as skin color and, in turn, organize racial hierarchies.<sup>31</sup> Sex—or, really, the expression of gender—is articulated foremost through sexist norms of acceptable behavior for women and men, particularly the division of labor. These norms are justified by specious claims about social conditions of sexual reproduction and separate spheres.<sup>32</sup> Disability is characterized by physical, intellectual, emotional, or behavioral conditions that impair one's activities within social contexts that limit or cut off full participation in mainstream social life.<sup>33</sup> A disability embodies categorization and stigmatization, but only if an individual's disability is known to others. Some disabilities can remain invisible, though, whereas more visibly evident categories, such as gender, are more difficult to conceal. Thus, people with disabilities often experience overt discrimination during the interview process and on the job if and when potential employers learn of their disability.<sup>34</sup>

Aging, for its part, is widely viewed as a social problem in the United States. Age is a unique basis of ascriptive hierarchy in that most people will eventually join the purportedly lower-status category of older people.<sup>35</sup> Yet age hierarchies are variable and extraordinarily context-specific. In the workplace, employees over the age of forty face unique disadvantages in hiring and promotions. However, when rules of seniority are in place, as in many unionized workplaces, older workers are more likely to have greater job protections than their younger counterparts.

Each of these ascriptive hierarchies is made more complicated when multiple axes of subordination are involved.<sup>36</sup> Hierarchies of sex and age

intersect, for example, in that people commonly define “age appropriate” behavior differently depending on whether the individual assessed is female or male.

Antidiscrimination law is among the few institutions that proactively attempts to *minimize* ascriptive hierarchies through legal means.<sup>37</sup> Depending on the basis of discrimination (such as race or age), antidiscrimination laws have distinctive jurisprudential histories shaped by constitutional law and the nature of civil rights protections, as well as the extension of employment discrimination laws to the aged and those with disabilities and new theories of discrimination such as sexual harassment.

For example, in constitutional litigation, racial distinctions are subject to the most stringent standard, strict scrutiny, while categorization on the basis of sex is subject only to intermediate scrutiny.<sup>38</sup> While race discrimination law protects people of color and white people alike and sex discrimination law protects both women and men, age discrimination law draws a bright line around what constitutes a protected class: those forty years of age and older. Antidiscrimination law on disability also draws such a line and uniquely concerns standards of appropriate accommodation.

Ascriptive hierarchies of race, sex, age, and ability and the inequalities that spring from them persist in US workplaces. For example, in the workforce—if a worker can find a job (something that is itself racialized)—the median weekly wage for African American workers is about 78% that of similarly situated white workers, and Latino/a workers earn about 73%.<sup>39</sup> By the same token, white women, on average, receive weekly wages at 82% of their white male counterparts’ pay. Considerable research demonstrates that these disparities remain after controlling for several possible explanations.<sup>40</sup> Social hierarchies permeate the American workplace and job market.

And yet, scholars debate how much of workplace inequality in hiring, promotion, wages, and salaries results from illegal discrimination. Some economists, most notably James Heckman, believe that only a very small percentage (1%–2%) of the gap can be explained by discrimination.<sup>41</sup> Most labor market economists, sociologists, and statisticians who have carefully studied the problem believe that a much greater proportion (some 35%–50%) of the gap is due to workplace discrimination itself.<sup>42</sup> Banaji and colleagues tell us that some of the disparity likely is

due to unconscious bias (as opposed to animus-based discrimination).<sup>43</sup> Meanwhile, critical race and feminist scholars observe that both blatant hate and more subtly institutionalized discrimination remain a very important source of disadvantage in the workplace.<sup>44</sup>

Our review of the literature indicates that significant, obvious, animus-based discrimination is still far more prevalent than we want in the United States. A growing body of work also indicates that discrimination routinely now occurs through implicit biases, norms, and assumptions that fall outside the purview of law.<sup>45</sup> Insofar as any part of workplace inequality is due to discrimination, Americans share an increasing consensus that the state has a legitimate duty to eliminate discrimination.

In addition to the hierarchies of ascribed status characteristics, workplace conflict necessarily embodies workplace hierarchy as well. Managerial prerogatives, workers' rights, income and status differences, and other kinds of hierarchies in the workplace environment all play a role in workplace conflict.<sup>46</sup> In the workplace, a worker/management hierarchy is implicated in these conflicts (unlike race, sex, age, and disability, worker status is not a protected category). Class-based hierarchies affect the very ability of plaintiffs to pursue viable cases, most notably in whether they can afford an attorney. And they advantage defendant employers, who have far more training and experience in litigation and far more resources to manage a defense. All of the people we study are embedded in these hierarchies, which influence how they make sense of their situation.<sup>47</sup>

This theoretical framework of rights, law, and hierarchy guides our thinking as we put rights on trial. It raises critical questions about employment discrimination litigation: is our regulatory and court system of primarily individually driven civil rights working to eliminate illegal discrimination? At what cost?

Our answer, based on systematic quantitative and qualitative data, is that law is deeply implicated in and affected by the very hierarchies of race, sex, disability, and age that employment civil rights law was created to address. Our analysis shows that law's capacity to disrupt illegitimate workplace hierarchies is undermined by three intertwined factors, all of which tend to disadvantage plaintiffs relative to employers and attorneys: structural asymmetries in power in workplaces and the courts; the adversarial nature of the conflict; and the individualization of the dispute. These factors result in the reinscription of ascriptive hierarchy

rather than its dismantling, as we show in chapter after chapter. Managerial prerogatives, workplace structures, agency rules, and the courts that appear bias-neutral actually function to obfuscate bias themselves.

Most plaintiffs not only lose or gain small settlements in the process of litigation; they are vilified by their employer (or former employer) during the EEOC complaint process and litigation. Contrary to the ideal model of civil rights law effecting social change by correcting discriminatory behavior at work, we find that seldom is the outcome of a case implemented in a way that promotes equal opportunity. Instead, most outcomes are sealed off from the workplace. When plaintiffs settle their claims, they typically sign a confidentiality agreement that encapsulates the results of litigation, preventing it from resulting in meaningful change.

In addition, we see the influence of social hierarchies in the litigation process itself. Chapter 9 systematically investigates how stereotypes are invoked both by workplace actors and in legal accounts. During litigation, African American men are characterized as dangerous, lazy, and incompetent; African American women are referred to as overbearing (“bitchy”). All African Americans are less likely to gain legal counsel, which has disastrous consequences for their case outcomes. Female plaintiffs are characterized as “hysterical”—even by their own lawyers—or as being overly sensitive to sexual innuendo in the workplace. Plaintiffs with disability cases are labeled slackers. Plaintiffs charging age discrimination are said to be resistant to change or out of touch with the modern workplace.

At the same time, the litigation system routinely flattens the differences *across* these groups, particularly through its privileging of managerial authority. With the exception of a few key patterns, including African Americans’ reduced access to legal representation, we do not find major discrepancies in how different claims fare in court. Time and again, plaintiffs told us very similar stories of how they were treated, regardless of whether their claim was based on race, sex, disability, age, or some combination thereof.

As we show, law—in the form of employer responses to claims of employment discrimination and the administration of complaints and lawsuits by the EEOC and the courts—reinscribes the invidious hierarchies it was created to ameliorate. These findings suggest the need for a re-examination of the system of employment civil rights litigation as a policy matter. Can it be effectively reformed? Are there plausible alter-

natives to the current system of rights litigation? Or is the system so flawed that it must be remade from scratch? We take up this discussion in the final chapter of this book.

### **The Design of the Study: A Mixed-Methods, Multi-perspectival Approach**

Most empirical scholarship about employment civil rights litigation has studied the relatively small proportion of cases that lead to published judicial opinions or otherwise become visible through media coverage.<sup>48</sup> While valuable, these approaches have limited generalizability and can miss legal participants' nuanced, complex, often contradictory accounts of litigation. We devised our mixed-method, multi-perspectival approach to pursue core concerns in the sociology of law: moving from law in the books to law in action to how law is experienced and perceived by the actors within it. We also designed our methodology to capture the stories of plaintiffs such as Gerry Handley and Kristen Baker, whose cases represent the promise and perils of pursuing employment civil rights in the post-Civil Rights era American courts. Our combination of quantitative datasets and in-depth qualitative interviews supports a more comprehensive treatment of the relationship between the system of employment civil rights litigation and hierarchies of race, gender, disability, and age in the American workplace.

Specifically, our project draws on three datasets. The first is an expanded replication of Donohue and Siegelman's groundbreaking research on employment discrimination case filings from 1972 to 1987—a project that, like ours, was conducted under the auspices of the American Bar Foundation.<sup>49</sup> We collected a random sample of employment civil rights cases filed in federal courts between 1988 and 2003 in seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco. These are the same seven federal district courts included in Donohue and Siegelman's research. These districts contain about 20% of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. In each of these districts we drew three hundred cases from the list of all civil employment discrimination cases (classified as nature of suit code “442”) compiled by the Administrative Office of the US Courts (AOUSC), yielding a sample of 2,100

total cases. We derived sampling weights by district based on the total number of employment discrimination case filings in each district. Some of the sampled cases were missing key variables and were discarded, resulting in a final sample for analysis of 1,788. For some analyses we include only closed cases, of which there are 1,672.

We developed an extensive, thirteen-page coding form (see online appendix at [press.uchicago.edu/sites/rightsontrial/](http://press.uchicago.edu/sites/rightsontrial/)) and established coding operations with trained teams of coders for each site. The same data collection manager supervised and trained coders in each location. Ten percent of the cases were coded independently by different coders to allow tests of intercoder reliability. In 94% of those cases there was agreement between coders on case outcome, the key dependent variable. Manually coding a random sample of case filings provides far more valid and representative data, but the approach presents some limitations: publicly available files can be incomplete due to misfiling or poor record keeping. These quantitative data frame our study and are the focus, in particular, of chapter 3.

A second dataset consists of one hundred in-depth interviews with parties and their legal counsel. We selected these individuals first by constructing a four-by-four table with the most common bases of discrimination in the national data (race, sex, age, and disability) cross-tabulated with the outcomes of greatest theoretical interest (dismissed, early settlement, late settlement, and trial).<sup>50</sup> Each of the sixteen cells represented a possible case, such as discrimination based on age and settled early. The purpose of the interviews was to better understand the process of employment civil rights litigation that we documented at the macro level.<sup>51</sup>

Then, from our filings sample in two districts, we drew a random subsample within each of the sixteen cells for willing participants. Specifically, we interviewed forty plaintiffs (and one adult child of a deceased plaintiff), nineteen plaintiff lawyers, twenty HR officers and inside counsel representing defendant employers (whom we refer to as defendant representatives), and twenty lawyers serving as outside counsel to employers. We did not try to interview any named individual defendants, such as a manager accused of sexual harassment.

We then conducted interviews with plaintiffs, their lawyers, and, when feasible, with defendants' representatives and lawyers in the same case. When this was not feasible, we selected defendants' representatives and lawyers from other cases in the random subsample.

Our response rate for the interviews (after locating a potential informant) was 51%, with defense attorneys agreeing to interviews at the highest rate (68%) and plaintiffs at the lowest (44%). The greatest challenge in this respect was locating plaintiffs. Despite extensive sleuthing, we were unable to find and make personal contact with 149 (58%) of the randomly selected plaintiffs. This difficulty raises the possibility that our subsample of plaintiffs is not representative of the sample overall, particularly of low-wage workers who would be less likely to have phone records, but we do not believe it compromised the quality of our data. The plaintiffs we did locate and interview represent a range of occupations, workplace contexts, and litigation experience. The appendix (table A.1) contains a listing of interviewees by pseudonym, age, and race. The age of plaintiffs referred to throughout this book is at time of filing. For all other interviewees we report age in 2007.

Our interview protocols consisted of open-ended, semi-structured questions about closed employment discrimination cases involving the interviewee. The plaintiffs' interviews covered their personal experiences of job discrimination, workplace dispute resolution, legal authorities, and case resolution. Defendant representatives discussed a specific closed case and their organization's general strategies for managing discrimination complaints and lawsuits. Each interview lasted about one hour and ended with forced-choice demographic and attitudinal questions that replicated questions used in previous studies.<sup>52</sup> The appendix (table A.2) contains a brief summary of demographic and attitudinal data we obtained through interviews. We coded interview transcripts using NVivo qualitative analysis software. We developed the coding scheme inductively, with codes identified through data analysis, and deductively, with codes based on secondary literature.<sup>53</sup> Throughout this book we use pseudonyms for the names of interviewees and the private employers and government agencies for which they worked.

We use rich, textured data to identify social mechanisms and general processes at work in the system of employment civil rights litigation.<sup>54</sup> Because we asked interviewees to "tell us their story," the data can be viewed as narrative.<sup>55</sup> Respondents provide a personal account, or a "plot," with a beginning, middle, and end.<sup>56</sup> Such narrative studies are sometimes criticized as overly individualistic, but we locate these narratives within larger structures and social processes that are intertwined with employment civil rights litigation: the workplace, the dispute claim system, the life course, and membership in identity groups.<sup>57</sup>

Our interviewees' plots are necessarily retrospective. Nonetheless, interviewees' reconstructions of their closed cases are important in their own right, even if necessarily different from their *in situ* experiences. Through memories of salient events, legal actors continually reconstruct their faith, or lack of faith, in the law.

Our project is unusual in that it includes both plaintiffs and defendants,<sup>58</sup> in order to reveal the subjective and relational experiences that create each side's assessments of litigation. We do so by putting dynamic social relationships and social processes at the center of analysis and by staying attuned to the interplay of social structure and culture at the macro and micro levels.<sup>59</sup> Most of the chapters in this book are based on interviewees' narratives, contextualized with the national case filings data and interviewees' answers to close-ended questions. To some extent, we foreground plaintiffs' perspectives, opening the qualitative chapters with plaintiffs' narratives relevant to the chapter themes. We integrate attorneys' and defendants' perspectives into those case studies whenever possible. In this respect, plaintiffs' actions and interpretations drive the narrative, just as they drive the legal cases through court.

A relatively unique aspect of our qualitative data is the voice recordings of interviews made available online. With few exceptions, interviewees gave us permission to record their interviews and use the audio in publications and presentations. As we saw above, in the quotes from the interview with Gerry Handley, throughout this book we note when an audio recording of that quote is available on our website with the symbol  (available at [press.uchicago.edu/sites/rightsontrial/](http://press.uchicago.edu/sites/rightsontrial/)).<sup>60</sup> The audio recordings provide further richness to our data. They reveal the race, gender, age, class, emotion, education, and legal sophistication of our interviewees. They help bring our respondents and our observations to life.

We also make limited use of the confidential charge data file obtained from the EEOC for the years 1991–2002, which contains all complaints made to the EEOC or state fair-employment agencies.<sup>61</sup> In some 85% of cases in the court filings dataset we were able to match to the EEOC charge file. For cases from 1995 on, we are able to use the EEOC priority handling code contained in the EEOC charge file.

Our research design offers several important innovations. By systematically coding a representative sample of discrimination complaints, from the least visible and most routine cases to the blockbuster trials and settlements that dominate media coverage, we attempt to more comprehensively assess law's role in processing claims of discrimination.<sup>62</sup>

The quantitative portion of the research, together with the findings from Donohue and Siegelman's research, provides an historical perspective on litigation over time. Further, rather than analyze litigation outcomes in binary terms (i.e., as a plaintiff's win or loss), we conceptualize case outcomes as a sequential variable. This approach better captures the dynamic character of the litigation process and the dilemmas that parties and courts face in adjudicating claims. By including distinct categories of outcomes that are largely unmeasured and therefore invisible in other research, our analysis more clearly reveals the social organization of discrimination litigation.

Interviewing all sides in a subset of cases affords insight into the multiple, conflicting perspectives on workplace events and the transformation of those events in litigation. Our interest is in contested constructions—an interest that aligns with an emergent theoretical orientation toward relational conceptions of discrimination and stratification.<sup>63</sup> Our intervention captures the constitutive interplay of institutions, lived experience, and interaction through both our conceptualization of the litigation system and our use of mixed methods.

This combination of quantitative results and interviews with opposing sides and their lawyers is significant for the empirical study of law and the social sciences more generally. As one of the authors, Nielsen, has written in a handbook on empirical legal research, this particular combination of quantitative and qualitative data offers three important payoffs.<sup>64</sup> First, the quantitative data informed how to select cases for in-depth interviewing, making case selection more rigorous and systematic. Second, the in-depth interviews revealed that even experts in employment civil rights litigation harbor perceptions about the system that are disproved in quantitative data. Finally, the mixed methods used in this book provide multiple vantage points on basic facts of each case, shedding light on both those facts and participants' experiences and perceptions of them in ways that quantitative or qualitative data could not do alone.

For example, one plaintiff-interviewee featured later in this book, Sam Grayson (P4), reported that he thought the settlement he received was a loss—he had hoped to get his job back. We know from the quantitative data, however, that the settlement he received was much higher than the median settlements in cases like his. The quantitative data revealed his settlement as substantial, whereas the qualitative data revealed that it was personally unsatisfactory and why.<sup>65</sup>

For all the strengths of this combination of methods, our research often cannot answer what is often posed as the core legal question in these cases: *did discrimination happen?* Because most cases settle or are decided on technicalities, there is usually no official adjudication of the facts of the case. During data collection, we initially asked the research assistants who read and coded the case files to try to assess the merits of the cases, but they rarely agreed about the validity of any particular case. Some were clear instances of “frivolous” cases and a few seemed to have “smoking guns,” but the vast majority fell in between. As such, the qualitative data are interviewees’ *accounts* of what occurred in the workplace and in court, not our own first-hand observations or even adjudicated “facts.”<sup>66</sup> Because they are not definitive statements of what transpired, but represent plausible interpretations, we incorporate multiple viewpoints on the same events wherever possible.

More fundamentally, while lawyers, judges, and human resource professionals understandably want to know whether or not discrimination “happened” in any given case, from a socio-legal perspective, this emphasis is misplaced. As one of the anonymous reviewers of the manuscript observed, “Discrimination is a contested event, told from multiple perspectives. These stories carry different weight and legitimacy depending on who is telling them, in what venue, and with what support. Thus the question of ‘what happened’ is itself a variable, subject to much interference from social factors,” such as the social position and resources of the target and the employer. In fact, whether the target has legal support, social networks, and knowledge of the law can influence both formal and informal determinations that discrimination did or did not occur.

Indeed, this poses a central quandary for our analysis and for the system of employment civil rights litigation. If the problem of discrimination is as much structural as intentional, then finding evidence of it in individual cases is fraught with difficulty. As many of our narrative accounts reflect, individual claims of discrimination often are complicated and ambiguous. This in itself is an important aspect of the American regime of antidiscrimination law.

## **Overview of the Book**

This book is organized into three parts with ten chapters. Part I of the book includes the Introduction (chapter 1) along with two other chap-

ters. Chapter 2 establishes the legal context of our study. It highlights major legislative, regulatory, and judicial trends over fifty years of employment civil rights. The chapter covers additional ground by examining public data on trends in discrimination claims and filings, outlining a model that estimates the likelihood that a target of discrimination will bring a lawsuit, and reviewing research on the media (mis)treatment of employment civil rights cases. Chapter 3 presents key findings from our quantitative dataset on case filings from 1988 to 2003. It provides a quantitative portrait of case filings and outcomes previously unavailable. This chapter reveals several social facts of significance to theoretical and policy discussions about the system of employment discrimination litigation.

Chapters 4 through 8 constitute the second part of the book. Each presents narrative analyses of litigation based on our in-depth interviews with parties and lawyers. In chapter 4, we consider the beginnings of the workplace dispute that eventually leads to the filing of an EEOC charge of discrimination and a federal lawsuit. In chapter 5, we examine who gets legal representation and why, and we consider at length why African American plaintiffs have a lower rate of legal representation than other racial/ethnic groups. Chapter 6 discusses the relationships between litigants and their attorneys and demonstrates the sharp contrast in the nature of this relationship for plaintiffs and defendants. In chapter 7, we analyze the adversarial process in employment civil rights cases and make sense of the conflicting views of plaintiffs and defendants in these disputes. Defendants accept the tenets of antidiscrimination law, but almost always reject the validity of the claims brought by particular plaintiffs. In chapter 8, we examine the outcomes of litigation and how the parties view those outcomes.

The narrative chapters of the book show how law fails to live up to its ideals in practice. They illustrate the reinscription of hierarchy by analytically attending to adversarialism, structural asymmetry, and individualization in employment civil rights cases. These processes show up in different ways at different stages of the litigation process, but they provide the critical link between rights, law, and hierarchy. With this theoretical framing, we see how workplace discrimination occurs and how biases operate not only in the institutional setting of the workplace but also as actors move into the institutional setting of the law. We see inequities in access to justice and differences in the perceived legitimacy of the various actors' stories throughout the disputing process—from the

search for counsel, to the experience in early and later stage settlements, and occasionally in going to trial. We see that nearly all plaintiffs encounter ascriptive biases in the legal realm.

Chapters 9 and 10, which constitute the third and concluding part of the book, present theoretical and policy conclusions. Chapter 9 elaborates our theory of the reinscription of hierarchy through employment civil rights litigation by foregrounding one notable and measurable manifestation of social hierarchies: stereotypes about disadvantaged groups. By centering our analysis on stereotypes, we fully illustrate a key mechanism by which ascriptive hierarchies of race, gender, age, and disability are mobilized in the workplace and reinforced through the legal process. The book concludes with a discussion of the policy implications of our results and the theoretical implications of our analysis for models of rights-based social change.

Throughout these chapters, we develop the concept of *the legal reinscription of hierarchy*. We suggest that reinscription occurs both directly in the litigation process and indirectly, given that challenges to workplace hierarchies in the form of discrimination lawsuits typically are insulated from the workplace through legal decisions that settle claims and make the terms of settlement confidential. We also attend to the importance of voice in employment civil rights law. We consider the various voices we have made heard in this project: from conservative critics of litigation, to the voice of management in the workplace, to the voices of plaintiffs who sought justice through law, to the voices of their lawyers and adversaries.

## **Conclusion**

Mr. Handley and Ms. Baker's experiences, introduced at the outset of this chapter, reveal the deep contradictions that characterize the American system of employment civil rights regulation and enforcement. The Civil Rights Act gave these plaintiffs the right to challenge egregious discriminatory treatment in the workplace. Yet as they pursued their legal claims, they were subjected to hostile treatment by their employers and defense counsel—the plaintiffs were put on trial.

This book explores the realities of the system of employment civil rights litigation and critically assesses the relationship between this system and patterns of illegitimate hierarchies in the American workplace.

Our analysis suggests that the system is widely viewed as unfair by both plaintiffs and defendants. It is shaped by and likely amplifies the asymmetry of power between plaintiffs and defendants. And yet the system is entrenched in regulatory politics, the legal system, and the personnel systems of employers. It functions to legally reinscribe ascriptive status hierarchies. As such, it must be seen as a fundamentally flawed aspect of the American system of justice and an inadequate institutional response to persistent patterns of illegal discrimination.