

LITIGANTS AND LAW:
THE DETERMINANTS
OF LITIGATION OUTCOMES

by

MATTHEW REID KRELL

JOSEPH L. SMITH, COMMITTEE CHAIR
RICHARD C. FORDING
GEORGE HAWLEY
DANA M. PATTON
PAUL PECORINO

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ABSTRACT

I investigate the determinants of settlement and plaintiff payouts in federal civil trial litigation. Using a process theory framework, I analyze the impacts of multiple litigation phases on the outcomes of cases and on one another. While most work on litigation offers uncertain inference due to the possibility of using a selected sample, I include both settled and adjudged cases in my sample. This allows me to more closely approximate a random sample, making inferences to the population of disputes more defensible. I find that there's very little evidence that judicial ideology plays a substantial role in trial-court outcomes, and some evidence of strategic behavior among trial judges. The primary determinants of both whether a case settles, and the outcome to the plaintiff, is the relevant facts and law.

The major theoretical contribution of this dissertation is the integration of dialogue among the litigants and the court. Empirically, it innovates on its use of payouts instead of a simple win/loss metric, using events other than the final outcome to measure determinants, and using multiple ideological measures. My findings suggest that our analyses of trial courts should be predicated on the uniqueness of that institutional setting rather than importing models from collegial courts.

DEDICATION

I am not so lucky as to have a partner or children to whom I can dedicate this work. Instead, I dedicate it to the lonely and frequently-impooverished young solo practitioner who's trying to decide whether the client who just walked into their office is the case that's going to make their dreams of success come true, or even just let them make rent this month.

This dissertation exists because I was once you. Go get 'em, Tiger.

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One of the most important lessons that graduate school teaches you is that even with research where only one name appears, there are so many other hands along the way who have shaped and guided the project. And so it is here. First and foremost, I must thank Joe Smith, my committee chair, for giving me the room to pursue a project I was interested in, even if he wasn't, and for being generous with his time and energy well above and beyond the call of duty. I also have to thank the rest of my committee, Richard Fording, George Hawley, Dana Patton, and Paul Pecorino, for their insightful questions and careful feedback.

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THE PROBLEM OF LITIGATION

Consider a lawsuit. On the one hand, a plaintiff who claims they are entitled to compensation. On the other hand, a defendant who claims nothing is owed. Left in the middle, a federal district judge attempting to both do justice and manage his caseload. The parties have scheduled a mediation to attempt to settle the case and reach an agreed resolution. Awaiting the judge's decision is a dispositive motion, where the defendant has asked the judge to throw out the entire case. The plaintiff opposes this. Two days before the mediation, the judge calls in the attorneys for both sides, and says, "I know you have a mediation scheduled in two days, and I have this dispositive motion that I haven't decided. Would you rather I decided it before the mediation, so that you know what issues are left to settle, or would you rather I wait until after the mediation, to give you some room to negotiate?"

At this point, counsel have a choice. They can either accept the additional information that the judge is offering, and update their information about the value of the case. Or they can decline the additional information and go into settlement negotiations with their existing information set. The first mover's choice is unconstrained, but he has the ability to gain information through his move. If he asks the judge to rule pre-conference, then *if* the second mover asks the judge to delay, he knows the second mover thinks his own case is weak. If he asks the judge

to rule post-conference, he gets no information, because the first-mover advantage accrues to the second mover.

So no lawyer will ever ask the judge to rule post-conference. And so it is here. Defense counsel immediately jumps in and says they want the judge to rule immediately, and plaintiff's counsel, perhaps begrudgingly, does the same. The next day, the judge dismisses all the plaintiff's claims and the mediation is cancelled. Could the case have settled had the judge waited? What if one of the parties had asked him to wait?

This is far from the only time that the litigants and the judge interact. Early in the process, judges confer with counsel to discuss the case management concerns that are likely to arise and to plan the schedule of the case. Motion practice throughout the case is an opportunity for all parties to update their understanding of the case. And during and after trial, the parties and the court interact to determine what evidence the jury should hear and what law they should receive.

The litigant behavior literature would tell us that the decisions of the parties are exogenous to the decisions of the judge. Under that literature, the failure of the case to settle has nothing to do with the judge's decision to poll the lawyers for a decision date. Rather, it has to do with the fact that the two parties either did not share the same information set, or did but evaluated it differently. Thus, had the parties discussed their frank understandings of the strengths and weaknesses of the case, they might have reached an accord.

The judicial decision-making literature would tell us that the judge's decision to toss out all the claims had nothing to do with the party's choices. Instead, the judge's decision was driven by case characteristics and their own personal characteristics. The choices of the litigants along the way have no effect on the judge.

But the vignette I've just described shows us a process where both litigants and judges use the behavior of other case participants to inform their decisions. In fact, litigation is best understood as a conversation among the litigants and the judge. When we analyze courts using this logic, we find that our analyses go in many different directions. Sometimes they follow familiar paths, where judges and litigants behave the way that prior scholars have shown. Sometimes they follow unfamiliar paths, and while the behavior is not consistent with prior work, it is theoretically sound. And sometimes the findings go in unexpected directions, suggesting exciting new paths for research.

This dissertation makes the first effort at determining the effects of the interaction between litigants and judges on the outcomes of cases. The results are promising enough to suggest that this is a research agenda that political scientists should not ignore. While work is beginning to exploit the particular nature of the litigation process, both theoretical and empirical questions remain. I attempt to provide some answers to both.

The "basic social logic" of courts is a triad: two disputants and a third decisionmaker (Shapiro 1981: 1). The problem becomes that the decisionmaker rests

in an uneasy equilibrium between the disputants – when he “decides in favor of one of [them], a shift occurs from the triad to a structure that is perceived by the loser as two against one” (Shapiro 1981: 2). It is possible to rely on consent as the mechanism for protecting the triad; if both parties agree to the judge, how can they complain when the decision goes against them (Shapiro 1981; Glover 2012; Erichson 2009; Sternlight 2005). But in modern contexts, the state-controlled court (as distinguished from private arbitration) does not have the explicit consent of the parties. Indeed, much ink has been spilled over the appropriate ways to secure jurisdiction of a nonconsenting party (see Marcus, et al. 2013). In lieu of consent, modern courts rely on the power of law and office to secure the presence of litigants (Shapiro 1981). This reintroduces the collapsing equilibrium problem, “[f]or it was essentially his consent at every preliminary stage that enabled the losing disputant to continue seeing the triad as a triad rather than two against one” (Shapiro 1981: 8). Shapiro, at least, offers no way out of this conundrum, and instead simply ignores it, continuing to assume consent.

Strangely enough, three years prior to Shapiro’s work, Lon Fuller had filled this hole. The fundamental function of courts is dispute resolution, which Fuller identifies as a form of social ordering (Fuller 1978). He goes on to argue that the distinguishing characteristic of adjudication as opposed to other forms of social ordering is “the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor” (Fuller 1978: 364). If the losing party had the ability to

present proof and reasoned argument, and if the decisionmaker gives reasons for its decision that rely on the disputants' proof and arguments, then Shapiro's objection dissolves. This model of courts at its heart describes what is meant by the "rule of law," and as Fuller points out, "[w]hatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself" (Fuller 1978: 364).

The political science consensus around courts is particularly corrosive to this Shapiro/Fuller model. Political scientists usually talk about judicial decisionmaking as if the litigants were not even present (Segal and Spaeth 2003; Zorn and Bowie 2010; Boyd, Epstein, and Martin 2010 Black and Owens 2012; 2015; Hinkle 2015). Instead, they treat judges as if they were legislators who can make decisions without any sort of case-level constraints and without regard to the information set the litigants offer them.¹ One of the exceptions to this is the effect of *amicus curiae* briefs on the Supreme Court (Collins 2007; Box-Steffensmeier, Christensen, and Hitt 2013). But *amici*, by definition, are not the disputants in a case, which makes the applicability of that literature to the litigation triad limited. Meanwhile, work on litigation outcomes frequently suffers from one or more of four shortcomings:

- 1) Excluding settlements (e.g., Waldfogel 1998)

¹ Canes-Wrone, Clark, and Kelly (2014) explicitly state that their theory treats judges as legislators.

2) Neglecting the effect of judges and judicial ideology (e.g., Klerman and Lee 2014)

3) Neglecting the effect of lawyering choices (e.g., Ashenfelter, Eisenberg, and Schwab 1995) and

4) Too much variation over the legal arguments available (e.g., Heise and Wells 2016).

But what if we took the Shapiro/Fuller model seriously? What if we asked how the reasoned arguments and proofs offered by the parties affected their legal outcomes? What if we did so at the trial-court level, the forum where judges are most likely to be constrained by the possibility of reversal, and thus have an incentive to get things right (Zorn and Bowie 2010; Klein and Hume 2003)? The criticism to this suggestion is that it is impossible to measure and operationalize these issues. But declaring all other explanations unmeasurable, and then assuming that the only thing we can measure is the cause of all variation, is the antithesis of science (Mendelson 1963). And, even if the criticism had been true; it no longer is.

This model of the “rule of law” – the disputing triad with a decision-maker that responds to reasoned proof and evidence – means that isolating either litigants or judges only tells half the story. Judges in adversarial systems make decisions based on the information and argument that litigants present.¹ Those litigant

¹ I don't express an opinion at this time about whether my analysis could be applied to inquisitorial

choices are themselves strategic; litigants decide at every step of the way what information to present the court in order to make a favorable decision as likely as possible. The factors driving litigant choices are in part exogenous to the judge and partly endogenous. For example, while litigants would like to assert their claims as strongly as possible, they can't possibly hope to assert legal claims for which they can present no factual support; and to the extent that litigants are aware that judge characteristics affect judicial decision-making, they may engage in forum-shopping to secure their preferred judge (Botoman 2018; Anderson 2016). Thus, analyzing litigation through this lens requires analyses that take into account the information exchange among the parties and the court.

In addition, litigants may use their knowledge of the judge to shape the information they present to the court and their settlement negotiations. For example, if it's known that judges with daughters are more open to gender-based claims than judges without them (Glynn and Sen 2015), then plaintiffs before judges with daughters may press their gender claims more strongly. A judge known to be hostile to certain types of claims may reduce the parties' perceptions of the settlement value of cases involving those claims (Heise and Schwab 2011). Ignoring the interactions between litigants and the court may cause us to misspecify causal or descriptive relationships in the litigation process that in fact are driven by these interactions.

systems.

In this dissertation, my goal has been to incorporate into my analysis not only the factors in litigation outcomes that come from outside, but also those that come from within the litigation triad. This approach allows me to focus on the way litigant choices shape the case over its entire life. In other words, I have operationalized the “reasoned proof and argument” that Fuller claimed was the key to the rule of law. I’m thus able to determine whether these cases represent the “rule of law” as I’ve defined it. In true lawyerly fashion, my answer is: it depends.

I provide four major theoretical innovations in this dissertation. First, as explained above, I integrate the conversation among the litigation triad into my analysis rather than treating litigants’ and judges’ behavior as exogenous to one another. Second, I go beyond final outcomes and analyze case behavior based on information that becomes available over the life of the case. Third, I use both a dichotomous dependent variable like prior analyses (whether a case settles or goes to trial), but rather than using a dichotomous “plaintiff victory” variable, I actually distinguish between meaningful plaintiff victories and nominal plaintiff victories by using the amount of money plaintiffs received. Finally, I provide further evidence of the interchangeability of the Judicial Common Space (Epstein et al. 2007) and the Database on Ideology, Money in Politics, and Elections (DIME-CF) (Bonica and Sen 2017) ideological scores by demonstrating no significant difference between them in my results. This is, to my knowledge, the first analysis of trial-court decision-making using the DIME-CF scores.

I focus on the following empirical questions: How do the cases that settle differ from the cases that are decided after trial? As their uncertainty declines over the life of the case, do parties grow more or less likely to settle? Are the models that we use to predict judicial decision-making useful for analyzing trial courts? Finally, how does the application of legal standards affect the dollar amounts plaintiffs recover (through either settlement or damages award)? I use a dataset that will allow us to test these questions using a method that maximizes internal validity. Thus far some scholarship fails this due to its insistence on using a random sample of the population of cases, which varies too much over the applicable legal standard (*see, e.g.*, Waldfogel 1998). Too much variation over the legal standard leaves too much variation in potential outcomes. Instead, I rely on data from the EEOC Litigation Project, a subset of cases that limits the applicable legal standard. This dataset uses a stratified sample of litigation conducted by the Equal Employment Opportunity Commission between 1997 and 2006. Thus, I focus on the role of the legal issues raised and litigated by the parties as the district court resolves those issues on litigant decisions to settle and on what payments they receive.

Overall, the answers to these questions have the potential to change our understanding of the litigation process and development of the law, as, if the effects of law on litigation outcomes is more accurately understood, scholars may be able to break open the black box of litigation and make inferences about the relationship between legal standards and dispute outcomes (Hall and Ura 2015; Klerman and Lee 2014). Productive avenues of further research will be identified at the

conclusion. Thus far, much litigation-process scholarship has either focused on the behavior of judges (Ashenfelter, Eisenberg, and Schwab 1995; Clermont and Eisenberg 1998; Eisenberg 1991) or the interactions between litigants (Boyd and Hoffman 2012; Boyd 2015).¹ Opening the scope of legal system analysis into studying the behavior of all litigation participants as a system gives us a better understanding of the system's effects on human behavior. Analyzing the conversation among litigation participants improves our understanding of the behavior of all of them.

Plan of the Dissertation

This project proceeds in six chapters. Chapter Two will address the prior literature. I spend some significant space discussing the theoretical models that analyze whether litigation outcomes give us meaningful information about the law at all. I also consider past work on litigant behavior and judicial behavior to examine the gaps created by not considering how they interact. Finally, I walk through the litigation process phase by phase, explaining what prior scholars have learned about how those litigation events affect case outcomes.

Next, Chapter Three will provide a theoretical framework based on process theory and the existing litigation literature. I argue that the frequent focus on final outcomes has made it possible for scholars to ignore opportunities for litigants and

¹ Heise and Wells (2016) is a limited exception. Cooter, Marks, and Mnookin (1982) ask a similar question but focus on the psychological determinants of party preferences rather than the legal standards in play.

judges to shape case outcomes through shaping the information set. I also provide some evidence of this argument in a proof of concept setting by testing the relationships within pre-trial motions via a panel analysis.

Then I will justify my use of damages awarded as a dependent variable in Chapter Four, by showing that there is no better dependent variable. Essentially, unless the litigants know prior to filing the lawsuit what their maximum recovery is, the legal regime in place strongly encourages them to ask for an amount of damages that bears little to no relation to their valuation of the claim. Because of this, scholars cannot expect, in the population of cases filed, to be able to compare the damages claimed to the damages awarded. We are limited to the damages awarded as the best possible measure of the outcome.

In Chapter Five, I will discuss the data I used from the EEOC Litigation Project, the data I collected to expand its dataset, and I will provide a qualitative exploratory analysis of jury instructions. The EEOC Litigation Project provides information on over 300 variables for over 2300 agency enforcement actions brought between 1996 and 2006. I collected and coded 17 variables related to the *defendants'* initial filings in the case for 289 of the cases already in the EEOC Litigation Project. I also collected documents related to jury instructions proceedings in 30 cases, which was not enough to do hypothesis testing. There's also not a lot of theory connecting jury instructions to final outcomes, especially settlements.

I do a descriptive and qualitative analysis of the jury instructions documents. I find that there appear to be two categories of jury instructions, one related to

“procedural” matters and the other related to “substantive” matters. The parties are somewhat more likely to contest substantive instructions. I also find evidence that the more the *court* chooses contested instructions from one side, the better the outcome for that side.

Finally, the two quantitative empirical chapters will test my hypotheses that can be tested, with Chapter 6 focusing on the factors that lead to settlement and Chapter 7 focusing on factors affecting payouts. I find that there are certain major breakpoints where cases are likely to settle, being specifically the filing of the defendants’ first pleading and the filing of a dispositive motion. I also find that there is little evidence that traditional models of judicial decision-making drive settlement, which makes sense – settlement is a choice of the parties, not the judge.

While judge characteristics – specifically, ideology – has some influence on amounts recovered, I find that there are much more robust and larger effects for factual allegations and changes in the legal regime. This suggests that district judges, at least, are more focused on getting things right than enacting their policy preferences, except on the margins. I also report some signs that changes in the legal regime change the set of cases being presented to the courts rather than changing outcomes directly.

Conclusion

The EEOC data affords a unique opportunity to analyze the effect of the law on litigation outcomes and litigant behavior. It expands our understanding of the relationship between law and litigation. And it offers a path out of the morass of

selection effects, allowing inferences to be made about the law. More broadly, I also provide a bridge between the law and society scholarship and the law and economics approach by providing a rational-choice analysis to explain the pleadings choices litigants make.

In addition to its effect on law and society concerns, this project serves the interests of public law-oriented political scientists. It takes the existing EEOC Litigation Project dataset and extends it by adding new variables. This project contributes to our understanding of litigation by allowing us to view litigation as a path-dependent process, where prior choices constrain future outcomes. It also represents a new development in our theoretical framing of litigation by connecting the judge and the litigants in the ways envisioned by Shapiro and Fuller. Methodologically, I hope to have begun the process of demonstrating that properly designed research into a subset of cases can give generalizable inferences about how parties act in civil litigation across the board, and to demonstrate the appropriateness of a continuous dependent variable in litigation analysis.

We need to better understand trial-court litigation. We know little about its resolution, very little about its instigation, and even less about the connections between litigation events over the case's life cycle. Legal scholars know about the law as judges express it, but they fail to account for the selection bias inherent in their case-driven analyses. This project could move us closer to understanding the relationship between the law that judges use and the results that parties get.

LITERATURE REVIEW

This project lies at the intersection of the litigation process, legal compliance, and judicial behavior literatures. Litigation process scholars focus on the mechanisms and interactions between parties that generate case outcomes, whether they be settlements or judgments. Legal compliance scholars address the relationships between higher and lower courts, the ability of lower courts to disregard the wishes of higher courts, and the higher court's ability to monitor and enforce its own preferences. Judicial behavior scholars focus on the factors that structure the decisions of individual judges and courts.

While the initial exchange of information in litigation is between the parties, the court becomes part of the process when it begins to resolve contested issues, and thus the court's ability to discern and comply with prior precedent and its desire to do so become relevant factors. Interactions between all three actors in the archetypical case follows the "triadic dispute resolution" mechanism identified by Shapiro (1981), so I include interactions between all three members of the triad in the process. This, in particular, is why interaction between the judicial behavior, legal compliance, and litigation process literatures is needed. In addition, this project should shed light on the thirty-year debate over whether selection effects systematically bias case outcomes toward a 50% plaintiff win rate (Klerman and

Lee 2014). In essence, this argument posits that because parties can settle their case at any time, rational litigants will settle any case where they evaluate their chances of winning as less than 50%. Thus, only those cases where the parties both believe they have a 50% chance of winning proceed to a verdict (Priest and Klein 1984). This tendency for cases to go to verdict—and thus influence the population of trial results and future disputes—only if both parties believe they have a 50% chance of winning is a selection effect, and renders inferences about the effects of legal standards on dispute outcomes problematic.

The difference between the “plaintiff win rate” and the “population win rate” is the key concept in the Priest-Klein literature. When I refer to inferences from litigation outcomes being biased or the legal system being biased, I am referring to the tendency of outcomes in the sample of cases tried to drift from the latent pattern of outcomes in the population of cases filed. Thus, the “population win rate” is a latent variable that refers to the percentage of *cases filed* where the plaintiff would receive meaningful relief *if all cases were tried*. The “plaintiff win rate” is the observed percentage of *cases tried* where the plaintiff receives meaningful relief. The basic concept behind the Priest-Klein literature is that the “plaintiff win rate” doesn’t necessarily tell us anything about the “population win rate.”

Because courts are engaged in a project of applying law to facts, the removal of cases with “easy” facts—cases in which one party believes they will lose due to factual circumstances of the case—from the population of cases makes the legal system appear to turn on cases with “hard” facts—cases in which the factual

circumstances of the case render the chance of winning ambiguous. In reality, most cases fall into clear categories and have clear winners and “easy” facts; their resolution is fairly straightforward once both sides have the same information (Boyd and Hoffman 2012; Waldfogel 1998). Thus, while the law might be slanted strongly toward one side or the other in a particular class of disputes and thus would generate a larger or smaller number of plaintiff victories, the effect of selection out of the population of verdicts means that scholars will think the legal regime is neutral, when in fact it is not. The relationship is not reversible, either; because selection effects shift the apparent plaintiff win rate toward 50%, all regimes will appear neutral according to the Priest-Klein hypothesis. This project overcomes that concern by using a population of cases where settlements must be publicly reported, thereby eliminating the aforementioned selection effect.¹ It thus presents a hopeful new path toward examining litigation outcomes.

Previous theoretical work has examined the differences between cases which settle and cases decided after trial, and concluded that settled cases are those where the parties have a range of agreement about the likelihood of plaintiff victory and damages. Namely, cases which settle are those where the plaintiff’s range of expected outcomes, with appropriate discounting, overlap with the defendant’s range of expected outcomes (P’ng 1983; Klerman and Lee 2014). For example, if the

¹There is an additional selection effect in that some disputes never give rise to litigation. Attempting to find a way around this effect to discuss the population of *all disputes* is well beyond the scope of this project (but see Kritzer (2011; 2009) for an interesting elaboration of a research agenda on the issue; Eisenberg and Farber (1997) for an attempt at testing it; and Relis (2006) for an argument for one relevant causal mechanism).

parties agree that the plaintiff can prove \$100,000 in damages, and has a 60% chance of winning, rational litigants will settle for \$60,000. Introducing uncertainty either on the amount of damages or the probability of victory converts the point of agreement to a range. On the other hand, cases decided after trial tend to be those where either the parties have such different expectations for the outcome that their range of potential payoffs do not overlap (Bebchuk 1984) or the information on which they evaluate the potential payoffs differ (Waldfogel 1998; Priest and Klein 1984).

These differences complicate the credibility of any answers generated about law's effects on litigation outcomes, as they mean that cases that go to trial may do so because the parties cannot predict the outcome (the 50% plaintiff-victory prediction), or because the parties have different predictions for the outcome (based on either divergent expectations or asymmetric information). In other words, the likelihood of systematic differences between cases which settle and cases decided after trial prevent us from drawing valid inferences about our research questions because settlement selects out those cases where the law prescribes only one outcome. Instead of a binomial-logistic distribution of outcomes, all results cluster around the mean.

Ultimately, the largest gap in the literature is less that the literature doesn't cover everything it needs to cover. Rather, the gap is that the literature treats litigants and judges as engaged in separate processes, when they actually are complementary and interactive. Because nothing in the literature at the trial court

level acknowledges this reality, and the only work on appeals courts focuses on *amici* rather than real parties in interest, this dissertation offers a new direction for trial courts research.

Selection Effects—the Problem of Inference

The classic theoretical approach to selection effects in trial results suggests that no inferences about the effects of the law on legal disputes can be drawn from plaintiff win rates, because the parties will choose to settle all but the closest of cases (Priest and Klein 1984). These effects can lead both practitioners and scholars to think that the law is balanced, when the legal regime is actually strongly favoring one side or the other. In other words, if the observed plaintiff win rate is 50%, the bench and bar will assume that this holds for all cases, when in fact the *population* win rate may be significantly different from 50%. The question that arises becomes the extent to which selection effects inhibit the ability to make inferences from trial result data. When making these evaluations, the literature begins with the assumption that the population consists of all disputes which become litigation. The sample consists of that subset of cases which proceed to judgment for one side or the other. Selection effects arise when the process of determining which cases are in the sample is systematically biased (Siegelman and Donohue 1995). This systematic bias is due to the choices of the parties to settle cases where one side or the other has a particularly weak case.

There are two competing models for measuring the difference between the true plaintiff win rate and the observed plaintiff win rate; and the scope conditions

of selection effects, divergent-expectations models and asymmetric-information models. Divergent-expectations models assume that both sides have equal information but draw different conclusions about their likelihood of victory (Landes 1971; Posner 1973). Asymmetric-information models assume that one side has private information (P'ng 1983; Bebchuck 1984). Asymmetric-information models do not predict complete selection (Hylton 1993; Shavell 1996), consistent with Klerman and Lee (2014)'s analysis that defendants attempt to mask their true liability in settlement negotiations.

Some scholars have found partial selection (Siegelman and Donohue 1995), while some find complete selection (Ashenfelter, Eisenberg, and Schwab 1995). Partial selection means that the likelihood of plaintiff victory has an effect on whether the case is tried, but that other issues also drive litigation (Siegelman and Donohue 1995). "Complete selection" predicts a 50% win rate for plaintiffs in cases that do not settle (Ashenfelter, Eisenberg, and Schwab 1995). Others find that external characteristics influence trial results without regard to the parties' choices (Epstein, Landes, and Posner 2013; Eisenberg & Johnson 1991; Kulik, Perry, and Pepper 2003).

Priest and Klein (1984) offer the most important early theoretical approach to the effect that settlement has on the power to make inferences from litigation outcomes. They conclude, relying strictly on a formal-theoretic model, that "where the gains and losses from litigation are equal to the parties, the individual maximizing decisions of the parties will create a strong bias toward a rate of success

for plaintiffs at trial or appellants on appeal of 50 percent regardless of the substantive standard of law” (Priest and Klein 1984: 5). They then relax the assumption that payoffs are equal and demonstrate that the model predicts that variation from the 50% plaintiff-victory rule will be driven almost entirely by the differences in expected payoffs (Priest and Klein 1984: 24-30). They test the model using their own data from Cook County, Illinois jury verdicts and find some support for its predictions (Priest and Klein 1984: 31-44); and review prior scholarship, concluding that most of it supports the model.

Klerman and Lee, thirty years later, note that “Priest and Klein’s article is startling in suggesting that selection bias is so strong that a change in the legal standard would result in no observable change in the plaintiff trial win rate” (Klerman and Lee 2014: 210). Their argument, summed up, is that “under all standard settlement models and under a wide range of reasonable conditions, one may be able to make valid inferences from the percentage of plaintiff trial victories” (Klerman and Lee 2014: 210). While they agree that “the characteristics of litigated cases do deviate significantly from those of settled cases” (Klerman and Lee 2014: 214; see also Klerman 2012), they conclude that *ceteris paribus*, changes in the legal standard *should* change plaintiff win rates.

This finding, they argue, holds regardless of whether plaintiffs make offers in hopes of settling with high-liability defendants, or defendants make offers in hopes of signaling their information regarding their likelihood of liability (referred to as “asymmetric information” models). They also argue that Priest and Klein’s finding

only holds if the parties accurately measure the defendant's level of fault (Klerman and Lee 2014: 228-229). The only exception is changing damages standards – under the Priest/Klein model an increase in damages moves plaintiff win rates toward the population rate, while under the asymmetric-information models an increase in damages increases plaintiff win rates (Klerman and Lee 2014: 235).

The degree of selection effects on observed litigation outcomes is significant if notable differences between the set of cases which settle and the set of cases decided after trial are found. If Klerman and Lee are correct, then it becomes vital to determine two things: first, whether litigants use asymmetric-information or divergent-expectations behaviors in settlement negotiations; and second, if they use divergent-expectations models, whether their errors in predicting outcomes are large enough to support Klerman and Lee's assertions (Klerman and Lee 2014: 228-229). The evidence from the prior literature, discussed below, suggests that the answers to these questions are, respectively, divergent-expectations and possibly.

With regard to the first question, Waldfogel (1998) tested the predictive power of both models, and found divergent-expectations models more consistent with the evidence. He argued that divergent-expectations models predict that plaintiff win rates converge on 50% as trial rates decline, while asymmetric-information models predict that as trial rates decline, plaintiff win rates converge on either 0 or 1. Examining 65,000 federal district court cases in New York filed between 1979 and 1986, Waldfogel found that raising trial rates in tort and civil rights cases by a standard deviation reduced plaintiff win rates by half—and if he

controlled for the amount in controversy, the reduction was three-quarters. His research design predicted a positive relationship between trial rates and plaintiff win rates if asymmetric information applied, and a negative relationship if divergent information applied. This is consistent with Klerman and Lee (2014)'s argument that both approaches lead to partial selection, such that inferences may be made from trial results.

In addition to being supported by the evidence, divergent-expectations are supported by the legal regime. In the United States, particularly in federal courts, the judiciary has methodically moved away from “trial by ambush,” meaning the introduction of surprise evidence at trial, since the adoption of the Federal Rules of Civil Procedure in 1938 (*Smith v. Ford Motor Co.* 1980). In cases where one side attempts, knowingly or unknowingly, to ambush the other, the result is a mistrial and a substantial sanction against the ambushing party (*Bobo v. United Parcel Service* 2012).

In short, while asymmetric information models may have stronger game-theoretic roots and broader scholarly acceptance (Klerman and Lee 2014), they do not represent the litigation process as it exists in the United States (Waldfogel 1998).¹ Thus, empirical work on trial results in the American context should assume divergent expectations. This is consistent with most efforts to test these models quantitatively (Farber and White 1991; Huang 2007; Shavell 1989). Under these

¹With the possible exception of behavior at the pleadings stage; see Chapter 4.

models, the greater the parties' differences in predicted outcomes, the higher the proportion of cases that are tried, and the more plaintiff win rates will diverge from the 50% predicted by Priest and Klein (1984; Klerman and Lee 2014). This matters because if the parties have large prediction errors, then Klerman and Lee suggest that the outcomes from tried cases will approach the population outcome; but if the parties accurately measure the outcome probability, plaintiff victories will converge on 50% (Klerman and Lee 2014: 228-29).

With regard to the second question, whether errors in outcome estimation are large enough to justify Klerman and Lee's optimism for inferences from trial outcomes, Boyd and Hoffman (2012) suggest that it might be. They argue that non-discovery motion practice serves as information exchange mechanisms (Boyd and Hoffman 2012). They suggest that if this is true, then cases in which motion practice occurs will be more likely to settle as the variance in estimation of outcomes narrows (Boyd and Hoffman 2012). Using a random sample of federal litigation, they find such an effect. This suggests that the litigation process may facilitate settlement by reducing estimation error in outcome prediction, and that if settlements are included in the dataset, that inferences about the law from a sample of litigated cases could be made.

In addition, Bock (2013) points out that there are cases where after settlement is reached, the parties ask the district court to vacate a previous ruling as part of the settlement. Vacating a ruling in these cases usually eliminates a finding relating to an issue that would recur in other cases but would present

collateral estoppel issues. This would mean that the parties would be unable to relitigate the issue. This is consistent with Boyd and Hoffman's conclusion that motion practice gives the parties a lens on how the court views the case, and allows them to reach agreement on the settlement value of the case on that basis. Bock's findings support Boyd and Hoffman because the court in his cases drives settlement when it announces its resolution of an issue; but because one or both parties would want the opportunity to press their arguments on that issue in a later case, they ask the court to vacate the ruling as a condition of settlement. Bock's argument is suggestive rather than conclusive because his sample is quite small (N=79) and the sampling frame is unrepresentative (patent cases where post-settlement motion practice sought to vacate a ruling adverse to a particular side). But this finding provides some confirmation that Boyd and Hoffman's work should provide consistent expectations for the relationship between motion practice and trial.

Boyd and Hoffman and Bock also represent examples of the conversation between judges and litigants being embedded in trial courts research, but not being explicated. Both pieces focus on how the parties update their priors using information from the court, but neither models the way that the substantive information from the court changes the outcome. Instead, the additional information is treated as either present or absent.

This project differs from Boyd and Hoffman's in that it will, instead, look at both the possibility of settlement and the payouts to plaintiffs. This means the entire life cycle of litigation can be examined, because the process and standards

involved are limited. Thus, while the theoretical concern of this research is the effect of law on litigant choice, the empirical question being tested is the effect of the court's decisions about law on those choices. Findings regarding the influence of resolutions of questions of law on settlement and recovery thus answer the research questions by allowing us to make inferences about the effect of law on litigation, which can strengthen inferences about law *from* litigation.

Litigation Process—Information Gathering

The information the parties acquire informs the amount they would accept in settlement over the life of the case. I add the court as an information source for the parties. The parties possess some factual information prior to the complaint's filing, but they primarily acquire information about the case from each other over the course of litigation (Boyd and Hoffman 2012). Additionally, the law defines what fact patterns give rise to claims for damages. This means that facts do not give rise to claims for damages unless they are shown to violate a duty imposed by some legal standard. If the standard gives the court some flexibility (*see* Smith and Todd 2015; Bailey and Maltzman 2011), rulings may be motivated by some other purpose (Segal and Spaeth 2002; Smith and Tiller 2002; Black and Owens 2012, 2015). Regardless of purpose, these rulings are a source of information for the parties (Boyd and Hoffman 2012). Further discussion of the role of legal standards can be found *infra*.

In addition, some scholars consider the exchange of information between the parties to play a role in the litigation. They describe this process as “litigating

toward settlement” and suggest that “motion practice makes litigation dynamic and reflexive, permitting parties to learn about their cases” (Boyd and Hoffman 2012: 899; citing Kritzer 1986). Thus, there are two sources of external information that litigants can rely on in evaluating their likelihood of success: —the court and opposing parties. The parties define the issues; the court frames them; the finder of fact (either the judge or the jury) resolves them, unless the parties short-circuit that process through settlement.

This project’s methods focus on those sources of information and the litigants’ use of them. It asks how variation in the issues that are presented —and when those issues are resolved by reference to the appropriate legal standards—affects the recovery of plaintiffs. However, the process of defining standards is frequently seen as a black box in litigation process studies, because what is interesting to litigation process scholars is the interaction of the parties, not standards.

The level of litigants’ uncertainty about whether and how much they will win (or lose) if the cases is decided after trial determines the range of settlement offers. The more confident they are that they have correctly measured the potential damages and likelihood of liability, the narrower the range of potential offers they will make (Craswell and Calfee 1984). Uncertainty usually causes defendants to undervalue settlement, making offers too low to create agreement (Ordover 1981; Simon 1981). However, increasing the penalties can increase settlement valuation similarly to increasing the likelihood of liability (Craswell and Calfee 1986; Klerman and Lee 2014). Fee-shifting rules constitute an important mechanism for

increasing penalties and thus making settlement more likely (Beckner and Katz 1995; Coursey and Stanley 1988). However, in cases where the plaintiff's counsel is paid on a contingency fee arrangement, fee-shifting makes trial more likely (Farmer and Pecorino 2005). The information differential between the parties can play a role in whether cases settle and how much they settle for (Schwab and Heise 2011), both of which are questions I investigate.

Litigation process literature grew out of the Priest-Klein debate. After Priest and Klein (1984) concluded that litigants would only go to trial if the likelihood of plaintiff victory was 50%, scholars began to ask how likely it was that litigants could accurately assess their own likelihood of victory. Craswell and Calfee (1984) point out that when legal standards are uncertain or indeterminate, that the defendant's evaluation of the law's uncertainty determines their compliance. In general uncertainty creates under-compliance (Ordoover 1981; Simon 1981). However, uncertainty can *also*, depending on the defendant's calculation of probabilities, lead to over-compliance via a "playing it safe" mechanism (Craswell and Calfee 1984). They followed up on this with formal proofs that when uncertainty is low, parties tend to over-comply, but when uncertainty is high, they can be expected to under-comply (Craswell and Calfee 1986). The difference in high-uncertainty outcomes is almost entirely driven by the size of the penalties. If the penalty for violation is large enough, it will trigger the "playing it safe" over-compliance response (Craswell and Calfee 1986).

Beckner and Katz (1995) consider the interactions between litigant costs and legal uncertainty. Their approach to this question addresses a particular cost-shifting rule:—the “American rule” that litigants carry their own costs, as opposed to the “British rule” that the loser pays the winner’s costs. They find that there is no real efficiency gain to the British rule. Instead, a defendant’s uncertainty about the likelihood of liability prevents the efficient allocation of resources in all cases. How the defendant evaluates the probability of liability leads to both under- and over-compliance with the relevant legal standard (Beckner and Katz 1995: 213-215).

However, other scholars argue that the British rule has different gains. Coursey and Stanley (1988) examine the traditional American rule, the British rule, and Federal Rule of Civil Procedure 68. Their basic argument is that cost-shifting leads parties to prefer settlement to litigation, because the possibility of having to pay the other side’s attorney’s fees combined with the uncertainty of victory leads to a preference for settlement. They used a negotiation experiment to test actual behavior, finding that cost-shifting rules did lead to more settlements and more equitable settlements (defined as closer to an even split) (Coursey and Stanley 1988).

Some scholars theorize that some or all of the litigation process is about signaling in an attempt to secure better settlements. Lavie and Tabbach (2018) go so far as to suggest that all litigant behavior is, at least in part, directed at the opposing party rather than the court. They especially identify three behaviors whose sole rational purpose, they argue, is to suggest the strength of the litigant's

case: one-way fee-shifting provisions, waivers of claims, and award-modification agreements. They operate under the assumption of asymmetric information, which, as discussed above and in more detail in Chapter 4, may only be present very early in the case. I find that certain types of early behaviors may lead to more or larger settlements, consistent with this signaling approach.

In litigation, all of these studies are consistent with Klerman and Lee's argument that damages standards have a different effect on results than liability standards. As the ability to impose higher damages on a liable defendant increases, defendants become more likely to seek exit, but if they evaluate themselves as a low-liability defendant, they may choose not to make an offer the plaintiff will accept. Thus, outcomes will approach the population liability rate.

Legal Compliance—Defining and Enforcing Standards

The litigants are only part of the litigation story – the court has a role to play as well in defining and applying the appropriate standard. I introduce the litigants as additional actors in the trial court decisionmaking process. “Legal standards” are the tests courts use to evaluate factual situations to determine if there is legal liability (Hart 1994; Dworkin 1986; Segal 1984). This definition fits into the literature on compliance with judicial orders, which differentiates between “rules” and “standards” (Smith and Todd 2015). In that literature, “rules” are envisioned as defining a set of potential factual categories and prescribing the legal outcome for each category (Twerski 1982; *Mind Games, Inc. v. Western Publishing Company, Inc.* 2000). “Standards” are broad definitions of the types of facts that should lead to

certain outcomes, leaving the decision-maker with the power to determine what facts meet the standard in any particular case (Sullivan 1992). Thus, “rules” are regarded as limiting judicial discretion, while “standards” expand it. “Rules” includes such requirements as the obligation of an employer to maintain wage and hour records (29 U.S.C. § 216(c)). “Standards” would include such tests as whether a complaint asserts a claim for relief under Rule 8 of the Federal Rules of Civil Procedure, which requires that the factual assertions give rise to a “plausible” claim for relief (*Bell Atlantic Corporation v. Twombly* 2007). This project seeks to explore the relationship between legal standards and litigant behavior, a topic as yet mostly unstudied.

Where higher courts have not clarified the appropriate choice of standard, lower courts can be expected to vary in their choice of standards (Bailey and Maltzman 2011). This variation may be predictable according to the “usual suspects” of judicial behavior, including judicial ideology (Segal and Spaeth 2002) or fear of reversal or desire for advancement (Smith and Tiller 2002; Black and Owens 2012, 2015). “When the court is induced to rule, even when that ruling does not end the case, the parties gain a . . . source of information—what the court thinks about the legal merits and facts” (Boyd and Hoffman 2012: 900; see also Bock 2013).

Another gap in the literature involves the assumption that “[t]he court's perspective on the relevant doctrine may at times be predictable” (Boyd and Hoffman 2012: 899). This assumption runs throughout game-theoretic approaches to litigation: that there is only one legal standard that applies, and the parties

recognize the same standard to be relevant (Klerman and Lee 2014). Both theoretical and empirical approaches to the litigation process tend to assume that the legal standard is known and certain (Klerman and Lee 2014; Boyd and Hoffman 2012). This assumption is justified by limiting the scope of research to particular parts of the process where rules are used instead of standards (Boyd and Hoffman 2012; Smith and Todd 2015).

In fact, in many cases, the relevant legal standard is uncertain and the standard applied is contested. Some of these contests may have more merits than others, but the mere fact that the Supreme Court recognizes part of its role as including resolution of “circuit splits,” where the same law is applied differently in different parts of the country (Supreme Court Rule 10), suggests that the monolithic view of the law that game theorists frequently assume is, at best, incomplete.

Smith and Todd (2015) make an important contribution to this literature in noting that most of the compliance literature focuses on rules-oriented areas of law. They note that standards and rules require different approaches to compliance, since standards afford enough judicial discretion that it is difficult to determine when a lower court is engaged in compliance. Reviewing search-and-seizure cases in the courts of appeals over a period where the Supreme Court replaced a rule with a standard, they find that the shift to a standard appeared to have freed circuit court judges to rule in accordance with their ideology.

Another important standard-based study again focused on searches and seizures: Songer et al. (1994) used Burger-Court search and seizure decisions to

determine the ability of the Supreme Court to control the Courts of Appeals. They found that the courts of appeals followed the Supreme Court's lead, as identified by Segal (1984), but that much of the effect of the courts of appeals was determined by the policy preferences of the appeals-court judges (Songer et al. 1994: 689).

However, they also found that litigant behavior was an important component of the higher court's ability to monitor lower-court compliance (Songer et al. 1994: 690).

Kim (2007) questions the entire principal-agent assumption underlying the judicial compliance literature, where lower courts should faithfully enact the policy preferences of the Supreme Court as expressed through precedent. Instead, she concludes that law normatively grants trial courts discretion under certain conditions, namely under standard-based frameworks and when operating under a deferential standard of review. This study frames future empirical research on trial-court decisionmaking but does not do any empirical work of its own.

Finally, Beim (2017) argues that courts that exercise discretionary review learn about the state of the world and appropriate doctrinal approaches from the cases they accept and the cases they decline. Her theoretical approach argues that because lower-court judges only make ideologically extreme decisions when the parties do not discover the same evidence of the state of the world, the higher court is able to infer the evidence presented to lower courts based on the decision they make, even before review is granted. Thus, the higher courts are able to monitor not only the doctrinal choices that lower courts make but also how they are responding

to evidence. This allows the higher courts to ensure that doctrine reflects reality, rather than whatever pre-existing perceptions of the world judges may have.

These three studies demonstrate that the discretion afforded judges tasked with interpreting legal standards has an important role in determining litigation outcomes. That discretion affects the strategic calculus of litigants; but without including cases where the parties terminate the case before a final, appealable judgment, studies that focus on appellate courts are subject to the same Priest-Klein criticism that their findings are biased by selection. Transitioning into a sample of cases where settlement does not exclude the case from the dataset strengthens the inferences about the effect of legal standards, which is why this project will be conducted using such a sample.

This project, unlike prior litigation-process work (with the exception of Beim's theoretical approach, discussed above), does not focus solely on the relationship between the parties. Instead, it includes the judge as an important driver of litigation outcomes and decisions as they act to resolve legal uncertainty within the case. Unlike the compliance literature, this project does not assume that litigants are exogenous to the decisions judges make, but rather participate in and react to those decisions (see also Gelbach 2012; 2014; 2015). Because of the nature of the data, discussed *infra*, there are cases where the standards are *never* resolved (such as cases where the parties settle quickly, and thus the court never rules on any issues between them), and this provides a natural experiment for plaintiff outcomes controlling for variables that are present at all stages of a case—jurisdiction, time,

lawyering, judicial demographics, and party characteristics (Eisenberg and Lanvers 2009).

I have found two studies in the literature that examines the effect of litigant behavior on judicial compliance with legal standards. Both reached the same conclusion: when judges are constrained by a rule in a salient case, they are most likely to rely on litigants' arguments if the rule commands a result they are ideologically predisposed against (Sheppard 2012; Sheppard and Moshirnia 2013). Both studies have limited external validity because they rely on a lab experiment using law students and recent graduates. However, given the burgeoning literature on the role of law clerks in judicial decision-making, that population may be more valid than it might at first blush appear (Hacker, Blake, and Hopwood 2015; Kromphardt 2017).

However, because of the litigants' power to settle their case by agreement at any point prior to a final judgment, making scientific inferences about legal standards from trial outcomes is difficult. The litigant choice to settle is influenced by the legal standard itself, such that the selection *into* the dataset is driven by the variation that attempts to explain the dependent variable, so that no *actual* variation on the independent variable can be observed. (Priest and Klein 1984).

Judicial Decisionmaking – Ideology, Strategy, Law

There are three major approaches to judicial decision-making, all derived from Supreme Court studies. Attitudinal models assume that judges are naive policy-preference maximizers, and vote in line with their ideologies, however those

are defined (Segal and Spaeth 2002; Canes-Wrone, Clark, and Kelly 2014). Strategic models argue that judges acknowledge other preferences than their own, and act to maximize their preferred outcome within a policy space defined in part by other actors (Epstein and Knight 1997, 2017; Smith and Tiller 2002). Both of these models assume that the legal analysis courts use to explain their decisions is nothing more than a veneer (Sheppard and Moshirnia 2013). The legal model, in contrast, takes law seriously as a source of judicial decisionmaking (Bailey and Maltzman 2008, 2011; Friedman and Martin 2011; Kim 2007). These models of decisionmaking underlie most American judicial politics research, even that of trial courts.

The literature appears to be mostly converging on the notion that judges are more-or-less strategic actors. The questions at this point in this debate lie in the details of strategic decision-making; what preferences do judges seek to maximize, what strategic incentives move them off their ideal outcomes, and what constraints prevent them from simply engaging in policy-making? In the courts of appeals, this seems to be a reasonable conclusion.

Using these models makes sense for appellate courts, but not necessarily for trial courts. Heise and Wells (2016) find no association between success in a trial court with success on appeal, suggesting that these levels are analytically distinct and should be approached differently. Kim, Schlanger, Boyd, and Martin (2009)

concur, noting that while appellate judges decide a case once,¹ “a district judge may rule in a single case on multiple occasions and on different types of questions, only a few of which could be dispositive but all of which affect the case's progress and ultimate outcome” (85). But this literature is what we have. Studies that purport to address the role of ideology in federal district courts can be lumped into four categories along two dimensions: on the one hand, studies that use appeals-court models and those that do not; on the other hand, studies that use partisan affiliation in some way as a proxy for ideology and those that use Giles-Hettinger-Peppers common-space scores or their successors (Giles, Hettinger and Peppers 2001; Epstein et al. 2007).

In the district courts, the evidence for ideological effect cuts both ways. This is consistent with Baum (2006)'s analysis that district judges have many cross-cutting priorities, of which their ideological preferences are merely one, and perhaps not even the most important. It is also consistent with Cross (2003)'s argument that “[t]rial judges tend to confront more 'easy cases,' with less ideological contestation, than appellate judges do, and trial judges' decisions have less precedential impact. As a result, their opinions are somewhat less ideological than those of appellate courts” (1481). Thus, the evidence of ideological influence in the district courts is deeply mixed.

¹The exceptions to that rule are so infrequent as to be ignorable.

Any summary of district-court ideological analysis must include Rowland and Carp (1996), who used a coding process similar to that used by the Supreme Court Database to determine which outcome was “liberal” or “conservative” and determined that Democratic judges were more “liberal” across most issue areas. Many subsequent studies have followed their approach, which essentially replicates the appellate-court model in trial-courts. In these approaches, “[i]n the realm of civil rights and liberties, liberal judges generally seek . . . [t]o extend these freedoms In the area of government economic regulation, liberal judges tend to uphold legislation that benefits working people In criminal justice cases, liberal judges are generally more sympathetic to criminal defendants . . .” (Carp, et al. 1993: 299).

Several studies have used published district-court decisions and found a variety of results. Winkler (2006) finds a weak ideological effect for cases involving race-based classifications and fundamental liberties (such as substantive due process). Similarly, Schultz and Petterson (1992) find a partisan effect in job-segregation cases, but no effect for the appointing President; they speculate that this is because Republican presidents appointed Democratic judges (presumably to accommodate Democratic home-state senators). Contrast this with Johnson and Songer (2002), who found that presidential policy preferences explained far more district-court variation than senatorial preferences. Segal (2000) speculates that her null findings as to the difference between white-male and non-white-male judges appointed by President Clinton may be explained by ideological homogeneity.

Many other studies use party affiliation but find no ideological effect for district courts in a variety of contexts. Pinello (1999) finds that across all then-extant studies of district-court that use party affiliation as the ideology measure, that the significance of ideology is entirely driven by statistical technique. King (1998) finds no ideological effect in fair housing decisions across the 1970s and 1980s (although other extra-legal factors mattered, suggesting some strategic considerations). Walker (1972) finds no partisan effect in civil liberties cases. Sisk, Heise, and Morriss (1998; 2004) find no partisan effect in district-court decisions on both the constitutionality of the United States Sentencing Guidelines and religious freedom. Dioso-Villa (2016) finds no effect in the admission of experts in either the criminal or civil context. Swenson (2004) finds no partisan effect in a district judge's decision to publish a decision (and thus make it precedential). Eisenberg and Johnson (1991) find that the intent requirement in equal-protection cases is interpreted similarly across party lines. Ashenfelter, Eisenberg, and Schwab (1995) found no ideological effects in employment-discrimination cases.

The studies that analyze district-court ideological effects using the Giles-Hettinger-Peppers scores are fewer. Two studies find an ideological effect; two find none. Boyd and Spriggs (2009) use a spatial model to determine that district judges are less likely to cite Supreme Court precedent if their supervising circuit court agrees with them in disapproving of the precedent, but that the closer the court of appeals gets to the Supreme Court's decision ideologically, the more likely the district court is to cite it. Perino (2006) finds that district judges appear to behave

strategically in adopting an uncertain proof standard in securities fraud cases, except the most extreme conservative judges, who behaved ideologically. Zorn and Bowie (2010) find no ideological effect in cases that eventually were heard by the Supreme Court. Sisk, Heise, and Morriss (2004) report as an alternative specification that the use of GHP scores did not change their null results for ideology in religious freedom cases. To my knowledge, this is the first project to use the DIME-CF scores (Bonica 2016; Bonica and Sen 2017) to analyze district court decision making.

The strategic model is explicitly tested in only one study that I've found evaluating district courts. Smith (2006) concludes that the fear of reversal is both ideologically driven and shapes judicial behavior on the United States District Court for Washington, D.C. Republican-appointed judges were much more likely to have their decisions appealed than Democratically-appointed judges. Democratic-majority appellate panels were more likely to reverse district court decisions, and district judges of all ideological stripes were more likely to conform future decisions to match the appellate court's expressed preference.

Evidence supporting the legal model is relatively thin on the ground, but possibly for lack of trying. King (1998) presented evidence that legal factors play an important role in determining fair-housing case outcomes in district courts, but her evidence also suggests that extra-legal factors were relevant. Perino (2006) found weak support for the legal model (one of four variables that he claimed were law-oriented was significant in the expected direction), but he was surprised to find that

it was the one variable that *judges* claimed was least important to them. Most other studies either dismiss the legal model as naive or assume it without testing (Rutherglen 1995; Selmi 2001).

The Litigation Life Cycle – The Phases of the Case

Pleadings (complaints and answers) are rarely empirically studied by judicial politics scholars for three reasons: first, the standard rarely changes; second, pleadings offer little information about the case outcome, since they only represent one party's view of the facts without any assessment of the relevant law; and finally, the role of pleadings has historically been understood to be gatekeeping disputes out of court rather than leading to resolution of them.

The pleadings standard produces very little variation in the legal regime; when the Supreme Court adopted the *Twombly/Iqbal* standard in 2007 and 2009, it overturned a standard first elucidated in 1957, which was the first time the Supreme Court had ever announced a pleadings standard under the Federal Rules of Civil Procedure.¹ So a lack of variation made empirical work cumbersome, as the simplest method to test the role of pleadings is to see if different standards generate different outcomes (or different pleadings). Absent that variation, research on pleadings would require analysis of the facts alleged in the complaint, a level of granularity imposing tremendous costs on scholars in data collection.

¹Indeed, the authority the Court used in that case to demonstrate the standard all came from lower courts.

Luckily, the dataset used in this project includes information on allegations in the complaint. In addition, I have collected and coded information regarding affirmative defenses asserted in answers in around 300 cases in the larger EEOC dataset.¹ While other studies have examined the effect of the change in the standard (Brescia 2011; Brescia and O'Hanian 2013; Dodson 2012; Hannon 2008; Hubbard 2013), this project's focus on pleadings will focus on the substantive allegations contained in the pleadings, because the entire time period covered by the EEOC dataset is pre-*Twombly*.

The only study I have found to analyze the *content* of complaints like I do identifies eight major clusters of federal civil action complaints. They studied exhaustively the relationships between the different types of claims asserted, showing how pleadings create a "cloud of possible legal theories: a winnowing litigation follows" (Boyd et al. 2013: 272). They argue that their method can give rise to helpful information about case outcomes, but do not do so. In any event, the clustering methods used there are beyond the scope of this project and remain assigned for future research. Instead, I use less-sophisticated methods to test the relationships between pleadings and outcomes.

Second, a complaint does not constitute evidence. Nor does an answer. Both documents offer one party's view of the facts in the case, and while they present important framing opportunities, they neither conclude the inquiry into the facts

¹See Chapter 5 for more detailed discussion of that data.

nor determine it. However, they do play one important role: in an answer, a defendant is required to either admit or deny allegations contained in the complaint. Allegations that are admitted are conclusively admitted, and may not be contested later. Future work should consider the agreement between the parties at the pleadings stage and the effect on outcomes, but the current coding of the EEOC dataset does not allow this analysis. It does not code the locations of factual allegations within the complaint, and thus it is impossible to code which allegations the answers agree with.

The next phase of the litigation process is discovery, where the parties exchange information about the case. While there is some work that argues that discovery matters, it is overwhelmingly done off the record. Courts only intervene in discovery when the parties have some sort of dispute that they cannot resolve informally. Because most of the discovery process is therefore excluded from docket data, I do not analyze it in this dissertation.

During and after discovery, the parties usually engage in motion practice.¹ The relationship between motion practice and settlement outcomes is rarely studied. Boyd and Hoffman (2012) argue that motion practice is an information-exchange mechanism, and found that non-discovery motions did in fact speed settlement along, especially when plaintiffs won those motions. Cooper (2017) finds

¹ There is also a certain amount of pre-discovery motion practice. All motion practice is lumped together in my analysis.

that when a defendant cannot get a plaintiff's expert excluded, they are more likely to settle, but that the longer the court deliberates over that motion, the more settlement chances dwindle. Spurr (1997) and Clermont and Schwab (2004) find that moving beyond motion practice into a trial phase spurred settlement, although Spurr also finds that several case management mechanisms help as well.

The motion for summary judgment has been examined by only a few scholars as a settlement driver. Rave (2006) argues that motions for summary judgment reduce the settlement zone, because much of the work used for a summary judgment proceeding can be reused for trial, thus reducing the cost of trial and reducing the surplus available in settlement (see Pecorino and Van Boening 2010). Bronsteen (2007) argues that if summary judgment is unavailable, that defendants will settle instead of going to trial. While Galanter (2004) notes that the share of cases decided by trial is shrinking, Hadfield (2004) notes that settlements are also declining, and that both types of resolution are being swallowed by "nontrial adjudication," including summary judgment.

Two other studies have attempted to examine the causes of motion outcomes, both using EEOC Litigation Project data. Boyd (2016b) focuses on judge race and gender in dispositive motions, and finds that female judges are more plaintiff-friendly in EEOC cases. Knepper (2018) considers two questions: does judge gender affect whether female plaintiffs settle and/or win compensation in sex discrimination cases, and does judge gender affect whether the court grants pre-trial motions filed by each party? Neither study is perfect. Boyd does not take into

account the possible role of selection effects, thus ignoring the possibility that her sample is non-representative. Knepper, on the other hand, attempts to account for selection effects by including settled cases in his outcome analysis, but fails to differentiate between the types of motions, nor does he consider the variation within cases over time.

Part of the reason that summary judgment may be rarely studied is that making inferences about the role of the legal standard on outcomes is difficult. Gelbach (2012; 2014; 2015) points out that changes in procedural standards could be expected to produce changes in the subset of disputes that lead to litigation, which would mean that there would be no change in aggregate outcomes. Hubbard (2013) argues that appropriate research design can permit inferences on the effects of changes in law from these subsets, even allowing for selection effects.

Three studies have examined settlements in the context of payouts, which is my focus. Both leveraged unique datasets, like the EEOC Litigation Project, which provide information on settlement payouts. One finds that employees get a larger percentage of their claims in settlements than in judgments in Mexican labor courts, and that cases with multiple claimants secure lower percentages (Kaplan, Sadka, and Silva-Mendez 2008).

The second study uses a truly unique dataset that included information on settlement negotiation (plaintiff's first offer and defendant's counter) and the agreed payout (Schwab and Heise 2011). They find that when measured in raw dollars that defendants capture more of the surplus in settlement value (see Pecorino and Van

Boening 2010), but that when the figures are converted to natural logarithms, that the parties secure roughly equal amounts of the surplus (Schwab and Heise 2011). They also find that the order of the process matters: plaintiffs who were first movers influenced counters, while simultaneous offers showed no such influence (Schwab and Heise 2011).

The third study uses the same dataset as Schwab and Heise, and finds that settlements rise over the life of the case,¹ and that most settlements fall within a range of percentages close to the claimed lost wages (Kotkin 2007). It also provides some evidence that settlement distributions follow familiar patterns: race and gender claims pay less due to the wage gap, age claims pay more because they frequently involve more senior workers. Because it offers nothing but descriptive statistics, its causal claims are difficult to judge, but they're plausible enough to warrant further investigation. Analyzing this dataset is beyond the scope of this project, but may be useful for supplementing the book.

Conclusion

While there's a lot that we know now about litigation, it's hard to put the pieces together in a meaningful way. A lot of the prior literature has, quite reasonably, focused on small pieces of the process rather than viewing litigation holistically. It's reasonable to focus on small pieces of the process because that

¹ Such that cases that settle late tend to settle for more than cases that settle early, all else being equal.

allows for defensible inferences. The problem is that focusing on one small piece at a time ignores the ways that the different stages of the process affect one another. A major contribution of this project is that I look to see if early events in the process affect later events. In Chapter 3, I offer some data on motion practice that suggests that this time-variant approach to within-case variation offers additional insight into trial-court processes within the life of the case. In Chapters 6 and 7, I offer some analysis that suggests that outcome-oriented approaches might need to worry about those issues less.

The first issue in analyzing trial courts is the question of whether they can be meaningfully analyzed at all. While game-theoretical approaches have raised questions about whether settlements render the population of cases tried an unrepresentative sample of cases filed, empirical tests have been mixed. Some scholars have suggested using dispositive motions (Boyd 2016; Knepper 2018) to get around this, but this misconceives what's happening in dispositive-motion practice. In some respects, summary judgment is trial, now; litigants frequently present the complete panoply of their evidence in summary judgment (Miller 2003), and if summary judgment is denied, cases almost always settle (Boyd and Hoffman 2012; Spurr 1997; Bronsteen 2007; Berger, Finkelstein, and Cheung 2005; but see Parker 2006). Thus, an analysis that looks at dispositive motions but does not account for the possibility of selection effects has the same problems as one that looks at final outcomes (indeed, unless the data is very carefully specified, an analysis of final outcomes probably *includes* dispositive motions).

An additional concern in these analyses is the discretion that trial-court judges enjoy over some of their decisions. Especially in pre-dispositive motion practice, there's very little oversight of district judges, which may suggest that the judges freelance in these areas where higher courts don't ensure compliance. This shapes outcomes as the use of certain case management mechanisms changes the likelihood of settlement. In addition, these pre-dispositive motions are a mechanism of information exchange, allowing all participants to update their priors on the case. In this way, the discretion afforded district judges may help move cases toward settlement, but it may not help plaintiffs secure meaningful redress.

Finally, the process itself has been atomized and analyzed in bits and pieces. While the piecemeal approach has given a great deal of insight into the different events that go into trial litigation, prior work has focused on the exogenous effects of external characteristics on litigation events. There has been basically no work that analyzes whether litigation events affect later events in the same case, and mediate effects on the outcome through those later events. This analysis will focus on ways to fill that gap in the literature.

LITIGATION PROCESS THEORY

There's a fundamental attraction to treating courts as courts in American politics. We teach about the "judicial branch" or the "judicial system" when introducing students to American politics. American courts all share the same ceremonial trappings: an elevated bench with advocates debating from a well; adversarialism; the primacy of witnesses as mechanisms for establishing reality. And if all courts are the same, then our models have the virtue of parsimony in that the same explanations drive decisions throughout the system.

The problem is that seeing all courts as equivalent commits the same fallacy that Mendelson (1963) complained of in the behavioralist approach to the Supreme Court. Instead of analyzing the differences we observe, we assume out all the rich, complex variation and then claim that the only remaining information explains all phenomena we see. In this case, scholars could learn from practitioners. Practicing lawyers have known for decades that the approach to litigation in a trial court is fundamentally different from the way to appeal it.

There are exceptions to this shortcoming; a notable example is Boyd and Hoffman (2012)'s approach to settlement as a function of motion practice. And certainly I'm not the first to argue that an outcome-driven approach to trial courts is fundamentally flawed (see, e.g., Kim et al. 2010). But in general, studies of trial

courts operate under the assumption that there is meaningful content to be drawn from the outcome of the case, without regard for the events that led up to that outcome.

In the prior chapter, I argued that past work on trial courts was focused on particular events and outcomes, rather than viewing each case as a process leading to a conclusion. The purpose of this chapter is to demonstrate the power of a process-oriented analysis on studies of trial courts. To that end, I will proceed in three stages. First, I will explain the methods and theories underlying the study of processes more generally, with a special emphasis on the study of institutional learning, drawing strongly on the policy process and strategic learning literatures. Second, I will review the burgeoning process-oriented literature on trial courts, showing how that literature uses concepts and theories similar to, if not derived from, the organizational evolution literature. Third, I will offer a brief empirical confirmation of the theoretical framework, intended to demonstrate the utility of this approach in answering questions that the outcome-oriented theories cannot. I will conclude by deriving the hypotheses that will be tested in the larger empirical analysis of the dissertation.

Process Theory, Writ Broadly

The basic assumption underlying process theory is that the researcher is less interested in investigating the causal relationships that determine an outcome than they are in investigating the steps that led to a particular outcome (Langley 1999). In other words, process theory is a mechanism for penetrating the logic behind

observed temporal progressions (Langley 1999). This theoretical framework is intended to discern "gradual background trends that modulate the progress of specific events" (Langley 1999: 693). Thus, the key element of any process theorizing is temporal - either the researcher must account for a time dimension in the data, thus making time-series methods appropriate, or they must use qualitative approaches that allow for the tracing of events over time (Langley 1999; Sabherwal, Hirschheim, and Goles 2001; Van de Ven and Huber 1990).

There have even been studies that concluded that conflictual or adversarial policy processes could demonstrate long periods of calm and abrupt changes. Jenkins-Smith et al. (2017) found that when policy opponents interact in a policy subsystem, that they modify their belief structures in response to their opponents' arguments. Wood (2006) showed that conflict-management strategies could attenuate conflictual policy processes. These findings are particularly pertinent to this project because of the adversarial nature of American litigation and the conflict-management component of the settlement process. Jenkins-Smith's findings suggest that organizational learning arises out of adversarial information exchange, while Wood's findings suggest that the settlement negotiation process could arise out of information revealed in the adversarial litigation process.

Process Theory in the Courts

Process theory has been used to study the interactions between courts and litigants in two major studies. Baird (2007) argued that interest groups interacted with the United States Supreme Court to accommodate the Court's signals about

new policy areas it is interested in, thus allowing the Court to shift its policy agenda suddenly even though the Court is not a proactive agenda-setter. Thus, she argued, the Court's opinions could represent punctuation in the attention levels given to different issues as the Court signals its interest and litigants respond. Cichowski (2006) applied a similar approach to the European Court of Justice, finding that the ECJ afforded a transnational opportunity to engage in rapid policy-making not available to interest groups that focused on national policymaking. These approaches are appropriate if we can conceptualize of a litigation process as consisting of lengthy periods where nothing changes followed by quick changes in the nature of the case.

In addition, while they did not ground their analysis in process theory, Hofnung and Weinshall-Mergel (2011) argued that the Israeli Supreme Court was striking a middle course between the government and activists in hearing human rights cases. They argued that even when the Court ruled in favor of the government, it frequently did so after forcing concessions from the government in favor of the position of human rights activists, even if the Court did not require the government to go as far as activists wanted. These findings were specifically only available because they went beyond the final outcome and attempted to measure the ways in which the Court pushed the parties throughout the process.

Finally, Wofford (2017) used a process analysis in a survey experiment to test the differences in litigation strategies between male and female litigants. She presented each respondent with a vignette about a potential claim, and only those

who pursued legal remedies were presented with the next step in the process. In this way, she was able to measure the willingness of respondents to escalate their dispute to the next step without a promise of victory. Similar to this project's analysis, Wofford assumed that earlier choices drove later options (in the starkest sense – the earlier choice was “continue” or “stop.”) This analysis takes that framework and further refines it.

This seems appropriate. Many prior studies have approached trial court processes as similar to appellate processes, where the final outcome is all that matters (Winkler 2006; Schultz and Petterson 1992; Johnson and Songer 2002; Segal 2000; and many others). It's fair to describe these studies as producing results that were unclear; Winkler (2006) and Johnson and Songer (2002) find ideological effects while Schultz and Petterson (1992) and Segal (2000) offer more nuanced findings. Other studies that examine final outcomes as their variable of interest offer equally puzzling findings that resist coherence (King 1998; Ashenfelter, Eisenberg, and Schwab 1995; Perino 2006; Zorn and Bowie 2010). Ultimately, it appears that the reliance on final outcomes as generating cross-sectional data is misconceiving the way the process works.

I'm not the first to reach this conclusion. Kim, Schlanger, Boyd, and Martin (2009) suggest that the study of trial courts should be built around a case's docket rather than its outcome. They reach this conclusion because of three different selection effects that influence the population of outcomes available to researchers. First, studying published opinions does not present a random sample of cases;

"rather, authoring judges decide whether to designate a particular opinion for publication, and their decision to do so may depend on formal rules, court culture, personal predilections, or strategic considerations" (Kim, Schlanger, Boyd, and Martin 2009: 97). This renders studies based on opinions problematic if they purport to make statements about case outcomes or judicial decisionmaking (e.g., Parker 2006; Segal 2000; Sisk, Heise, and Morriss 1998, 2004; Sisk and Heise 2012). Second, the emphasis on trial court opinions captures a small minority of actual judicial action: depending on whether ministerial and unopposed actions are included, the proportion of trial-court decisions encompassed by opinions ranges from three percent to twenty percent, and opinions are more likely when a judicial decision is appealable (Hoffman, Izenman, and Lidicker 2007). Finally, litigant selection removes disputes from the population due to the litigants' ability to settle (Priest and Klein 1984; Klerman and Lee 2014; Shavell 1996).

In addition, Liu (2015) argues that the use of process-theory-oriented approaches to analysis of legal systems can generate new tools for analyzing the social forms of law. She contrasts this approach with "power/inequality" approaches that focus on the dynamics of the decision-maker. Similarly to her theory, my analysis asks how the litigation process affects litigants, instead of focusing only on judges.

Thus far, the Kim et al. argument has been used to support the evaluation of non-final phases of cases. Scholars have used the argument in favor of docket analysis to support analyses of motions to dismiss (Reinert 2015), settlement-

related motions for vacatur (Bock 2013),¹ using large amounts of docket data to support settlement negotiation (Stevenson and Wagoner 2015), the differences between district judges and magistrate judges (Boyd 2016a),² and the effect of judge characteristics on motion-practice outcome (Boyd 2016b; Knepper 2018).

While these studies have used the docket argument to suggest that non-final events also provide interesting information about the function of the district court, I have, to date, only found one analysis that incorporated a time element into their analysis of the litigation process. Boyd and Hoffman (2012) argue that motion practice serves as a form of information exchange between the parties and allow them to close an informational gap that can prevent settlement. This analysis takes Boyd and Hoffman's approach several steps farther.

First, Boyd and Hoffman do not ask about the effect of litigation events on the judicial decisionmaking process. I argue that judges' approach to cases are colored by their prior experiences with litigants. We know that the repeat player phenomenon is real at the Supreme Court; lawyers who appear more frequently before the Supreme Court are more successful (McGuire 1993, 1994, 1998; Krell 2010). While judge-oriented decision-making theories drawing on the Supreme Court seem to be of limited salience, lawyer-oriented decision-making theories seem more salient because the dynamics are more similar. While a Supreme Court justice

1 Vacatur is a post-judgment motion asking the court to set aside its judgment. In the modern federal rules, the equivalent to vacatur is governed by Rule 60.

2 Magistrate judges are non-Article III judges appointed under the Magistrate Judges Act (28 U.S.C. § 631 et seq.), with limited jurisdiction except by consent of the parties.

can ignore prior decisions except to the extent that norms urge them to use them, a trial judge who ignores precedent faces the specter of reversal. But at both levels, close questions could be resolved in part by the prior relationship and trust the judge has with the lawyer urging a particular position.

Theoretically, it makes sense in a trial-court environment that the repeat-player effect would have greater salience, in that many of the dimensions of variation across cases in the Supreme Court are held constant within a case before the district court (*see also* Galanter 1974, who argues for a repeat-player effect that is agnostic to forum). It would also make sense that the repeat-player effect would cut both ways: lawyers who win will keep winning, while lawyers who lose will keep losing. I test this basic theoretical insight at the end of this analysis.

Second, Boyd and Hoffman only ask whether motion practice makes settlement more likely. They do not ask whether motion practice has an effect on the payouts plaintiffs receive. Because the EEOC data contains information on settlement amounts, my analysis is able to proceed on a sample that can be treated as random (Kim, Martin, and Schlanger 2013). Thus, my dependent variable provides more information about case outcomes than Boyd and Hoffman's dichotomous "settlement/trial" outcome.

Finally, Boyd and Hoffman use a survival analysis to determine how long cases linger prior to settlement. This is a helpful and useful analysis, but it does not address the feedback loop of prior litigation events affecting later ones. Boyd and Hoffman themselves argue that the court's decisions change the parties' calculus of

potential outcomes, but don't take the natural next step of arguing that prior events affect the court's perspective on later events. I argue that earlier litigation events should play a role in how the court views later events, either as a function of the court limiting issues in play or through the repeat-player effect. Thus, I introduce the notion of the "stream of litigation," where earlier events affect the set of possible outcomes of later events. This introduces the possibility that the judge and the parties can affect one another's analysis of the case over the case's life cycle. It also, admittedly, makes the analysis more complicated, because my model specification and functional form has to account for the autoregressive nature of the theory. In this chapter, I make some attempts at using modeling techniques that account for the time series. In Chapters 6 and 7, I use a simple lag system to account for the effects of time.

The Litigation Life Cycle - Ideal and Real

The litigation process, in EEOC cases, begins with the filing of a charge of discrimination (EEOC 2000). The EEOC's internal processes are beyond the scope of this project. Eventually, the EEOC can either dismiss the charge as unfounded, issue a Notice of Right to Sue (RTS) where they choose not to enforce but authorize a private lawsuit, or pursue its own enforcement action. My analysis only looks at cases where the agency chooses to pursue its own enforcement action. Once the EEOC files the lawsuit, the process plays out similarly to any other federal civil lawsuit.

Figure 3.1 illustrates the notional litigation process as we conceive of it. The plaintiff (in this case, always the EEOC) begins by filing a complaint which lays out the factual allegations of the case (Fed. R. Civ. P. 8). During the time period of the dataset, the complaint could only be dismissed if the defendant could show that the plaintiff could show "no set of facts" consistent with the complaint that would give rise to a valid claim (*Conley v. Gibson* 1950). As an agency of the United States, the EEOC pays no filing costs, which should be expected to reduce pre-filing settlements to zero (Farmer and Pecorino 2007). After the defendant is served with the lawsuit and thus given notice, they must file a responsive pleading (Fed. R. Civ. P. 7). At this point, the process has laid out the facts as the parties each believe them to be true.

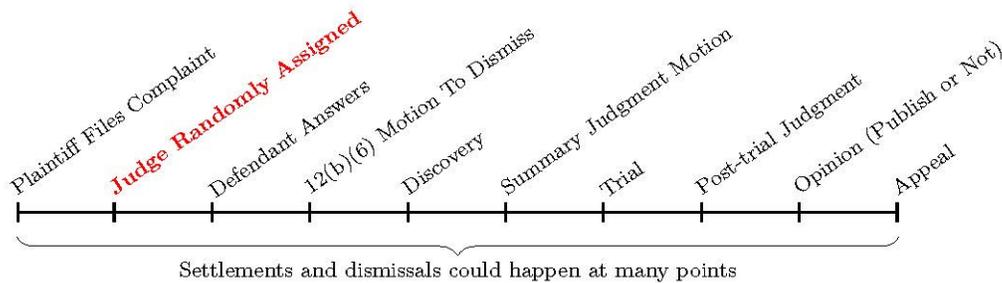


FIG. 3.1: Stylized diagram of litigation process (Hübert and Copus n.d.). Courtesy Ryan Hübert.

Then the parties begin to exchange the information they have about the case. This process, called "discovery," is not required, but no rational litigant would go forward without it. While discovery takes place under the supervision of the district court, it is done mostly off the record, with only intractable disputes requiring judicial intervention creating a public record (Fed. R. Civ. P. 37; Boyd 2016).

Discovery is a vital part of the process; it converts a process where the parties do not share the same information into one where the only difference between the parties is their expectations as to likelihood of victory. And as they acquire the same set of information, the likelihood of the parties reaching agreement increases (Boyd and Hoffman 2012). The Federal Rules require some voluntary disclosures and other mandatory forms of discovery (Fed. R. Civ. P. 26). However, discovery that allows litigants to determine their actual probability of victory should be expected (Farmer and Pecorino 2005). One exception would be if most plaintiffs are evaluated as weak; in that case, it may not be worth incurring the cost of discovery to determine whether the plaintiff's case is weak or strong (Farmer and Pecorino 2013).

After discovery is concluded, the parties proceed into the disposition phase. Usually the defendant files a motion for summary judgment, which allows the district court to grant judgment in favor of a party if there are no disputes of material fact and that party is entitled to judgment as a matter of law (Fed. R. Civ. P. 56). At this point, the parties face an embedded ultimatum game¹ in their settlement negotiations, where they face the threat of an adverse decision they cannot control where the court can rule that they bear the full costs of the dispute (Pecorino and Van Boening 2010). This is theorized to drive settlement dynamics

1 A type of non-zero-sum game where the failure to reach agreement has the consequence of a third party making a zero-sum decision (Cardella and Kitchen 2017).

such that defendants settle cases in such a way as to capture for themselves all the cost-avoidance surplus of settlement (Pecorino and Van Boening 2010). By this, I mean that the cost of litigation includes a cost of trial (attorney's fees, witness fees, opportunity costs, etc.). Settlement produces a non-zero-sum surplus equal to these costs, but defendants demand that the entire surplus be awarded to them (Pecorino and Van Boening 2010).

Assuming that the case neither settles nor is resolved via summary judgment, it proceeds to trial. Throughout the time period represented by the data, litigants have a right to a jury trial, which they may waive. Cases presented to a jury require jury instructions on the law to be applied, while cases tried to the bench require presentations of proposed findings of fact and conclusions of law (Fed. R. Civ. P. 52). A verdict comes from the factfinder, and the court enters a judgment thereafter.¹ An appeal as of right may be taken to the relevant circuit court of appeals by a non-prevailing party on any issue. Once an appeal is taken, the process of the case moves beyond the scope of this project, unless the court of appeals reverses and remands the case back to the district court on some issue.

One major obstacle to trial-court analysis is that the process outlined above, with neat and clean breaks from one phase to the next, is frequently more aspirational than actual. Figure 3.2 demonstrates a more realistic process, although

¹ The parties have the right to ask the court to disregard a verdict if it is contrary to law or meets a set of other delineated criteria (Fed. R. Civ. P. 50, 59, 60).

even it is not perfect, as it includes no feedback loops. Instead, real cases are messier. Lahav (2018) describes this process as the "textbook procedural order," because this sequence follows the path outlined in most civil procedure textbooks. But she notes that it is likely that around half of the federal docket follows some sort of variation on the process, and identifies five major areas where the courts have departed from textbook order: jurisdiction, motions to dismiss, class-action certification, summary judgment, and appeals. The last category is beyond the scope of this project; but the rest can appear in our data. But by using litigation events, of any type, as the cross-sectional unit of analysis, we can be agnostic as to the order of events. It doesn't matter if the summary judgment proceeding comes prior to a discovery contest, because what makes the event interesting as an information exchange opportunity is the contestation.

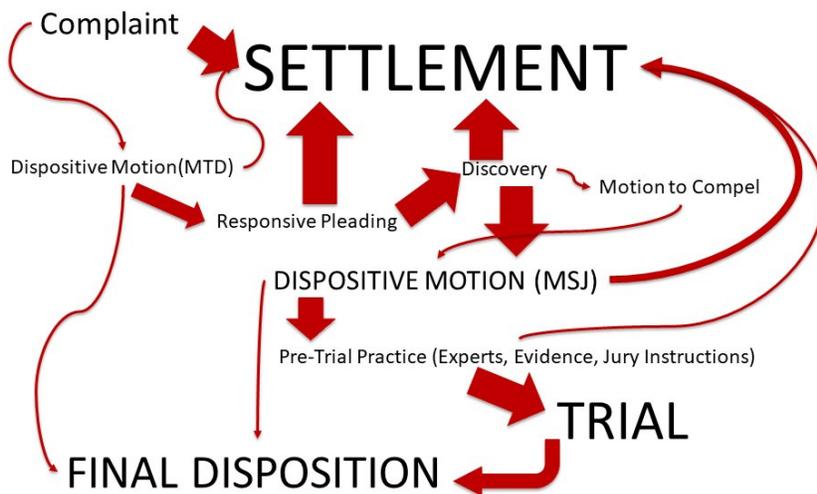


Fig. 3.2. Diagram of litigation progression (more realistic).

This process-oriented approach supports large-N quantitative analysis, but it requires significant data collection and coding. Luckily, the vast majority of the data required is available from the EEOC Litigation Project. There is also a concern that process analysis focuses on similarities in cases, while statistical mechanisms measure differences in cases (Langley 1999; Monge 1990). But it is quite possible to use process data to test probabilistic hypotheses (Siegelman and Waldfogel 1999; Smith, Grimm, and Gannon 1992; Romanelli and Tushman 1994). This approach thus treats the case (the relevant unit of analysis) as a discrete series of events.

Hypotheses

Dissertation hypotheses

The hypotheses in this project are derived from Lahav's description of the "textbook order" litigation process and variations. The specific legal issues in the sample are defined by statute (*see, e.g.*, 42 U.S.C. § 2000e). Thus, the litigation process, as defined by the procedural constraints of the rules and the substantive constraints of the statute, has several natural break points. These break points give rise to resolution opportunities, and thus testable hypotheses. Each hypothesis in the project focuses on a particular phase in the litigation process.

Uniformly, the first point where defendants acquire information is in the complaint, when they learn how many claimants the EEOC represents when they file suit.¹ Collective actions represent a much greater risk for the defendant, as each

1 They also learn here the facts alleged against them, but for clarity I'll discuss that *infra*.

plaintiff can obtain a personalized remedy. This is a count variable of the number of claimants which can also be expressed as a "collective/single claimant" dummy. I assume that defendants prefer less risk to more risk, and thus that collective actions increase defendants' interest in concluding the case. This conclusion is supported by the assumption because of the increased exposure risk for defendants, which should be expected to pressure settlements. A defendant is not necessarily more or less likely to be held liable in a collective action than an individual one, but if they are held liable, their damages exposure is much greater.

H₁: Cases with larger numbers of claimants are more likely to settle.

H₂: Cases with larger numbers of claimants lead to greater recoveries.

More complex cases present greater risk for defendants, as there are more paths to recovery. I operationalize case complexity using two different pieces of data. First, I use a count of the factual assertions contained in the complaint to determine the number of facts that the plaintiff believes are relevant. Then I add the number of affirmative defenses asserted in the answer. These two counts, added together, constitute the "facts at issue" component of the case. In addition, asserting more relevant defenses sends a signal that the defendant intends to vigorously defend a case, which may make a busy agency lawyer more likely to recommend an early settlement. Conversely, a "kitchen sink" responsive pleading that asserts defenses that cannot be proved sends a signal that the defense lawyer may not know the law very well, and the agency may more vigorously prosecute the enforcement action.

Thus, this project distinguishes between defenses that fall within the ambit of federal employment law, and other defenses. I collected the data for these variables personally, and the data collection process is described in Chapter 5. The codebook that describes the judgments I made in coding those variables is in an appendix. Defenses are coded using several variables. First, I create a series of count variables for six categories of defenses: those related to employment, defenses related to the rules of procedure, defenses related to alternative dispute resolution (such as arbitration or collective bargaining), defenses invoking equity, and defenses related to damages. Then I also code a count for "irrelevant defenses," defined as a defense that asserts contractual or common-law defenses not appropriate for employment actions. These variables give rise to the following hypotheses:

H₃: Cases where defendants assert more employment-law defenses are more likely to settle, holding irrelevant defenses constant.

H₄: Cases where defendants assert more employment-law defenses have smaller recoveries, holding irrelevant defenses constant.

At this point in the proceeding, the parties have defined the issues between them. It is now time for the court to begin to resolve the questions of law that the parties have raised. Most of these questions of law present multiple ways in which they can be framed, and the parties frequently contest them. The questions of law also depend on facts that can be proven. The more facts the parties contest, the more likely it is the case continues, because only contested facts can bring the case

to trial. I will thus look at the relationship between facts at issue, *supra*, and dispositive motions (especially summary judgment, but I will also test motions to dismiss as a robustness check). In addition, a motion for summary judgment is a mechanism for defendants to show plaintiffs the weaknesses in their case and thus lower the settlement value. I will test the following hypotheses:

H₅: Cases with more facts at issue are more likely to be denied summary judgment.

H₆: Among cases that settle, those where defendants file motions for summary judgment lead to smaller recoveries than those where no motion for summary judgment is filed.

Because judicial ideology cuts in a couple of different directions, its effect on dispositive motions is difficult to predict. On the one hand, liberal judges are regarded as worker- and agency-friendly (Rowland and Carp 1996); this would suggest that they prefer to grant dispositive motions the EEOC files and deny employer motions. On the other hand, I speculate that liberal judges could also prefer letting juries resolve cases, which would suggest that they simply deny dispositive motions. Since over 80% of dispositive motions are filed by employers in the dataset (*see* Chapter 5), it may not be unreasonable to treat liberal judges as anti-dispositive motion in general, at least for this data. This leads to the following hypotheses:

H₇: More liberal judges are more likely to deny summary judgment.

H₈: Liberal judicial ideology and the denial of summary judgment interact to

create greater recoveries.

H₉: Liberal judicial ideology and greater numbers of contested facts interact to create greater recoveries.

The final stage where legal issues can be contested at the trial court level is in jury instructions. Where jury instructions are contested, both the instruction given and the rejected instruction are made part of the record. Presumably, both sides are offering instructions that frame the case in ways they think are favorable to them. A court that accepts the plaintiff's proposed instruction has thus arguably made a plaintiff's recovery more likely, and more likely to be greater. Due to a lack of observations, I examine this piece of the analysis qualitatively in Chapter 5, using a diverse case selection method (Gerring and Seawright 2008). Because the data does not support hypothesis testing at this time, I reserve for future research these four hypotheses.

H₁₀: Cases where the court accepts more contested jury instructions from the plaintiff are more likely to settle.

H₁₁: Cases where the court accepts more contested jury instructions from the plaintiff have greater recoveries.

H₁₂: More liberal judges accept more contested jury instructions from the plaintiff.

H₁₃: Liberal judicial ideology and contested jury instructions interact to create greater recoveries.

The conclusion of the case at the trial court does not necessarily conclude the

case. An appeal as of right may be taken. Appeals are a costly signal of a party's seriousness (Cameron and Kornhauser 2006; Krell 2010), and may be used to provide leverage in settlement negotiations. However, an appellee, defending a successful judgment, has little incentive to settle. Cases with an appeal are probably also more likely to have been contentious. However, because there is no systemic expectation regarding which side is more likely to appeal, I do not expect appeals to have an effect on recoveries.

H₁₄: Cases where an appeal is taken are less likely to settle.

As with any other litigation, the judges who decide the questions of law are not computers free from pre-existing biases. It is widely believed that in cases where the law is contested, judicial ideology may play a role (Segal and Spaeth 2002). The current accepted standard measure of judicial ideology is the Judicial Common Space (Epstein et al. 2007). This project will use the trial judge's Judicial Common Space score to measure ideology (Boyd 2015), with the expectation that more liberal judges will be more plaintiff-friendly, and thus encourage larger settlement payments, since evidence suggests that litigants do anticipate judicial behavior (Taha 2010). As an alternative specification and a robustness check, Bonica and Sen (2017)'s Database on Ideology and Money in Politics and Elections (DIME-CF) ideology score will also be used to test these results.

H₁₅: Cases with a more liberal judge are more likely to settle.

H₁₆: Cases with a more liberal judge lead to greater recoveries.

Motion practice and repeat player hypotheses

One concern with the process-oriented approach is a question whether it gives us information about the litigation process that outcome-oriented approaches do not. If no additional information can be gleaned from the more-granular process approach, then there's no justification for using it. To test that, the remainder of this chapter will provide an empirical proof-of-concept regarding the theoretical framework I've laid out.

The repeat player literature argues that the more someone appears before a court, the more they build up some sort of credibility that allows the court to trust them and be more likely to rule in their favor (Galanter 1974). While Galanter's argument is not specific to a forum, most analyses that have tested it have been focused on the Supreme Court. This argument is made for individual litigators (McGuire 1993, 1994, 1998; Lazarus 2007; Krell 2010; Bhatia 2012), for interest groups appearing as amici (Caldeira and Wright 1988; Collins 2007; Box-Steffensmeier, Christensen, and Hitt 2013), and for the Solicitor General's office (Krell 2010; Shah 2013; Chandler 2011). The causal mechanism is speculated to be a combination of the talent and care taken in the lawyering presented by these litigants and litigators (Lazarus 2007; Krell 2010), and the Court's increasing familiarity with them (Box-Steffensmeier, Christensen, and Hitt 2013).

But this causal mechanism, if anything, would be present even more strongly at a trial court level. Instead of appearing once in each case, and the Court being forced to weigh whether *this* case is somehow different or whether it can rely on

past impressions, at the trial court, appearances within a case have the same case-level factors, and the only difference is whether the lawyer has increased their quality of advocacy, or whether the court has canalized their impressions of the case based on prior decisions. Thus, I would argue that winning an early contested proceeding will make a litigant more likely to win later contested proceedings, *ceteris paribus*.

H₁: A favorable ruling in the prior contested proceeding makes it more likely that a party will obtain a favorable ruling in the current contested proceeding.

Data and Methods

The data for this analysis comes from the EEOC Litigation Project. This dataset consists of 2,316 enforcement actions brought by the Equal Employment Opportunity Commission (EEOC) between 1996 and 2006. I discuss the data more extensively in chapter 5; this discussion is limited to the scope of the data necessary for the proof-of-concept empirical analysis I undertake here.

The dependent variable in this study is whether the EEOC wins their preferred outcome. The EEOC dataset codes motion outcomes as "granted in full," "partially granted," and "denied in full." There is at least a reasonable argument that these represent ordinal outcomes - that relief granted in full is of superior magnitude than a partial grant, which is of superior magnitude than a denial of relief. However, this argument makes most sense within types of motions, since the grant of partial relief is meaningfully different in a dispositive motion than in a discovery motion or a procedural motion. For example, partial relief in a dispositive

motion means that some claims are dismissed, while partial relief in a discovery motion means that some of the requested discovery is disclosed and some is not.

Since I am analyzing across types of motions, I also combine partial grants with grants in full to create a dichotomous outcome dependent variable. By coding the dependent variable as the agency's preferred outcome, I account for the identity of the filer and the court's decision - which are the variables I define as important in this theory. In addition, the ordinal models for hypothesis testing fail to converge, so no results can be reported for them, although a few ordinal robustness checks are reported.

I code the prior winner of a contested motion by checking the outcome and the party filing. If the prior contested motion was granted, in full or in part, and the same party filed the current observation's motion, the "prior winner" variable is coded as 1. Similarly, if the prior contested motion was denied in full, and the other party filed the current observation's motion, the "prior winner" variable is coded as 1. All other observations are coded as 0.

I also include controls for the party filing the motion, the motion type, and case-invariant controls like the types of adverse employment actions alleged (a count variable), the statutory basis for the lawsuit (a series of dummies for the Equal Pay Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, with Title VII treated as a reference category), jurisdictional differences (the circuit court governing the case) and judge-level variables (the Judicial Common Space and DIME-CF ideological scores). I do not report the

circuit-court variables, as they never present significant results under any specification. With ideological measures, in this chapter I only report DIME-CF scores, as I regard it as conceptually superior to the JCS because it is based on the actual behavior of judges as opposed to imputing an elected official's ideology to a judge. Using JCS changes none of the results anyway. In Chapters 6 and 7, the primary empirical analyses of this dissertation, I use JCS because it is the accepted ideological measure in judicial politics.

Because motions are sequential over time and nested within cases, they present a panel data structure (Shiu and Lam 2004; Wawro 2002). This method of analysis uses the cross-sectional unit to organize the time series data and allows me to control for time-invariant characteristics such as the quality of counsel, judicial ideology, jurisdictional differences, and case complexity. Panel analyses fall into one of three camps: fixed effects, random effects, and dynamic panel analysis (which can be either fixed or random effects). Because my theory requires autoregression, this is a dynamic panel model.

The choice between fixed and random effects is difficult. The use of a lagged dependent variable means the controls are correlated with individual-specific effects, which excludes random effects, but when the number of time-series observations is small, as here, fixed-effect estimators are also biased and inconsistent (Scheve and Slaughter 2004). The solution is to use the Arellano-Bond method-of-moments estimator, which takes the static econometric model and adds a lagged dependent variable (Wawro 2002; Scheve and Slaughter 2004). The Arellano-

Bond estimator is linear, however, which may make its estimates unreliable for the binomial dependent variable used here. In addition, I am unable to find any information about whether the estimator is reliable and unbiased when used on an unbalanced panel (that is, one where not every cross-sectional unit has the same number of time-series observations). Because there is a reasonable argument that logistic regression is good enough for a directional hypothesis (Angrist and Pischke 2009), I will report the Arellano-Bond estimator and basic regression (both logistic and ordered) and allow the reader to determine which they find more compelling.¹ I also provide post-estimation tests to evaluate the reliability of the results.

Results and Discussion

Table 1 reports the results of logistic regression in determining whether the EEOC received their desired relief. Remember that whenever I use the dichotomous dependent variable that partial grants count as wins for the filer; thus, partial grants when the EEOC filed are coded as 1; partial grants when the defendant filed are coded as 0. From this, we can see that the pooled regression does not capture any relationships between the EEOC's success and any of the variables of interest. There are a few relationships here - Equal Pay Act and ADA claims are more likely to result in EEOC success than Title VII claims (although the confidence level is dubious), while discovery motions and cases with more adverse employment actions are less likely to result in EEOC success (with a similar lack of confidence). The

¹ Static panel estimators fail to converge.

"prior winner" variable is also significant, but the sign is negative. This is the opposite of what I predicted in H₁; and frankly, I don't have an explanation for this in the theory I've canvassed.

DV: EEOC Victory	Model 1: All motions/prior winner	Model 2: Discovery motions/prior winner	Model 3: Dispositive motions/prior winner	Model 4: All motions/prior filer	Model 5: Discovery motions/prior filer	Model 6: Dispositive motions/prior filer
Winner (n-1)	-.5790704***	-.2347719	-.9290909***			
Filer (n-1)				.1018617	1.015193**	-.2620178
Any relief granted (n-1)				-.2082463	.8826257*	-.7705066**
Discovery motion	-.9460903**			-.8552659**		
Dispositive motion	-.7204006*			-.6079371		
Issues alleged	-.1141309	.0503091	-.2498501**	-.1131235	.0558445	-.224712**
Post-Desert Palace	-.1833761	.3071792	-.2187406	-.143701	.2148508	-.2327836
Defendant Filing	.2083666	-.972183**	.6342645*	.2753653	-.9441284**	.6181069*
EPA	1.221236*		.7614285	1.132301		.7021091
ADA	.5620702**	-1.44975**	.9665262***	.5709485**	-1.516782**	1.070386***
ADEA	.0897436	-.6927861	.3495174	.0797427	-.5687509	.2528135
DIME-CF	.0950336	-.4556432*	.1110299	.1207806	-.3488429	.1329291
N	553	123	392	553	123	392

TABLE 3.1: Pooled logistic regression coefficients, EEOC victory prediction.

* - p<.1; ** - p<.05; *** - p<.01.

Results from the Arellano-Bond dynamic panel estimator are reported in Table 3.2. The "prior winner" variable is dropped due to multicollinearity. Again, remember that because this estimator is linear, its estimates may be unreliable for the dichotomous dependent variable. While the EEOC's prior success does not have a meaningful relationship (thus making it impossible to confirm H₁), cases where the last filer lost the previous motion have a negative impact on the EEOC's success

rate. In addition, when defendants file, the EEOC is more likely to win (because in the ordinal data, an observation where the defendant filed is only coded as an EEOC success if no relief is granted at all). These results undermine the “repeat player” hypothesis, but they provide support for the larger theoretical framework. This is a result that cannot be tested using final outcomes; without the additional within-case variation the docket data provides, it would be impossible to test this hypothesis at all. To that end, while these results are surprising, they provide a useful support for the dissertation’s framework.

DV: EEOC Victory	Model 1: "prior winner"	Model 2: "prior filer"
EEOC Victory (n-1)	.0919799	.0322138
Winner (n-1)	.2575741**	
Filer (n-1)		.1512202
Any relief granted (n-1)		.1482495
Discovery motion	-.1661619	-.1859578
Dispositive motion	.0091659	-.0639767
Defendant Filing (n)	.0416108	.0255886
DIME-CF	-.521718	-.5172453
N (observations/groups)	184/81	184/81

TABLE 3.2: Arellano-Bond dynamic panel estimator coefficients. ** - p<.05.

The first results in Tables 3.1 and 3.2 point in the direction of a few additional exploratory analyses that are not derived from existing theory. First, the pooled regression suggests that there may be something unusual about discovery and dispositive motions, so a pooled logistic regression for only those observations allows us to isolate the relationships in specific types of motion practice. Models 2 and 3 of Table 3.1 displays these relationships. For discovery motions, only two relationships are significant: whether the defendant files the motion, and whether the case alleges an ADA claim. In both cases, the relationship is negative,

suggesting the judges are likely to rule against the EEOC in discovery disputes when defendants seek additional discovery and in ADA cases. There is also a marginally significant ($p < .1$) effect for ideology, which suggests that conservative judges may be slightly more likely to rule against the agency in discovery disputes. It should be emphasized that these are exploratory results suggested by the panel analysis, and are not grounded in the existing theory I use.

For dispositive motions, the results are slightly different. The number of adverse employment actions has a negative effect on whether judges rule in the EEOC's favor in dispositive motions. This result holds if we treat motion outcomes as ordinal and break grants and partial grants into separate categories.¹ The party filing has a marginal ($p < .1$) opposite effect; the EEOC is more likely to win when defendants seek to terminate cases pre-trial. ADA cases are significantly more likely to result in EEOC victory than Title VII cases (the reference category), and the ideological effect disappears.

Second, both the pooled regression and the Arellano-Bond estimator suggests that there may be a relationship between the "prior winner" variable and EEOC success, even if the relationship moves in the opposite direction from predicted. Because the "prior winner" variable is coded as 1 when two conditions are true, it is

¹ These results are not reported because the data does not satisfy the Brant test for using ordered logistic regression and generalized ordered logistic regression fails to converge.

effectively an interaction term. It may be helpful to disentangle those two conditions.

Replacing the "prior winner" variable with the "prior filer" and "any relief granted" variables disentangles the conditions and allows us to determine what is driving the EEOC success rate in discovery practice. The right-most columns of Tables 3.1 and 3.2 provides those results (with, again the caveat of using a linear estimator with binary data). For the pooled regression, the results become very puzzling. For all motions (Model 4 of Table 3.1), the component terms of the "prior winner" variable fail to achieve significance, while nothing else changes. For discovery practice (Model 5 of Table 3.1), the component terms become significant where the interaction was not, and the ideological effect disappears. In dispositive motions (Model 6 of Table 3.1), it appears that the effect of the interaction term lies in the "any relief granted" portion rather than the "prior filer," which suggests that there may be a slight tendency for judges to rule against the EEOC in dispositive motions after they grant any relief on any issue.

The key finding here is that while there is a relationship for "prior winners," this relationship is actually the reverse of what the theory predicts. Judges may be likely to grant relief where they've previously denied it when all else is equal in order to prevent the appearance of bias. While this would explain the negative relationship between the "prior winner" and motion outcomes, it probably ends the inquiry, at least with this data.

These results provide a puzzling picture of trial court practice. But a few things seem to emerge related to the larger research agenda I propose. First, to the extent that trial courts behave ideologically, it appears that they avoid doing so in areas where they are subject to *de novo* review. This is consistent with other findings (Smith and Tiller 2002; Perino 2006; Smith 2006) which suggest that judges avoid making decisions in a way that facilitates reversal. To that extent, the difference in results between discovery and dispositive motions provides us with an interesting confirmation of a phenomenon already described.

Second, it appears that while trial judges can be affected by past events in a case, that effect is weak and inconsistent. I have some results for past events in most models. Most importantly, it is strongly contingent - the only past events that seem to matter are when defendants, having previously won relief, seek additional help from the court. These results do not tease out and allow us to distinguish between the three potential causal mechanisms of lawyer credibility (the "repeat player" theory), lawyer competence, and selection effects. They may also suggest a different causal mechanism - the "aggravated judge" who would rather this case just go away. Future analysis can show how much the parties adopt that analytical framework, allowing us to determine whether decisions in motion practice move the parties closer together in settlement negotiations in an attempt to avoid continuing a case before a judge who is signaling that the case should end.

Finally, the larger research agenda is supported. I have at least some results attributable to the values of prior observations, whether it's the identity of the prior

filer, whether the court granted relief in the last contested motion, or whether the prior winner filed the motion. There is an effect for downstream events from upstream events, even if it is uncertain what that effect is, which means that when we study trial courts, we have to account for the time-variant nature of the litigation process. While it may be that panel analysis does not, in the long run, work for this approach, we have to include in our research designs some way of accounting for the ways in which earlier litigation events constrain and control the ability of the decisionmaking triad to shape future outcomes. It's for this reason that in the major empirical chapters of this project I use variables that account for the effects of prior case phases.

Conclusion

There's really one major takeaway from this chapter's analysis: outcome-oriented approaches to trial courts leave a lot of information on the table. We should begin thinking seriously about ways to collect data on trial courts that preserves the time-variant nature of the litigation process. Right now, our data offers tantalizing hints of possible effects, but it's impossible to speak with any certainty about whether the effects we see are either a) real or b) caused by the theoretical mechanisms we've posited in the past.

Second, there is one very interesting result, which is that trial courts appear to make ideological decisions in these cases only when they are insulated from review. This confirmation of prior results in other contexts suggests that judges may regard indulging their preferences as somehow illegitimate, which would also

be consistent with the norms surrounding judicial decisionmaking and the legal system in general.

Ultimately, I think the major conclusion I have to offer so far is that our work is not done. Scholars of judicial politics need to turn more attention to trial courts and spend more time thinking about how our prior work is useful in this new context. I think this analysis suggests that a lot of what we think we know about this piece of the judicial puzzle is at best incomplete.

In addition, all of the analysis in this chapter, and most work on trial-court outcomes, asks questions about dichotomous outcomes. But the EEOC Litigation Project includes information about the amount of monetary relief obtained in almost all observations. Even settled cases are included since the EEOC disfavors confidential settlements. Why not make use of that information? One concern would be that there are significant outliers in payouts caused by case-invariant factors such as the size of the employer and whether a class action was alleged, that have nothing to do with the merits of the claim. In the next chapter, I demonstrate that no better continuous variable is available than the amount of monetary relief obtained, whether we use raw dollars or log dollars. This allows me to move forward with the analysis of payouts with minimal transformation.

THE PLEADINGS GAME AND THE DEPENDENT VARIABLE

This chapter digresses from the main narrative of the dissertation. Critics of my research design could argue that instead of plaintiff payouts, I should use the ratio of damages received to damages claimed. This would express the payout as a percentage of the claim, and standardize outliers significantly without sacrificing any information. The purpose of this chapter is to argue why that is impossible.

Prior work on the litigation process almost uniformly uses dichotomous dependent variables. Past studies were either interested in why cases settle or why plaintiffs win in cases that don't settle. In both types of analyses dichotomous dependent variables are sufficient. But that means that a plaintiff who settles for a minimal recovery is treated as equivalent to the one who settles for every dollar they could ask a jury to award. And a plaintiff who recovers one dollar after trial is equivalent to a multi-million dollar award.

These seem to be qualitatively different outcomes. It leaves a lot of information buried in the case to treat these as equivalent outcomes. Therefore, to the extent that information on recoveries or payouts¹ is available, we should use it. But every case presents a different *potential* outcome in addition to the *actualized*

¹ I use these terms interchangeably.

outcome, which means that variations in outcomes might be driven by variations in potential outcomes.

A would-be plaintiff and their counsel must make many decisions that could affect their ability to recover damages months or even years later. The choice of venue; which legal theories to pursue; even whom to name as defendants can affect the final recovery. All of these decisions must be explained and justified in the complaint, where the plaintiff alleges facts to support their claims.

Lawyers, when pleading complaints to initiate a lawsuit, must include what is referred to as an “ad damnum” clause, where they claim the damages caused by the wrongful act of the defendant. Many lawyers have been trained to plead an “ad damnum” alleging “an amount of damages to be proven at trial.” But why do they plead that, instead of demanding a certain amount of damages? Even if the plaintiff’s lawyer cannot determine their client’s damages with certainty, why not simply plead some astronomical figure that would include any amount that could possibly be awarded? Here, I demonstrate that a plaintiff may want to plead indeterminate damages in order to preserve their choice of forum. If the plaintiff pleads specific damages, then the defendant may be able to force the case to move into a different forum. So we should, all else being equal, expect plaintiffs to plead indeterminate damages. This will make it impossible for scholars studying litigation recoveries to use damages ratios to control for the differences in potential recoveries.

Prior chapters have demonstrated that we don't know much about how litigants frame their claims in the pleadings stage. Studying pleadings is difficult because there is a lack of variation and because it's not clear how pleadings relate to outcomes. In addition, there's a strain of scholarship that sees the role of pleadings as removing claims from the population of cases rather than defining them (Hubbard 2013; Gelbach 2012; 2014; 2015). An extensive literature discusses the decision to pursue a dispute (*e.g.*, Felstiner, Abel, and Sarat 1981; Wofford 2017). And a smaller literature discusses the substantive claims made in a lawsuit (Boyd et al. 2013). But the *ad damnum* has not been analyzed mostly due to a lack of observed variation (or lack of observation altogether) and presents a unique opportunity to gain insight into litigators' thinking.

This chapter argues, first, that under certain circumstances, the most rational course of behavior for the plaintiff is to plead indeterminate damages, and traces out the most rational response to that behavior. It then examines the law to find that those circumstances are not necessarily met, and tweaks the model to reach a more realistic conclusion, combining expectations about litigant behavior with the legal regime in place. It therefore reaches the conclusion that scholars studying litigation recoveries cannot reasonably hope to use damages ratios most of the time.

The Litigation Process: Pleading and Games

Studies that focus on the choices made by litigants are fairly few and far between in political science. Cameron and Kornhauser (2006) discuss an appellant's

decision to appeal as a signaling mechanism to the court, while Krell (2010) discusses the choice of an experienced litigator in the same context. Both studies find that increasing litigant costs constitute signals of seriousness from appellate parties, and that those signals may shift the court. Boyd and Hoffman (2012) use motion practice as a proxy for information exchange to measure the likelihood of settlement as the parties acquire the same set of information, finding that as their respective informational sets converge, settlement becomes more likely. Boyd (2015) finds that litigant resource levels have a significant effect on the choice to appeal.

Some literature focuses on the decision to institute a lawsuit to begin with, following a dispute generation process first identified by Felstiner, Abel, and Sarat (1981). First, a potential plaintiff must recognize that they have suffered some sort of injury (“naming” their injury). Second, they must identify a responsible party (“blaming”). Finally, they must demand relief of some sort from the responsible party (“claiming”) (see, e.g., Kritzer (2011) for an approach using this framework). There are other steps (refusal of the demand, obtaining counsel, etc.) that fit into the process in various places, depending on how the process plays out in a particular case. But these three are necessary and sufficient to generate a dispute.

Other studies have used the “naming, blaming, and claiming” approach to dispute generation to see when disputants become litigants. A few examples demonstrate the scope of the approach. First, a team from Berkeley studied what causes student activation when their rights are violated at school (Morrill et al. 2010). Second, Morgan considered when sexually harassed women proceed to

litigation (Morgan 1999). Finally, Wofford used an ingenious survey experiment to determine the difference in propensity to litigate between men and women (Wofford 2017).

This “naming, blaming, and claiming” process constitutes one approach to the beginning of the dispute. Other approaches include focusing on the ability of low-income communities to meet their legal needs (American Bar Association 1994), although many of these studies are either quite old (Curran 1977; Mayhew and Reiss 1969) or focus on foreign contexts (Currie 2006; Coumarelos, Wei, and Zhou 2006). Another group of studies examine how litigants travel through the dispute generation process in particular contexts (Kritzer, Vidmar, and Bogart 1991; Hirsh and Kornrich 2008; Marshall 2005). A third group focuses on litigation rates as a proxy for dispute generation (Jacobi 2009; Yates, Tankersley, and Brace 2010), while a fourth uses compensation for injuries to explore the likelihood of a claimant to become a litigant (Hensler *et al.* 1991). Two other groups use data-intensive approaches to either define a “justiciable problem,” where a legal issue was raised regardless of whether it resulted in a dispute (Genn 1999; Currie 2010); or to study interactions within a community intensively (Yngvesson 1988; Greenhouse *et al.* 1994). The justiciable problem approach has yet to be applied in the United States.

This chapter’s analysis fits into a place in the process between the dispute generation step and the judicial-politics outcome-oriented approach. This piece asks, having made the decision to pursue legal relief, why do plaintiffs plead indeterminate damages, and how and why do defendants respond to that pleading?

It's important for the larger analysis because there is wide variation in the payouts dependent variable (see Chapter 5 for descriptive statistics). This chapter demonstrates that we cannot expect to use a damages ratio that accounts for the potential outcome in most cases.

Thus far, pleadings have been the province of legal scholars, who focus overwhelmingly on the courts' responses to party actions. In American legal scholarship, these issues arise in discussing the invocation of a federal court's diversity jurisdiction (and so they will here). In diversity jurisdiction, the federal court can hear state-law cases if the parties on either side are from different states and if the amount in controversy exceeds a statutory minimum (currently \$75,000) (28 U.S.C. § 1331). Even if a plaintiff files in state court, a defendant can "remove" the case into federal court if the case could have been originally filed in federal court (28 U.S.C. § 1446). Plaintiffs can seek to return the case to state court, but face a heavy burden.

Prior work has been result-oriented. For example, Karns (1996) and Jessee (1999) focus on the proliferation of standards that the federal circuit courts have adopted in evaluating whether a plaintiff's complaint alleges damages that reach the statutory "amount in controversy." Noble-Allgire (1997) argues that the law regarding these issues is incoherent, leading to inconsistent results across courts. Plitt and Rogers (2006) similarly discuss the different methods of calculating an "amount in controversy," but still focus on how the federal court can resolve whether it has jurisdiction. They revisit the issue, and find that 2012 amendments

to the removal statute resolve the different methods (Plitt and Rogers 2013).

McInnis (1998) argues that injunctive and other types of “priceless” or “valueless” relief must be measured in accordance with the cost to the defendant of compliance with that relief.

Lastimososa (2002, 2003) examines the evidence available to a plaintiff on a motion to remand, and how courts should evaluate one type of evidence – the post-removal stipulation that damages are beneath the statutory minimum; she concludes that they should be evidence of the amount in controversy that can be rebutted. Clark (2005) argues that post-removal damages stipulations should be banned as they “[flout] U.S. Supreme Court precedent, congressional intent, and [are] bad policy” (221). But in both cases, the authors are not arguing over whether plaintiffs should use these stipulations. Instead, they are focused on how courts should respond to their use.

Three studies in the legal scholarship have used social science methods to determine whether there are actual differential effects that should lead the parties to prefer particular fora. Clermont and Eisenberg (1998) examined plaintiff win rates in removed cases against cases that remained in their original forum (either federal or state), and found that plaintiffs were nearly twice as likely to prevail in cases that stayed in their first forum as opposed to removed cases. Miller (1992) surveyed attorneys on forum selection and finds that plaintiff’s attorneys representing in-state individuals preferred filing in state courts because they perceived them as more friendly, while plaintiff’s attorneys representing out-of-

state corporations preferred to file in federal courts for the same reason.¹ However, Eisenberg *et al.* (1995) found no statistical significance between win rates in state and federal courts.

The difference between these studies probably lies in selection effects (Heckman 1979; Priest and Klein 1984; Klerman and Lee 2014). Comparing state versus federal courts does not capture the real variation, because removal is a selection bias that systematically effects case results. Defendants should not be expected to remove cases they will win in state court anyway; nor should they be expected to remove cases that they will lose in federal court anyway.² Thus, only those cases where defendants think they will lose in state court but win in federal court get removed. This systematically reduces plaintiff win rates in both categories, rendering estimates unreliable. Thus, isolating removed cases from first-forum cases leads to accurate measurement of the effect of removal.

My analysis in this chapter falls into a slightly different area from prior scholarship on forum selection. Instead of discussing the court's reaction to forum-shopping actions, it examines the incentives for the parties to engage in a particular form of forum shopping – pleading damages to manipulate the “amount in controversy” requirement. Ressler (2013) examines something similar when she

¹ Miller cites to five earlier attorney surveys on forum selection, but the most recent of these is from 1981 and all of them offer only rudimentary descriptive statistics with no causal analysis.

² Empirically, it may be true that removed cases constitute a random sample, since many defendants instinctively remove any removable case. But neither Eisenberg *et al.* (1995); Clermont and Eisenberg (1998); nor Miller (1992) ask about defense responses to removable complaints.

argues that the unanimous consent rule, whereby every defendant must agree to removal, allows for rent-seeking among defendants. But I consider the interaction between plaintiffs and defendants in seeking the best possible forum. The purpose of this analysis in my dissertation is to demonstrate that there is no better way to analyze litigation payouts than by using the actual payouts. No damages ratio can replace them, because we cannot expect to have a defined value for the denominator in the ratio.

The choice of forum matters because the forum affects not just plaintiffs' win rates, but also the predictability of results. While Eisenberg (1991) found that federal litigation had a strong positive relationship between pre-trial motion practice and trial results, Heise and Wells (2016) find no such relationship in state courts. Parties choose the forum they choose because they believe that the forum may make a difference on the margins (Miller 1992).

This piece also matters for the methods scholars use to study the litigation process. Those studies that have focused on outcomes almost always use a dichotomous dependent variable – either plaintiff victory (Waldfogel 1998; Songer, Cameron, and Segal 1995; Boyd 2015) or whether the case settles (Eisenberg and Lanvers 2009; Boyd and Hoffman 2012). Studies that examine dispute generation have, in some cases, used compensation received as the dependent variable, but they do not focus on *litigation* (Kritzer 1991; Hensler *et al.* 1991). For study of civil litigation, it is trivial to note that using a measure of damages awarded would be superior to using dichotomous variables. However, damages variance is so wide as

to render statistical analysis incoherent. There are two ways to cope with this: standardization (by using the ratio of damages awarded to damages claimed) or statistical manipulation (such as the use of logarithms of damage awards).

A few studies, focusing on the effects of representation on litigation outcomes, use a "recovery ratio" to measure their dependent variables. Lederman and Hrungr (2006) examine a sample of Tax Court cases where they rely on the percentage of the tax the IRS claimed that was ordered paid. Korobkin and Guthrie (1997) used an experiment with defined damages to evaluate the difference between litigant and lawyer evaluations of settlement offers. In both of these studies, however, the definition of damages was exogenous to the decision to plead. In IRS cases, the agency has already defined the amount they claim in a "notice of deficiency" sent to the taxpayer (Lederman and Huang 2006), while in the experiment, the researchers defined the relevant damages by fiat (Korobkin and Guthrie 1997; Shadish, Cook, and Campbell 2002).

In most civil cases, by contrast, the amount of damages available is always to some extent uncertain at the time of filing. Some types of cases authorize attorney's fees, which cannot be determined until the case is over (e.g., 42 U.S.C. § 1988; 29 U.S.C. § 706); others provide for damages that increase over time (e.g., 35 U.S.C. § 284). Still others authorize noneconomic damages, which by definition defy pre-trial calculation (e.g., *State Farm Mutual Insurance Co. v. Campbell* 2003). Without the certainty provided by exogenous calculation, litigants and their lawyers must

determine the damages pleading that will maximize their chance of recovery.

I argue that because of the incentives for litigants, that standardization through damages ratios, while it is methodologically superior (Taagepera 2008), is theoretically impossible. Section II of this chapter lays out the assumptions necessary for the model, while Section III presents the game-theory model of litigant incentives in damages pleading. It concludes that under almost all circumstances, it makes sense, given the assumptions in the model, plaintiffs should claim an indeterminate amount of damages. Section IV tests certain assumptions of the model against the existing legal regime, finding some puzzling results that suggest that the model's base assumptions may not be realistic. I conclude by explaining why this analysis is relevant to the larger project.

Assumptions of the Model

Litigation can be described as a strictly non-simultaneous zero-sum game with incomplete information. It is strictly non-simultaneous because while each party takes their moves in turn, they are fully aware of past moves and, at least in theory, share the same set of information about the law and the facts. It is an incomplete information game because neither party knows the preferences of the other and are not able to determine one another's payoff preferences. It is zero-sum because any gain for the plaintiff is at the defendant's expense.¹ This game thus

¹ This is not *strictly* true; the defendant has two types of costs: payoff costs (which are zero-sum) and defense costs (which are non-zero-sum). If payoff costs are less than defense costs, it is trivial that a rational defendant should pay the plaintiff.

differs from the ultimatum game Pecorino and Van Boening assume (2010; see also Farmer and Pecorino 2005; 2007), because it assumes that litigation costs are minimal, nonexistent or sunk.

Assumption 1: Costs are minimal or nonexistent.

Next, the litigants are regarded as instrumentally rational (Songer, Cameron, and Segal 1995). It is possible that litigants should be regarded as having limited rationality, but future research can relax the instrumental rationality assumption. Given the fiduciary duty of counsel to client, attorneys should be expected to behave with instrumental rationality; *pro se* litigants are excluded because their claims usually are dismissed on the merits, such that damages pleadings are irrelevant.

Assumption 2: Litigants are instrumentally rational.

Third, the litigation in this game takes place in the United States, under state law, with a single plaintiff against a single out-of-state defendant. This potentially triggers the “diversity” jurisdiction of the federal courts, which allow federal courts to hear state-law cases provided a) that the plaintiff and defendant are from different states and b) that the “amount in controversy” meets a certain threshold, which is currently set at \$75,000 (28 U.S.C. § 1332).

This analysis also applies to states that have multiple levels of trial courts, some with limited jurisdiction. The payoffs work out the same, but instead of \$75,000 being the relevant floor, the relevant floor is the maximum jurisdiction for the court of limited jurisdiction. For example, Mississippi has three kinds of courts

of limited jurisdiction: justice courts (which do not require the judges to be lawyers, and have a jurisdictional limit of \$3,500), county courts (which have a jurisdictional limit of \$200,000) and chancery courts (which have sole jurisdiction over cases seeking equitable relief). In a comparative context, in Israel, magistrate's courts have original jurisdiction over civil claims involving less than 2.5 million shekels, while district courts have original jurisdiction over all civil claims. A complaint could allege damages beneath those ceilings in order to avoid the crowded circuit-court docket (or an unfriendly circuit judge). For the purposes of the model, these cases are indistinguishable from diversity-jurisdiction cases. This assumption can be more generically stated as "litigation meets all requirements for concurrent jurisdiction in multiple fora."

Assumption 3: Litigation meets all requirements for concurrent jurisdiction in multiple fora.

Fourth, plaintiffs are assumed to prefer their initial choice of forum. There are circumstances where a plaintiff may prefer a forum other than the one in which they file. For example, filing fees are significantly higher in federal courts than in most state courts, and are paid by the party who invokes federal jurisdiction. Thus, a plaintiff may prefer a federal forum, but file in state court to take advantage of lower filing fees and expect the defendant to remove the case to federal court (28 U.S.C. § 1446). These cases are not covered by the model, because they involve strategic guesses about the behavior of the other party that are beyond the scope of this model.

Assumption 4: The plaintiff prefers their initial forum.

Next, it is assumed that the defendant prefers a federal forum. In general federal courts are regarded as more defendant-friendly: the *Twombly/Iqbal* “plausibility” pleading standard is stricter than many states, which still follow standards similar to the pre-*Twombly* standard, where a case could go forward unless “no set of facts” as alleged in the complaint would give rise to a claim. The evidence that supports this is sketchy; one study found no significant difference between state and federal courts (Eisenberg *et al.* 1996), while another found that removed cases had significantly fewer plaintiff victories than cases that remained in their first forum (Clermont and Eisenberg 1998). Attorneys definitely believe it to be so, however (Miller 1992). It is worth noting that all of these studies are pre-*Twombly/Iqbal*, so federal courts may have become less plaintiff-friendly since 2009.

It may be arguable that since federal courts do not make state law, that some plaintiffs would also prefer a federal forum in order to avoid potentially making bad law in the event of a loss. A defendant in such a situation would behave indistinguishably from a defendant who prefers a federal forum because of its defendant-friendly nature. For plaintiffs, they simply allege damages to explicitly provide federal jurisdiction or file there initially. In the same way, if federal courts are actually more friendly than the relevant state court, the plaintiff alleges sufficient damages to grant the federal court jurisdiction. Those cases are excluded from the model.

Assumption 5: The defendant prefers a federal forum.

I set the probability of plaintiff victory in the forum as a variable that is known to the parties but can range from 0 to 1. Priest and Klein (1984) argue, based on divergent expectations, that only 50% rates of plaintiff victory can be predicted from trials. Klerman and Lee (2014) make the point that this is a limiting result as trial rates go to zero, and that different plaintiff victory rates are possible as trial rates increase. Shavell (1996) argues that when the parties have asymmetric information (one side knows something the other side does not), that any probability of plaintiff victory is possible. While it is true that divergent-expectations models are generally better-supported empirically for trial rates (Huang 2007; Waldfogel 1998), the pleadings phase may be the only phase of litigation where an asymmetric-information model is more sound (Bebchuck 1983).

Empirically, plaintiff win rates in employment litigation (which is the area of law that I use; see Chapter 5) are around 40-50% (Selmi 2001; Clermont and Schwab 2004; Oppenheimer 2003). Thus, I play out the games in this model assuming win rates of 40% and 50%. The dynamics play out similarly for any relationship between state and federal-court win rates, as long as state courts have larger win rates than federal courts. If federal courts have larger win rates than state courts, of course, the plaintiff should be expected to file in federal court and allege sufficient damages to establish diversity jurisdiction.

Pleadings present a phase where the defendant knows everything that the plaintiff thinks they can prove in the litigation, but the plaintiff only knows the

things that the defendant has admitted to be true. This constitutes a classic asymmetric-information situation. Thus, Shavell (1996)'s model is the appropriate one for measuring the appropriate discount rate. As he demonstrates, when defendants possess more information than plaintiffs, plaintiff trial victory rates are lower than the population plaintiff victory rate (Shavell 1996).

In the Shapiro/Fuller model that I began with, this piece of the puzzle fits into the process of dialogue among the decision-making triad. While the parties initially have an asymmetry of information, the exchange of initial pleadings discloses certain pieces of private information while continuing to conceal others. They will, eventually, pull back the veil completely, and the court will also give them information, but at this point, the plaintiff wants to appear as damaging as possible, which means giving the impression of maximal damages.

Because plaintiffs cannot predict which cases will settle at this early stage, they must assume that all cases can go to trial.¹ Plaintiffs can know the trial victory rate for plaintiffs in a given court, and can reasonably assume that their case's probability of victory at the outset is no less than that. If π = a plaintiff victory, then the plaintiff's calculation of damages uses that discount rate.

Assumption 6: Payoffs are discounted x , where $x = Pr(\Pi)_{tried}$.

¹ There are cases where plaintiff's counsel never intends to go to trial, and is essentially attempting to extort a settlement from the defendant. These lawyers, sometimes derisively referred to as "demand-letter lawyers," frequently maintain high-volume personal injury practices. They are thus highly relevant to the model (as they frequently bring cases that present diversity-jurisdiction opportunities), but for the purposes of simplicity, are not considered in this piece. Future work should consider their effects on the population of cases.

The available damages also affects the plaintiff's calculus of where to file. If there is no opportunity to obtain more damages than the jurisdictional minimum, then there is no way to file in federal court. If the available damages are greater than the jurisdictional minimum, but more heavily discounted in the higher-value forum (in this case the federal forum), then it may be that the expected payoff is greater by limiting the *ad damnum* and pursuing the case in state court.

With that in mind, the plaintiff, as the first mover, must choose their preferred forum. If they prefer a federal forum, they file in federal court alleging that they meet the requirements for diversity jurisdiction. If they prefer a state forum, then they file in state court. But at this point they face a choice. A plaintiff knows that a jury will not award them *more* than they plead (Karns 1996). But pleading "an amount of damages to be proven at trial" allows defendants to claim that the plaintiff has placed an amount "in excess of \$75,000" in controversy. So while the plaintiff may think that a state court will be more likely to award them *anything*, only a federal court can award them more than \$75,000. Thus, based on the information they have at the time of filing, a plaintiff must discern what they think the likely damages are. If a plaintiff thinks that the ceiling on their likely damages is *around* \$75,000, they may decide that the forgone damages are worth the increased likelihood of victory. If the damages are much greater than \$75,000, a plaintiff may decide that the risk of removal and concomitant lower probability of victory are worth the extra available damages.

Assumption 7: State courts and federal courts have different payoff discount rates, x_s and x_f respectively, and $x_s < x_f$.

Damages Pleadings as a Game

If the plaintiff chooses to allege damages “to be proven at trial” in state court, the defendant can choose one of three options. First, they can choose to remain in state court and litigate the matter on its merits. Second, they can remove the case into federal court, asserting that the “amount of damages to be proven at trial” is in excess of \$75,000. Finally, they can attempt to force the plaintiff to announce whether their damages exceed the jurisdictional amount through discovery (requests for admissions, interrogatories, requests for production, and depositions).

Defendants who choose to remain in state court end the game. If a defendant chooses to remove, the plaintiff can either attempt to show that their damages do not meet the jurisdictional requirement and secure remand, or acquiesce to federal jurisdiction.¹ The discovery game can quickly become protracted, as the parties engage in an arms race to either gain a concrete answer or avoid giving one, and so this model assumes that those cases remain in state court for the time being. The costs of discovery represent a large barrier to questioning too closely the plaintiff’s claims about damages. Unless a defendant is fairly certain that the plaintiff’s

¹ Removal and remand proceedings are not costless for the parties. However, for defendants the cost of removal is fixed at the federal filing fee and the cost of copying the state-court record; they lack control over whether remand proceedings occur, and thus those costs are sunk at the time of removal. For plaintiffs, the cost of removal is outside their control, and the cost of remand proceedings are minimal in comparison to available damages.

damages will reach their desired outcome, the costs of discovery practice should encourage defendants to either remove or acquiesce based on the pleadings (see, e.g., Craswell and Calfee 1986).¹

In addition, the discovery path could foreclose the possibility of removal altogether, at least in federal court. The removal statute provides that a notice of removal must be filed within thirty days of service of the complaint (28 U.S.C. § 1447). To this author's knowledge, only the Fifth Circuit permits an equitable tolling of this limit on a showing of bad-faith pleading (*Tedford v. Warner-Lambert Co.* 2003). Thus, a defendant who prefers a federal forum due to its higher discount rate may find that by seeking discovery to limit available damages, that they have both expanded the available damages and lowered the discount rate by making the federal forum unavailable.

The indifference curve of plaintiffs is a function of three variables: the jurisdictional minimum (J), x_s , and x_f . The indifference point is defined by the function of $d / J = x_s / x_f$, where d is the available damages. Because a plaintiff who asks for more damages than J invites removal, the plaintiff cannot expect to win more in state court than J , and thus their expected payoff is $J(x_s)$. In federal court, where the full array of damages are available, the expected plaintiff payoff is $d(x_f)$. Setting these payoffs equal to each other gives the indifference function above. Table 4.1 gives the

¹ I am indebted to William H.J. Hubbard for raising both of these points related to the costs of the parties.

values for x_s / x_f in multiples of J , and Table 4.2 expresses it in dollars when $J = \$75,000$, as it currently does.

Win Rates	$X_f =$								
	.1	.2	.3	.4	.5	.6	.7	.8	
$X_s =$									
.1	N/A								
.2	2	N/A							
.3	3	1.5	N/A						
.4	4	2	1.334	N/A					
.5	5	2.5	1.667	1.25	N/A				
.6	6	3	2	1.5	1.2	N/A			
.7	7	3.5	2.334	1.75	1.4	1.167	N/A		
.8	8	4	2.667	2	1.6	1.334	1.142857	N/A	
.9	9	4.5	3	2.22	1.8	1.5	1.285714	1.13	

TABLE 4.1: The amount of damages at which Plaintiff is indifferent between state and federal courts, expressed in multiples of a jurisdictional minimum.

Win Rate	$X_f =$								
	.1	.2	.3	.4	.5	.6	.7	.8	
$X_s =$									
.1	N/A								
.2	150,000	N/A							
.3	225000	112500	N/A						
.4	300000	150000	100050	N/A					
.5	375000	187500	125025	93750	N/A				
.6	450000	225000	150000	112500	90000	N/A			
.7	525000	262500	175050	131250	105000	87502.5	N/A		
.8	600000	300000	200025	150000	120000	100050	85714.28	N/A	
.9	675000	337500	225000	166725	135000	112500	96428.55	84375	

TABLE 4.2: Plaintiff Indifference values for d between X_s and X_f expressed in dollars, when $J = \$75,000$.

This means that plaintiffs must consider which of three potential damages cases they have. One is where $d < J$, in which case the plaintiff alleges damages of d and remains in state court. The next is where $d > J$, but $d / J < x_s / x_f$. In that case, the plaintiff's payoff of $J(x_s)$ is greater than $d(x_f)$, so the plaintiff should again allege damages of J and seek to remain in state court. Finally, when $d / J > x_s / x_f$, plaintiffs should allege indeterminate damages and allow removal. This raises the

obvious question, then, of why the vast majority of complaints allege either indeterminate damages or astronomical damages. The answer is relatively simple: either d is unknown (or escalates over time, as in any case where, for example, lost wages are an element of available damages) or either x_s or x_f is unknown. In those cases, the plaintiff cannot calculate their indifference point, and should plead indeterminate damages to ensure that they obtain the maximum payoff.

Figure 4.1 demonstrates the general mechanics of the game. The plaintiff (P) makes their first move, asserting the amount of damages they choose, based on their calculations of likely damages available and likelihood of victory. I assume that $d = \$100,000$, strictly for ease of computation (since $\$75,000$ is a simple fraction of $\$100,000$). I similarly assume that $x_s = .4$ and $x_f = .5$, strictly for illustrative purposes. Defendant payoffs equal the mirror image of plaintiff payoffs, minus the plaintiff payoff to represent the cost of defense (since if the cost of defense exceeds the plaintiff's payoff, a rational defendant would settle).

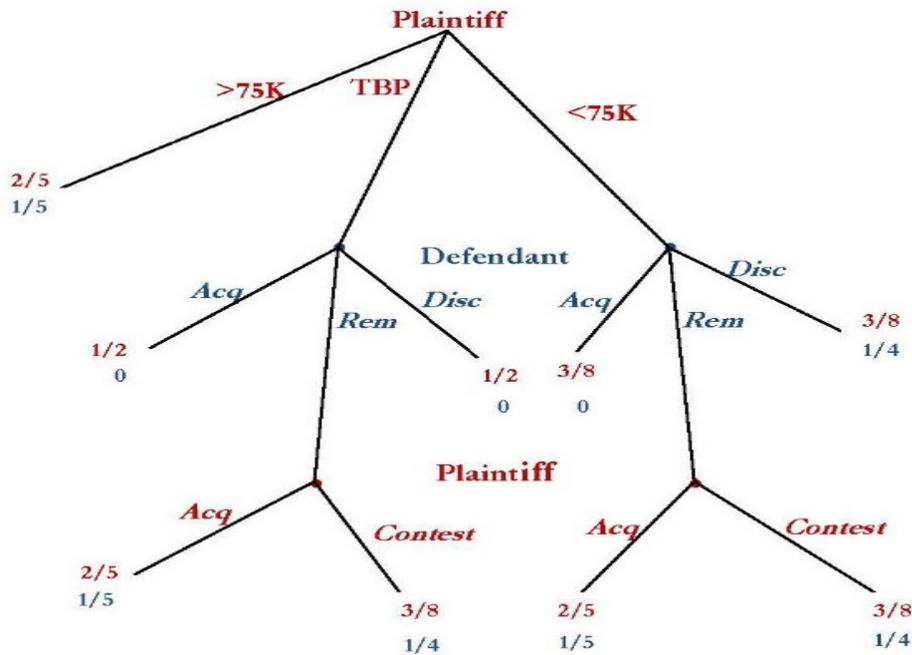


FIG. 4.1: Game at 50% plaintiff win rate in state court, 40% plaintiff win rate in federal court; \$100,000 in damages.

In the first strategy, the plaintiff alleges damages in excess of \$75,000 and the defendant removes. This is a stable strategy. Because of the additional discount for federal fora, the plaintiff can expect a payoff of $\frac{2}{5}$ of their claimed damages, while the defendant can expect a payoff avoidance of $\frac{1}{5}$ of the claimed damages. In the second strategy, the plaintiff alleges damages “in an amount to be proven at trial”. If the defendant remains in the state-court forum, either acquiescing to the forum or attempting to force a statement of damages in discovery, the plaintiff can expect the maximum possible payoff of $\frac{1}{2}$. The defendant’s payoff in this case is 0. If the plaintiff attempts to remain in state court by alleging damages beneath the jurisdictional floor, then they cannot recover damages beyond that allegation. Thus,

with the 50% discount rate, their maximum payoff, if the defendant remains in state court, is $3/8$. The defendant's payoff in those cases is $1/4$.

On the other hand, if the defendant removes the case into federal court, then the plaintiff can either acquiesce to the removal or contest it, seeking remand. If the plaintiff acquiesces, this is identical to the first strategy. If they contest, then (assuming they win), this becomes identical to alleging damages less than the jurisdictional minimum. Given these payoffs, there is a preferred strategy for plaintiffs to allege damages to be proven, for defendants to remove, and for plaintiffs to acquiesce in the removal and litigate in federal court.

If, on the other hand, we assume, as many commentators do, that state courts are not just *more* plaintiff-friendly than federal courts, but are *objectively* plaintiff-friendly, then the payoffs change and so does the dominant strategy. If state courts are assumed to give plaintiffs 60% win rates, while federal courts give plaintiffs 40% win rates, then Figure 4.2 demonstrates the payoffs. In this case, the preferred strategy is for the plaintiff to allege damages under the jurisdictional limit, defendants to seek removal, and the plaintiff to seek remand.

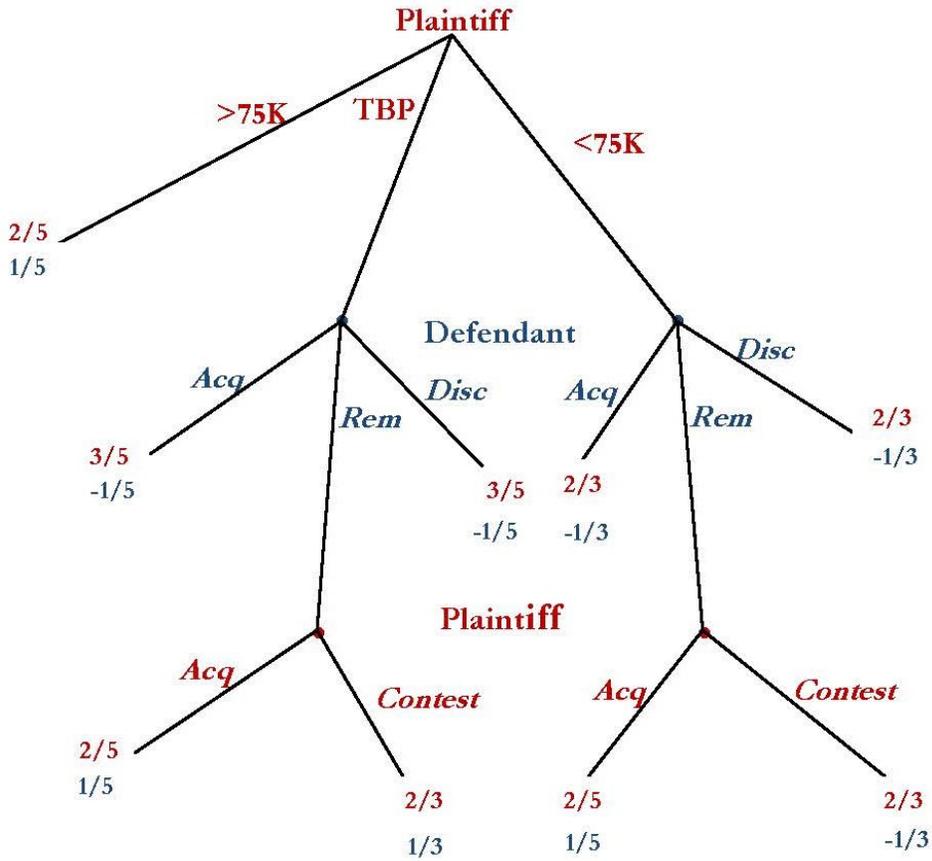


FIG. 4.2: Game with 60% plaintiff win rate in state court, 40% plaintiff win rate in federal court; \$100,000 in damages.

An additional problem is that not all payoffs move in lockstep as damages increase. Figures 3 and 4 show games based on potential damages of \$200,000 (with neutral and plaintiff-friendly state courts, respectively). In these cases, plaintiffs who claim to fall below the jurisdictional minimum would be giving up significantly more damages. In the case of neutral state courts, the preferred strategy remains the same: plaintiffs plead damages to be proven, defendants remove, plaintiffs acquiesce to federal jurisdiction. In the case of the plaintiff-friendly state courts, the

increase in damages means that the new preferred strategy becomes the same one as all other cases: plaintiffs plead damages to be proven, defendants remove, and plaintiffs acquiesce.

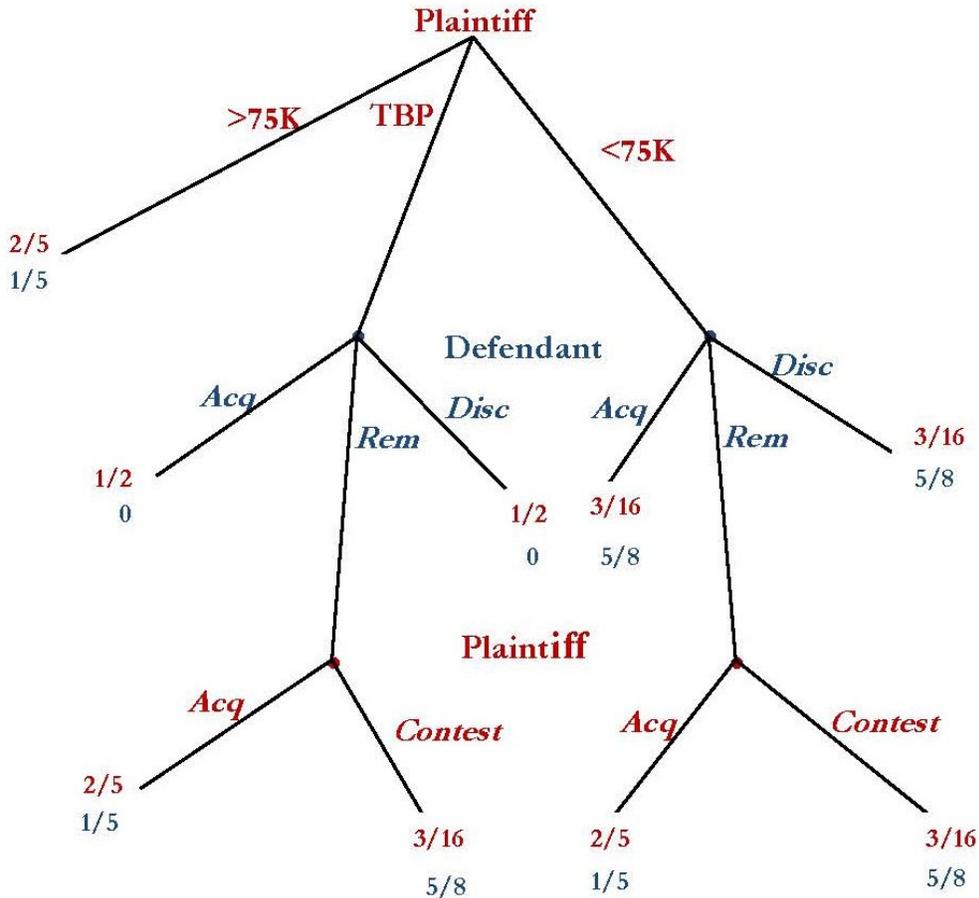


FIG 4.3: Game with plaintiff win rates at 50% in state courts, 40% in federal courts; \$200,000 in damages.

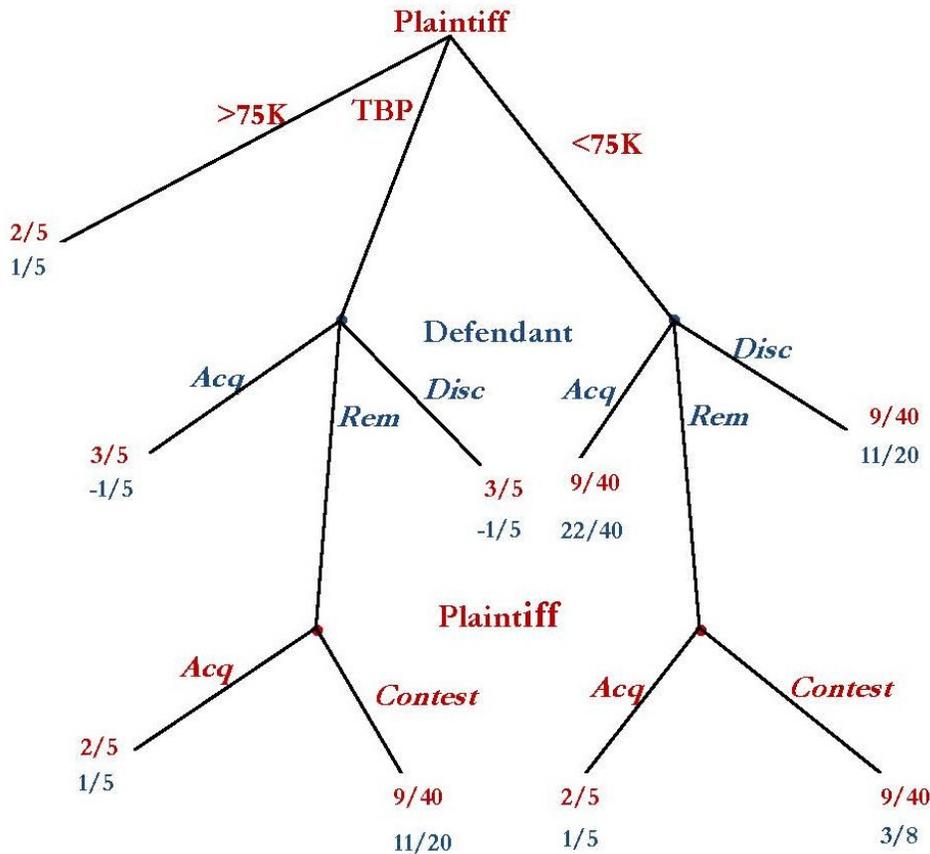


FIG. 4.4: Game with 60% plaintiff win rate in state court; 40% plaintiff win rate in federal court; \$200,000 in damages.

The game makes clear that in pleading, the most important factor is the damages available. For example, if the plaintiff calculates their available damages as only \$50,000, then the game changes. Figure 5 demonstrates these changes in neutral state courts; no results change if the state courts are made plaintiff-friendly, so that game is not shown. First of all, the plaintiff cannot in good faith allege their damages “in excess of \$75,000,” so the left-most branch in prior games simply disappears. Second, the plaintiff also cannot acquiesce to removal to federal court, as later developments could lead the federal court to conclude it lacks subject

matter jurisdiction and reverse a plaintiff's verdict (Jessee 1999; *Limbach Co. v. Renaissance Ctr. Partnership* 1978; *Rosack v. Volvo of America Corp.* 1976). Thus, the plaintiff payoffs in those branches drop to zero. But in every case, because the state court can award the full measure of damages without limitation, in this game, every other branch has the same payoff, which means there is no equilibrium under the game's initial conditions.

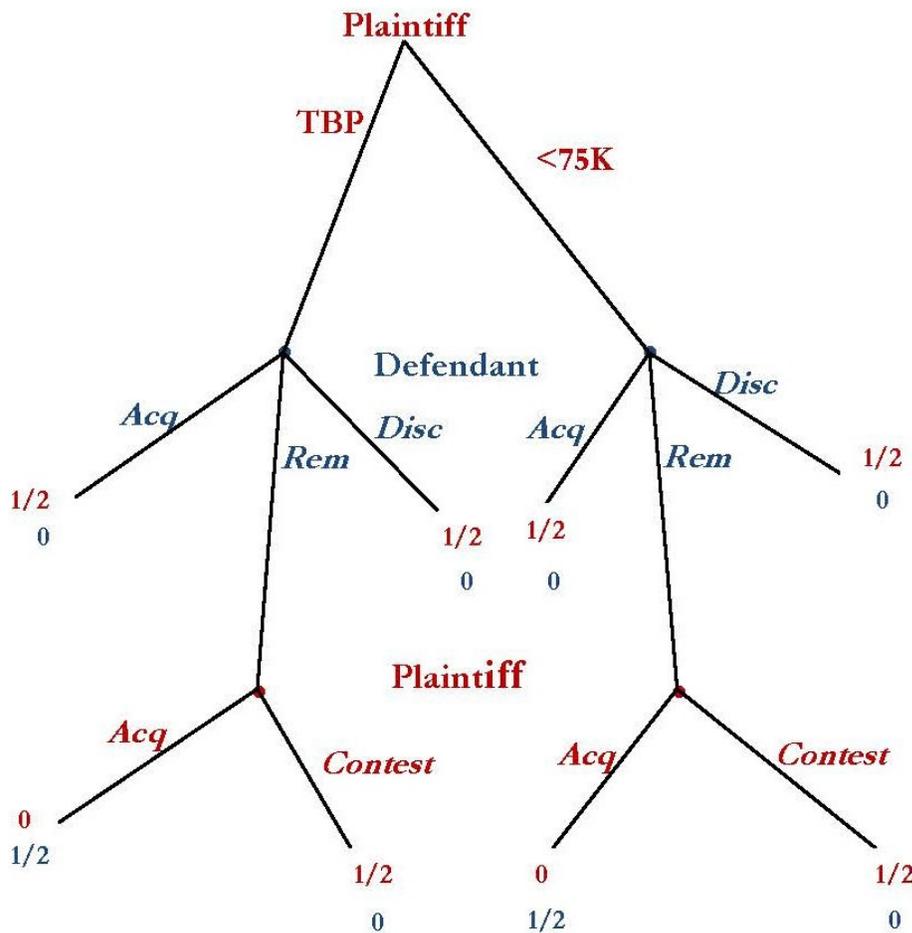


FIG. 4.5: Game with 50% plaintiff win rate in state courts; 40% plaintiff win rate in federal courts; \$50,000 in available damages.

Thus, it is clear: given the assumptions made about the state of litigation within the model, the most likely course of pleadings for rational parties is for the plaintiff to plead damages to be proven, and not to contest the subsequent removal to federal court. This makes damages ratios impossible to determine. As Table 2 demonstrates, as the gap between state and federal courts widens, the amount of damages required to make a plaintiff prefer federal court grows linearly. The next section will test the assumptions of the model against the legal regime, and finds that the assumptions are not necessarily reflected in the law.

The Legal Regime Governing Pleadings

The model implicitly assumes that fact finders “do not” award more damages than have been pleaded. This is a weak assumption; a stronger version of the assumption would state that juries “cannot” award more damages than have been pleaded. This assumption is made weakly instead of strongly because of Federal Rule of Civil Procedure 54(c), which provides “A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.” Thus, in federal courts, alleging a specific amount of damages imposes no limitations whatsoever unless the plaintiff takes a default.

Thirty states and the District of Columbia have enacted rules similar to Rule 54(c). Of these, twenty-five have enacted it as part of a parallel set of rules, such

that the state rule is also Rule of Civil Procedure 54(c). Nevada has enacted a set of parallel rules, but specifically declined to include Rule 54(c). Mississippi enacted Rule 54(c), but included a limitation that monetary damages “shall not” exceed the amount sought in the pleading. Eighteen other states¹ have not clearly enacted Rule 54 or Rule 54(c). In the thirty-one jurisdictions where a specific damages pleading does not foreclose relief, with neutral state courts the game looks like Figure 4.6, regardless of damages. Pleading less than \$75,000 does not impose a damages penalty, and thus there is no equilibrium, because the state court can award the full panoply of relief. The only difference lies in that defendants should always seek to remove, and while plaintiffs should seek remand to maximize their payoffs, they can litigate in federal court without having to worry about a lack of subject-matter jurisdiction eliminating any favorable judgment. The payoffs change but not the results if state courts are plaintiff-friendly, so that model is not reported. In the twenty states that do not allow for the full panoply of relief under Rule 54(c), plaintiffs should behave as predicted in the model.

¹ California, Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New York, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, and Virginia.

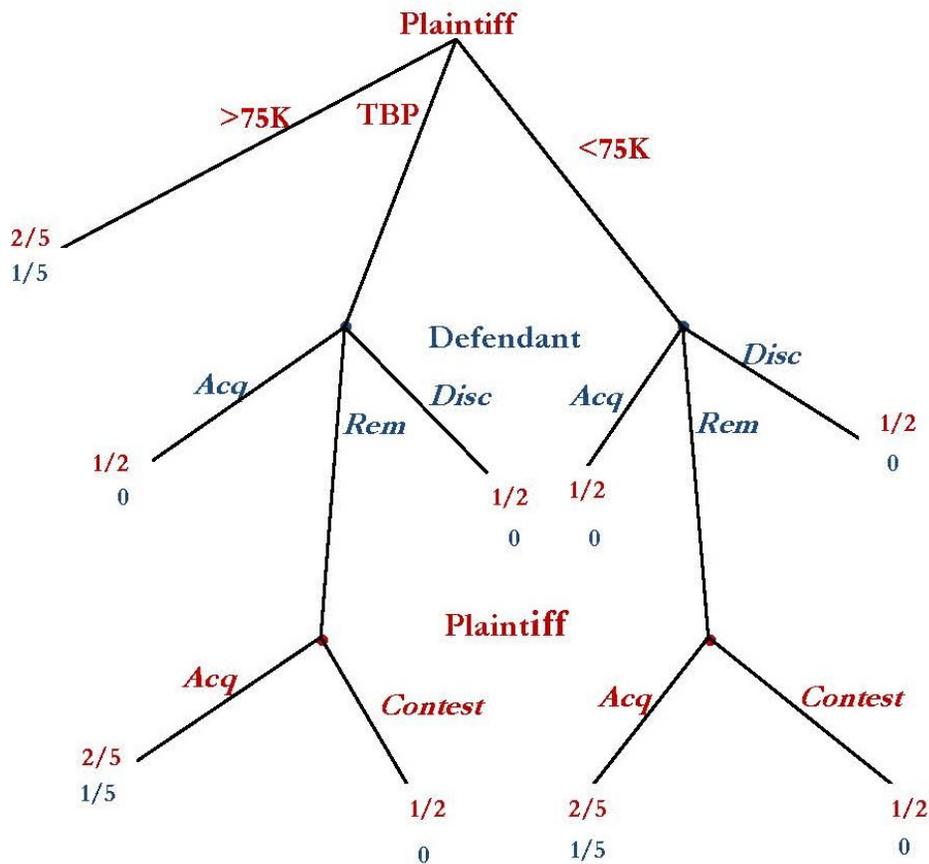


FIG. 4.6: Game with 50% plaintiff win rate in state court, 40% in federal court plus state Rule 54(c); all damages.

The model predicts that under a few circumstances, plaintiffs should seek remand after removal. In those circumstances, would plaintiffs be better off pleading indeterminate damages or pleading a specific amount of damages to serve as evidence of the amount in controversy? As an initial matter, some may suggest that it is irrelevant; defendants bear the burden of demonstrating that the amount in controversy has been met (Jessee 1999; *Burns v. Windsor Ins. Co.* 1994). Prior to

2012, standards had proliferated, with four standards in place. Congress displaced these standards in 2012, imposing a “preponderance of the evidence” standard for demonstrating that removal jurisdiction exists (Plitt and Rogers 2013). This replaced some district courts which required a “reverse legal certainty” standard, where defendants only had to show that damages could in theory exceed the jurisdictional minimum; and the Eleventh Circuit’s “legal certainty” standard, which required defendants to show that it was impossible for damages to fall below the jurisdictional minimum (Jessee 1999; Karns 1996).

Part of the question boils down to when the inquiry about amount in controversy is framed. If it is framed as "amount in controversy at filing," then courts are required to determine the damages. Since the "plaintiff is the master of the complaint" (*Bell v. Hershey Co.* 2009; *St. Paul Mercury Indemnity Co. v. Red Cab Co.* 1938), the allegations in the complaint should define the damages available at the time of filing. On the other hand, if the court's ability to hear a case can be divested by a failure of diversity, then an ongoing inquiry into the damages available is appropriate. But this determines the question of what evidence is admissible to determine the amount in controversy (Lastimososa 2003; Clark 2005). This question is beyond the scope of this paper, but represents a useful framing for future inquiry.

Thus, the court can conduct an inquiry into potential damages and hear argument regarding the availability of damages (Lewis 2009). This leads to what one judge described as a “comic scene: plaintiff’s personal injury lawyer protests up

and down that his client's injuries are as minor and insignificant as can be, while attorneys for the manufacturer paint a sob story about how plaintiff's life has been wrecked" (*Shaw v. Dow Brands, Inc.* 1993). Given that some courts have refused to use post-removal stipulations as evidence of the amount in controversy (Lastimoso 2002; 2003) and at least one commentator calls for their ban (Clark 2005), a rational plaintiff may prefer to name damages, particularly in jurisdictions where specific damages do not limit recoveries, to give themselves flexibility in choosing to litigate removal or acquiesce to federal jurisdiction.

It should be clear by now that there is enough information to make certain predictions about the behavior of litigants. In states where Rule 54(c) does not exist, plaintiffs should plead damages to match their expectations regarding damages and win rates. When damages increase over time, or win rates are uncertain, plaintiffs should plead indeterminate damages, since they can usefully assume that by the point of trial, their available damages will exceed the indifference point. The only exception to this are when damages are only slightly over jurisdictional limits and state courts are *significantly* more plaintiff-friendly, in which case the potential damages lost by pleading below the jurisdictional limit are less than the potential damages lost by entering a less friendly venue. In states with a Rule 54(c) counterpart, plaintiffs should plead damages beneath the amount in controversy, so that their alleged damages provide evidence in support of their arguments for remand. In addition, some states specifically ban pleading specific damages in certain cases (Jessee 1999). Some of these states (such as Colorado and Iowa) also

use Rule 54(c). Plaintiffs in those states, of course, should follow the model, since they are directed to do so by state law.

Given the breadth of the model's equilibrium in favor of pleading indeterminate damages, we should usually expect plaintiffs to avoid naming their damages. This means that the "damages ratio" approach to outcome analysis is not possible. That approach requires knowledge of both the damages pleaded and the damages recovered. When there's no number attached to the damages pleaded, the ratio becomes undefinable.

The calculations differ slightly in the analogous case of state courts of limited jurisdiction. Many of these courts are specifically prohibited from awarding relief beyond their jurisdictional limits. In those cases, plaintiffs should probably only file in those courts if their damages fall below the jurisdictional ceiling, and plead damages specifically to avoid dismissal due to lack of subject-matter jurisdiction.

Conclusion

Unfortunately, I have demonstrated that it is probably impossible to secure a perfect research design in the litigation process. The goal of this chapter was to assess the viability of using damages ratios to measure litigation payoffs. I concede that damages ratios are superior because using them would eliminate the wide variance between cases alleging small damages (like consumer protection claims) and cases alleging enormous damages (like the patent dispute between Apple and Samsung). However, this paper makes it clear that it is more likely than not that the denominator in that ratio (damages sought in the *ad damnum*) does not exist in

most cases. Thus, the damages awarded are the best possible variable for studying litigation outcomes, and research designs must be built around the limitations, including the wide variance in values, that damages have.

The plaintiff's desire to make their case appear as strong as possible for as long as possible is the basic causal mechanism for this game. While the plaintiff knows that eventually they will be required to disclose their actual amount of damages, they hope to settle before the case progresses to that point, because their case might weaken. Meanwhile, the defendant seeks the best possible forum based on the limited information available to them. As they acquire more information, they are able to update their priors, but at that point forum selection is complete; this phase of the game is over.

At this point, since it is impossible to standardize litigation outcomes to measure relative plaintiff success across cases, we can use absolute outcomes as an imperfect measure of plaintiff success. While the next chapter discusses descriptively the scope of the information that I have about outcomes and the facts that go into them, Chapters 6 and 7 use outcomes to test the hypotheses. In Chapter 6, I look at the determinants of settlements. That chapter focuses on the ability of the parties to reach agreement on the value of the case. In Chapter 7, I look at the actual value received, regardless of outcome (across settlements, pre-trial dispositions, and trials).

Research into the litigation process has only just begun. There is room for scholars to continue to examine the entire process, instead of the piecemeal

approaches that have been used thus far (and are used in this chapter). Better understandings of the process will allow us to better understand the results. My analysis in Chapters 6 and 7 attempts to improve upon this piecemeal approach by studying multiple litigation events over the life of the case.

DATA AND JURY INSTRUCTIONS

At this point, I return to the main narrative of the dissertation. This chapter will walk through the process of dialogue that the parties use to share their information sets. I will focus on the ways in which the data can be exploited to show how the parties exchange information with each other and the court, including a qualitative theory-building discussion on a phase where the dialogue can be explicitly seen. By the conclusion of this chapter, readers should understand how the dynamics of the process play out, at least in their most generic forms and in the broadest of senses.

The data for this analysis comes from the EEOC Litigation Project. This dataset consists of 2,316 enforcement actions brought by the Equal Employment Opportunity Commission (EEOC) between 1996 and 2006. The dataset contains a stratified random sample of all enforcement actions, and captures information on 302 variables, including information about the allegations brought, the relief sought, interventions by private plaintiffs, judges, motion practice, and defendants (Kim, Schlanger, and Martin 2013). Because the data collection process used docket sheets to capture case events, the entire dataset contains multiple observations about each case.

The most relevant conclusion to be drawn from this data is that there's a lot of action in these cases. Even in cases that eventually settle, the parties frequently contest issues and argue over appropriate intermediary results. Using outcome-oriented approaches leaves us seeing agreement where little exists, as I argued in Chapter 3. As I explain the scope and nature of the variation presented in the data, it should become clear that prior work has left a lot of information behind. While my analysis is far from perfect, the work I do in Chapters 6 and 7 better serves the data (and thus, the litigation process) than prior work which focused on a particular phase of litigation.

Dependent Variables

I use three dependent variables. First, I use a simple dichotomous variable for the resolution of the case. I collapse settlement agreements and consent decrees into one category called "Settled Cases" (DV=1). All other cases (which were resolved through some sort of contested decision) are "Non-Settled Cases" (DV=0). Second, some of the motion practice hypotheses in both Chapter 3 and Chapter 7 test the outcomes of the *motion*, not the case. In those analyses, the unit of analysis is the motion, and the dependent variable is whether the EEOC received the relief they wanted. Thus, when the EEOC filed the motion, the DV=1 when the motion was granted in whole or in part, and when the employer filed the motion, the DV=1 when the motion was denied. Finally, when measuring payouts I consider the amount actually paid to the complaining employees. Considering the total monetary relief means including any attorney's fees and costs the EEOC was granted, which

seems inconsistent with my intent to analyze the resource distribution dynamics in litigation. To the extent that I'm analyzing the question of the differences between haves and have-nots in litigation (Galanter 1974), the role of the EEOC is to level the playing field, not drain employers' resources into their own coffers.

Variable	Obs	Mean	Std.Dev.	Min	Max
Damages Awarded	1356	261000	1330000	0	4.00e+07

TABLE 5.1: Descriptive Statistics – Damages Awarded

Proceeded to Judgment	429	18.52	18.52
Settled	1,887	81.48	100.00
Total	2,316	100.00	

TABLE 5.2: Tabulation of types of Outcomes

Complaints and Initial Pleadings

The original data includes information on the statutory basis for the EEOC's claims. This information is contained in Tables 3-6. The summary tabulations suggest that the vast majority of the EEOC's enforcement actions arise under Title VII. This makes sense, as Title VII delineates the most protected classifications. Unlike the ADA, ADEA, and EPA, all of which protect only one class of people, Title VII protects people from six different types of discrimination: race, color, national origin, sex, and religion. All four statutes include anti-retaliation provisions.

Basis	Freq.	Percent	Cum.
yes	1,468	82.70	82.70
no	307	17.30	100.00
Total	1,775	100.00	

TABLE 5.3: Tabulation of titleVIIBasis

yes	213	12.00	12.00
no	1,562	88.00	100.00
Total	1,775	100.00	

TABLE 5.4: Tabulation of ADABasis

yes	140	7.89	7.89
no	1,635	92.11	100.00
Total	1,775	100.00	

TABLE 5.5: Tabulation of ADEABasis

yes	58	3.27	3.27
no	1,717	96.73	100.00
Total	1,775	100.00	

TABLE 5.6: Tabulation of EPABasis

In addition, the correlation matrix in Table 7 between the statutory bases suggest that with the exception of the Equal Pay Act, the claims stand alone. The correlation of the EPA with Title VII makes sense, because they both forbid discrimination on the basis of gender, such that an Equal Pay Act violation is likely to also be a Title VII violation. And indeed, the cross-tabulation between those two

types of claims discloses only seven cases where the EEOC brought an Equal Pay Act claim without also bringing a Title VII claim (see Table 8). The positive correlation of the EPA with ADEA is caused by the smaller number of ADEA cases (see Table 9). Since there is no overlap in protected classes between the ADA and ADEA, or Title VII and ADA or ADEA, it makes sense that those correlations are negative. Except in cases where the protected classification is intersectional and both classifications are alleged to have motivated the adverse employment action, the EEOC would only be able to bring claims under the statute that protected the classification at issue.

Variables	(1)	(2)	(3)	(4)
(1) titleVIIBasis	1.000			
(2) ADABasis	-0.730	1.000		
(3) ADEABasis	-0.458	-0.044	1.000	
(4) EPABasis	0.025	-0.039	0.029	1.000

TABLE 5.7: Matrix of correlations

Title VII	EPA	Basis	
Basis	Yes	No	Total
yes	51	1,417	1,468
no	7	300	307
Total	58	1,717	1,775

TABLE 5.8: Cross-tabulation of Statutory Bases: Title VII and EPA

	EPA	Basis

ADEA Basis	Yes	no	Total
yes	7	133	140
no	51	1,584	1,635
Total	58	1,717	1,775

TABLE 5.9: Cross-tabulation of Statutory Bases: ADEA and EPA

The dataset also contains information on the substantive factual allegations contained in the complaint. It codes for the presence of nine forms of alleged discrimination under EEOC jurisdiction, three non-discrimination theories of liability, and the presence of eleven forms of adverse employment action. The correlations between the types of discrimination are contained in Table 10. They contain some as-expected results. Race, color, and national origin are all positively correlated, while sex and pregnancy discrimination are positively correlated only with each other. Disability discrimination is negatively correlated with all other forms of discrimination, which makes sense given that disability is not associated with any of the other protected characteristics. Age is negatively correlated with everything except associational discrimination, since age comes to everyone.

Variables	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
(1) Race	1.000								
(2) Color	0.141	1.000							
(3) National Origin	0.142	0.217	1.000						
(4) Religion	-0.062	0.004	0.039	1.000					
(5) Sex	-0.375	-0.056	-0.258	-0.227	1.000				
(6) Pregnancy	-0.118	-0.024	-0.072	-0.060	0.167	1.000			
(7) Age	-0.088	-0.006	-0.040	-0.069	-0.250	-0.064	1.000		
(8) Disability	-0.175	-0.017	-0.112	-0.088	-0.374	-0.085	-0.061	1.000	
(9) Association	0.082	0.054	0.063	-0.023	-0.020	0.001	-0.028	-0.036	1.000

TABLE 5.10: Matrix of correlations, types of discrimination

The odd results are for religion and association. Religious discrimination claims are positively associated with color and national-origin claims, but negatively correlated with all others, suggesting that religious claims are mostly brought for minority religious groups with large numbers of people of color. And sure enough, as Table 11 discloses, the plurality of religious claims were brought for Muslims, with a couple others brought for Sikhs. Associational discrimination does not require that the complainant have the protected characteristic, but rather that they have been discriminated against because they are associated with someone with the protected characteristic (the classic example is the employee fired because of their interracial marriage). Thus, these claims can arise in any context, and exhibits no pattern.

Discrimination -			
Religion Category	Freq.	Percent	Cum.
Catholic	2	2.90	2.90
Protestant	11	15.94	18.84
Jewish	9	13.04	31.88
Muslim	25	36.23	68.12
Jehovah's Witness	4	5.80	73.91
Sikh	2	2.90	76.81
Seventh Day Adventist	10	14.49	91.30
Other	6	8.70	100.00
Total	69	100.00	

TABLE 5.11: Tabulation of Religions Alleged for Discriminated Employees

In addition to redressing direct discrimination, the EEOC can redress three additional theories of liability. Retaliation claims arise when the EEOC alleges that the employer took an adverse employment action because an employee engaged in activity protected by an EEOC statute, and can be based on complaints to the employer for unlawful activity directed at the self or others, or based on cooperating with the EEOC's investigations. Disparate impact claims arise when a policy that appears nondiscriminatory has a large adverse effect on a protected group than on those outside it. And pattern and practice claims arise when the discriminatory animus is not driven by the relevant decisionmaker, as with normal discrimination claims, but with the top leadership that engages in a discriminatory policy. About 30% of the observations include a retaliation claim of some sort. Less than 2% of observations assert disparate impact claims, and 6% of observations assert pattern and practice claims.

The EEOC can enforce discrimination that arises out of eleven types of adverse employment actions. These adverse employment actions can be roughly categorized into “failure to enhance employment status” actions (consisting of failure to hire or to promote, issues with testing and training, issues related to pay, and issues related to leave or reasonable accommodations) and “detriments to status” actions (consisting of issues surrounding medical exams, harassment, discipline, demotion, and discharge). Tables 12 and 13 show the correlations between these allegations. There’s not a strong discernable pattern here, although promotions, training, testing and hiring appear to form something of a cluster and medical exams are negatively correlated with all other forms of detrimental actions.

Variables	(1)	(2)	(3)	(4)	(5)	(6)
(1) Hiring Issue						1.000
(2) Testing Issue	0.114					1.000
(3) Training Issue	0.068	0.131				1.000
(4) Pay Issue	-0.064	0.026	0.070			1.000
(5) Promotion Issue	0.026	0.070	0.242	0.103		1.000
(6) Leave/ Accommodation Issue	0.008	0.032	-0.015	-0.058	-0.058	1.000

TABLE 5.12: Matrix of correlations, Failure to Enhance Status Adverse Actions

Variables	(1)	(2)	(3)	(4)	(5)
(1) Medical Exam Issue					1.000
(2)	-0.123				1.000

Harassment Issue					
(3) Discipline Issue	-0.030	0.032			1.000
(4) Demotion Issue	-0.001	0.019	0.194		1.000
(5) Discharge Issue	-0.055	0.131	0.120	0.065	1.000

TABLE 5.13: Matrix of correlations, Detriment to Status Adverse Actions

Responsive Pleadings (Collected Data)

The EEOC Litigation Project is missing information on two phases of the process that I hypothesize to be important: responsive pleadings and jury instructions. To correct this, I collected some additional data to extend the dataset by adding variables. The federal courts use an electronic filing system and provide public access to their docket through a system called “Public Access to Court Electronic Records,” or PACER. PACER charges a per-page fee to access party filings, which would have been cost-prohibitive. However, the regulations implementing PACER allow chief judges of individual courts to grant fee waivers allowing individual researchers to obtain documents from PACER free of charge.

I contacted 93 of 94 United States district courts¹ and requested a fee waiver. Many did not respond at all; some denied the request. For courts that granted the fee waivers, I downloaded from PACER the docket sheets, all answers, and all jury

¹ The EEOC Litigation Project includes no cases from the U.S. Virgin Islands, but does include cases from Washington, D.C., Puerto Rico, Guam, and the Northern Marianas Islands.

instructions available for download for cases already included in the EEOC Litigation Project dataset. Not all cases in the dataset from courts that granted fee waivers were available; the EEOC Litigation Project spans the time period during which the federal courts were rolling out electronic filing, and documents filed prior to the implementation of that system were not available for download.

None of the documents downloaded are published as part of this project; the PACER terms of service forbid the republication of any documents obtained using a fee waiver. However, I offer two mechanisms for review and replication of my work on this data. First, the documents are uploaded to a private cloud server, which I can provide access to on a case-by-case basis; my understanding of the PACER terms of service permits this. Second, for the responsive pleadings, I include as an appendix the codebook I developed in coding the documents for analysis. This codebook contains the exact language of every affirmative defense where I exercised judgment in coding and states how it was coded. This should allow any curious reader or reviewer to evaluate my exercise of judgment and determine whether they agree with me.

Ultimately, I collected 517 responsive pleadings across 283 cases in 37 district courts across 29 states and territories.¹ The number of answers filed in a particular case ranged from one to eight. When I coded answers, after certain identifying information, I coded the number of answers downloaded and how many

¹ I collected documents from cases filed in the District of Columbia and Guam.

of the answers I had were superseded by subsequent pleadings. Superseded pleadings were defined as pleadings where a subsequent document was from the same defendant, responding to the same plaintiff. In some cases, electronic filing was implemented during the life of the case, and some responsive pleadings were downloadable but others were not. These cases are identified.

I count all affirmative defenses asserted across all downloaded documents. I also count the number of defenses falling into one of six categories: defenses specific to employment claims, defenses related to procedural issues, defenses arising out of the common-law equity doctrines, defenses asserting the existence of an arbitration agreement, defenses related to limiting damages rather than liability, and defenses that do not fit any of the other categories. Table 14 provides summary statistics for the six categories of defenses.

Variable	Obs	Mean	Std.Dev.	Min	Max
Total	274	21.153	19.245	0	113
Employment	274	8.898	9.289	0	61
Equity	274	1.617	2.414	0	14
Alternative Dispute Resolution	274	.029	.208	0	2
Damages	274	4.752	5.07	0	30
Procedure	274	4.292	4.172	0	27
Other	274	1.566	3.008	0	23

TABLE 5.14: Descriptive Statistics, Affirmative Defenses Asserted (Raw)

Finally, I generate a “unique defenses index,” in an attempt to roughly eliminate duplicate defenses asserted in superseded answers. This index is generated by dividing the number of non-superseded answers by the number of total answers, and then multiplying each defense count by that index. For example, if I downloaded four answers in a particular case, but two of them were superseded by the other two, the index value for that case would be .5, and every count variable would be multiplied by .5 to get a rough calculation of unique defenses.¹ Table 15 provides summary statistics for the six categories of defenses when corrected using this index.

¹ I acknowledge that this is likely eliminating unique defenses because the similarity score includes non-affirmative-defense text; to the extent that this text is repeated, the repetition in these passages is counted *as if* it constitutes repetitive affirmative defenses. This renders all estimates for the effect of defenses conservative, as it reduces counts of defenses across the board, albeit an indeterminate amount.

Variable	Obs	Mean	Std.Dev.	Min	Max
Total, Corrected	273	17.654	14.583	0	90
Employment, Corrected	273	7.42	6.889	0	35
Alternative Dispute Resolution, Corrected	273	.029	.208	0	2
Equity, Corrected	273	1.316	1.886	0	14
Damages, Corrected	273	4.033	4.107	0	29
Procedure, Corrected	273	3.623	3.359	0	27
Other, Corrected	273	1.234	2.199	0	15.333

TABLE 5.15: Descriptive Statistics, Affirmative Defenses Asserted, Corrected

I collected 80 jury instructions documents from 30 cases in 6 courts across 6 states. The jury instructions ranged from single-party proposed jury instructions, after which the case settled; to multiple sets of opposing proposed jury instructions and multiple orders defining the jury instructions. I discuss these documents further in the jury-instruction qualitative analysis, *infra*.

When I review the responsive pleadings documents I collected, the first issue is whether to use raw defense counts or corrected defense counts. The former counts every defense asserted in every answer. The latter reduces the counts by the ratio of non-superseded answers to total answers, in an attempt to provide some measure of control over the tendency of lawyers to repeat themselves. I offer summary statistics for both so that readers can judge for themselves. In Tables 14 and 15, I offer the summary statistics for both raw defense counts and the corrected counts.

A few things stand out: almost no defendants assert alternative dispute resolution defenses, either the existence of arbitration agreements or collective-bargaining mechanisms. This makes sense, as the primary claim in these matters is

brought by the administrative agency, which has no contractual relationship with the employer that contains such an alternative-dispute-resolution agreement. But it is surprising that employers don't attempt to strip off non-EEOC claims asserted by intervenor plaintiffs through attempts to compel arbitration.

Another surprising result is the *lack* of duplication within cases. While the maximum for employment defenses drops significantly (almost 50%), most other categories of defenses see minimal reductions in their maxima. Means also drop very little in absolute terms, although the proportional reduction in the mean procedural defenses is almost 25%. This suggests to me that most of the repetition in the affirmative defenses is found in the defenses specific to this area of law, and related to liability rather than damages. This makes sense, since defendants want to make sure that the record contains their most powerful defenses.

Motion Practice

The dataset also contains information on 6,358 motions filed across all cases. I eliminated all motions that weren't contested and motions filed by parties other than the EEOC and employers, leaving me with 635 motions across 296 cases, of which 140 had only one motion filed, 75 had two motions filed, and the remaining 81 were spread between three and seventeen motions filed. Table 16 provides some summary statistics about the types of motions filed, who filed them, and the results.

Motion Type	EEOC Filed			Defendant Filed		
	Granted	Partially Granted	Denied	Granted	Partially Granted	Denied
12(b)(6) - Dismissal				8	6	33
12(b)(7) - Dismissal						2
12(b)(1) - Jurisdiction/Venue				5	1	24
Default Judgment			1			
Voluntary Dismissal						1
41(b) - Invol. Dismissal				9	4	41
Judgment on Pleadings				2		3
Joinder			1			1
Severance						5
Discovery	26	19	32	20	18	29
Summary Judgment	11	12	29	51	54	136
59(c) - Alter or Amend Judgment		3	3	2	2	5
50(a) - Judgment as a Matter of Law				1	2	13
Injunction	2	1	3			
Remittitur/ Additur	1			1		1
New Trial		1	2			5
Consolidation	2					1

TABLE 5.16: Summary statistics for motion filings by party filed and outcome.
Source: EEOC Litigation Project

From these summary statistics we can see that almost half (46%) of the contested motion practice consists of motions for summary judgment, a pre-trial dispositive motion that requires the undisputed facts to support judgment for one side or the other (Fed. R. Civ. P. 56). Another 21% of contested motion practice consists of various motions to dismiss under either Rule 12 or Rule 41, which present mechanisms for the court to dispose of cases where no plausible claim for relief can be presented (*Twombly* 2007; *Iqbal* 2009). Most of the remaining third (23%) consists of contested "substantive discovery motions," defined as "motions to

compel, for a protective order, etc., rather than motions related to timing of discovery, numerical limits, etc" (Kim, Schlanger, and Martin 2013). Thus, nine out of ten contested motions in the dataset are either dispositive or discovery-related.

We also see the party distribution of motion practice. With the exception of discovery motions and motions for reconsideration, where the EEOC and employers initiate the court's review almost equally, employers are much more likely to engage in motion practice. For example, the EEOC files less than one in five summary judgment motions. This is consistent with the state of the law, since the Supreme Court has said that plaintiffs always bear the ultimate burden of persuasion in employment law (*Reeves* 2000), and thus summary judgment for a plaintiff will almost never be proper, since a factfinder is entitled to disregard evidence (*Karlson* 2017). In other types of motion practice, the EEOC files very little, but neither do defendants.

Jury Instructions

The literature on jury instructions actually offers almost no discussion of the effect that the jury-instruction process has on the *parties*. Jury instructions become relevant at the trial phase of the case, where the finder of fact receives instruction on the law governing the case. The parties can seek agreement on the instructions, but where they do not agree, the court decides what the appropriate instruction is, after hearing the parties' suggestions and justifications.

There are, in essence, two interacting research questions underlying this project's interest in jury instructions. First, do jury instructions alter outcomes

indirectly? This would require some evidence that jury instructions induce the parties to settle, or change settlement payouts. Second, do jury instructions alter outcomes directly? This would require some evidence that jury instructions play a role in the jury's verdict. After a careful analysis of thirty cases' jury instructions, both proffered and ordered, I feel comfortable saying that there may be two categories of jury instructions: procedural, which don't really affect the outcome; and merits, which do.

The state of knowledge on jury instructions

In terms of prior literature, relevant evidence is rare. A careful canvass of the literature suggests that there may, in fact, be *not a single piece of scholarship* examining the relationship between jury instructions and settlements. This is hardly surprising; by the time a case reaches the point of needing jury instructions, litigant positions can reasonably be expected to have hardened beyond the hope of settlement.

And yet; of thirty cases I reviewed for this analysis, seventeen lack any sort of court order defining the appropriate jury instructions and thus unequivocally settled. Three of the other thirteen settled after the court's adoption of the jury instructions and before the verdict. So the relationship between jury instructions and settlements shouldn't be ignored. The fact that it has been ignored to date strikes me as coming from a paucity of easy data. The rarity of jury instructions and the difficulty of collecting trial-court data means that the use of real data presents

resource demands that many scholars cannot meet.¹ In addition, the jury decision-making literature uses simulated juries and surveys to test hypotheses where real-case data is difficult or unavailable – and of course, the whole point of settlement is that it deprives the jury of the decision, rendering both simulations and surveys irrelevant.

When considering the relationship between jury instructions and verdicts, the first question is whether jurors understand the instructions they've received at all. The answer appears to be that they mostly do not. One group of studies tests juror comprehension of instructions without any intervening trial (Luginbuhl 1992). Another group tests juror comprehension after simulated trials (Hastie, Schkade, and Payne 1999). And yet another group uses actual juries via post-trial data collection, either using questionnaires (Saxton 1998) or interviews (Young, Cameron, and Tinsley 2001). None of them have great results; most show comprehension scores between 50 and 70 percent (Devine 2012). Equally as troubling, most jurors report having no problems understanding their instructions (Cutler and Hughes 2001). Ultimately, if whether a jury instruction has any impact on the verdict comes down to a coin flip on whether the jury understood it, should we even care?

¹ State courts are even harder to collect data for, as many of them still do not provide electronic access to court records.

I submit that we should, for two reasons. First, the litigants clearly think that jury instructions matter. Twenty-five of thirty cases demonstrate at least some contestation of the jury instructions. Second, like motion practice, jury instructions afford the parties an opportunity to receive the court's evaluation of their respective views of the case (Boyd and Hoffman 2012). Since I conceive of trial litigation as the authoritative disposition of resources through the application of reasoned proof and evidence (Fuller 1978), that ongoing dialogue becomes an important part of the process.

In evaluating the effect that jury instructions actually have on the verdict, the first concern is the diversity of analyses. One meta-analysis found little relationship between jury instructions and juror behavior, but considered five different kinds of instructions (pre-trial publicity, nullification, disregarding inadmissible evidence, eyewitness testimony, and legal definitions) and five different types of jury outcome measures (verdicts, sentences, attitudes, comprehension, and recall) (Nietzel, McCarthy, and Kerr 1999). This diversity suggests that a possible result was that some instructions have positive effects on certain outcomes, while other instructions had negative effects, thus washing out the true effects.

A subsequent meta-analysis examined only the effect of limiting instructions on inadmissible evidence on criminal verdicts, and found that giving those instructions at the end of the trial had a fairly significant effect on jury behavior, reducing convictions by 16 percent (Stebly, Hosch, Culhane, and McWethy 2006).

They also found that giving a limiting instruction immediately upon the ruling that evidence is inadmissible had almost no effect, and in a few studies even increased conviction rates, which the authors speculated grew out of calling attention to the inadmissible evidence.

So which should we believe? The Nietzel et al. analysis has the benefit of more closely approximating a real case's environment, where jurors receive a dizzying array of instructions on a variety of topics, and then are directed to retire and "deliberate," whatever that means to them (Abramson 2000). But the Steblay et al. analysis suggests that there may be different effects for different instructions and that trial context matters as well. Ultimately, given the paucity of data, a definitive answer is well beyond the scope of this project, but I hope to offer a bit of evidence to guide future researchers with better resources to hand.

Data collection and processing protocol

I use cases selected for and included in the EEOC Litigation Project, because unless the settlement was sealed by court order or the case was live when they concluded data collection, all cases have outcomes, even if they settle (Kim, Schlanger, and Martin 2013). 1,669 cases in that dataset have outcomes. I used the same data collection protocol for jury instruction as I used for responsive pleadings, discussed *supra*. First, I will offer some descriptive statistics on the thirty cases I have. These statistics will offer some insight into the scope of the data. Next, I will consider three case studies where the parties contested the jury instructions and the court entered an order resolving the contestation: one where the case settled,

one where it went to a plaintiff's verdict, and one where it went to a defendant's verdict.

In coding jury instructions documents, I considered whether an instruction was "contested" or "uncontested." Contested instructions were those where both the EEOC and the employer submitted competing instructions on a particular topic, or there was an indicator that the non-submitting party objected to the submission in some way. Objections could be explicit ("[party] objects to this instruction") or implicit (an instruction marked as "[party]'s proposed jury instruction"). Just because only one party filed a particular instruction did not lead me to code it as contested.

I then had to determine, in cases where the court entered a jury instructions order, whether it had used the EEOC's version, the defendant's version, an uncontested instruction, some cobbled-together instruction that partook of both sides' submissions, or a different instruction altogether. The last three categories were all treated as functionally equivalent as being in favor of neither party. The only times I coded a court's order as adopting a party's instruction was where the opposing party had contested the instruction, either by objecting or by offering an alternative, and the court had adopted the submitting party's instruction verbatim.

Descriptive statistics

In cases where the court entered no order regarding jury instructions (n=17), the parties agreed on an average of 19.35 instructions, and disagreed on an average of 15.41 instructions. The minimum number of agreed instructions was one, and the

maximum was 48. The minimum number of contested instructions was zero, and the maximum was 56. The median number of agreed instructions was 18, and the median number of contested instructions was 6. The number of cases with no contested instructions was five, which explains the difference between the mean and median numbers of contested instructions.

There were a few patterns that began to emerge from these seventeen cases. The parties tended to agree on framing instructions, such as instructions on what “preponderance of the evidence” meant, what is and is not evidence, and the ways in which the jury should consider different types of evidence (such as depositions, expert witnesses, or interrogatories or admissions). There tended to be more disagreement over substantive instructions, such as the elements of the claims, the ways in which different types of damages could be proven (or whether they were available at all). But as discussed above, there were five cases where there was no contestation. In four of these five cases, only one party submitted jury instructions. In two cases, only the employer submitted jury instructions. In one case, only the EEOC submitted jury instructions. In the fourth case, only the individual claimant-intervenor submitted jury instructions. And in the last case, only the EEOC and the intervenor plaintiff submitted jury instructions. This suggests that the only time that parties don’t contest *anything* in the jury instruction process is when they reach a resolution before the second mover in the process files their jury instructions.

In cases where the court entered a jury instructions order (n=13), I set aside one order because it had no associated submissions, making it impossible to determine how the parties' contestation affected the court's decision.¹ Of the remaining twelve cases, the parties agreed on an average of 21.53 instructions and contested an average of 20.67 instructions. The minimum number of uncontested instructions was 6, and the maximum was 47. The minimum number of contested instructions was 3, and the maximum was 45. The median number of uncontested instructions was 23, and the median number of contested instructions was 22.

When the courts entered jury instructions, they tended to prefer crafting their own instructions from the bits and pieces offered by the parties. Two court orders contained no instructions offered by the parties, instead only instructing the jury using the court's constructed instructions. One other court adopted only one of the defendant's instructions, spurning the EEOC entirely. Including these three, the twelve court orders instructing juries adopted a mean of 3.33 plaintiff's instructions and 3.41 defendant's instructions, and crafted an average of 11.41 of their own.² The minimum number of instructions adopted from either side was 0, as stated. The maximum number of plaintiff's instructions adopted was 9, and the maximum number of defendant's instructions adopted was 10. The maximum

¹ This case was live during the implementation of electronic filing in that court, so that some documents were downloadable and others were not. The court's order selecting jury instructions was downloadable; the parties' submissions of proposed jury instructions were not.

² Astute readers may note that this means a *lot* of proffered instructions are not recorded as having been accepted by the court *at all*.

number of adopted instructions proffered by both or neither side was 24, while the minimum was 1. The median numbers of instructions adopted was 2.5 from the plaintiff, 3.5 from the defendant, and 13 crafted by the court or uncontested.

Five of the twelve cases with court orders were from the Middle District of Florida. Three of the remaining seven were from the District of Arizona. The other four were one apiece from the District of Connecticut, the Northern District of Indiana, the District of Nebraska, and the Western District of North Carolina.

Of these twelve cases, three settled prior to a verdict. One of the three settlements was sealed, making it impossible to determine the payouts. The other two settlements were for \$75,000 and \$90,000. Of the other nine cases, employers won four of them, resulting in judgments of zero. The five plaintiffs' judgments produced employee payouts of between \$200 and \$1.55 million.

Case-study analysis

This qualitative analysis should be considered a “straw-in-the-wind” test of jury instruction relationships (Collier 2011; Ricks and Liu 2018), because there are many other plausible explanations for the outcome of interest. The case selection method is a variation on Seawright and Gerring (2008)'s diverse case selection method, in that it encompasses all possible outcomes but is indifferent as to causal values. Geddes (2003) makes the point that in these types of research problems where the causal mechanism is ill-specified (or unspecified) that selection of cases on the dependent variable may be appropriate for the exploration of plausible causal mechanisms rather than hypothesis testing. Gerring (2012) similarly argues

that descriptive work needs to be done without pre-expected causal relationships in mind to support the expansion of causal investigation into new arenas. Given the paucity of existing research on jury instructions, I argue that a descriptive approach is appropriate without expectations.

In case selection, I found that it is possible to have all three outcome types in cases from the same court – the Middle District of Florida.¹ Thus, I limit my qualitative analysis of the jury instruction process to three cases in the Middle District of Florida. *EEOC v. Rio Bravo International, Inc.*, Docket No. 99-cv-01371-EAK-MAP (M.D. Fla.) resulted in a plaintiff’s judgment of \$1.55 million. *EEOC v. Pacino’s, Inc.*, Docket No. 97-cv-01193-PCF, resulted in a \$75,000 settlement. *EEOC v. FLTVT, LLC*, Docket No. 05-cv-01452-JA-KRS, resulted in a judgment for the defendant. In describing the processes these three cases took, I will refer to document titles in text and ECF document numbers in parentheses. All documents are available for review upon request, but cannot be published due to the terms of the PACER fee waiver, as discussed above.

Rio Bravo

In *Rio Bravo*, the EEOC and the intervening plaintiffs first submitted a single instruction equating Title VII and the Florida Civil Rights Act (Doc. 333). They also submitted two “amended” sets of jury instructions, which were identical

¹ The \$200 plaintiff’s judgment can be classified as a net defendant’s victory, which would allow for one of each case type from Arizona to be analyzed. But I conservatively only count defendants’ judgments as defense victories for this analysis.

except the first one included pre-trial instructions rejected by the court and alternative theories of liability that it appears the court directed the EEOC to scrap, since the second amended set refers to the court's "*ore tenus* order" (Doc. 412).¹ Between these filings, the defendants offered their set of instructions (Doc. 370). The plaintiffs submitted a total of 18 instructions, and the defendant submitted 16. Of these, the parties disagreed on 11, for a total number of contested instructions of 22, and did not contest 13. The court adopted 4 of the plaintiff's instructions and 5 of the defendant's, crafting 13 of their own.

In preliminary matters, the parties disagreed on whether the court should instruct the jury that a government agency and a corporation are equal before the law, whether the jury should be instructed that they could draw inferences from the evidence, whether the jury should be instructed on the "hired gun" line of questioning,² and whether the jury should be instructed to ignore the "reasonable doubt" standard used in criminal trials. On the merits of the case, the parties disagreed on how much detail the jury should receive on how sexual harassment claims were evaluated, how deeply the law of retaliation should be explained, whether a mixed-motive instruction was appropriate,³ and how to frame the jury's analysis of any damages claim.

¹ *Ore tenus* is Latin for "by way of mouth," and refers to an order or request for relief done in court, not reflected in a filing on the record.

² Expert witnesses are frequently cross-examined on the financial aspects of their testimony as an attack on their credibility. This is sometimes referred to as the "hired gun" question: whether an expert is a "hired gun" who will say whatever they're paid to say.

³ Mixed-motive instructions grew out of the 1991 Civil Rights Act, and allow plaintiffs to recover if

The court adopted most of the defendant’s preferred instructions in the preliminary matters, while adopting the plaintiff’s preferred instructions on the merits issues (Doc. 431). The court-crafted instructions mostly involved compromises between the parties – where one party preferred including a paragraph and the other preferred excluding it, the court usually included part of the paragraph, and similar decisions.

For example, the EEOC argued that the claimants’ claims of sexual harassment required them to prove that the Defendant, “through its agents,” subjected the claimants to “sexually demeaning conduct that was unwelcome,” and that was “sufficiently severe or ‘pervasive’ to alter the conditions of employment and create an abusive environment” (Doc. 412). They defined “unwelcome” conduct as conduct that the claimant “did not solicit or invite” and that they “considered . . . undesirable and offensive” (Doc. 412). They then pointed out that determining whether a work environment is hostile required considering the totality of the circumstances, and that there is a balancing act between repetitive unwelcome sexual conduct and severe unwelcome sexual conduct – the greater the frequency, the less severity that is required to meet the standard, and vice versa (Doc. 412).

The Defendant, in contrast, offered five elements that the EEOC had to prove. In addition to the elements offered by the EEOC, they argued that the

they show that both a legitimate and a discriminatory motive underlay their termination, unless the defendant can show that even without the discriminatory motive, they would have made the same decision.

agency had to prove both that an objective person would find the work environment to be hostile and abusive and that the claimants found the work environment to be subjectively (as in, to themselves personally) hostile and abusive (Doc. 329). They also offered a discussion on “ordinary socializing in the workplace,” which is not sexual harassment, even if it is “occasional horseplay, sexual flirtation, sporadic or occasional use of abusive language, gender related jokes, and occasional teasing” (Doc. 329). They also asserted a requirement for but-for causation.¹

The district court crafted its own instruction on liability. It used the EEOC’s proposed instruction for the first three paragraphs, which covered the scope of the claims and the elements the EEOC was required to prove (Doc. 431). In instructing the jury on what had to be proven to show that the work environment was “hostile and abusive,” the court switched to using the Defendant’s preferred language except that it excluded the element of unwelcomeness because it had already discussed the requirement that the sexual conduct be unwelcome (Doc. 431). It then went on to switch back to the Plaintiff’s instruction on the meaning of the totality of the circumstances, the weighing of severity and frequency, and declined to give the Defendant’s instruction on “ordinary socializing” or on but-for causation (Doc. 431).

In the end, the jury returned a verdict for the plaintiffs in the amount of \$1.55 million, or \$310,000 per plaintiff. This suggests that the *number of*

¹ But-for causation means that if the asserted wrongful act hadn’t occurred, nor would whatever damages the Plaintiff seeks to prove. It is distinguished from “proximate causation,” where any damage that is a foreseeable result of the wrongful act is recoverable.

instructions adopted from each side may matter less than *which* instructions are adopted. When the parties contest *both* preliminary and merits matters, maybe the jury is more likely to pay attention to and decide along the lines of the party whose merits instructions are adopted.

Pacino's

In *Pacino's*, the parties submitted a single jury instructions document, including the eight instructions they agreed on, the 18 submitted by the EEOC, and the 11 submitted by the defendant (Doc. 25). The parties agreed on four preliminary instructions related to the basic structure of the case, how to interpret the court's questions, and the credibility and impeachment of witnesses. They also agreed on two merits instructions on the definition of sexual harassment and that harassment need not involve a supervisor. They finally also agreed on two postliminary instructions related to the jury's conduct in the jury room.

The parties disagreed on instructions regarding what is and is not evidence, the burden of proof, the elements of the claims and defenses, the propriety of the mixed-motive instruction, damages, and certain other postliminary issues (Doc. 25). The court mostly adopted the plaintiff's proffered instructions, with the exceptions

being the instructions on the burden of proof, the *Ellerth/Faragher* defense,¹ the business judgment rule,² and punitive damages (Doc. 55).

On the burden of proof, the EEOC offered an instruction that said that the burden of proof required them to persuade the jury that “the Plaintiff’s claim is more likely true than not true” (Doc. 25). They then went on to distinguish this proof standard from “absolute certainty” or “beyond a reasonable doubt” (Doc. 25). The Defendant objected to this instruction but did not offer an alternative. The Court adopted the Plaintiff’s instruction except for the contrast with non-germane proof standards.

On the elements of the sexual harassment claim, the EEOC offered a similar instruction to the one they offered in *Rio Bravo*, except that they included a passage explaining that psychological damage is not required to meet the sexual harassment standard. The Defendant offered a complicated analysis of the elements that stretched across two instructions – one which discussed the claim and one which addressed the objective and subjective standards for a hostile environment. The Defendant asked the jury to be instructed on twelve factors to determine if the claim was valid, including the question of whether the work environment was

¹ The *Ellerth/Faragher* defense precludes legal liability for sexual harassment if the employer had an anti-harassment policy in place that included safe reporting mechanisms, and the employee unreasonably failed to take advantage of it. The logic behind the defense is that employers should be encouraged to protect their employees from sexual harassment rather than requiring lawsuits to do so, and the employer cannot be faulted if they attempted to protect the employee and the employee failed to take advantage of their protection.

² Which provides that as long as the employer’s reasons meet the legal requirements, the jury cannot find for the plaintiff because they think the employer *should* have done something else.

hostile, and six more factors to determine if the work environment was hostile. The district court adopted the Plaintiff's proffered instruction verbatim.

For punitive damages, the Defendant offered no instruction and objected to the EEOC's proffered instruction. The EEOC offered a lengthy punitive damages instruction that described the required state of mind, the appropriate standards for calculating punitive damages, and factors to consider in whether an award of punitive damages was appropriate. The district court gave the EEOC's instruction but with a significantly reduced verbiage, providing less guidance and fewer examples (Doc. 55).

The case eventually settled, with the claimant receiving \$75,000. This somewhat scattered outcome on the jury-instructions process may explain why the *Pacino's* case settled rather than going to verdict. Because the EEOC had gotten a lot of what they asked for, the employer may have been concerned that the EEOC's instructions could sway the jury. But because they didn't get everything they asked for, the agency may have been concerned that the jury would not have seen the case through the same lens they did.

FLTVT

In *FLTVT*, the parties submitted a single jury instructions document, with their proffered instructions intermingled with their agreed instructions in the order in which they expected them to be read (Doc. 59). The parties agreed only on certain preliminary matters, and disagreed on the jury's duty to follow the court's instructions, what is and is not evidence, and all the instructions on elements and

defenses of the claims involved (Doc. 59). The court typically followed the defendant's preferred form of instruction, injecting language from the plaintiff's preferred instructions in the discussion of the elements of the claim (Doc. 102). Specifically, the court converted a list of elements of the claim, as proffered by Defendants, into a narrative description of the elements. The only change was the elimination of the need to count the elements (Doc. 102). Other than that, the instruction given was the Defendant's, word-for-word. The court took, if anything, an even more defendant-friendly approach in other contested jury instructions. The court also rejected the EEOC's effort to break out each claimant and have their claims instructed separately, giving a single set of instructions for each type of claim and identifying the claimants for whom it was relevant (Doc. 102).

In this case, the jury returned a verdict for defendants, thus resulting in judgment against the EEOC. It thus appears that in all three cases, the court's preference for one side's *merits* arguments could have resulted in an outcome in that side's favor, suggesting that litigators are skilled at crafting jury instructions that tilt the jury in their favor, which is different from saying that any of these instructions are accurate.

Conclusion

In conclusion, the EEOC Litigation Project presents an opportunity to examine trial-court behavior in a way that hasn't previously been done. However, so far only four published articles have made use of this dataset. Two focused on the behavior of the administrative agency, and thus more appropriately belong in the

bureaucratic politics literature (Schlanger and Kim 2013; Bornstein 2014). The other two focus on the effects of judicial characteristics on outcomes (Boyd 2016; Knepper 2018). None of them talk about interactions between the litigants or interactions between the litigants and the trial court. Thus, as I conceive of litigation as it is actually practiced, none of the prior uses of the EEOC Litigation Project have fully leveraged its power. As was made evident in Chapter 3, the ability to hold case-level variables fixed and watch the development of the case over time is a new ability that this dataset grants which prior judicial data did not. Once again we see the phenomenon of litigant behavior being treated as separate from judicial behavior, instead of appropriately measuring the dialogue between them. I will grant that appropriate research designs are hard in these contexts – note the ambiguity and tentativeness of the empirical conclusions I reach in Chapter 3 – but that doesn't mean we should simply abandon the field.

Unfortunately, the EEOC Litigation Project is incomplete. Some of its lacunae cannot be filled – the federal practice of conducting discovery “offstage” until the parties reach an impasse renders that phase of litigation extremely opaque. But I have attempted to fill some of the gaps. I have secured enough documents to allow a meaningful analysis of the ways in which responsive pleadings affect case outcomes. The dynamics of those responsive pleadings suggest that defendants contest liability about twice as frequently as they contest damages, and that there is also a certain amount of risk management in defense pleading.

The other major gap that I attempted to fill was with jury instructions. While I did not have enough data to undertake quantitative analysis, I think this qualitative analysis performed two functions. First, it gives a useful distinction between *procedural* jury instructions, where contestation may have little effect on outcomes; and *merits* jury instructions, where the parties may fruitfully contend to affect the final result. This may suggest ways for simulated jury research to test the generalizability of these findings by expanding into an experimental survey.

For example, scholars could test whether different jury instructions lead to different outcomes. By holding constant the case facts vignette, written to create both a procedural issue and a merits issue, scholars could A/B test both types of jury instructions in a 2x2 survey experiment. This would let us see a) whether changing the jury instructions in a way that parties contest changes outcomes and b) whether the parties correctly predict the instruction that is better for their side.

Second, it demonstrates that jury instructions are a fruitful realm of analysis, in addition to our existing interest in motion practice and final outcomes. Data collection is onerous and data is scarce, but this additional stage for us to analyze the relationship among the participants in litigation grants more leverage into understanding how litigation allows us to distribute resources.

Finally, I hope the descriptive analysis in this chapter helps to set up and understand the quantitative analysis in the next two chapters. In them, I will work through the phases of litigation as I've described them in Chapter 3 and in the order in which I've presented them here. I will test all the hypotheses presented in

Chapter 3, but organized slightly differently. In Chapter 3, I presented all the hypotheses in order of the case phase. I break these hypotheses into two groups: those related to settlement (which speak to the existing literature that focuses on whether cases settle or go to judgment); and those related to payouts (which leverage the new dataset's strength in including settlement amounts). Among prior literature that uses this data, two pieces use dispositive motion outcomes (Boyd 2016; Knepper 2018); one uses EEOC injunctive-relief information (Schlanger and Kim 2013); one considers the rates of private-plaintiff intervention (Bornstein 2014); and *none* have so far utilized the payouts variables to see *how much* plaintiffs win. Thus, Chapter 6 speaks to the existing literature on trial court outcomes, while Chapter 7 breaks new ground and asks what plaintiffs get out of litigation as time goes on.

In addition, I include in Chapter 7 some discussion of testing the Priest-Klein hypothesis, asking whether litigants are systematically settling at different phases of the case. My analysis suggests that there are some case phases where litigants opt out of the decision process in ways that affect outcomes, rendering the outcome sample selected. This may raise questions about the validity of the results in those studies that look at outcomes (Boyd 2016; Knepper 2018). I leave for future research the reconciliation of my findings with Boyd's and Knepper's, who focus on a particular question beyond the scope of this analysis.

SETTLEMENT DETERMINANTS

So far, I have demonstrated that research on trial courts needs the additional leverage of considering the entire life cycle of the case. This approach is extremely rare; arguably, even those studies that consider those elements that are prior to final outcome generally limit their analysis to one piece of the puzzle. I have already demonstrated that there is a plausible argument supporting the analysis of jury instructions in outcomes. I have also demonstrated that the best available information for analyzing outcomes is the actual payout rather than any standardized value that would take into account the different *potential* recoveries in different cases. Finally, I have demonstrated that the appropriate way to conceive of litigation is as a dialogue among the litigants and the court.

In this chapter I will analyze how the progress of the case through the litigation process affects the probability of settlement. This approach fits into the existing literature on the differences between cases that settle and cases that go to trial. I ask whether the progressive unveiling of information over the life of the case affects the probability of settlement. I theorize that as the case develops and the dialogue continues, the increasing information context allows the parties to move closer to one another, eventually creating a “contract zone” (Pecorino and Van Boening 2010) where they can reach an agreement and settle the case.

Most prior work has focused on dichotomous outcomes.¹ And the Priest-Klein literature suggests that there is an analytical difference between cases that settle and cases that go to trial. This gives me two reasons to examine how events in the litigation process affect probabilities of settlement. First, it allows me to converse with prior work on the probability of settlement (e.g., Wofford 2017; Boyd and Hoffman 2012; Boyd 2013). Second, it allows me to test directly the Priest-Klein hypothesis, seeing if there are systematic differences in outcomes between cases that settle and cases that go to judgment. This fits into the dissertation's larger project because settlement dynamics are both empirically interesting in their own right and underlie any analysis of outcomes, given the possibility that settlement systematically affects the sample of cases that are tried.

Part of the importance of settlement lies in the litigants' power to end the case without a decision on the merits. The concern that this raises for scholars is that if there is a systematic difference between the cases that settle and the cases that proceed to judgment, then inferences from the cases that proceed to judgment cannot be generalized to the cases that settle (Klerman and Lee 2014; Shavell 1996; Ashenfelter, Eisenberg, and Schwartz 1995). Thus, the first set of results I report offer explanations of the determinants of settlement. I use probit regression for my

¹ See Chapter 2 for a discussion of the prior work that takes this approach, and exceptions to the rule.

settlement hypotheses in order to accommodate a “two-part” selection-effects model (Manning, Duan, and Rogers 1987).

As discussed in Chapter 5, the dependent variable for these analyses is whether the case settled. I define “settlement” in this chapter as encompassing both forms of agreed resolutions in the EEOC dataset – both settlements and consent decrees. Functionally, the difference between them lies only in enforcement and continued judicial oversight, so it is reasonable to treat them as equivalent for my purposes here. In general, I expect increasing informational contexts to support increasing likelihood of settlement, except for the post-judgment context of appeals, where I expect a hardening of positions to prevent settlement, since the court has now made a final decision.

The first part of the litigation process involves the filing of the complaint. At the point that the complaint is served, the parties know the factual allegations of the complaint, the identities of the parties, and the judge assigned. This information remains constant throughout the case (with the exception of cases where judges are reassigned for various reasons). Thus, I always include variables measuring the case complexity, in the form of the count of complaint allegations; the number of complainants the EEOC represents; the judge’s ideology as measured with the Judicial Common Space; dummies representing whether the case occurred before or after the three major cases changing the landscape of employment law during the 1996-2006 time period (*Desert Palace*, *Sutton*, and *Reeves*); and some key types of factual allegations. Table 1 lists the variables included in the probit

regression. In reporting results, I only list the variables that demonstrate statistical significance at least at $p < .1$.¹

Variable Name	Variable Description
Settled	Whether the case settled or proceeded to judgment.
Number of Complainants	Count of the number of individuals for whom the EEOC brought suit.
Issues Alleged	Count of the factual allegations coded in the EEOC dataset.
Judicial Common Space	Judicial Common Space score of the judge assigned to the case.
<i>Desert Palace</i>	1 if the case was decided after <i>Costa v. Desert Palace Resort, Inc.</i> ; else 0.
<i>Sutton</i>	1 if the case was decided after <i>Sutton v. United Airlines</i> ; else 0.
<i>Reeves</i>	1 if the case was decided after <i>Reeves v. Sanderson Plumbing Products, Inc.</i> ; else 0.
Title VII	1 if the EEOC brought suit under Title VII; else 0.
ADA	1 if the EEOC brought suit under the Americans with Disabilities Act; else 0.
ADEA	1 if the EEOC brought suit under the Age Discrimination in Employment Act; else 0.
Alleged Race Discrimination	1 if the EEOC alleged discrimination on the basis of race; else 0.
Alleged Sex Discrimination	1 if the EEOC alleged discrimination on the basis of sex; else 0.
Alleged Retaliation	1 if the EEOC alleged retaliation; else 0.
Alleged Pattern and Practice	1 if the EEOC alleged that the discrimination was a result of a pattern or practice; else 0.
Alleged Disparate Impact	1 if the EEOC alleged disparate impact; else 0.
Seeking Non-Pecuniary Relief	1 if the EEOC sought non-pecuniary relief (pain and suffering damages); else 0.
Seeking Punitive Relief	1 if the EEOC sought punitive damages; else 0.
Notice of Appeal Filed	1 if the case was appealed to the circuit court; else 0.

TABLE 6.1: Variables used throughout.

¹ Full tables are reported in an appendix.

Initial Filings

The first hypothesis I test is whether the number of complainants played a role in determining whether the case settled. I expect this relationship to be positive, since larger cases present a larger risk for defendants and should induce them to settle. Table 2 reports the regression results for this hypothesis, but only the test variable and statistically significant controls. The first result that jumps out is that there is no measurable effect for the number of complainants. This suggests that contrary to my theoretical expectations, that increasing the number of complainants does not push the parties toward settlement. I had theorized that increasing the number of complainants would increase the risk exposure for defendants, encouraging risk-averse defendants to settle. Instead, it appears that while some risk-averse defendants may settle, others may avoid settlement as complainants increase because of the increased cost of settlement.

Settled	Coef.	St.Err	t-value	p-value	Sig.
Number of Complainants	0.036	0.028	1.26	0.208	
Seeking Non-Pecuniary Relief	-0.956	0.469	-2.04	0.042	**
Seeking Punitive Relief	1.585	0.863	1.84	0.066	*
Constant	19.294	919.128	0.02	0.983	

TABLE 6.2: Likelihood of settlement, based on number of complainants

*** p<0.01, ** p<0.05, * p<0.1

The statistically-significant control variables support the notion that settlement is driven by risk aversion. When the EEOC alleges non-pecuniary damages, which are damages that compensate for actual but non-economic harm,

the likelihood of settlement decreases, because defendants know that non-pecuniary damages require specific proof and the evidence can be difficult to judge. However, when the EEOC alleges punitive damages, the likelihood of settlement rises, because while punitive damages are difficult to prove, they present a large risk exposure for defendants that outweighs the difficulty of proving them.

While no coefficients are reported in the main text for non-significant controls, the null results also capture a few interesting effects. The parties know the ideology of the judge, but it does not affect the likelihood of settlement.¹ The statutory basis of the claims filed, the complexity of the case (as measured by the number of factual allegations the EEOC makes), and alleging the most common and lucrative types of claims, have no effect on the likelihood of settlement. The only issues that matter are the types of relief the EEOC seeks. This is consistent with the Priest-Klein hypothesis literature that argues that changes in the damages standard lead to changes in settlement rates (Klerman and Lee 2014).

Responsive Pleadings

The second settlement hypothesis is related to responsive pleadings. The basic argument here is that when defendants respond to the complaint, they a) increase the case complexity by asserting certain affirmative defenses; b) assert the viability of certain legal issues not raised in the complaint; and c) signal their own competence and persistence. This additional information plays a role in allowing the

¹ This will be further discussed when reporting results testing Hypothesis 15.

parties to move closer to one another in their settlement expectations, and may allow negotiations to proceed in a more complete factual situation. To that end, I expect that the assertion of certain types of affirmative defenses should increase the probability of settlement. Table 3 discusses the answer-related variables included in this analysis.

Variable	Description
Employment-Related Defenses	Count of defenses that appear to be related to specific employment-law issues.
Procedural Defenses	Count of defenses that appear to be related to the rules of civil procedure.
Equity Defenses	Count of defenses that appear to be related to equity rather than law.
Arbitration Defenses	Count of defenses that appear to be related to an arbitration agreement.
Damages Defenses	Count of defenses related to limiting damages assuming liability.
Other Defenses	Count of defenses that do not appear related to any of the above categories.
Corrected Total Defenses	The total defenses (sum of the above) reduced by the case's repetition coefficient as calculated in Chapter 5.

TABLE 6.3: Affirmative Defenses Variables

In Hypothesis 3, I theorized that asserting more employment-specific defenses would signal greater competence and determination to defend, which could induce a busy agency attorney to settle rather than litigate a case that would be hard-fought. Table 4 shows the results from testing this hypothesis. Column One shows the results from the raw defense count, while Column Two shows the corrected count results.¹ In both cases, the results are the same in direction, although slightly different in magnitude and in statistical significance. I report the

¹ The “corrected” count of defenses attempts to account for repetition across multiple responsive pleadings. Details on how I attempt to correct can be found in Chapter 5.

results for five categories of defenses.¹ Because none of the controls were statistically distinguishable at $p < .1$, I report coefficients for none of them; full tables are provided in an appendix.

Settlement	Raw Count (b/se)	Corrected Count (b/se)
Employment Defenses	0.037** (.019)	0.039 (.024)
Damages Defenses	-0.045 (.030)	0.042 (.035)
Other Defenses	-0.047 (.035)	-0.074* (.044)
Equity Defenses	0.004 (.045)	-0.018 (.058)
Procedure Defenses	-0.054* (.032)	-0.046 (.038)

TABLE 6.4: Likelihood of settlement, responsive pleadings. * = $p < .1$, ** = $p < .05$.

Table 4 demonstrates that Hypothesis 3 should be further investigated. On the raw count, Hypothesis 3 is confirmed at $p < .05$ – more employment defenses make settlement more likely. But when we use the corrected count, the statistical distinction from randomness dissipates, leaving the results uncertain. I can't claim that Hypothesis 3 is confirmed, because the hypothesized causal mechanism is the signals of competence counsel sends. Since the corrected count approximates the actual assertion of unique employment defenses, while the raw count also measures the ability of defense counsel to repeat themselves, I don't feel comfortable saying that defense counsel competence drives settlement.

In other results, asserting more procedural defenses decreases the probability

¹ As could be seen in Chapter 5, defenses related to alternative dispute resolution are so rare as to provide no meaningful results.

of settlement, which I speculate may be caused by the fact that if procedural defenses are actually applicable, that motion practice may resolve them. Asserting them in a responsive pleading does not actually bring them into play, so the agency may see it as posturing. In addition, asserting more unique odd or inappropriate defenses also reduces the likelihood of settlement, which provides some additional support to my argument that settlement can be driven by defense counsel competence. I have theorized that these sort of “kitchen-sink” defenses signal a defense counsel who doesn’t really understand the issues, which would allow the agency to take a harder line. Consistent with that argument, the more “other” defenses there are, the less likely settlement is.¹

At this point in the process, the parties should proceed to discovery. Because many courts have adopted an “offstage” approach to discovery, where the parties do not include their discovery process in the official record unless the court is required to resolve a discovery dispute, much of this process is a black box. With that said, as discussed in Chapter 3, discovery motion practice is one area where it appears that the district courts engage in ideological behavior. This suggests that to the extent that district judges seek their policy preferences, they do so by shaping the evidence available in the case, where appellate review is limited and deferential.

Dispositive Motions

Once discovery closes, the parties usually proceed to dispositive motion

¹ See the codebook appendix for more information on what constitutes an “other” defense.

practice. At this point, the appropriate procedural vehicle is the motion for summary judgment under Rule 56.¹ This project tests five hypotheses related to summary judgment practice. While four of them are appropriately reported in the chapter on measuring final outcomes, the fifth is a hybrid. Hypothesis 6 suggests that cases that settle prior to dispositive motion practice settle for more, all else being equal, than cases that settle after the filing of a dispositive motion.

As an initial plausibility check, I regressed the claimants' payouts against the filing of the summary judgment motion, controlling for treatment assignment variables. It's worth noting that all these cases settled, so if the motion was filed (test IV = 1), then it was either denied or the case settled while it was pending. Table 5 reports these results. Columns 1 and 2 report the results when I count the number of complainants; Columns 3 and 4 report the results using the collective action dummy. All of these regressions use a tobit model, because the claimant's payout can never drop below zero.

The only consistent measurements in these regression results are the direction and that it is large. When using raw dollars, the coefficient that measures the reduction in value from filing the motion is over two million dollars if we count the number of complainants, but the confidence level is relatively low ($p < .15$). If we use the collective-action dummy, so that all the cases with more than one

¹ Once trial begins, the appropriate vehicle is a motion for judgment as a matter of law under Rule 50, but until the finder of fact issues a verdict, the standard for both is the same.

complainant are treated the same, the effect size shrinks significantly, to "only" 1.4 million dollars and meets traditional 95% confidence requirements.

These results seem to suggest that what may actually be having is that a few large outlier class actions are driving the result, so I ran the regression again using a logarithmic transformation of the dependent variable. To avoid creating missing data from zeroes, I added one cent (.01) to every observation's value, and set the tobit lower limit to -2 (that is, log .01). These results indicate the problem is outliers, because both models that use the logarithmic dependent variable meet the 95% significance level. The effect size suggests a 95% reduction in settlement value for any set of case facts in any court before any judge, based simply on whether the defendant files a motion for summary judgment.

Variable	Dollars/ Complainants	Dollars/Collective Action	Log Dollars/ Complainants	Log Dollars/ Collective Action
Summary Judgment Filed	-1,399,290 (941,398.8)	-2,076,593* (1,005,936)	-1.50864** (.567771)	-1.542928** (.55997)
Collective Action		412,536 (1,007,746)		.7195453
Number of Complainants	777,516.6*** (173,458)		.0932903 (.1055443)	
Issues Alleged	1,911,255*** (405,673)	2,480,856*** (423,383.1)	.480596 (.2471587)	.4854371* (.2382999)

TABLE 6.5: Tobit regression coefficients on settlement value as measured by payout to claimants. Standard errors in parentheses. * = $p < .05$, ** = $p < .01$, *** = $p < .001$.

I follow this up by using matching algorithms to test the causal claim that filing the motion for summary judgment reduces settlements.¹ Table 6 reports the

¹ The explanation of how the matching algorithms were implemented is included in an appendix.

treatment effects for each matching algorithm. Columns 1-3 show the average treatment effect of filing a motion for summary judgment on settlement payouts when we count the number of complainants, which is a measure of the number of employees the EEOC represents when they file the lawsuit. Columns 4-6 demonstrate the same outcome when we treat all collective actions equally, which assigns a dummy variable as 1 if the EEOC represents more than one complainant. The effect size is measured in dollars.

	MDM/ Number of Compl.	PSM/ Number of Compl./ Logit	PSM/ Number of Compl./ Probit	MDM/ Coll. Action	PSM/Coll. Action/ Logit	PSM/ Coll. Action/ Probit
ATE	-777404.6	-805225.9	-1180768	-1430117	-1339503	-1324642
p< z 	0.148	0.108	0.115	0.081	0.092	0.097

TABLE 6.6: Average treatment effect of filing a motion for summary judgment on the eventual settlement payout. P-values reported.

In all three collective-action-dummy specifications, the p-value meets the same threshold ($p < .1$). In the specifications using the number of complainants, the p-value approaches $p < .1$, but never quite drops below it. Power analysis suggests that the findings are robust for the sample size, so we turn to the effect size. The numbers vary, but none of the runs suggest that the treatment effect is less than half a million dollars, and some runs produce treatment effects in excess of a million dollars. This is consistent with the regression findings, giving us confidence in concluding that the average treatment effect is probably around a million dollars. The results for matching when using the logarithmic dependent variable offer similar conclusions and are thus not separately reported.

Thus, we can conclude that the act of filing a motion for summary judgment

causes the settlement value of the case to decline precipitously, on average. The "on average" is important; many of these cases involve fairly low-level workers and sometimes fairly small groups of them, such that the maximum relief they *could* have obtained is well below the average treatment effect; if they experienced the "average treatment effect," they would have obtained nothing in settlement. This is definitely a situation where outliers in individual-observation treatment effects may have inflated the average effect size, which explains the lower-than-hoped-for confidence level. The logarithm results support this conclusion, since they point in the same direction but have magnitudes that are at least plausible.

The economic literature on litigation payouts defines a major benefit of settlement as a cost-avoidance surplus. In other words, litigating to judgment is an extremely costly process that reduces the value of any judgment; while settlement entails accepting a smaller payout than judgment would, it avoids the risk of a negative judgment and the costs of trial. Pecorino and Van Boening (2010) observe that defendants in litigation offer much less of the cost-avoidance surplus than in a traditional bargaining game, and speculate that this is because settlement in litigation is zero-sum -- every dollar offered to the plaintiff is taken out of the defendant's pocket. This would seem to suggest that in cases where a defendant has insurance, settlement may be easier, since those situations more closely resemble non-zero-sum games.¹

1 But there may be limits on the plaintiff's ability to recover based on the insurer's policy limits, as

In this case, there is an additional wrinkle that may explain outcomes. Federal agencies that conduct civil litigation to enforce statutes, including the EEOC, National Labor Relations Board, Securities and Exchange Commission, and Internal Revenue Service, all have explicit litigation policies preferring settlement to trial. In that case, since the agency is actually empowered to settle over the objection of the complainants, defendants can reduce settlement offers fairly drastically, thus capturing all or almost all of the cost-avoidance surplus.

Schwab and Heise (2011) find that in actual dollars defendants move much less from their initial offers than plaintiffs do. But if all the values are converted to natural logarithms, the parties each move an equal amount. They offer several explanations for this difference, but the most interesting for my purposes is "that the parties intuitively weigh the order of magnitude of their initial positions and then split the difference of those magnitudes" (Schwab and Heise 2011: 946).

This suggests that the effect that summary judgment has on settlement is driven by the parties' evaluation of how their legal theories are being received by the court. If Schwab and Heise are correct, then the reduction in settlement value that summary judgment causes is based on the evaluation that the litigants give to whether the motion is likely to be granted. The strength of the parties' positions in the summary-judgment proceeding determines whether they can create a "contract zone" that allows them to settle (Pecorino and Van Boenine 2010). In short, the

Schwab and Heise (2011) note.

variables omitted from the selection model (judicial ideology, motion outcome, and lawyer quality) are the causal mechanisms that determine the outcome through the parties' evaluation of the summary judgment papers.¹ If, after reading the summary judgment papers and weighing the likely outcomes, the litigants are able to reach an agreement on what they think the outcome will be, they can quickly reach settlement as well. The court's decision on the motion gives settlement negotiations additional information that the parties can use to guide their case evaluations. Finally, attempting to *predict* the likely motion outcome requires the parties to weigh how they think a judge will react to their arguments, which may involve inquiry into whether the judge is more worker-friendly or employer-friendly.

Another potential causal mechanism is more prosaic. Perhaps defendants are settling strong cases early, and litigating close cases. Such a finding would be consistent with the generalized form of the Priest-Klein hypothesis (Klerman and Lee 2014). I should emphasize that this is extremely speculative -- I have absolutely no evidence on causal mechanisms. But it suggests some avenues for future research to confirm these causal pathways.

Appeals

Even if the district court has entered a final judgment, the case can still settle post-judgment if the losing party keeps the controversy alive by appealing the

¹ The methodological appendix explains why these variables are omitted in more detail, but briefly: if a variable affects *treatment outcome* but not *treatment assignment*, then it needs to be omitted from the selection model (Brookhart et al. 2006; Imai, King, and Stuart 2008; Stuart 2010).

judgment. Hypothesis 14 argues that the final judgment hardens the positions of the parties, making settlement more difficult; thus, filing a notice of appeal will reduce the likelihood of settlement. Table 7 reports the results of testing that hypothesis and significant control variables.

Settled	Coef.	St.Err	t-value	p-value	Sig.
Notice of Appeal Filed	2.269	0.347	6.53	0.000	***
Pattern or Practice Alleged	-0.550	0.277	-1.98	0.047	**
Constant	14.249	2032.307	0.01	0.994	

TABLE 6.7: Likelihood of settlement based on whether case appealed

*** p< 0.01, ** p<0.05, * p<0.1

The headline result in this table is that Hypothesis 14 is strongly disconfirmed. The probit regression results are not directly interpretable, but the act of filing the notice of appeal creates a real effect of making settlement more likely. This suggests that filing the notice of appeal is a way of continuing settlement negotiations by keeping the case live. However, in cases that are appealed, an allegation of discrimination based on pattern and practice reduces the likelihood of settlement. This is likely because the pattern and practice cases involve the largest stakes for employers because they require company-wide remediation to resolve. Large policies will have to shift to settle pattern and practice cases, and most employers can be expected to be unwilling to settle on terms the agency will find acceptable.

Judicial Ideology

Finally, Hypothesis 15 tests the effects of judicial ideology on the likelihood of

settlement. The basic argument is that the parties know the ideological predilections of their judge, and that knowledge shifts expectations about likely outcomes. Since the agency will always settle (EEOC 2000), I argue that a more liberal judge makes settlement more likely as defendants seek to avoid adverse results. Because this tests ideological effects agnostic to case phase, I report both results that control for two of three case-phase identifiers and results that exclude all case-phase identifiers. Including all three case-phase identifiers (number of complainants, denial of summary judgment, and notice of appeal) causes the model to fail to converge. The issue is the inclusion of the summary judgment variable; excluding it causes the model to work.¹ So I report a model with the number of complainants and the notice of appeal dummy, and one without those variables in Table 8.

¹ The reason for this is related to the mechanism I used to ensure that only one observation per case was used; see Chapter 5 for a discussion of the relevant observation selection process.

Settled	Case-Phase FE (b/se)	Case-Phase Pooled (b/se)
Judicial Common Space	0.093 (.267)	0.208 (.242)
Pattern or Practice Alleged	-0.519* (.291)	-0.434* (.263)
Non-Pecuniary Relief Requested	-0.846* (.525)	-0.957** (.466)
Notice of Appeal Filed	2.256*** (.349)	
Punitive Relief Requested	1.365 (1.123)	1.436* (.891)
Constant	15.349	2054.0

TABLE 6.8: Likelihood of settlement based on judicial ideology
*** p<0.01, ** p<0.05, * p<0.1

Neither model reports significant results for the Common Space score, suggesting that judicial ideology does not affect the parties' decision to settle. However, in both models the type of claim and type of relief matter; pattern and practice claims reduce the likelihood of settlement, as do non-pecuniary damages requests. In the model using case-phase fixed-effects, the notice of appeal is significant while the number of complainants is not. In the pooled model, punitive damages becomes relevant. Both events increase the likelihood of settlement in their respective models. This is consistent with the earlier results, strengthening the inferences from those models.

Conclusion

Ultimately, the results are disappointing for my hypotheses, but exciting for the larger realm of settlement causes. While neither the size of the case nor the complexity of it appears relevant to whether the case settles, certain types of claims of relief are. Responsive pleadings appear to have some effect on settlement through

signaling competence, although it's not a consistent finding. The filing of a motion for summary judgment reduces the amount that the case can settle for, suggesting that the motion for summary judgment is a mechanism for capturing trial-avoidance surplus. Filing a notice of appeal appears to be an attempt to continue settlement negotiations, even though one party has already won at the trial-court level. Finally, judicial ideology has no effect on whether the parties settle. These findings appear to largely support the theory that it is interactions among the decision-making triad that determine litigation outcomes.

It appears that settlement is driven by factors other than those included in the EEOC dataset, or that it may be idiosyncratic or stochastic. One concern is that the patterns of settlement are borne by the payment patterns, so that the actual drivers of settlement is the payout. This raises endogeneity issues, since the theory underlying this project argues that settlement drives payouts through selection effects. However, testing this is beyond the scope of this project and is reserved for future research.

The next chapter will expand on these findings and analyze the connection between the litigation life cycle and the payouts that plaintiffs receive. This expands the conversation into comparing the amounts that plaintiffs get in settlement against the amounts they receive in judgments, and allows me to measure the quality of plaintiff wins. Where this chapter mostly focused on the factors that inhibit or encourage settlement, the next chapter focuses on the ways in which plaintiffs improve their payouts over the life of the case.

PAYOUTS DETERMINANTS

Previously, this project has demonstrated that there is a role for litigation life cycle events in outcomes. Both the qualitative analysis of jury instructions in Chapter 5 and the quantitative analysis of settlement determinants in Chapter 6 support this. But as pointed out in Chapter 5, “plaintiff victories” at trial can range from less than a thousand dollars to well over a million dollars. To lump those in as “tried cases” or “plaintiff victories” leaves a lot of information behind.

The major methodological innovation that I undertake in this project is to analyze the effects of case-level factors on the actual payouts received by complainants. Analyses of whether a case settles or goes to trial are long-standing tests of the Priest-Klein hypothesis, and have offered a variety of empirical findings. But because most prior analyses have involved private litigation, information on payouts secured in settlements has been unavailable. In these analyses, it has been impossible to determine whether the Priest-Klein hypothesis is confirmed because it is impossible to compare outcomes in tried cases to outcomes in settled cases.

Using the EEOC Litigation Project data avoids this problem, because while approximately 70% of the cases in this dataset settled (either via settlement agreement or consent decree, which I treat as equivalent), over two-thirds of those

settled cases have known monetary awards. Thus the dataset includes both tried and settled cases, and there is no presumed selection effect from settlement.¹ This means that my analysis can test the Priest-Klein hypothesis empirically.

For these analyses, I use two dependent variables – the amount of the monetary payout complainants received in a case and its logarithm-transformed equivalent. Using this variable, as opposed to the total monetary relief awarded, separates the damages complainants recoup from any award of fees or costs to the EEOC. This matters because focusing on the amount complainants receive allows us to measure the effectiveness of the EEOC in leveling the playing field between the haves and the have-nots (Galanter 1974). Including monies paid to the EEOC would demonstrate the effect of the EEOC system on employers but that doesn't necessarily mean that the EEOC's goal of redressing unlawful employment practices is being met.² Because I find that there is extreme variance in the amounts complainants receive, a logarithmic transform can preserve the relationships between payouts while reducing the variance. Table 1 contains summary statistics for the amounts complainants receive.

¹ I actually test whether the likelihood of settling in a prior phase affects payouts. Where those results suggest selection, I report and discuss them. Where they do not, coefficients can be found in the appendix.

² Of course, a true analysis of the EEOC's policy effectiveness would also require an analysis of non-monetary relief like injunctions and remedial measures. Converting these outcomes into numerical values is difficult (McInnis 1998).

	Observations	Mean	Standard Deviation	Minimum	Maximum
Plaintiff Payouts	1053	\$388095.2	\$835132.4	\$0	\$120000000

TABLE 7.1: Summary Statistics, Plaintiff Payouts.

In reporting results, I report both raw-dollar and log-dollar models if they point in the same direction for the test variable, even if effect sizes are very different. If both models point in different directions, I say so, but only report the results here for the model preferred by the Box-Cox test. Full models are reported in an appendix.

Because the standard deviation is greater than the difference between the mean and the minimum values, it is impossible for this data to be normally distributed. The zero-value observations are those where defendants won, of which there are 259. Since defendants cannot press claims against the EEOC except under very circumscribed circumstances, none of which occur in the cases where awards are recorded, it is appropriate to treat the data as left-censored. Thus, I use tobit regression models, defining the lower limit as the minimum value. For the summary judgment hypotheses, different methods are used for reasons explained in the presentation of those results below.

In addition to the control variables used in Chapter 6, I add the probit coefficients for all observations based on the analyses of the equivalent case phase. As discussed in Chapter 2, the power to settle means that any analysis of outcomes may be based on a selected sample. While including settlements allows me to determine whether the sample is selected, effects coefficients for settlements may

systematically differ from those for judgments. While the accepted method for testing for selection in a sample is a Heckman model, when that does not work a similar measure can be achieved by using a probit regression for the selection variable and including the probit coefficient as a control in the second linear equation (Manning, Duan, and Rogers 1987). In this case, the likelihood of settlement is the selection variable. Thus, the payouts regression for the complaint hypothesis uses the likelihood of settlement based on the information available at the initial stage, and so forth through the life cycle of the case. Table 2 describes the additional variables I use in this chapter.

Variable	Description
Plaintiff Payout	Monetary relief received by complainants
Logarithmic Payout	Logarithmic transform of the amounts complainants received
Probability of Settlement – Complaint	Predicted probability of settlement based on information available upon initial filing.
Probability of Settlement – Appeal	Predicted probability of settlement based on information available to parties choosing whether to appeal.

TABLE 7.2: Additional variables.

Initial Pleadings

The first hypothesis tested in this chapter, Hypothesis 2, argued that the number of complainants increased the amounts that complainants would receive, since increasing the number of payees requires paying more to the payees unless the per-payee receipts are reduced. Table 3 reports the results of the tobit regression for this hypothesis. As in Chapter 6, results will be reported and discussed for all variables that are significant at $p < .1$; complete regression tables are reported in an appendix.

Plaintiff Payout	Dollars (b/se)	Magnitude (log payout) (b/se)
Number of Complainants	-35000* (18914)	.069** (.032)
Probability of Settlement	6410000*** (1710000)	5.558* 2.916
Number of Issues Alleged	-78900* (46316)	
Judicial Common Space	-385000** (168000)	
Title VII	2470000*** (747000)	2.163* 1.275
ADEA	1330000*** (487000)	
Race Discrimination	446000** (207000)	.703** (.353)
Sex Discrimination	362000** (180000)	.855*** (.307)
Retaliation	-114000* (61516)	-.218** .105
Disparate Impact	486000** (209000)	.629* (.356)
Pattern and Practice	1060000*** (235000)	.651* (.401)
Non-Pecuniary Relief	1850000*** (620000)	
Punitive Relief	-1940000*** (647000)	
Constant	-11600000 (3700000)	

TABLE 7.3: Determinants of payouts at time of filing

The structure of the data is probably the reason that the results for the raw-dollar model are so large. The coefficients for the actual amounts paid are initially alarming, until we remember that tobit coefficients estimate the effect of the model on an uncensored latent variable. So when the “probability of settlement,” which tests for the effect of selection on the sample, indicates a six-million-dollar effect for the likelihood of settlement, that’s using the censored data to estimate an uncensored distribution. And that *particular* result is almost certainly driven by the

fact that the only outcomes where complainants take nothing – in other words, cases up against the lower limit – are cases that did not settle. Every complainant who settles walks away with *something*.

This means that as the likelihood of settlement increases, on average payouts of necessity increase because the likelihood of taking nothing decreases. This data-structure issue means that while a finding of no measurable effect demonstrates a lack of selection effects, finding an effect for the likelihood of settlement is only suggestive of selection effects. So I would conclude that the test of the Priest-Klein hypothesis at *this* stage of the case is suggestive that it is confirmed but not conclusive.

For the hypothesis tested, the results are inconclusive. When measuring in raw dollars, increasing the number of complainants is associated with a *decrease* in the payout value of the case – completely the opposite of my expectations. But when we measure the magnitude of the payout by using the logarithm, the sign flips and increasing the number of complainants is associated with an increase in the magnitude of the payout.

When linear and log-linear models point in different directions, a Box-Cox test can help distinguish between them (Box and Cox 1964). When I perform the Box-Cox test on the regression model in Table 3, it reports that the preferred model is the linear model. From this, I conclude that the number of complainants is associated with a reduction in payouts, and that we should focus our attention on the raw-dollar model for subsequent analysis.

In the raw-dollar model, a few control variables are significant that are not significant in the logarithmic model. Case complexity, allegations of punitive damages, and more conservative judges reduce payouts; claims under ADEA and for non-pecuniary relief increase them. The judicial-ideology result and the non-pecuniary relief result are normal and reasonable consequences of existing theory. In particular, the ideological result suggests that there may be room for judicial ideology in trial courts. This contradicts the work done since Epstein, Landes, and Posner (2013) concluded that “there is no evidence of ideological effect in trial courts” (207). It suggests that when we move beyond the dichotomous final outcome of plaintiff victories, that we may be able to unlock a previously-unmeasured effect for judges’ policy preferences on litigation outcomes.

I’m also not surprised by the finding that pleading a claim for non-pecuniary relief increases recoveries. Non-pecuniary claims represent “pain and suffering” damages, and when the *agency* pleads these claims, it may indicate a strength to the claimant’s story that isn’t necessarily implicated when private plaintiffs assert these claims. Future research may consider whether there are different outcomes when private plaintiffs assert these types of claims as opposed to an agency.

The remaining findings are puzzles that suggest interesting further research. While I do have doctrinal expectations regarding the relative outcomes of different types of claims, those expectations are not systematically derived (Selmi 2001; Parker 2006). So to find that the statute under which the claim is brought matters isn’t *surprising*. Without getting into the weeds on this: I think that proof standards

and the relevant standards of care interact in the four EEOC statutes so that the easiest types of claims to prove are disability claims, followed by Equal Pay Act claims, and then Title VII (race, gender, and religion claims, mostly) and age claims being the most difficult.

Responsive Pleading

When the defendant files their responsive pleading, the information set changes. Now, in addition to the allegations contained in the complaint, the information set includes the defendant's assertions of what they intend to prove and their responses to the plaintiff's allegations. In addition, the quality of the pleading sends a signal as to how difficult the litigation will be to win. While "pleading quality" is difficult to measure, I have operationalized it by counting defenses specifically related to employment law (such as asserting a legitimate, non-discriminatory motive)¹ and the limitation of damages (such as the constitutionality of any punitive damages award), and subtracting defenses that signal a lack of attention, such as defenses related to procedure or the maxims of equity. In Hypothesis 4, I argue that this pleading-quality measure is negatively related to payouts – so as the net number of legitimate defenses asserted rises, payouts decrease. Table 4 reports the results of this analysis. The first two columns show

¹ Calling this an affirmative defense is a bit of a misnomer; defendants bear the burden of proof as to an affirmative defense, while under American employment law, the burden of demonstrating a legitimate, nondiscriminatory motive for whatever action the plaintiff protests is a burden of production (*Reeves* 2000). But defendants frequently list it as an affirmative defense, and pleading such things is generally fairly relaxed (*Goff and Bales* 2011; *Rand* 2016).

the results of tobit regression of the raw payouts, while the third and fourth columns show the results of the same regression of the logarithm transforms. The first and third columns use the raw counts of defenses, while the second and fourth use the corrected counts. Once again, the five categories of defenses of interest are included, and controls with statistical significance of $p < .1$ are included.

Payout Amount	Raw Payout- Raw Defenses (b/se)	Raw Payout- Corrected Defenses (b/se)
Employment Defenses	-24800** (9834)	-33500** (13511)
Damages Defenses	49985*** (17704)	72306*** (25718)
Other Defenses	94604*** (27699)	157000*** (41819)
Equity Defenses	-23600 (23365)	-14300 (30484)
Procedure Defenses	24387 (16452)	20853 (19698)
Number of Complainants	739567*** (21452)	60709*** (22511)
Issues Alleged	-128000** (60076)	-155000** (61849)
Title VII	-1430000*** (537000)	-1810000*** (604000)
ADA	-1500000*** (530000)	-1790000*** (587000)
ADEA	815000** (371000)	988000** (392000)
Sex Discrimination	-415000** (179000)	-478000** (184000)
Retaliation	-140000** (63422)	-151000** (62793)
Disparate Impact	1260000*** (297000)	1420000*** (321000)
Pattern and Practice	-421000** (191000)	-423000** (192000)
Non-Pecuniary Relief	2900000*** (494000)	3230000*** (542000)
Settlement Probability	4970000 (1100000)	6020000*** (1330000)
Constant	-3900000*** (943000)	-4320000*** (987000)

TABLE 7.4: Tobit regression, payouts and responsive pleadings.

Table 4 presents a number of puzzles for analysis. First, when considering the raw payout, nearly *every* variable is statistically significant at least at the $p < .05$ level. The exceptions are race discrimination claims and claims for punitive relief, neither of which had a discernible effect on recoveries in any model (and thus are not reported here). Second, in the logarithmically-transformed model, most of the relationships disappear. One explanation is that the relationship is too marginal, so that the logarithmic transformation does not preserve it. I think it more likely that the data is structured in such a way that the logarithmic transformation introduces bias (Feng et al. 2014). This is confirmed by the Box-Cox test, which supports the use of the linear model. To that end, I only report the logarithmic model for this hypothesis in the appendix.

In both cases, asserting more employment-law defenses is associated with a reduction in recovery. The coefficient is larger for the corrected-count model, which further supports the argument that asserting more *unique* employment defenses signals competence and preparedness. Asserting more damages defenses and more odd defenses are both associated with an increase in recovery in both models, which seems reasonable. The finding regarding “other” defenses supports the “counsel competence signal” theory of pleading, in that asserting more bizarre defenses gives the agency reason to think that the case is easy.

The relationship with damages defenses is harder to explain. It is possible that asserting defenses that preclude recovery or certain types of recovery *even if* liability is proven (which is what damages defenses do) enable plaintiffs to push

harder to get settlements, because if the fight is over damages, the defendant has already lost. This is not to suggest that asserting defenses related to damages is an implicit admission of liability. Rather, it's to suggest that the more damages defenses an employer offers, the more likely it is that these defenses will be interpreted as supporting an easier path to liability.

Finally, in all models the probability of settlement has a statistically discernible effect on payouts. This is the variable that tests the Priest-Klein hypothesis. It suggests that the effect of the answer on the likelihood of settlement creates systematic differences between the cases that settle and the cases that go to trial. It's also positive, suggesting that as settlement probability increases, payouts increase. This would mean that after the parties have exchanged pleadings, that they frequently have enough information about the case to be able to reach an agreement on an appropriate resolution. In private litigation, I would speculate that this was driven by defendant evaluations of the case and not plaintiff investigations, since private plaintiffs don't have a lot of investigatory abilities until after the responsive pleadings are filed (Lahav 2017). But since the litigation in my analysis is all administrative enforcement, both the plaintiff-agency and the defendant-employer have information beyond the pleadings. This may suggest that pre-discovery disclosure would bring more cases to settlement without the necessity for extensive discovery or motion practice (Farmer and Pecorino 2005b). The likelihood of this possibility requires further comparison between private litigation and administrative enforcement.

This finding erodes support for the “signal of competence” causal mechanism. My theory is that signaling competence would cause a busy agency lawyer to dial back their settlement demands in order to avoid a hard-fought case. Thus, presenting appropriate and valid defenses and avoiding irrelevant nonsense would lead the agency lawyer to want to close the file so that scarce agency resources could be dedicated to winnable cases. If that mechanism was working as intended, while the probability of settlement might have a discernible effect, it would be associated with a reduction in payouts, not an increase. Increasing settlement probability increasing payouts indicates that it is defendants bailing out of litigation based on what their investigation to create the responsive pleading reveals. In other words, when a defendant is served with a lawsuit and begins investigating to prepare their response, what they conclude is that they are likely liable, which leads them to be willing to pay more to settle the case after filing their responsive pleading.

But I would argue that this finding of selection effects supports a more nuanced story. Recall that the agency, like all enforcement agencies, have a stated policy of preferring settlement to trial. Thus, the agency can accept any reasonable settlement offer from the defendant. The issue is convincing defendants that settlement is in their interest. This finding, that the responsive pleading creates a systematic difference between cases that settle and cases that go to trial, supports the notion that when the responsive pleading does not offer a large hope of success, that defense counsel urge their clients to settle.

Another possible explanation is discovery effects. In Chapter 6, I pointed out that the discovery process is basically a black box for this analysis because almost all of it takes place off the official court record. Because discovery takes place between responsive pleadings and dispositive motions, its effect is baked into the responsive-pleadings model. So it would be impossible to distinguish between settlements driven by the information contained in the pleadings and settlements driven by information disclosed in discovery.

Dispositive Motions

The next several hypotheses are concerned with the effects of motion practice on payouts. Hypotheses 5 and 7 test the predictions of different models of judicial decision-making. Hypothesis 5 tests the legal model, using our case complexity measure as the test variable. Hypothesis 7 tests the attitudinal model, which predicts that judicial ideology should drive decision-making.¹ Hypothesis 8 suggests that when judges deny summary judgment, they create an environment where their ideology becomes more salient; defendants pay out larger sums because they fear trial before a more liberal judge. Hypothesis 9 argues that the decision-making process in this is in fact multi-causal, so that the appropriate test is the interaction between case complexity and judicial ideology.

¹ The pioneers of the attitudinal model disclaimed any intention to explain judicial behavior beyond the Supreme Court (Segal and Spaeth 2002). But there's a significant literature that uses it for trial courts anyway (see Chapter 2). A recent analysis concluded that ideology had no effect on federal district court decision-making (Epstein, Landes, and Posner 2013).

Table 5 reports odds ratios for logistic regression for whether the motion for summary judgment was granted at all. The difference between the two models is the ideology measure. Model 1 uses the Judicial Common Space; Model 2 uses DIME-CF scores. Model 3 shows the results for a probit model using the Judicial Common Space to demonstrate the strongest results I found for the legal model hypothesis. Table 6 shows the same results when the dependent variable is measured as ordered. Other model specifications I used are included in an appendix.

Variable	Model 1 (or/se)	Model 2 (or/se)	Model 3 (b/se)
Judicial Common Space	.6922693 (.3024603)		-.2289987 (.265611)
DIME-CF		.9196883 (.1243449)	
Title VII	.3058981 (.2334579)	.4093315 [†] (.2042451)	-.6966499 [†] (.4109096)
ADA	.2050519* (.1586213)	.3244409* (.1655673)	-.9325252* (.4114314)
ADEA	.3293179 (.2308794)	.5028162 (.2271645)	-.6588416 [†] (.383402)
Partial Relief	.4772339* (.1499665)	.6124616* (.1303012)	-.4604785* (.1878025)
Issues Alleged	1.451089** .1830446	1.050716 (.0761551)	.232507** (.0767193)
N=	312	630	312

TABLE 7.5: Determinants of summary judgment (binary).

Variable	Model 1 (or/se)	Model 2 (or/se)
Judicial Common Space	1.017031 (.3898685)	
DIME-CF		1.021696 (.1244076)
Title VII	.3786215 [†] (.1951587)	.3906538* (.1562507)
ADA	.2739449* (.1406123)	.3960585* (.1622324)
Issues Alleged	1.370273** (.151241)	1.001139 (.0659143)
Ideology*EEOC Filing	.5736522 (.5228104)	.7458302 (.1966547)
N=	314	630

TABLE 7.6: Determinants of summary judgment (ordered).

In both binary (grant/deny) and ordered (grant/partial grant/deny) conditions, the question of case complexity becomes extremely relevant. Comparing logit odds ratios to probit coefficients is impossible, but for the case complexity measure, we are at least confident that all of these results are in the same direction. And except for regressions using DIME-CF measures of ideology, they're all significant at $p < .05$. Thus, I feel comfortable reporting H_5 as confirmed.

H_5 argued that because dispositive motions require that the facts be uncontested, cases with more facts that matter will be less likely to be tossed out on summary judgment. Across multiple model specifications and functional forms, I find this to be the case. This suggests that in this case phase, that courts are performing a truth-finding function. Where cases are relatively simple and the parties agree on what happened, an early disposition can be appropriate. Where they are more complex, a full fact-finding is necessary.

The attitudinal model finds very little support. Under no model specification are ideological effects statistically significant. I would also note that to the extent

H_7 is rejected, that that finding confirms Ashenfelter, Eisenberg, and Schwab (1995)'s and Epstein, Landes, and Posner (2013)'s findings. However, it is possible that judges exercise their ideology elsewhere in the motion practice process. Bronsteen (2007) in particular raises the possibility that judges may instead use motions to dismiss to eliminate claims instead of motions for summary judgment. Motions to dismiss under Rule 12(b)(6), at the time of these cases, required a defendant to demonstrate "no set of facts" under which the plaintiff could recover, assuming all the plaintiff's allegations were true (*Conley v. Gibson* 1957). This standard is widely regarded as more deferential to plaintiffs than the summary judgment standard, and plaintiffs do win more motions to dismiss than they do motions for summary judgment (Parker 2006).

Attempting to replicate this analysis with motions to dismiss is difficult. The numbers of motions to dismiss are much smaller, both less than 100 for the Judicial Common Space and DIME-CF scores. Power analysis suggests that the findings are susceptible to error in this analysis, and numerous control variables drop out of the model for lack of variation or lack of observations. The party-filing question does not arise, as contested motions to dismiss are only filed by the defendant. But the attitudinal finding holds: there is no measurable effect for ideology on granting motions to dismiss. The details of this analysis are available in the appendix.

Table 7 reports the results of the tobit regression on payouts. As per usual, only statistically significant results are reported except for test variables. And in this case, only two variables are significant for the raw-dollar model. While ideology

plays a role in the payout after the motion for summary judgment is denied, it also plays a role in the payout *before* the motion for summary judgment is granted. The sign reverses in the pre-summary judgment context, which almost certainly reflects the fact that stronger cases settle early in the process.

Plaintiff Payout	Raw Dollar (b/se)	Log Dollar (b/se)
JCS Score after motion denied	-785000*** (265000)	-2.23*** (.61)
JCS Score before motion denied	494000** (223000)	2.235*** (.516)
<i>Desert Palace</i> Dummy		0.412* (0.251)
Title VII Claim Asserted		2.995*** (0.752)
ADA Claim Asserted		1.689** (0.742)
Race Discrimination Alleged		.632* (0.342)
Sex Discrimination Alleged		.82** (0.310)
Constant		7.402*** (2.429)

TABLE 7.7: Post-summary judgment payouts: Tobit regression

In the log dollars model, the relationship between ideology, motion practice, and payouts is preserved, but several control variables also are significant. Cases decided after the Supreme Court decided *Desert Palace* have slightly larger payouts, which I combine with my earlier finding that this case did not affect the likelihood of settlement to suggest that *Desert Palace* did in fact lead to more cases going to trial and more plaintiff victories.¹ If correct, this finding is an empirical disconfirmation of the Priest-Klein hypothesis, since a change in the law would have

¹ This should not be interpreted as conclusive. A direct test of this question would probably involve a difference-in-difference design, and is reserved for future work.

caused a change in the plaintiff win rate.

In addition, the types of claims asserted and the types of wrongful conduct seem to matter. Title VII and ADA claims increase payouts by well over an order of magnitude from the Equal Pay Act (the reference category), and within Title VII, alleging race and sex discrimination both increase payouts by somewhat less than an order of magnitude. This is evidence that law matters not only for how cases get decided, but also for the redistribution of resources from the haves to the have-nots, and the ability of administrative agencies to oversee that redistribution to ensure substantial justice.

Judicial Ideology

When we consider the relationship between judicial ideology and litigation outcomes, we have to consider the fact that the prior literature is ambivalent on the question of whether trial judges behave ideologically, (see, e.g., Smith 2006 *contra* Epstein, Landes, and Posner 2013). We also must cope with the fact that using outcome data only from cases that go to judgment are a selected sample that makes inference to the population of disputes suspect (Klerman and Lee 2014). This analysis avoids the second issue by using a data set that includes agreed resolutions (settlements and consent decrees).

In Table 8 I present the results of the tobit regression testing the interaction between judicial ideology and case complexity. In the raw-dollar model, none of the test variables are significant, but the interaction term *and* case complexity standing alone are marginally significant ($p < .1$) in the log-dollar model, which may suggest

that outliers have undue influence and are stochastic (thus eliminating any relationships in the raw-dollar model). The marginal significance of the three test variables in the log-dollar model suggests that judges use case complexity as a mechanism to cover and justify their ideological behavior, because simple cases don't allow for judgment calls that can be ideologically-flavored as often.

In both models, whether the case is an ADA case filed before *Sutton* is significant ($p < .01$). Since *Sutton* significantly narrowed the definition of “disabled person” under the ADA, this should be interpreted as a selection effect – the EEOC is devoting far fewer resources to ADA cases post-*Sutton*.¹ Cases filed after *Reeves* and cases alleging a pattern and practice are significantly different ($p < .05$) in the raw-dollar model only and in the expected direction. Cases alleging retaliation are marginally significant ($p < .1$) in the log-dollar model, but the sign is negative when I'd expect it to be positive.

¹ Indeed, this is accurate – there are *no* ADA cases in the dataset that are post-*Sutton*.

Payouts to Plaintiffs	Raw Dollars (b/se)	Log Dollars (b/se)
IdeologyxCase Complexity	43013 (60922)	.204* (.108)
Ideology	-228000 (312000)	-.457 (.551)
Case Complexity	12226 (41894)	.133* (.074)
Pre-Sutton ADA Case	1500000*** (480000)	1.537* (.847)
Post-Reeves Case	1330000*** (304000)	
Retaliation Alleged		-.243* (.107)
Pattern or Practice Alleged	446000*** (165000)	
Constant	-.997000 (1760000)	9.272*** (3.101)

TABLE 7.8: Effects on Plaintiff Payouts from Judicial Ideology and Case Complexity *** p<0.01, ** p<0.05, * p<0.1

Overall, I would characterize H_9 as tentatively confirmed. There's no relationship in raw dollars because there's too much variation in the payouts, but when we squeeze the distribution by using logarithmic transformation, we find that judges can shape the payouts by using the complexity of the case to mask the effects of their own ideological choices. This may suggest that the conclusion of Epstein, Landes, and Posner (2013) that district judges do not behave ideologically is incomplete.

It seems clear that district court decision making in motion practice involves a different set of factors than decision making on either the Courts of Appeals or the Supreme Court. While those higher courts may give judges more latitude to enact their policy preferences, trial courts seem relatively constrained. Instead of being motivated by their ideologies, district court judges seem in general focused on the

demands of the actual law and the facts that the evidence provides. However, when given an opportunity to seek policy preferences by either masking the outcome or because review is deferential, they do so.

These results are certainly reassuring for the bench and bar, which has pushed back against political scientists who argue that judges enact policy preferences since the legal realists first devised the explanation in the late nineteenth century (Cardozo 1921; Holmes 1881 [2010]; Pound (1931)). The strongest explanation for grants of summary judgment is the law and the facts, and the law and facts have the largest effects on the amounts plaintiffs recover. This comports with and supports the importance of legal training, which is predicated on the notion that law matters.

I expect that liberal judges increase plaintiff payouts because of the judge's control over many aspects of the case. The presiding judge controls the outcome of discovery disputes, thus defining the facts that can be presented to the factfinder. They decide dispositive motions, determining which cases go to trial among those that don't settle. And they instruct the jury, defining the legal environment in which the factfinder weighs the evidence. Thus, regardless of the phase of the case, I would expect a judge's ideology to affect payouts. It affects settlements just like it affects judgments because the litigants (or at least their lawyers) have at least intuitive understandings of the ideology of judges – even if they have no better information than the appointing president. Thus, more liberal judges probably shift

the zone of agreement where a settlement can be reached to higher numbers, producing larger payouts in settled cases.

Table 9 shows the results of the relevant tobit regression. It tests the effect of the JCS score on payouts without regard to case phase. As before, only the test variable and significant controls are reported, with full tables available in an appendix. The surprising result is that ideology doesn't matter for payouts without regard to case phase, disconfirming H_{16} . This may suggest that district judges don't behave ideologically, but I suspect that it is more likely to reflect litigant error in measuring the likelihood of prevailing. This is because almost 75% of the observations analyzed are from cases with agreed resolutions, which means that litigant estimates of the likely result are more salient than judicial behavior.

Plaintiff Payout	Raw-Dollar Model.	Log-Dollar Model
JCS Score	-26700 (148000)	.276 (.248)
Number of Complainants		.118*** (.022)
Post-Desert Palace Cases		-.352* (.217)
Pre-Sutton ADA Cases	1800000*** (488000)	1.588* (.819)
Post-Reeves Cases	1620000*** (319000)	
Sex Discrimination Alleged		.680** (.302)
Retaliation Cases	-139000* (78234)	
Pattern and Practice Cases	425000** (168000)	

TABLE 7.9: Payout regression, ideology and case-level factors

Control variables present some interesting results as well. Once again, *Sutton* is significant in the expected direction (albeit marginally so in the log-dollar model), demonstrating that this change in the ADA drastically changed the shape of litigation under the ADA. In the raw-dollar model, *Reeves* and pattern and practice allegations are significant ($p < .05$), which suggests that these cases present better opportunities for recovery. In the log-dollar model, the number of complainants, and sex-discrimination cases are significant ($p < .05$). For the first time, *Desert Palace* is marginally significant ($p < .1$), indicating that when all case phases are pooled, that *Desert Palace* had an effect, although the direction is not as expected.

My interpretation of this coefficient is that after *Desert Palace*, the EEOC believed that the *McDonnell Douglas* framework was no longer good law, and brought cases that they otherwise might have disposed of with a right-to-sue letter. But when these cases reached the courts, the actual legal effect of *Desert Palace* has essentially been nil. Most courts still distinguish between direct and circumstantial evidence; most courts will not use a mixed-motive analysis; most courts still default to the *McDonnell Douglas* framework. Thus, these weaker cases that the EEOC would have expected to win had the lower courts followed *Desert Palace*'s analysis instead were getting dismissed on summary judgment. I find this result interesting, because the strongest version of the Priest-Klein hypothesis asserts that it is actually impossible for a change in the legal standard to change litigation outcomes (Priest and Klein 1984). Yet here is evidence that precisely that happened with *Desert Palace*, even though it did not affect the way courts analyze these cases.

Conclusion

This chapter has analyzed the effects of various phases of the litigation process on actual employee payouts. I think it's fair to describe the results as ambiguous. Some hypotheses were confirmed, while others were disconfirmed. In particular, the finding that judicial ideology plays a role in payouts when interacting with case complexity presents a potential solution to the ambiguity of prior trial-court findings on the effects of judicial ideology. Instead of concluding that ideology *always* matters or *never* matters, the effect of ideology is *contingent*. It is most salient in complex cases or large cases; it is muted in dispositive motion practice.

The effect of law is also oddly contingent; while *Reeves* appears to have had the effect scholars predict, of making employment cases easier to prove, and *Sutton* completely eliminated the ADA as an enforceable employment statute, *Desert Palace* has different effects in different models. This may reflect the almost universal disdain lower courts had for the *Desert Palace* analysis; or it may reflect a growing confidence from the EEOC after 2003; or some combination of the two.

Finally, some types of issues clearly present better opportunities for recovery than others. Retaliation claims were almost always worse off, an odd finding given that retaliation claims offer the only path to punitive damages. The notion of litigant signaling is supported by the findings on responsive pleadings. Ultimately, while some hypotheses were confirmed, the clearest finding is that using payouts to analyze trial-court outcomes provides a wealth of additional information that allows

us to further unlock the puzzles of trial-court decision-making and the litigation process.

So up until this point, the analysis offered has been more or less broadly consistent with the prior literature on trial courts. But this chapter's analysis challenges several aspects of that prior literature. My findings suggest that law may actually matter, both in the selection of disputes and in their final outcomes, since changes in the law produced changes in outcomes, and because factual complexity (which is determined by the governing law) frequently has an effect on payouts. It also suggests that the judge-oriented approach to judicial politics are less helpful in the trial-court context, because the most common drivers of payouts are things that are outside the judge's control. While there are occasional results that support ideological findings, most of the results I've presented here show effects driven by things like the facts of the case. This finding arguably raises fundamental questions about a lot of the literature on decision-making in trial courts, which frequently assumes out litigants and case facts.

Instead, it seems reasonable to conclude that the dialogic model of litigation gives us significantly better results. When we include the information that the litigants bring to the case, both in terms of case facts and litigant behavior, we see both evidence of previously-masked ideological behavior and evidence of other determinants. This suggests that our understanding of trial courts may be predicated on theories that fail to accommodate the actual mechanisms at work.

IMPLICATIONS, LIMITATIONS, SPECULATIONS

In this dissertation, I set out to argue that federal district-court decision-making has been unjustly treated by political scientists. While important and significant work on district courts has been done, much of this work has relied on models derived from analysis of the Supreme Court. My analysis has demonstrated that these models leave a lot of information on the table. But there are larger issues implicated in my analysis. While fully exploring these issues is beyond the scope of this project, I intend here to lay out the ground I think my analysis implies exists for future research.

Implications

I began this analysis by attempting to go all the way back to first principles: what is a court? How do we distinguish a court from any other political institution? In doing so, I went back to Martin Shapiro's seminal 1981 comparative piece, where he argued that the four traditional elements of "courts" were in fact illusory. Shapiro described the "prototypical" court as involving "1) an independent judge applying 2) pre-existing legal norms after 3) adversary proceedings in order to achieve 4) a dichotomous decision in which one party was assigned the legal right and the other found wrong" (Shapiro 1981: 1). He argued, contrarily, that the fundamental characteristic of courts is what he called the "decision-making triad,"

consisting of two disputants over some legal right and a neutral decisionmaker. He then provided four case studies, in each of which one of the four “prototypical” characteristics was not present, but the system he described was inarguably a court. In each case he found the decision-making triad.

Initially, I assumed what Shapiro’s “prototypical” construction of courts. As an initial matter, Shapiro’s “prototype” is not contained within this data.

Approximately 75% of the cases I analyze involved agreed resolutions. As can be seen, there were three major evolutions of the relevant doctrine during the time period covered by the data, making it impossible to describe the norms as “pre-existing.” And finally, most cases do not result in all-or-nothing decisions.

Frequently, the winning side does not get everything they wanted. So the prototype Shapiro is criticizing is similarly not present in the federal trial system.

One flaw in Shapiro’s triadic model is that for the triad to be considered legitimate, the neutral decision-maker must be chosen by the disputants.

Otherwise, he argued, the losing party will view the decision as illegitimate “ganging up.” In systems where decision-makers in courts are chosen by operation of law, such as any modern state’s judicial system, the triad breaks down. Shapiro’s method for coping with this issue was to acknowledge it exists, then ignore it.

This is a real flaw in the triadic model, and may explain why so little judicial politics scholarship uses a triadic approach of considering the relationship among the parties and the court. In grappling with this question, I’m left asking why Shapiro’s model is empirically sound in so many systems despite this flaw, and why

doesn't it destroy the legitimacy of these judiciaries? In short, why do we have courts at all in the face of this legitimacy trap? And why does the American judiciary enjoy higher support than other, more democratic institutions (e.g. Caldeira and Wright 1988)?

Lon Fuller offers an explanation. He has argued that what distinguishes courts from legislatures, bureaucracies, and other political institutions is that unlike these institutions, courts engage in the unique activity of adjudication (Fuller 1978). Adjudication, for Fuller, is more than just policy making or law making. Fuller defines adjudication as an allocation of resources between parties who all claim a right to it. What makes adjudication unique from legislation is the process by which the resources are allocated, which involves allowing the disputants to submit "reasoned proof and evidence that the decision-maker is obligated to take seriously and respond to in its decision" (Fuller 1978: 360).

So what makes the triadic model stable and legitimate, in addition to being empirically true, is that the decision-maker cannot simply choose a winner by fiat, but must offer reasons for its decision. And those reasons have to connect to the arguments and evidence offered by the disputants. In other words, there should be a connection between what litigants offer and what the court decides. This also demonstrates the fallacy of the "democratic accountability" argument supporting judicial elections (Bonneau and Hall 2009; Canes-Wrone, Clark, and Kelly 2014; Curry and Romano 2018; Goelzhauser 2016; 2019; Geyh 2019). If the legitimacy of courts derives from the way that they explain and justify their decisions, then it

doesn't matter how judges are selected. What matters is how responsive they are to the arguments and evidence marshaled before them.

There is some empirical work that demonstrates this connection between facts, arguments, and decisions (Segal 1984; King 1998). There is theoretical work that shows the importance of litigants in giving information to the court (Beim 2017). This analysis has incorporated the communications among the parties and the court into a triadic approach and I have found several results that suggest that our approach to trial courts is woefully incomplete.

I have confirmed some earlier findings. I have found that judges strategically avoid behaving ideologically when they are subject to close oversight, but may behave ideologically when review is deferential. I have found, fairly consistently, that it is rare for settled cases to systematically differ from tried cases in their payouts, and have shown that changing the legal standard changes payouts across the population, thus providing two different challenges to the Priest-Klein hypothesis. I have found that the process is responsive to the inputs of the parties, thus demonstrating that the triadic approach is key.

My findings regarding the Priest-Klein hypothesis bear some unpacking. There are two key empirical predictions from the strong Priest-Klein hypothesis: first, that parties settle cases where they evaluate one party as more likely to win, which means that plaintiff win rates converge on 50% regardless of the legal standard. Second, the hypothesis predicts that settled cases will differ demonstrably

from tried cases, such that we cannot make inferences about the population of cases from the sample that are tried.

My findings push back against both of those predictions. When I consider dichotomous outcomes, as when I weigh motion practice, the law being applied to the cases changes the outcome. For the second prediction, I simply have no findings that there are significant differences between cases that settle and cases that go to trial in this dataset except for the filing of the responsive pleading.

These findings have some interesting implications beyond the litigation process, as well. To a first approximation, it is fair to describe the triadic model with Fuller's adjudication as the "rule of law" (see also Ly 2018). Historically, political science has defined the rule of law as being a system where the government is constrained by rules. This ignores the largest concern of the jurisprude – can a legal system that perverts rules-based constraints to immoral ends be referred to as the "rule of law"? Put another way, was the Third Reich a rule-of-law system?

The definition of the "rule of law" I offer here avoids those concerns, because it does not define the rule of law by outcomes. A system that follows the Fuller process using the triadic institutional design is engaged in the rule of law, regardless of outcomes. This is so because the Fuller adjudicative process requires the decision-maker to engage losing arguments and explain *why* they lost. Thus, even when the Supreme Court of the United States declares that it "ha[s] exercised all the power which the constitution and laws confer upon [it], but that power has been resisted by a force too strong for [it] to overcome" (*ex parte Merryman* 1861),

that is still the rule of law because the legal system has been responsive to losing arguments.

In this sense, the Nazi system could have been a rule-of-law system without raising questions about whether there are normative obligations to obey its orders. The question of whether Nazi law was “law” becomes disconnected from the question of whether it is moral to obey it. Instead, we can answer the empirical question by reference to processes and responsiveness to litigants.¹ Then the normative question becomes driven strictly by the content of the decision.

By relying on a judge-centered approach to judicial decision-making, political scientists have ignored the strong norm of being responsive to reasoned proof and evidence. Litigants and litigators have disappeared from our analyses of judicial decision-making, even though their briefs and exhibits define the issues and the factual context for that decision-making. And that scholarship which focuses on litigant behavior treats the judge as an exogenous factor, even though the judge can only decide based on what the litigants give them.

My analysis incorporates the interchange among the triad to analyze how cases evolve over their lifespan. I have attempted to demonstrate limitations and hedge my findings where appropriate, and to clearly signal when I was speculating as to causal mechanisms.

¹ This question is completely beyond the scope of my work here. I flag it simply for future reference.

Limitations

One major limitation of my analysis has been the paucity of data that meets my needs. The EEOC Litigation Project contains information on 2,316 cases, but I can only analyze between 200 and 600 of them, depending on model specification.¹ Future work should consider ways to obtain information on larger datasets, either by filling in gaps in the EEOC data or using other datasets where information on more observations is available.

In addition, some exogenous factors that probably play a role simply cannot be measured using the data I have. This does not mean that I think we should ignore those factors (Mendelson 1963). For example, there is some significant literature that discusses the importance of lawyer quality in determining litigation outcomes (Lazarus 2005; Krell 2010; McGuire 1995; Corley 2008; McAtee and McGuire 2007; Johnson, Wahlbeck, and Spriggs 2006; Lederman and Hrungrung 2006). I have no way, using the data that I have, to operationalize lawyer quality. The relationship between the ability of the lawyer arguing the case and the outcome has to be reserved for future research.

Similarly, the operationalization of the “reasoned proofs and argument” that I used almost completely ignores the “argument” side of the Fuller model. The EEOC data (and my data) focuses almost entirely on the factual allegations in the lawsuit. Once the case descends into legal argument in motion practice, there is no

¹ And of course, I can't use quantitative methods on the jury instructions at all.

information on the substantive content of the docket. The only place in my research where I have information on the legal arguments employed is in the jury-instructions analysis in Chapter 5. There I did find a faint suggestion of possibility that when weighing contested legal standards on the merits of the claim, the side that secures more agreement from the judge may have more success with the jury.

Finally, it's reasonable to ask how generalizable my results are. The EEOC is a fairly sophisticated litigant; many private plaintiffs are less sophisticated and may bring weaker claims that the EEOC would refuse to bring. Employment law is one of the most complicated areas of law in the United States and it's questionable whether the same results would hold in simpler areas where there may be less room for judges to exercise discretion (Smith 2006; Smith and Todd 2015). And historically political scientists have treated state courts and federal courts as very different creatures; whether my analysis has any relevance to state courts is a fair question not answered here.

However, I am confident of the basic research design. It seems clear that the triadic model gives us information about litigation that we did not previously have. It also seems clear that piercing beyond the usual dichotomous variables (win/lose, settle/trial) gives us new information about the process. Finally, it seems clear that the evolution of cases as the docket progresses gives us new information about trial courts, in particular.

I've also shown that there are limits to our ability to analyze trial courts using models derived from collegial courts. While I have evidence of strategic

behavior, that behavior is inconsistent. My evidence of ideological behavior is deeply contingent, and consistent with a strategic approach to policy-seeking. My strongest results suggest that the actual determinant of case outcomes in the trial court is usually the legal standard and the factual allegations.

Speculations

Why are there differences between trial courts and appellate courts? I want to be clear: this discussion is extremely speculative, but I argue that it is consistent with my findings and thus warrants future research. I would suggest that it may be appropriate to conceptualize the judiciary as actually having two different components engaged in different political activities. Trial courts are engaged in the allocation of resources. Appellate courts, in contrast, are engaged in the allocation of values.

This difference is consistent with the struggles that my findings have had to fit into appellate-court models. If trial courts are engaged in a fundamentally different activity than appellate courts, the incentives, motivations, and grounds for decisions will differ between the types of courts. It also is consistent with the literature on appellate courts that argues that the oversight function of the courts of appeals is mostly failing due to overload. If appellate courts are engaged in the allocation of values rather than resources, then their scarce resources will be husbanded for cases that give rise to clashes of values, and cases that present straightforward resource-allocation issues will receive short shrift.

I also wonder if this division of labor within the judicial hierarchy can explain the puzzle of diffuse support. The literature on public support for the judiciary and the Supreme Court is fairly consistent in finding that mass opinion supports the courts even when they see the courts as political institutions rather than legal ones, and even when respondents strongly disagree with decisions courts make. The causal mechanism in this literature is hard to nail down, with authors trying to tie it to some broad patriotic sense or a generic support for the rule of law.

But what if the actual causal mechanism is because individuals can witness the wheels of justice grinding fine in their own towns? What if the political weathervane that is the Supreme Court is mostly ignored, and people conceive of the judiciary as working because they go to traffic court and see the process at work, or they watch *Law & Order* and think that the real courts are like that? I want to emphasize that I'm speculating when I say this, but it would be consistent with all prior work and the analysis I've presented here.

Future Research

In Chapter 3, I demonstrated that rational expectations play a role in a heretofore unanalyzed step of the litigation process – the pleadings game. However, it does not prove that litigants always behave in accordance with rational expectations. The presence of Rule 54(c), the burden of proof in remand proceedings, and state-law pleading requirements all color the calculations that plaintiffs make in pleading damages. The model, combined with the study of the legal regime, gives rise to six empirical predictions:

Prediction 1: In states without a Rule 54(c) equivalent (or in courts of limited jurisdiction), rational plaintiffs will usually allege indeterminate damages, unless their damages only slightly exceed the jurisdictional minimum and state courts are significantly more plaintiff-friendly.

Prediction 2: All rational defendants will remove cases with indeterminate damages, arguing that they exceed the amount in controversy.

Prediction 3: In states without a Rule 54(c) equivalent, rational plaintiffs acquiesce to federal jurisdiction, unless their damages do not or only slightly exceed the jurisdictional minimum and state courts are significantly more plaintiff-friendly.

Prediction 4: In states with a Rule 54(c) equivalent, rational plaintiffs allege specific damages if known.

Prediction 5: In states with a Rule 54(c) equivalent, rational plaintiffs seek remand of removed cases, arguing that their damages cannot exceed the jurisdictional minimum.

Prediction 6: In courts with maximum-damages jurisdictional limits, rational plaintiffs only file if their damages do not exceed the jurisdictional limits, and plead specific damages.

These predictions would be testable in future research replicating Miller (1992)'s approach. Using an attorney survey, scholars could gain information about the specific practices of litigators and determine if state law has an effect. They could also determine if personal characteristics, such as length of practice, area of practice, or other issues play a role in determining litigant behavior.

Equally as important, Chapter 3 demonstrates that when studying litigation outcomes, that the payout is the best and most useful dependent variable. Because plaintiffs cannot be expected to plead determinate damages, we can't use the final value of the case expressed as a percentage of initial pleaded damages. However, we can use payouts where they are available to discern the difference between marginal and resounding plaintiff's victories. The findings I have related to payouts do suggest that this analysis may be fruitful.

There is also some work in the econometrics literature that may suggest ways to approach the question of lawyer quality. Using head-to-head tournament-style network analysis, scholars are developing ways to infer rank-ordering even where not all participants in a group have interacted with one another (Mukherjee 2012). Using similar methods, I would expect to be able to build a measure of attorney success that could serve as a reasonable proxy for quality.¹

Generalizability concerns would lead to replicating this research design in other contexts. Administrative agencies with enforcement powers in other areas of law would be an important context. The Securities and Exchange Commission, the Internal Revenue Service, the Federal Trade Commission, and the Departments of Labor, Education, and Interior all engage in enforcement litigation; building datasets that explore their successes and failures would enrich our understanding

¹ I can't claim that this would actually measure attorney quality, because there are too many factors that determine litigation outcomes that aren't attorney quality (as I've shown in this dissertation).

of enforcement litigation in particular.

Generating datasets with cases that settled and cases that went to judgment outside of the enforcement context presents a particular challenge. The confidentiality agreements that mark most private settlements make it difficult at best to connect any information about the settlements to information about the docket. The settlement dataset generated in Illinois could only exist by promising to remove all identifying information from the case so that the parties could be assured of their confidentiality (Schwab and Heise 2011). However, new work suggests that where states require disclosure of settlement information, that that data may provide leverage to examine whether these findings reach beyond the enforcement context into general private litigation (Helland, Klerman, Dowling, and Kappner 2017).

This project should be seen as a beginning, not the end. While my findings are hardly the final word in these matters, it suggests that trial courts offer a fertile new field for research in judicial politics, and that our approach to trial courts requires significant refinement. We should undertake data collection with an eye to conducting research on the trial court as a specific forum distinct from the rest of the judicial hierarchy.

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APPENDIX A: FULL TABLES

Chapter 3 Full Regression Results

	Coef.	St.Err	t-value	p-value	Sig.
EEOC Victory					
Prior Motion Winner	-0.776	0.214	-3.63	0.000	***
Discovery Motion	-0.949	0.423	-2.24	0.025	**
Dispositive Motion	-0.680	0.408	-1.67	0.096	*
Issues Alleged	-0.112	0.084	-1.33	0.184	
Post-Desert Palace	-0.214	0.186	-1.15	0.251	
Defendant Filing Motion	0.132	0.239	0.55	0.580	
Equal Pay Act	1.172	0.723	1.62	0.105	*
ADA Claim	0.588	0.246	2.39	0.017	**
ADEA Claim	0.118	0.356	0.33	0.740	
Judicial Ideology	0.066	0.124	0.53	0.595	
Constant	-2.133	1.651	-1.29	0.196	
Mean dependent var	0.600	SD dependent var		0.490	
Pseudo r-squared	0.045	Number of obs		553.000	
Chi-square	33.348	Prob > chi2		0.000	
Akaike crit. (AIC)	732.841	Bayesian crit. (BIC)		780.310	

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

	Coef.	St.Err	t-value	p-value	Sig.
EEOC Victory					
Defendant Filed Prior Motion	0.058	0.225	0.26	0.798	
Any Relief Granted Prior Motion	-0.179	0.236	-0.76	0.448	
Discovery Motion	-0.859	0.421	-2.04	0.041	**
Dispositive Motion	-0.615	0.405	-1.52	0.129	
Issues Alleged	-0.113	0.084	-1.35	0.176	
Post-Desert Palace	-0.144	0.184	-0.78	0.434	
Defendant Filing Motion	0.288	0.235	1.23	0.220	
Equal Pay Act	1.154	0.713	1.62	0.106	*
ADA Claim	0.572	0.243	2.35	0.019	**
ADEA Claim	0.079	0.352	0.23	0.822	
Judicial Ideology	0.122	0.123	0.99	0.321	
Constant	-2.292	1.635	-1.40	0.161	
Mean dependent var	0.600	SD dependent var		0.490	

Pseudo r-squared	0.029	Number of obs	553.000
Chi-square	21.358	Prob > chi2	0.030
Akaike crit. (AIC)	746.830	Bayesian crit. (BIC)	798.614

*** p<0.01, ** p<0.05, * p<0.1

Regression results

	Coef.	St.Err	t-value	p-value	Sig.
EEOC Victory					
EEOC Victory Prior Motion	0.234	0.163	1.44	0.150	
Prior Motion Winner	0.296	0.116	2.55	0.011	**
Discovery Motion	-0.269	0.168	-1.60	0.109	*
Dispositive Motion	-0.107	0.140	-0.77	0.443	
Defendant Filing Motion	0.053	0.106	0.50	0.614	
Judicial Ideology	-0.558	0.369	-1.51	0.131	
Constant	0.328	0.226	1.45	0.146	
Mean dependent var	0.568	SD dependent var			0.496
Number of obs	184.000	Chi-square			11.992

*** p<0.01, ** p<0.05, * p<0.1

Regression results

	Coef.	St.Err	t-value	p-value	Sig.
EEOC Victory					
EEOC Victory Prior Motion	0.188	0.152	1.24	0.216	
Defendant Filed Prior Motion	0.270	0.103	2.63	0.009	***
Any Relief Granted Prior Motion	0.271	0.117	2.32	0.020	**
Discovery Motion	-0.210	0.164	-1.28	0.201	
Dispositive Motion	-0.106	0.137	-0.77	0.440	
Defendant Filing Motion	0.039	0.098	0.40	0.693	
Judicial Ideology	-0.554	0.359	-1.54	0.123	
Constant	0.172	0.240	0.72	0.472	
Mean dependent var	0.568	SD dependent var			0.496
Number of obs	184.000	Chi-square			15.816

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

	Coef.	St.Err	t-value	p-value	Sig.
EEOC Victory					
Prior Motion Winner	-0.270	0.444	-0.61	0.542	
Issues Alleged	0.047	0.183	0.26	0.797	
Post-Desert Palace	0.296	0.399	0.74	0.458	
Defendant Filing Motion	-0.976	0.421	-2.32	0.020	**
o.Equal Pay Act	0.000	.	.	.	
ADA Claim	-1.438	0.584	-2.46	0.014	**
ADEA Claim	-0.709	0.998	-0.71	0.478	

Judicial Ideology	-0.463	0.265	-1.74	0.081	*
Constant	4.474	2.301	1.94	0.052	*

Mean dependent var	0.528	SD dependent var	0.501
Pseudo r-squared	0.081	Number of obs	123.000
Chi-square	13.729	Prob > chi2	0.056
Akaike crit. (AIC)	172.387	Bayesian crit. (BIC)	194.884

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

EEOC Victory	Coef.	St.Err	t-value	p-value	Sig.
Defendant Filed Prior Motion	0.853	0.499	1.71	0.087	*
Any Relief Granted Prior Motion	0.717	0.518	1.39	0.166	
Issues Alleged	0.011	0.186	0.06	0.954	
Post-Desert Palace	0.295	0.407	0.72	0.469	
Defendant Filing Motion	-0.980	0.424	-2.31	0.021	**
o.Equal Pay Act	0.000	.	.	.	
ADA Claim	-1.510	0.595	-2.54	0.011	**
ADEA Claim	-0.505	1.023	-0.49	0.621	
Judicial Ideology	-0.350	0.271	-1.29	0.197	
Constant	3.413	2.332	1.46	0.143	

Mean dependent var	0.528	SD dependent var	0.501
Pseudo r-squared	0.099	Number of obs	123.000
Chi-square	16.886	Prob > chi2	0.031
Akaike crit. (AIC)	171.230	Bayesian crit. (BIC)	196.540

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

EEOC Victory	Coef.	St.Err	t-value	p-value	Sig.
Prior Motion Winner	-1.088	0.272	-4.01	0.000	***
Issues Alleged	-0.240	0.101	-2.38	0.017	**
Post-Desert Palace	-0.261	0.231	-1.13	0.258	
Defendant Filing Motion	0.458	0.348	1.31	0.189	
Equal Pay Act	0.791	0.816	0.97	0.332	
ADA Claim	1.004	0.311	3.23	0.001	***
ADEA Claim	0.392	0.395	0.99	0.322	
Judicial Ideology	0.074	0.155	0.48	0.634	
Constant	-3.298	1.807	-1.83	0.068	*

Mean dependent var	0.615	SD dependent var	0.487
Pseudo r-squared	0.082	Number of obs	392.000
Chi-square	42.892	Prob > chi2	0.000
Akaike crit. (AIC)	497.687	Bayesian crit. (BIC)	533.428

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

	Coef.	St.Err	t-value	p-value	Sig.
EEOC Victory					
Defendant Filed Prior Motion	-0.288	0.285	-1.01	0.312	
Any Relief Granted Prior Motion	-0.659	0.303	-2.17	0.030	**
Issues Alleged	-0.226	0.100	-2.27	0.024	**
Post-Desert Palace Defendant Filing Motion	-0.191	0.228	-0.84	0.402	
Equal Pay Act	0.666	0.340	1.96	0.050	**
ADA Claim	0.720	0.797	0.90	0.366	
ADEA Claim	1.032	0.306	3.38	0.001	***
Judicial Ideology	0.270	0.394	0.69	0.494	
Constant	0.151	0.153	0.99	0.322	
	-2.872	1.797	-1.60	0.110	
Mean dependent var	0.615	SD dependent var			0.487
Pseudo r-squared	0.060	Number of obs			392.000
Chi-square	31.473	Prob > chi2			0.000
Akaike crit. (AIC)	511.106	Bayesian crit. (BIC)			550.818

*** p<0.01, ** p<0.05, * p<0.1

Chapter 6 Full Regression Results**Probit regression**

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Number of Complainants	0.057	0.018	3.20	0.001	***
Issues Alleged	-0.056	0.042	-1.33	0.185	
Judicial Ideology	0.583	0.145	4.03	0.000	***
Post-Desert Palace	-0.082	0.121	-0.68	0.496	
Post-Sutton Cases	-0.917	0.656	-1.40	0.162	
Post-Reeves Cases	1.035	0.524	1.97	0.048	**
Title VII Claims	-5.308	128.607	-0.04	0.967	
ADA Claim	-4.866	128.607	-0.04	0.970	
ADEA Claim	-4.469	128.606	-0.04	0.972	
Race Discrimination Claims	0.159	0.133	1.20	0.232	
Religion Discrimination Claims	-0.842	0.221	-3.81	0.000	***
Retaliation Claims	0.002	0.073	0.03	0.976	
Disparate Impact Claims	0.048	0.193	0.25	0.802	
Pattern and	0.031	0.151	0.21	0.836	

Practice Claims					
Non-Pecuniary	-1.058	0.333	-3.18	0.001	***
Relief Claims					
Punitive Damages	1.617	0.579	2.79	0.005	***
Claims					
Constant	24.121	643.031	0.04	0.970	

Mean dependent var	0.699	SD dependent var	0.459
Pseudo r-squared	0.090	Number of obs	838.000
Chi-square	92.410	Prob > chi2	0.000
Akaike crit. (AIC)	966.413	Bayesian crit. (BIC)	1046.841

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Number of Complainants	0.059	0.018	3.26	0.001	***
Issues Alleged	-0.067	0.042	-1.62	0.105	*
Judicial Ideology	0.155	0.068	2.29	0.022	**
Post-Desert Palace	-0.085	0.121	-0.71	0.479	
Post-Sutton Cases	-1.001	0.660	-1.52	0.129	
Post-Reeves Cases	1.034	0.529	1.96	0.050	**
Title VII Claims	-5.124	111.479	-0.05	0.963	
ADA Claim	-4.641	111.479	-0.04	0.967	
ADEA Claim	-4.356	111.477	-0.04	0.969	
Race Discrimination	0.167	0.133	1.25	0.211	
Claims					
Religion	-0.930	0.220	-4.23	0.000	***
Discrimination					
Claims					
Retaliation Claims	0.003	0.072	0.04	0.971	
Disparate Impact	0.094	0.191	0.49	0.622	
Claims					
Pattern and	0.029	0.150	0.19	0.849	
Practice Claims					
Non-Pecuniary	-1.062	0.333	-3.19	0.001	***
Relief Claims					
Punitive Damages	1.633	0.590	2.77	0.006	***
Claims					
Constant	23.321	557.388	0.04	0.967	

Mean dependent var	0.699	SD dependent var	0.459
Pseudo r-squared	0.079	Number of obs	838.000
Chi-square	81.236	Prob > chi2	0.000

Akaike crit. (AIC)

977.588 Bayesian crit. (BIC)

1058.015

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Raw Employment Defenses	0.037	0.019	1.97	0.049	**
Raw Damages Defenses	-0.045	0.030	-1.50	0.134	
Raw Other Defenses	-0.047	0.035	-1.33	0.184	
Raw Equity Defenses	0.004	0.045	0.10	0.922	
Raw Procedure Defenses	-0.054	0.032	-1.70	0.089	*
Number of Complainants	0.029	0.045	0.64	0.523	
Issues Alleged	0.054	0.125	0.43	0.667	
Title VII Claims	0.918	0.893	1.03	0.304	
ADA Claim	0.954	0.895	1.07	0.286	
ADEA Claim	-0.496	0.565	-0.88	0.379	
Race Discrimination Claims	0.075	0.313	0.24	0.811	
Sex Discrimination Claims	0.279	0.292	0.96	0.339	
Retaliation Claims	0.015	0.128	0.12	0.905	
Disparate Impact Claims	-0.595	0.464	-1.28	0.200	
Pattern and Practice Claims	0.138	0.406	0.34	0.734	
Non-Pecuniary Relief Claims	-1.283	0.809	-1.59	0.113	
Punitive Damages Claims	1.461	1.035	1.41	0.158	
Constant	-0.604	1.767	-0.34	0.733	

Mean dependent var

0.780

SD dependent var

0.415

Pseudo r-squared

0.103

Number of obs

250.000

Chi-square

27.210

Prob > chi2

0.055

Akaike crit. (AIC)

272.244

Bayesian crit. (BIC)

335.630

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Corrected Employment Defenses	0.039	0.024	1.60	0.110	
Corrected Damages Defenses	-0.042	0.035	-1.19	0.233	
Corrected Other Defenses	-0.074	0.044	-1.66	0.096	*
Corrected Equity Defenses	-0.018	0.058	-0.31	0.760	
Corrected Procedure Defenses	-0.046	0.038	-1.20	0.232	
Number of Complainants	0.029	0.045	0.63	0.528	
Issues Alleged	0.062	0.126	0.49	0.623	
Title VII Claims	0.965	0.883	1.09	0.274	
ADA Claim	0.940	0.883	1.06	0.287	
ADEA Claim	-0.490	0.560	-0.88	0.381	
Race Discrimination Claims	0.042	0.314	0.14	0.893	
Sex Discrimination Claims	0.287	0.293	0.98	0.328	
Retaliation Claims	0.048	0.128	0.38	0.708	
Disparate Impact Claims	-0.602	0.462	-1.30	0.192	
Pattern and Practice Claims	0.112	0.405	0.28	0.782	
Non-Pecuniary Relief Claims	-1.289	0.810	-1.59	0.111	
Punitive Damages Claims	1.457	1.033	1.41	0.159	
Constant	-0.851	1.757	-0.48	0.628	
Mean dependent var	0.783	SD dependent var		0.413	
Pseudo r-squared	0.098	Number of obs		249.000	
Chi-square	25.394	Prob > chi2		0.086	
Akaike crit. (AIC)	271.017	Bayesian crit. (BIC)		334.332	

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Motion for Summary	-1400000.000	941000.000	-1.49	0.140	

Judgment Filed					
ADA Claim	-390000.000	3180000.000	-0.12	0.903	
ADEA Claim	-562000.000	3130000.000	-0.18	0.858	
Title VII Claims	295000.000	3560000.000	0.08	0.934	
Complainant	2060000.000	3360000.000	0.61	0.541	
Represented by					
Private Attorney					
Complainant	2340000.000	3190000.000	0.73	0.465	
Represented by					
Public Interest					
Counsel or Union					
Court of Appeals	66994.323	176000.000	0.38	0.704	
With Jurisdiction					
Pecuniary Relief	1100000.000	2510000.000	0.44	0.663	
Claims					
Number of	778000.000	173000.000	4.48	0.000	***
Complainants					
Non-Pecuniary	-1120000.000	4030000.000	-0.28	0.782	
Relief Claims					
Issues Alleged	1910000.000	406000.000	4.71	0.000	***
Constant	-	14500000.000	-0.74	0.462	
	10700000.000				
Constant	4970000.000	318000.000	.b	.b	

Mean dependent var	1029162.867	SD dependent var	6077480.609
Pseudo r-squared	0.013	Number of obs	128.000
Chi-square	55.661	Prob > chi2	0.000
Akaike crit. (AIC)	4142.455	Bayesian crit. (BIC)	4179.531

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Motion for	-2080000.000	1010000.000	-2.06	0.041	**
Summary					
Judgment Filed					
ADA Claim	-1950000.000	3410000.000	-0.57	0.568	
ADEA Claim	2020000.000	3330000.000	0.61	0.545	
Title VII Claims	-2220000.000	3800000.000	-0.58	0.560	
Collective Action	413000.000	1010000.000	0.41	0.683	
Complainant	613000.000	3610000.000	0.17	0.865	
Represented by					
Private Attorney					
Complainant	1260000.000	3450000.000	0.37	0.715	
Represented by					
Public Interest					
Counsel or Union					
Court of Appeals	95823.201	190000.000	0.51	0.615	
With Jurisdiction					

Pecuniary Relief Claims	1250000.000	2720000.000	0.46	0.645	
Non-Pecuniary Relief Claims	5930000.000	4020000.000	1.48	0.143	
Issues Alleged	2480000.000	423000.000	5.86	0.000	***
Constant	-	15700000.000	-0.83	0.409	
	13000000.000				
Constant	5370000.000	344000.000	.b	.b	

Mean dependent var	1029162.867	SD dependent var	6077480.609
Pseudo r-squared	0.009	Number of obs	128.000
Chi-square	37.348	Prob > chi2	0.000
Akaike crit. (AIC)	4160.767	Bayesian crit. (BIC)	4197.844

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Motion for Summary Judgment Filed	-1.254	0.494	-2.54	0.012	**
ADA Claim	-0.790	1.687	-0.47	0.640	
ADEA Claim	-0.099	1.662	-0.06	0.953	
Title VII Claims	-2.658	1.874	-1.42	0.159	
Complainant Represented by Private Attorney	0.979	1.784	0.55	0.584	
Complainant Represented by Public Interest Counsel or Union	-0.151	1.693	-0.09	0.929	
Court of Appeals With Jurisdiction	0.178	0.092	1.93	0.056	*
Pecuniary Relief Claims	1.357	1.321	1.03	0.307	
Number of Complainants	0.105	0.092	1.15	0.254	
Non-Pecuniary Relief Claims	2.253	2.142	1.05	0.295	
Issues Alleged	0.459	0.215	2.13	0.035	**
Constant	9.221	7.702	1.20	0.234	
Constant	2.646	0.173	.b	.b	

Mean dependent var	11.103	SD dependent var	3.715
Pseudo r-squared	0.041	Number of obs	128.000

Chi-square	25.782	Prob > chi2	0.007
Akaike crit. (AIC)	631.873	Bayesian crit. (BIC)	668.950

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Motion for Summary Judgment Filed	-1.301	0.488	-2.67	0.009	***
ADA Claim	-1.090	1.674	-0.65	0.516	
ADEA Claim	0.194	1.629	0.12	0.905	
Title VII Claims	-2.862	1.848	-1.55	0.124	
Complainant Represented by Private Attorney	0.843	1.772	0.48	0.635	
Complainant Represented by Public Interest Counsel or Union	-0.090	1.691	-0.05	0.958	
Court of Appeals With Jurisdiction	0.177	0.092	1.93	0.057	*
Pecuniary Relief Claims	1.353	1.318	1.03	0.307	
Collective Action	0.693	0.493	1.41	0.162	
Non-Pecuniary Relief Claims	2.923	1.969	1.49	0.140	
Issues Alleged	0.476	0.207	2.29	0.024	**
Constant	8.728	7.680	1.14	0.258	
Constant	2.640	0.172	.b	.b	

Mean dependent var	11.103	SD dependent var	3.715
Pseudo r-squared	0.042	Number of obs	128.000
Chi-square	26.439	Prob > chi2	0.006
Akaike crit. (AIC)	631.216	Bayesian crit. (BIC)	668.292

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Notice of Appeal Filed	2.568	0.175	14.68	0.000	***

Issues Alleged	0.104	0.051	2.05	0.040	**
Post-Desert Palace	0.252	0.148	1.70	0.089	*
Post-Sutton Cases	-2.021	0.852	-2.37	0.018	**
Post-Reeves Cases	1.771	0.733	2.42	0.016	**
Title VII Claims	-3.450	85.305	-0.04	0.968	
ADA Claim	-4.103	85.305	-0.05	0.962	
ADEA Claim	-3.248	85.302	-0.04	0.970	
Race Discrimination Claims	-0.015	0.145	-0.10	0.917	
Religion Discrimination Claims	-1.102	0.231	-4.78	0.000	***
Retaliation Claims	-0.123	0.086	-1.42	0.155	
Disparate Impact Claims	0.394	0.225	1.75	0.080	*
Pattern and Practice Claims	-0.568	0.168	-3.39	0.001	***
Non-Pecuniary Relief Claims	-0.504	0.418	-1.20	0.229	
Punitive Damages Claims	1.167	0.834	1.40	0.162	
Constant	13.028	426.511	0.03	0.976	

Mean dependent var	0.695	SD dependent var	0.461
Pseudo r-squared	0.354	Number of obs	843.000
Chi-square	366.857	Prob > chi2	0.000
Akaike crit. (AIC)	701.913	Bayesian crit. (BIC)	777.705

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	0.901	0.849	1.06	0.289	
Issues Alleged	-0.077	0.094	-0.82	0.414	
Post-Desert Palace	-0.068	0.196	-0.35	0.730	
Post-Sutton Cases	-1.260	1.249	-1.01	0.313	
Post-Reeves Cases	1.411	1.322	1.07	0.286	
Title VII Claims	-6.212	200.613	-0.03	0.975	
ADA Claim	-5.834	200.604	-0.03	0.977	
ADEA Claim	-4.946	200.598	-0.03	0.980	
Race Discrimination Claims	0.132	0.253	0.52	0.602	

Religion Discrimination Claims	-1.096	1.334	-0.82	0.411	
Retaliation Claims	0.005	0.087	0.05	0.958	
Disparate Impact Claims	0.178	0.232	0.77	0.442	
Pattern and Practice Claims	-0.080	0.172	-0.47	0.642	
Non-Pecuniary Relief Claims	-1.520	1.669	-0.91	0.362	
Punitive Damages Claims	2.428	2.467	0.98	0.325	
Number of Complainants	0.096	0.073	1.32	0.188	
Probability of Settlement Predicted by Appeal	3.305	0.231	14.32	0.000	***
Probability of Settlement Predicted by Complaint	-3.847	4.345	-0.89	0.376	
Constant	27.986	1003.043	0.03	0.978	

Mean dependent var	0.699	SD dependent var	0.459
Pseudo r-squared	0.372	Number of obs	838.000
Chi-square	380.879	Prob > chi2	0.000
Akaike crit. (AIC)	681.945	Bayesian crit. (BIC)	771.834

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	0.583	0.145	4.03	0.000	***
Issues Alleged	-0.056	0.042	-1.33	0.185	
Post-Desert Palace	-0.082	0.121	-0.68	0.496	
Post-Sutton Cases	-0.917	0.656	-1.40	0.162	
Post-Reeves Cases	1.035	0.524	1.97	0.048	**
Title VII Claims	-5.308	128.607	-0.04	0.967	
ADA Claim	-4.866	128.607	-0.04	0.970	
ADEA Claim	-4.469	128.606	-0.04	0.972	
Race Discrimination Claims	0.159	0.133	1.20	0.232	
Religion Discrimination Claims	-0.842	0.221	-3.81	0.000	***
Retaliation Claims	0.002	0.073	0.03	0.976	

Disparate Impact Claims	0.048	0.193	0.25	0.802	
Pattern and Practice Claims	0.031	0.151	0.21	0.836	
Non-Pecuniary Relief Claims	-1.058	0.333	-3.18	0.001	***
Punitive Damages Claims	1.617	0.579	2.79	0.005	***
Number of Complainants	0.057	0.018	3.20	0.001	***
Constant	24.121	643.031	0.04	0.970	

Mean dependent var	0.699	SD dependent var	0.459
Pseudo r-squared	0.090	Number of obs	838.000
Chi-square	92.410	Prob > chi2	0.000
Akaike crit. (AIC)	966.413	Bayesian crit. (BIC)	1046.841

*** p<0.01, ** p<0.05, * p<0.1

Chapter 7 Full Regression Results

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Number of Complainants	1778.409	11678.430	0.15	0.879	
Probability of Settlement Predicted by Complaint	1130000.000	871000.000	1.30	0.195	
Issues Alleged	106000.000	26499.136	4.01	0.000	***
Judicial Ideology	-329000.000	183000.000	-1.80	0.073	*
Post-Desert Palace	14641.050	76032.967	0.19	0.847	
Post-Sutton Cases	-548000.000	400000.000	-1.37	0.171	
Post-Reeves Cases	336000.000	289000.000	1.16	0.247	
Title VII Claims	355000.000	411000.000	0.86	0.388	
ADA Claim	325000.000	322000.000	1.01	0.312	
ADEA Claim	301000.000	285000.000	1.05	0.292	
Race Discrimination Claims	-213000.000	91061.253	-2.34	0.020	**
Religion Discrimination Claims	147000.000	315000.000	0.47	0.640	
Retaliation Claims	-173000.000	38830.913	-4.46	0.000	***
Disparate Impact Claims	333000.000	111000.000	3.01	0.003	***

Pattern and Practice Claims	-53200.000	92500.887	-0.57	0.565
Non-Pecuniary Relief Claims	286000.000	402000.000	0.71	0.478
Punitive Damages Claims	-177000.000	469000.000	-0.38	0.706
Constant	-2540000.000	1840000.000	-1.38	0.168
Constant	710000.000	20349.889	.b	.b

Mean dependent var	348910.982	SD dependent var	748643.075
Pseudo r-squared	0.003	Number of obs	609.000
Chi-square	63.189	Prob > chi2	0.000
Akaike crit. (AIC)	18176.766	Bayesian crit. (BIC)	18260.591

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Raw Employment Defenses	-31600.000	12617.281	-2.51	0.013	**
Raw Damages Defenses	34480.888	17115.430	2.02	0.045	**
Raw Other Defenses	68257.832	26833.021	2.54	0.012	**
Raw Equity Defenses	-4273.249	23335.033	-0.18	0.855	
Raw Procedure Defenses	63441.785	23160.096	2.74	0.007	***
Number of Complainants	80332.360	22165.442	3.62	0.000	***
Issues Alleged	-125000.000	61654.729	-2.03	0.044	**
Title VII Claims	-1330000.000	556000.000	-2.40	0.017	**
ADA Claim	-1110000.000	503000.000	-2.20	0.029	**
ADEA Claim	686000.000	389000.000	1.76	0.079	*
Race Discrimination Claims	332000.000	123000.000	2.69	0.008	***
Religion Discrimination Claims	277000.000	231000.000	1.20	0.232	
Retaliation Claims	-170000.000	66106.831	-2.57	0.011	**
Disparate Impact Claims	1170000.000	313000.000	3.74	0.000	***
Pattern and Practice Claims	-475000.000	196000.000	-2.43	0.016	**
Non-Pecuniary Relief Claims	2630000.000	512000.000	5.14	0.000	***
Punitive Damages	-167000.000	360000.000	-0.47	0.642	

Claims Settlement Probability Predicted by Defenses	3940000.000	1130000.000	3.47	0.001	***
Constant	-3290000.000	953000.000	-3.46	0.001	***
Constant	651000.000	33766.274	.b	.b	

Mean dependent var	192514.483	SD dependent var	767242.903
Pseudo r-squared	0.016	Number of obs	219.000
Chi-square	91.551	Prob > chi2	0.000
Akaike crit. (AIC)	5711.329	Bayesian crit. (BIC)	5779.111

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Raw Employment Defenses	-0.013	0.095	-0.14	0.889	
Raw Damages Defenses	0.021	0.129	0.16	0.872	
Raw Other Defenses	0.135	0.201	0.67	0.504	
Raw Equity Defenses	0.027	0.173	0.16	0.875	
Raw Procedure Defenses	0.090	0.173	0.52	0.605	
Number of Complainants	0.193	0.166	1.16	0.246	
Issues Alleged	-0.255	0.453	-0.56	0.574	
Title VII Claims	-7.376	4.001	-1.84	0.067	*
ADA Claim	-7.966	3.573	-2.23	0.027	**
ADEA Claim	1.781	2.903	0.61	0.540	
Race Discrimination Claims	0.598	0.917	0.65	0.515	
Religion Discrimination Claims	-0.364	1.701	-0.21	0.831	
Retaliation Claims	-1.190	0.474	-2.51	0.013	**
Disparate Impact Claims	-0.709	2.434	-0.29	0.771	
Pattern and Practice Claims	0.277	1.507	0.18	0.854	
Non-Pecuniary Relief Claims	-1.724	3.881	-0.44	0.657	
Punitive Damages	-2.341	2.677	-0.88	0.383	

Claims Settlement Probability Predicted by Defenses					
Constant	10.698	8.501	1.26	0.210	
Constant	18.703	7.113	2.63	0.009	***
Constant	4.908	0.265	.b	.b	

Mean dependent var	9.019	SD dependent var	5.493
Pseudo r-squared	0.026	Number of obs	219.000
Chi-square	33.004	Prob > chi2	0.017
Akaike crit. (AIC)	1262.893	Bayesian crit. (BIC)	1330.674

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Corrected Employment Defenses	-60700.000	17618.412	-3.45	0.001	***
Corrected Damages Defenses	61488.166	23425.493	2.63	0.009	***
Corrected Other Defenses	166000.000	42181.592	3.93	0.000	***
Corrected Equity Defenses	20644.783	30690.645	0.67	0.502	
Corrected Procedure Defenses	119000.000	28853.411	4.11	0.000	***
Number of Complainants	45284.890	24006.342	1.89	0.061	*
Issues Alleged	-157000.000	61571.325	-2.55	0.011	**
Title VII Claims	-2090000.000	635000.000	-3.28	0.001	***
ADA Claim	-2090000.000	623000.000	-3.36	0.001	***
ADEA Claim	1190000.000	412000.000	2.89	0.004	***
Race Discrimination Claims	-147.185	165000.000	-0.00	0.999	
Sex Discrimination Claims	-626000.000	199000.000	-3.14	0.002	***
Retaliation Claims	-195000.000	64460.282	-3.02	0.003	***
Disparate Impact Claims	1650000.000	347000.000	4.75	0.000	***
Pattern and Practice Claims	-474000.000	191000.000	-2.48	0.014	**
Non-Pecuniary Relief Claims	3600000.000	586000.000	6.14	0.000	***
Punitive Damages Claims	-782000.000	403000.000	-1.94	0.054	*

Settlement Probability Predicted by Defenses	7180000.000	1520000.000	4.71	0.000	***
Constant	-4840000.000	1040000.000	-4.66	0.000	***
Constant	633000.000	32792.653	.b	.b	

Mean dependent var	192514.483	SD dependent var	767242.903
Pseudo r-squared	0.018	Number of obs	219.000
Chi-square	102.792	Prob > chi2	0.000
Akaike crit. (AIC)	5700.088	Bayesian crit. (BIC)	5767.870

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Corrected Employment Defenses	-0.064	0.135	-0.47	0.635	
Corrected Damages Defenses	0.044	0.179	0.25	0.805	
Corrected Other Defenses	0.279	0.319	0.87	0.383	
Corrected Equity Defenses	0.055	0.232	0.24	0.814	
Corrected Procedure Defenses	0.210	0.220	0.95	0.341	
Number of Complainants	0.149	0.182	0.82	0.412	
Issues Alleged	-0.317	0.465	-0.68	0.496	
Title VII Claims	-8.679	4.378	-1.98	0.049	**
ADA Claim	-9.185	4.175	-2.20	0.029	**
ADEA Claim	2.656	3.123	0.85	0.396	
Race Discrimination Claims	0.510	1.254	0.41	0.685	
Sex Discrimination Claims	-0.457	1.489	-0.31	0.759	
Retaliation Claims	-1.272	0.482	-2.64	0.009	***
Disparate Impact Claims	-0.057	2.709	-0.02	0.983	
Pattern and Practice Claims	0.247	1.522	0.16	0.871	
Non-Pecuniary Relief Claims	-0.157	4.488	-0.04	0.972	
Punitive Damages Claims	-3.434	3.038	-1.13	0.260	

Settlement Probability Predicted by Defenses	15.736	11.449	1.38	0.171	
Constant	16.337	8.038	2.03	0.043	**
Constant	4.907	0.265	.b	.b	

Mean dependent var	9.019	SD dependent var	5.493
Pseudo r-squared	0.026	Number of obs	219.000
Chi-square	33.036	Prob > chi2	0.017
Akaike crit. (AIC)	1262.861	Bayesian crit. (BIC)	1330.642

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

Summary Judgment Outcome (binary)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	-0.368	0.437	-0.84	0.400	
ADA Claim	-1.584	0.774	-2.05	0.041	**
ADEA Claim	-1.111	0.701	-1.58	0.113	
Title VII Claims	-1.185	0.763	-1.55	0.121	
Issues Alleged	0.372	0.126	2.95	0.003	***
Post-Desert Palace	0.091	0.279	0.33	0.744	
Second Circuit	13.171	820.614	0.02	0.987	
Third Circuit	11.865	820.614	0.01	0.988	
Fourth Circuit	13.124	820.614	0.02	0.987	
Fifth Circuit	12.992	820.614	0.02	0.987	
Sixth Circuit	13.263	820.614	0.02	0.987	
Seventh Circuit	13.522	820.614	0.02	0.987	
Eighth Circuit	12.612	820.614	0.01	0.988	
Ninth Circuit	13.664	820.614	0.02	0.987	
Tenth Circuit	13.008	820.614	0.02	0.987	
Eleventh Circuit	13.314	820.614	0.02	0.987	
o.DC Circuit	0.000	.	.	.	
Seeking Partial Relief	-0.740	0.314	-2.35	0.019	**
Motion Filed by EEOC	0.427	0.371	1.15	0.250	
Defendant Filing x Judicial Ideology	0.000	.	.	.	
EEOC Filing x Judicial Ideology	-0.556	0.911	-0.61	0.542	
Constant	-7.832	820.621	-0.01	0.992	

Mean dependent var	0.365	SD dependent var	0.482
Pseudo r-squared	0.087	Number of obs	312.000
Chi-square	35.640	Prob > chi2	0.012
Akaike crit. (AIC)	413.987	Bayesian crit. (BIC)	488.847

*** p<0.01, ** p<0.05, * p<0.1

Ordered logistic regression

Summary	Coef.	St.Err	t-value	p-value	Sig.
Judgment Outcome (ordered)					
Judicial Ideology	0.017	0.383	0.04	0.965	
ADA Claim	-1.295	0.513	-2.52	0.012	**
ADEA Claim	-0.146	0.462	-0.32	0.752	
Title VII Claims	-0.971	0.515	-1.88	0.060	*
Issues Alleged	0.315	0.110	2.85	0.004	***
Post-Desert Palace	0.074	0.249	0.30	0.766	
Second Circuit	13.381	724.774	0.02	0.985	
Third Circuit	13.098	724.774	0.02	0.986	
Fourth Circuit	14.097	724.774	0.02	0.984	
Fifth Circuit	13.953	724.774	0.02	0.985	
Sixth Circuit	13.757	724.774	0.02	0.985	
Seventh Circuit	14.006	724.774	0.02	0.985	
Eighth Circuit	13.340	724.774	0.02	0.985	
Ninth Circuit	14.225	724.774	0.02	0.984	
Tenth Circuit	13.423	724.774	0.02	0.985	
Eleventh Circuit	14.254	724.774	0.02	0.984	
DC Circuit	31.719	2397.625	0.01	0.989	
Seeking Partial Relief	-0.144	0.265	-0.55	0.586	
Motion Filed by EEOC	0.092	0.330	0.28	0.781	
Defendant Filing x Judicial Ideology	0.000	.	.	.	
EEOC Filing x Judicial Ideology	-1.153	0.828	-1.39	0.164	
Constant	10.579	724.776	.b	.b	
Constant	12.406	724.776	.b	.b	

Mean dependent var	-0.328	SD dependent var	0.740
Pseudo r-squared	0.058	Number of obs	314.000
Chi-square	36.708	Prob > chi2	0.013
Akaike crit. (AIC)	642.769	Bayesian crit. (BIC)	725.256

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

Motion to Dismiss Outcome (binary)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	1.805	2.165	0.49	0.622	
ADA Claim	0.372	0.465	-0.79	0.428	
ADEA Claim	1.954	3.108	0.42	0.674	
o.Title VII Claims	1.000	.	.	.	
Issues Alleged	1.209	0.368	0.62	0.533	
Post-Desert Palace	4.158	3.314	1.79	0.074	*
o.First Circuit	1.000	.	.	.	
Second Circuit	1.472	2.185	0.26	0.794	
Fourth Circuit	0.337	0.606	-0.60	0.545	
Fifth Circuit	0.467	0.549	-0.65	0.517	
Sixth Circuit	1.598	2.364	0.32	0.751	
Seventh Circuit	0.452	0.523	-0.69	0.492	
Ninth Circuit	0.604	0.684	-0.45	0.656	
Tenth Circuit	2.759	4.491	0.62	0.533	
Seeking Partial Relief	3.342	3.534	1.14	0.254	
o.Motion Filed by EEOC	1.000	.	.	.	
o.Motion Filed by EEOC#co.j~e	1.000	.	.	.	
Constant	0.304	1.461	-0.25	0.804	

Mean dependent var	0.286	SD dependent var	0.456
Pseudo r-squared	0.142	Number of obs	56.000
Chi-square	9.529	Prob > chi2	0.732
Akaike crit. (AIC)	85.477	Bayesian crit. (BIC)	113.832

*** p<0.01, ** p<0.05, * p<0.1

Ordered logistic regression

Motion to Dismiss Outcome (ordered)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	2.736	2.922	0.94	0.346	
ADA Claim	0.102	0.111	-2.10	0.036	**
ADEA Claim	5.535	8.614	1.10	0.272	
o.Title VII Claims	1.000	.	.	.	
Issues Alleged	1.435	0.440	1.18	0.238	
Post-Desert Palace	8.157	6.437	2.66	0.008	***

o.First Circuit	1.000	.	.	.	
Second Circuit	2.063	3.091	0.48	0.629	
Third Circuit	0.000	0.000	-0.01	0.996	
Fourth Circuit	0.091	0.166	-1.31	0.189	
Fifth Circuit	0.222	0.261	-1.28	0.201	
Sixth Circuit	0.474	0.705	-0.50	0.616	
Seventh Circuit	0.315	0.349	-1.04	0.297	
Eighth Circuit	0.000	0.000	-0.00	0.997	
Ninth Circuit	0.234	0.260	-1.31	0.190	
Tenth Circuit	0.605	0.965	-0.32	0.753	
Seeking Partial Relief	5.632	5.824	1.67	0.095	*
o.Motion Filed by EEOC	1.000	.	.	.	
0o.Motion Filed by EEOC#co.j~e	1.000	.	.	.	
Constant	-0.243	4.200	.b	.b	
Constant	1.483	4.199	.b	.b	

Mean dependent var	-0.357	SD dependent var	0.796
Pseudo r-squared	0.233	Number of obs	56.000
Chi-square	25.886	Prob > chi2	0.039
Akaike crit. (AIC)	119.399	Bayesian crit. (BIC)	153.830

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Summary	Coef.	St.Err	t-value	p-value	Sig.
Judgment Outcome (binary)					
Judicial Ideology	-0.229	0.266	-0.86	0.389	
ADA Claim	-0.933	0.411	-2.27	0.023	**
ADEA Claim	-0.659	0.383	-1.72	0.086	*
Title VII Claims	-0.697	0.411	-1.70	0.090	*
Issues Alleged	0.233	0.077	3.03	0.002	***
Post-Desert Palace	0.061	0.169	0.36	0.720	
Second Circuit	4.350	186.622	0.02	0.981	
Third Circuit	3.593	186.622	0.02	0.985	
Fourth Circuit	4.310	186.622	0.02	0.982	
Fifth Circuit	4.233	186.622	0.02	0.982	
Sixth Circuit	4.398	186.622	0.02	0.981	
Seventh Circuit	4.554	186.622	0.02	0.981	
Eighth Circuit	3.983	186.622	0.02	0.983	
Ninth Circuit	4.638	186.622	0.03	0.980	
Tenth Circuit	4.239	186.622	0.02	0.982	
Eleventh Circuit	4.422	186.622	0.02	0.981	
o.DC Circuit	0.000	.	.	.	

Seeking Partial Relief	-0.460	0.188	-2.45	0.014	**
Motion Filed by EEOC	0.273	0.224	1.22	0.223	
Defendant Filing x Judicial Ideology	0.000	.	.	.	
EEOC Filing x Judicial Ideology	-0.323	0.551	-0.59	0.557	
Constant	-1.226	186.630	-0.01	0.995	

Mean dependent var	0.365	SD dependent var	0.482
Pseudo r-squared	0.088	Number of obs	312.000
Chi-square	35.898	Prob > chi2	0.011
Akaike crit. (AIC)	413.729	Bayesian crit. (BIC)	488.589

*** p<0.01, ** p<0.05, * p<0.1

Ordered probit regression

Summary Judgment Outcome (ordered)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	0.015	0.229	0.06	0.949	
ADA Claim	-0.808	0.310	-2.60	0.009	***
ADEA Claim	-0.101	0.283	-0.36	0.720	
Title VII Claims	-0.547	0.311	-1.76	0.079	*
Issues Alleged	0.186	0.066	2.81	0.005	***
Post-Desert Palace	0.053	0.147	0.36	0.720	
Second Circuit	4.626	224.397	0.02	0.984	
Third Circuit	4.434	224.397	0.02	0.984	
Fourth Circuit	5.122	224.397	0.02	0.982	
Fifth Circuit	4.964	224.396	0.02	0.982	
Sixth Circuit	4.883	224.397	0.02	0.983	
Seventh Circuit	5.005	224.397	0.02	0.982	
Eighth Circuit	4.624	224.397	0.02	0.984	
Ninth Circuit	5.157	224.396	0.02	0.982	
Tenth Circuit	4.653	224.397	0.02	0.983	
Eleventh Circuit	5.157	224.396	0.02	0.982	
DC Circuit	10.795	298.306	0.04	0.971	
Seeking Partial Relief	-0.085	0.160	-0.53	0.595	
Motion Filed by EEOC	0.052	0.197	0.27	0.790	
Defendant Filing x Judicial Ideology	0.000	.	.	.	
EEOC Filing x Judicial Ideology	-0.686	0.489	-1.40	0.161	
Constant	2.913	224.400	.b	.b	

Constant	4.001	224.400	.b	.b
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Mean dependent var	-0.328	SD dependent var	0.740
Pseudo r-squared	0.057	Number of obs	314.000
Chi-square	36.520	Prob > chi2	0.013
Akaike crit. (AIC)	642.957	Bayesian crit. (BIC)	725.444

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Motion to Dismiss Outcome (binary)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	0.439	0.686	0.64	0.522	
ADA Claim	-0.550	0.763	-0.72	0.471	
ADEA Claim	0.492	0.976	0.50	0.614	
o.Title VII Claims	0.000	.	.	.	
Issues Alleged	0.126	0.180	0.70	0.485	
Post-Desert Palace	0.888	0.472	1.88	0.060	*
o.First Circuit	0.000	.	.	.	
Second Circuit	0.267	0.902	0.30	0.767	
Fourth Circuit	-0.718	1.066	-0.67	0.500	
Fifth Circuit	-0.519	0.701	-0.74	0.459	
Sixth Circuit	0.287	0.858	0.34	0.738	
Seventh Circuit	-0.428	0.644	-0.67	0.506	
Ninth Circuit	-0.349	0.651	-0.54	0.592	
Tenth Circuit	0.584	0.922	0.63	0.527	
Seeking Partial Relief	0.723	0.637	1.13	0.257	
o.Motion Filed by EEOC	0.000	.	.	.	
0o.Motion Filed by EEOC#co.j~e	0.000	.	.	.	
Constant	-1.009	2.920	-0.35	0.730	

Mean dependent var	0.286	SD dependent var	0.456
Pseudo r-squared	0.145	Number of obs	56.000
Chi-square	9.720	Prob > chi2	0.717
Akaike crit. (AIC)	85.286	Bayesian crit. (BIC)	113.641

*** p<0.01, ** p<0.05, * p<0.1

Ordered probit regression

Motion to Dismiss Outcome (ordered)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	0.776	0.593	1.31	0.191	
ADA Claim	-1.269	0.638	-1.99	0.047	**
ADEA Claim	0.920	0.912	1.01	0.313	
o.Title VII Claims Issues Alleged	0.000	.	.	.	
Post-Desert Palace	1.179	0.436	2.71	0.007	***
o.First Circuit	0.000	.	.	.	
Second Circuit	0.421	0.842	0.50	0.617	
Third Circuit	-5.103	457.556	-0.01	0.991	
Fourth Circuit	-1.509	1.042	-1.45	0.148	
Fifth Circuit	-0.800	0.663	-1.21	0.228	
Sixth Circuit	-0.450	0.858	-0.52	0.600	
Seventh Circuit	-0.542	0.616	-0.88	0.379	
Eighth Circuit	-6.222	647.894	-0.01	0.992	
Ninth Circuit	-0.855	0.629	-1.36	0.174	
Tenth Circuit	-0.311	0.871	-0.36	0.721	
Seeking Partial Relief	0.974	0.577	1.69	0.091	*
o.Motion Filed by EEOC	0.000	.	.	.	
0o.Motion Filed by EEOC#co.j~e	0.000	.	.	.	
Constant	-0.163	2.503	.b	.b	
Constant	0.827	2.502	.b	.b	
Mean dependent var	-0.357	SD dependent var			0.796
Pseudo r-squared	0.229	Number of obs			56.000
Chi-square	25.494	Prob > chi2			0.044
Akaike crit. (AIC)	119.791	Bayesian crit. (BIC)			154.222

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

Summary Judgment Outcome (binary)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	-0.242	0.215	-1.13	0.260	
ADA Claim	-1.624	0.770	-2.11	0.035	**
ADEA Claim	-1.118	0.700	-1.60	0.110	
Title VII Claims	-1.228	0.756	-1.62	0.104	*
Issues Alleged	0.362	0.126	2.88	0.004	***
Post-Desert Palace	0.072	0.279	0.26	0.797	
Second Circuit	13.100	820.826	0.02	0.987	
Third Circuit	11.861	820.826	0.01	0.988	
Fourth Circuit	13.057	820.826	0.02	0.987	

Fifth Circuit	12.975	820.826	0.02	0.987	
Sixth Circuit	13.208	820.826	0.02	0.987	
Seventh Circuit	13.339	820.826	0.02	0.987	
Eighth Circuit	12.597	820.826	0.01	0.988	
Ninth Circuit	13.577	820.826	0.02	0.987	
Tenth Circuit	12.962	820.826	0.02	0.987	
Eleventh Circuit	13.233	820.826	0.02	0.987	
o.DC Circuit	0.000	.	.	.	
Seeking Partial Relief	-0.729	0.312	-2.33	0.020	**
Motion Filed by EEOC	0.393	0.366	1.08	0.282	
Defendant Filing x Judicial Ideology	0.000	.	.	.	
EEOC Filing x Judicial Ideology	-0.044	0.441	-0.10	0.920	
Constant	-7.620	820.832	-0.01	0.993	

Mean dependent var	0.365	SD dependent var	0.482
Pseudo r-squared	0.087	Number of obs	312.000
Chi-square	35.450	Prob > chi2	0.012
Akaike crit. (AIC)	414.177	Bayesian crit. (BIC)	489.037

*** p<0.01, ** p<0.05, * p<0.1

Ordered logistic regression

Summary	Coef.	St.Err	t-value	p-value	Sig.
Judgment Outcome (ordered)					
Judicial Ideology	-0.020	0.191	-0.10	0.917	
ADA Claim	-1.313	0.509	-2.58	0.010	**
ADEA Claim	-0.171	0.460	-0.37	0.711	
Title VII Claims	-1.012	0.507	-2.00	0.046	**
Issues Alleged	0.304	0.110	2.76	0.006	***
Post-Desert Palace	0.076	0.249	0.30	0.762	
Second Circuit	13.360	724.874	0.02	0.985	
Third Circuit	13.067	724.874	0.02	0.986	
Fourth Circuit	14.042	724.874	0.02	0.985	
Fifth Circuit	13.970	724.874	0.02	0.985	
Sixth Circuit	13.745	724.874	0.02	0.985	
Seventh Circuit	13.932	724.874	0.02	0.985	
Eighth Circuit	13.365	724.874	0.02	0.985	
Ninth Circuit	14.196	724.874	0.02	0.984	
Tenth Circuit	13.405	724.874	0.02	0.985	
Eleventh Circuit	14.230	724.874	0.02	0.984	
DC Circuit	31.679	2397.669	0.01	0.989	
Seeking Partial	-0.123	0.263	-0.47	0.639	

Relief				
Motion Filed by EEOC	0.024	0.324	0.07	0.942
Defendant Filing x Judicial Ideology	0.000	.	.	.
EEOC Filing x Judicial Ideology	-0.238	0.417	-0.57	0.568
Constant	10.416	724.876	.b	.b
Constant	12.235	724.876	.b	.b

Mean dependent var	-0.328	SD dependent var	0.740
Pseudo r-squared	0.055	Number of obs	314.000
Chi-square	34.861	Prob > chi2	0.021
Akaike crit. (AIC)	644.616	Bayesian crit. (BIC)	727.103

*** p<0.01, ** p<0.05, * p<0.1

Logistic regression

Motion to Dismiss Outcome (binary)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	1.000	0.958	0.00	1.000	
ADA Claim	0.372	0.468	-0.79	0.432	
ADEA Claim	1.954	3.280	0.40	0.690	
o.Title VII Claims	1.000	.	.	.	
Issues Alleged	1.209	0.368	0.62	0.533	
Post-Desert Palace	4.158	3.358	1.76	0.078	*
o.First Circuit	1.000	.	.	.	
Second Circuit	1.472	2.226	0.26	0.798	
Fourth Circuit	0.337	0.614	-0.60	0.550	
Fifth Circuit	0.467	0.553	-0.64	0.520	
Sixth Circuit	1.598	2.436	0.31	0.758	
Seventh Circuit	0.452	0.557	-0.65	0.519	
Ninth Circuit	0.604	0.685	-0.45	0.656	
Tenth Circuit	2.759	4.589	0.61	0.542	
Seeking Partial Relief	3.343	3.924	1.03	0.304	
o.Motion Filed by EEOC	1.000	.	.	.	
0.Motion Filed by EEOC#c.jcs~e	1.805	3.683	0.29	0.772	
Constant	0.304	1.513	-0.24	0.811	

Mean dependent var	0.286	SD dependent var	0.456
Pseudo r-squared	0.142	Number of obs	56.000
Chi-square	9.529	Prob > chi2	0.796
Akaike crit. (AIC)	87.477	Bayesian crit. (BIC)	117.857

*** p<0.01, ** p<0.05, * p<0.1

Ordered logistic regression

Motion to Dismiss Outcome (ordered)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	0.336	0.307	-1.19	0.233	
ADA Claim	0.075	0.086	-2.26	0.024	**
ADEA Claim	2.603	4.284	0.58	0.561	
o.Title VII Claims	1.000	.	.	.	
Issues Alleged	1.445	0.440	1.21	0.227	
Post-Desert Palace	7.914	6.345	2.58	0.010	**
o.First Circuit	1.000	.	.	.	
Second Circuit	3.021	4.567	0.73	0.465	
Third Circuit	0.000	0.001	-0.01	0.996	
Fourth Circuit	0.066	0.129	-1.39	0.163	
Fifth Circuit	0.214	0.263	-1.25	0.210	
Sixth Circuit	0.913	1.460	-0.06	0.955	
Seventh Circuit	0.210	0.253	-1.30	0.195	
Eighth Circuit	0.000	0.000	-0.01	0.996	
Ninth Circuit	0.289	0.326	-1.10	0.271	
Tenth Circuit	1.121	1.808	0.07	0.944	
Seeking Partial Relief	3.056	3.395	1.01	0.314	
o.Motion Filed by EEOC	1.000	.	.	.	
0.Motion Filed by EEOC#c.jcs~e	20.631	41.765	1.50	0.135	
Constant	-1.981	4.473	.b	.b	
Constant	-0.219	4.457	.b	.b	
Mean dependent var	-0.357	SD dependent var		0.796	
Pseudo r-squared	0.246	Number of obs		56.000	
Chi-square	27.331	Prob > chi2		0.038	
Akaike crit. (AIC)	119.953	Bayesian crit. (BIC)		156.410	

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Summary Judgment Outcome (binary)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	-0.150	0.131	-1.15	0.252	
ADA Claim	-0.958	0.409	-2.34	0.019	**

ADEA Claim	-0.663	0.383	-1.73	0.083	*
Title VII Claims	-0.723	0.406	-1.78	0.075	*
Issues Alleged	0.226	0.077	2.95	0.003	***
Post-Desert Palace	0.049	0.169	0.29	0.771	
Second Circuit	4.305	186.674	0.02	0.982	
Third Circuit	3.590	186.674	0.02	0.985	
Fourth Circuit	4.265	186.674	0.02	0.982	
Fifth Circuit	4.218	186.674	0.02	0.982	
Sixth Circuit	4.363	186.674	0.02	0.981	
Seventh Circuit	4.438	186.674	0.02	0.981	
Eighth Circuit	3.970	186.674	0.02	0.983	
Ninth Circuit	4.582	186.674	0.03	0.980	
Tenth Circuit	4.207	186.674	0.02	0.982	
Eleventh Circuit	4.371	186.674	0.02	0.981	
o.DC Circuit	0.000	.	.	.	
Seeking Partial Relief	-0.454	0.187	-2.43	0.015	**
Motion Filed by EEOC	0.254	0.221	1.15	0.250	
Defendant Filing x Judicial Ideology	0.000	.	.	.	
EEOC Filing x Judicial Ideology	-0.007	0.265	-0.03	0.977	
Constant	-1.094	186.682	-0.01	0.995	

Mean dependent var	0.365	SD dependent var	0.482
Pseudo r-squared	0.087	Number of obs	312.000
Chi-square	35.687	Prob > chi2	0.012
Akaike crit. (AIC)	413.940	Bayesian crit. (BIC)	488.800

*** p<0.01, ** p<0.05, * p<0.1

Ordered probit regression

Summary Judgment Outcome (ordered)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	-0.003	0.115	-0.03	0.979	
ADA Claim	-0.820	0.309	-2.66	0.008	***
ADEA Claim	-0.114	0.283	-0.40	0.687	
Title VII Claims	-0.569	0.307	-1.85	0.064	*
Issues Alleged	0.180	0.066	2.72	0.007	***
Post-Desert Palace	0.054	0.148	0.37	0.713	
Second Circuit	4.619	224.411	0.02	0.984	
Third Circuit	4.418	224.411	0.02	0.984	
Fourth Circuit	5.090	224.411	0.02	0.982	
Fifth Circuit	4.973	224.411	0.02	0.982	
Sixth Circuit	4.878	224.411	0.02	0.983	

Seventh Circuit	4.972	224.411	0.02	0.982
Eighth Circuit	4.641	224.411	0.02	0.983
Ninth Circuit	5.148	224.411	0.02	0.982
Tenth Circuit	4.635	224.411	0.02	0.984
Eleventh Circuit	5.149	224.411	0.02	0.982
DC Circuit	10.779	298.317	0.04	0.971
Seeking Partial Relief	-0.072	0.159	-0.46	0.649
Motion Filed by EEOC	0.015	0.194	0.08	0.940
Defendant Filing x Judicial Ideology	0.000	.	.	.
EEOC Filing x Judicial Ideology	-0.130	0.237	-0.55	0.584
Constant	2.826	224.414	.b	.b
Constant	3.909	224.414	.b	.b

Mean dependent var	-0.328	SD dependent var	0.740
Pseudo r-squared	0.054	Number of obs	314.000
Chi-square	34.608	Prob > chi2	0.022
Akaike crit. (AIC)	644.870	Bayesian crit. (BIC)	727.356

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Motion to Dismiss Outcome (binary)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	0.009	0.582	0.01	0.988	
ADA Claim	-0.549	0.765	-0.72	0.473	
ADEA Claim	0.496	1.020	0.49	0.626	
o.Title VII Claims	0.000	.	.	.	
Issues Alleged	0.126	0.180	0.70	0.485	
Post-Desert Palace	0.889	0.478	1.86	0.063	*
o.First Circuit	0.000	.	.	.	
Second Circuit	0.264	0.926	0.28	0.776	
Fourth Circuit	-0.716	1.075	-0.67	0.505	
Fifth Circuit	-0.518	0.705	-0.73	0.462	
Sixth Circuit	0.284	0.887	0.32	0.749	
Seventh Circuit	-0.425	0.674	-0.63	0.528	
Ninth Circuit	-0.349	0.651	-0.54	0.592	
Tenth Circuit	0.580	0.950	0.61	0.541	
Seeking Partial Relief	0.727	0.714	1.02	0.308	
o.Motion Filed by EEOC	0.000	.	.	.	
0.Motion Filed by EEOC#c.jcs~e	0.424	1.241	0.34	0.732	

Constant	-1.018	2.986	-0.34	0.733
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Mean dependent var	0.286	SD dependent var	0.456
Pseudo r-squared	0.145	Number of obs	56.000
Chi-square	9.721	Prob > chi2	0.782
Akaike crit. (AIC)	87.286	Bayesian crit. (BIC)	117.666

*** p<0.01, ** p<0.05, * p<0.1

Ordered probit regression

Motion to Dismiss Outcome (ordered)	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	-0.636	0.537	-1.18	0.237	
ADA Claim	-1.402	0.661	-2.12	0.034	**
ADEA Claim	0.584	0.953	0.61	0.540	
o.Title VII Claims	0.000	.	.	.	
Issues Alleged	0.200	0.168	1.19	0.235	
Post-Desert Palace	1.160	0.444	2.62	0.009	***
o.First Circuit	0.000	.	.	.	
Second Circuit	0.738	0.899	0.82	0.412	
Third Circuit	-4.612	456.107	-0.01	0.992	
Fourth Circuit	-1.641	1.085	-1.51	0.131	
Fifth Circuit	-0.839	0.681	-1.23	0.217	
Sixth Circuit	-0.082	0.924	-0.09	0.929	
Seventh Circuit	-0.715	0.637	-1.12	0.262	
Eighth Circuit	-6.168	645.416	-0.01	0.992	
Ninth Circuit	-0.745	0.636	-1.17	0.242	
Tenth Circuit	0.036	0.909	0.04	0.968	
Seeking Partial Relief	0.638	0.638	1.00	0.317	
o.Motion Filed by EEOC	0.000	.	.	.	
0.Motion Filed by EEOC#c.jcs~e	1.973	1.190	1.66	0.097	*
Constant	-0.867	2.594	.b	.b	
Constant	0.140	2.591	.b	.b	

Mean dependent var	-0.357	SD dependent var	0.796
Pseudo r-squared	0.242	Number of obs	56.000
Chi-square	26.906	Prob > chi2	0.043
Akaike crit. (AIC)	120.379	Bayesian crit. (BIC)	156.835

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Number of Complainants	0.057	0.018	3.20	0.001	***
Issues Alleged	-0.056	0.042	-1.33	0.185	
Judicial Ideology	0.583	0.145	4.03	0.000	***
Post-Desert Palace	-0.082	0.121	-0.68	0.496	
Post-Sutton Cases	-0.917	0.656	-1.40	0.162	
Post-Reeves Cases	1.035	0.524	1.97	0.048	**
Title VII Claims	-5.308	128.607	-0.04	0.967	
ADA Claim	-4.866	128.607	-0.04	0.970	
ADEA Claim	-4.469	128.606	-0.04	0.972	
Race Discrimination Claims	0.159	0.133	1.20	0.232	
Religion Discrimination Claims	-0.842	0.221	-3.81	0.000	***
Retaliation Claims	0.002	0.073	0.03	0.976	
Disparate Impact Claims	0.048	0.193	0.25	0.802	
Pattern and Practice Claims	0.031	0.151	0.21	0.836	
Non-Pecuniary Relief Claims	-1.058	0.333	-3.18	0.001	***
Punitive Damages Claims	1.617	0.579	2.79	0.005	***
Constant	24.121	643.031	0.04	0.970	
Mean dependent var	0.699	SD dependent var		0.459	
Pseudo r-squared	0.090	Number of obs		838.000	
Chi-square	92.410	Prob > chi2		0.000	
Akaike crit. (AIC)	966.413	Bayesian crit. (BIC)		1046.841	

*** p<0.01, ** p<0.05, * p<0.1

Probit regression

Probability of Settlement	Coef.	St.Err	t-value	p-value	Sig.
Number of Complainants	0.059	0.018	3.26	0.001	***
Issues Alleged	-0.067	0.042	-1.62	0.105	*
Judicial Ideology	0.155	0.068	2.29	0.022	**
Post-Desert Palace	-0.085	0.121	-0.71	0.479	
Post-Sutton Cases	-1.001	0.660	-1.52	0.129	
Post-Reeves Cases	1.034	0.529	1.96	0.050	**

Title VII Claims	-5.124	111.479	-0.05	0.963	
ADA Claim	-4.641	111.479	-0.04	0.967	
ADEA Claim	-4.356	111.477	-0.04	0.969	
Race Discrimination Claims	0.167	0.133	1.25	0.211	
Religion Discrimination Claims	-0.930	0.220	-4.23	0.000	***
Retaliation Claims	0.003	0.072	0.04	0.971	
Disparate Impact Claims	0.094	0.191	0.49	0.622	
Pattern and Practice Claims	0.029	0.150	0.19	0.849	
Non-Pecuniary Relief Claims	-1.062	0.333	-3.19	0.001	***
Punitive Damages Claims	1.633	0.590	2.77	0.006	***
Constant	23.321	557.388	0.04	0.967	

Mean dependent var	0.699	SD dependent var	0.459
Pseudo r-squared	0.079	Number of obs	838.000
Chi-square	81.236	Prob > chi2	0.000
Akaike crit. (AIC)	977.588	Bayesian crit. (BIC)	1058.015

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Summary	0.000	.	.	.	
Judgment Granted x Judicial Ideology					
Summary	-785000.000	265000.000	-2.96	0.004	***
Judgment Denied x Judicial Ideology					
Judicial Ideology	494000.000	223000.000	2.21	0.029	**
Summary	50864.563	95817.985	0.53	0.597	
Judgment Denied Post-Desert Palace o.Post-Sutton Cases					
Post-Desert Palace	-7093.902	109000.000	-0.07	0.948	
o.Post-Sutton Cases	0.000	.	.	.	
Post-Reeves Cases	-278000.000	315000.000	-0.88	0.380	
Title VII Claims	370000.000	310000.000	1.20	0.235	
ADA Claim	315000.000	322000.000	0.98	0.330	
ADEA Claim	-24000.000	246000.000	-0.10	0.922	
Race Discrimination Claims					
Religion Discrimination					
Religion	-2083.252	274000.000	-0.01	0.994	

Claims				
Retaliation Claims	79034.633	71020.452	1.11	0.269
Disparate Impact	-153000.000	192000.000	-0.80	0.429
Claims				
Pattern and	-96000.000	138000.000	-0.70	0.488
Practice Claims				
Non-Pecuniary	8732.394	457000.000	0.02	0.985
Relief Claims				
Punitive Damages	-196000.000	546000.000	-0.36	0.721
Claims				
Constant	-525000.000	1040000.000	-0.50	0.615
Constant	414000.000	27775.927	.b	.b

Mean dependent var	257092.418	SD dependent var	442631.297
Pseudo r-squared	0.004	Number of obs	111.000
Chi-square	13.915	Prob > chi2	0.532
Akaike crit. (AIC)	3220.194	Bayesian crit. (BIC)	3266.256

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Summary Judgment Granted	0.000	.	.	.	
x Judicial Ideology					
Summary Judgment Denied x	-2.150	0.629	-3.42	0.001	***
Judicial Ideology					
Judicial Ideology	2.372	0.530	4.48	0.000	***
Summary Judgment Denied	-0.191	0.227	-0.84	0.404	
Post-Desert Palace	0.464	0.258	1.80	0.075	*
o.Post-Sutton Cases	0.000	.	.	.	
Post-Reeves Cases	-0.501	0.748	-0.67	0.505	
Title VII Claims	2.366	0.735	3.22	0.002	***
ADA Claim	1.781	0.764	2.33	0.022	**
ADEA Claim	-0.455	0.583	-0.78	0.436	
Race Discrimination	0.022	0.260	0.09	0.933	
Claims					
Religion	0.335	0.649	0.52	0.607	
Discrimination					
Claims					
Retaliation Claims	0.226	0.168	1.34	0.184	
Disparate Impact	-0.350	0.457	-0.77	0.446	
Claims					
Pattern and	-0.387	0.327	-1.18	0.239	

Practice Claims					
Non-Pecuniary	-0.812	1.084	-0.75	0.456	
Relief Claims					
Punitive Damages	-0.882	1.296	-0.68	0.498	
Claims					
Constant	8.472	2.469	3.43	0.001	***
Constant	0.982	0.066	.b	.b	

Mean dependent var	11.845	SD dependent var	1.132
Pseudo r-squared	0.090	Number of obs	111.000
Chi-square	30.599	Prob > chi2	0.010
Akaike crit. (AIC)	344.947	Bayesian crit. (BIC)	391.009

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology x	44353.483	30735.116	1.44	0.150	
Issues Alleged					
Judicial Ideology	-327000.000	175000.000	-1.87	0.062	*
Issues Alleged	87456.008	22459.736	3.89	0.000	***
Post-Desert Palace	-27600.000	71958.988	-0.38	0.702	
Post-Sutton Cases	-846000.000	355000.000	-2.38	0.018	**
Post-Reeves Cases	589000.000	201000.000	2.93	0.004	***
Title VII Claims	58520.010	289000.000	0.20	0.840	
ADA Claim	289000.000	289000.000	1.00	0.318	
ADEA Claim	100000.000	256000.000	0.39	0.696	
Race Discrimination	-145000.000	78839.899	-1.84	0.066	*
Claims					
Religion	-217000.000	164000.000	-1.32	0.186	
Discrimination					
Claims					
Retaliation Claims	-178000.000	38759.536	-4.60	0.000	***
Disparate Impact	311000.000	110000.000	2.83	0.005	***
Claims					
Pattern and	-17900.000	91351.000	-0.20	0.845	
Practice Claims					
Non-Pecuniary	-115000.000	254000.000	-0.45	0.651	
Relief Claims					
Punitive Damages	332000.000	278000.000	1.19	0.233	
Claims					
Constant	-954000.000	1170000.000	-0.81	0.417	
Constant	712000.000	20408.780	.b	.b	

Mean dependent var	348910.982	SD dependent var	748643.075
Pseudo r-squared	0.003	Number of obs	609.000

Chi-square	59.671	Prob > chi2	0.000
Akaike crit. (AIC)	18178.285	Bayesian crit. (BIC)	18257.697

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology x Issues Alleged	0.222	0.054	4.08	0.000	***
Judicial Ideology	-0.846	0.309	-2.73	0.006	***
Issues Alleged	0.156	0.040	3.93	0.000	***
Post-Desert Palace	-0.036	0.127	-0.28	0.776	
Post-Sutton Cases	-1.336	0.628	-2.13	0.034	**
Post-Reeves Cases	-0.228	0.356	-0.64	0.523	
Title VII Claims	0.260	0.512	0.51	0.611	
ADA Claim	0.870	0.511	1.70	0.089	*
ADEA Claim	-0.249	0.453	-0.55	0.583	
Race Discrimination Claims	-0.286	0.139	-2.05	0.041	**
Religion Discrimination Claims	-0.231	0.289	-0.80	0.425	
Retaliation Claims	-0.338	0.069	-4.93	0.000	***
Disparate Impact Claims	0.694	0.195	3.56	0.000	***
Pattern and Practice Claims	-0.401	0.162	-2.48	0.013	**
Non-Pecuniary Relief Claims	-0.658	0.449	-1.47	0.143	
Punitive Damages Claims	0.916	0.492	1.86	0.063	*
Constant	9.715	2.077	4.68	0.000	***
Constant	1.260	0.036	.b	.b	

Mean dependent var	11.820	SD dependent var	1.346
Pseudo r-squared	0.038	Number of obs	609.000
Chi-square	79.505	Prob > chi2	0.000
Akaike crit. (AIC)	2045.516	Bayesian crit. (BIC)	2124.929

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
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Notice of Appeal Filed	1190000.000	594000.000	2.01	0.045	**
Probability of Settlement Predicted by Appeal	-2140000.000	775000.000	-2.76	0.006	***
Issues Alleged	103000.000	26090.277	3.96	0.000	***
Post-Desert Palace	39686.898	78643.947	0.51	0.614	
Post-Sutton Cases	-1360000.000	408000.000	-3.34	0.001	***
Post-Reeves Cases	1050000.000	255000.000	4.13	0.000	***
Title VII Claims	-87300.000	288000.000	-0.30	0.762	
ADA Claim	-23900.000	317000.000	-0.07	0.940	
ADEA Claim	-89700.000	255000.000	-0.35	0.725	
Race Discrimination Claims	-89700.000	78395.536	-1.14	0.253	
Religion Discrimination Claims	-910000.000	292000.000	-3.11	0.002	***
Retaliation Claims	-201000.000	42802.450	-4.69	0.000	***
Disparate Impact Claims	497000.000	138000.000	3.61	0.000	***
Pattern and Practice Claims	-173000.000	133000.000	-1.30	0.193	
Non-Pecuniary Relief Claims	-390000.000	253000.000	-1.54	0.124	
Punitive Damages Claims	745000.000	288000.000	2.59	0.010	**
Constant	-656000.000	1180000.000	-0.56	0.578	
Constant	696000.000	19946.151	.b	.b	

Mean dependent var	348910.982	SD dependent var	748643.075
Pseudo r-squared	0.005	Number of obs	609.000
Chi-square	87.477	Prob > chi2	0.000
Akaike crit. (AIC)	18150.478	Bayesian crit. (BIC)	18229.891

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Notice of Appeal Filed	1.308	1.067	1.23	0.221	
Probability of Settlement Predicted by Appeal	-2.732	1.393	-1.96	0.050	**
Issues Alleged	0.169	0.047	3.61	0.000	***
Post-Desert Palace	0.061	0.141	0.43	0.668	
Post-Sutton Cases	-2.042	0.733	-2.79	0.006	***

Post-Reeves Cases	0.375	0.458	0.82	0.413	
Title VII Claims	0.028	0.518	0.06	0.956	
ADA Claim	0.477	0.570	0.84	0.402	
ADEA Claim	-0.573	0.458	-1.25	0.211	
Race Discrimination Claims	-0.114	0.141	-0.81	0.420	
Religion Discrimination Claims	-1.169	0.525	-2.22	0.027	**
Retaliation Claims	-0.345	0.077	-4.48	0.000	***
Disparate Impact Claims	0.945	0.248	3.81	0.000	***
Pattern and Practice Claims	-0.534	0.239	-2.24	0.026	**
Non-Pecuniary Relief Claims	-1.176	0.455	-2.59	0.010	**
Punitive Damages Claims	1.593	0.518	3.08	0.002	***
Constant	10.701	2.117	5.05	0.000	***
Constant	1.251	0.036	.b	.b	

Mean dependent var	11.820	SD dependent var	1.346
Pseudo r-squared	0.042	Number of obs	609.000
Chi-square	87.981	Prob > chi2	0.000
Akaike crit. (AIC)	2037.039	Bayesian crit. (BIC)	2116.452

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	-329000.000	183000.000	-1.80	0.073	*
Probability of Settlement Predicted by Ideology	1130000.000	871000.000	1.30	0.195	
Issues Alleged	106000.000	26499.136	4.01	0.000	***
Post-Desert Palace	14641.050	76032.967	0.19	0.847	
Post-Sutton Cases	-548000.000	400000.000	-1.37	0.171	
Post-Reeves Cases	336000.000	289000.000	1.16	0.247	
Title VII Claims	355000.000	411000.000	0.86	0.388	
ADA Claim	325000.000	322000.000	1.01	0.312	
ADEA Claim	301000.000	285000.000	1.05	0.292	
Race Discrimination Claims	-213000.000	91061.253	-2.34	0.020	**
Religion Discrimination Claims	147000.000	315000.000	0.47	0.640	

Retaliation Claims	-173000.000	38830.913	-4.46	0.000	***
Disparate Impact Claims	333000.000	111000.000	3.01	0.003	***
Pattern and Practice Claims	-53200.000	92500.887	-0.57	0.565	
Non-Pecuniary Relief Claims	286000.000	402000.000	0.71	0.478	
Punitive Damages Claims	-177000.000	469000.000	-0.38	0.706	
Number of Complainants	1778.409	11678.430	0.15	0.879	
Constant	-2540000.000	1840000.000	-1.38	0.168	
Constant	710000.000	20349.889	.b	.b	

Mean dependent var	348910.982	SD dependent var	748643.075
Pseudo r-squared	0.003	Number of obs	609.000
Chi-square	63.189	Prob > chi2	0.000
Akaike crit. (AIC)	18176.766	Bayesian crit. (BIC)	18260.591

*** p<0.01, ** p<0.05, * p<0.1

Tobit regression

Log Plaintiff Payouts	Coef.	St.Err	t-value	p-value	Sig.
Judicial Ideology	-0.786	0.315	-2.50	0.013	**
Probability of Settlement Predicted by Ideology	5.222	1.499	3.48	0.001	***
Issues Alleged	0.240	0.046	5.26	0.000	***
Post-Desert Palace	0.154	0.131	1.18	0.239	
Post-Sutton Cases	0.098	0.689	0.14	0.887	
Post-Reeves Cases	-1.383	0.498	-2.78	0.006	***
Title VII Claims	1.533	0.707	2.17	0.031	**
ADA Claim	0.903	0.553	1.63	0.103	*
ADEA Claim	0.703	0.491	1.43	0.153	
Race Discrimination Claims	-0.616	0.157	-3.94	0.000	***
Religion Discrimination Claims	1.460	0.542	2.69	0.007	***
Retaliation Claims	-0.306	0.067	-4.58	0.000	***
Disparate Impact Claims	0.819	0.190	4.31	0.000	***
Pattern and Practice Claims	-0.591	0.159	-3.72	0.000	***
Non-Pecuniary	1.190	0.691	1.72	0.086	*

Relief Claims					
Punitive Damages	-1.452	0.806	-1.80	0.072	*
Claims					
Number of	0.024	0.020	1.20	0.231	
Complainants					
Constant	2.711	3.163	0.86	0.392	
Constant	1.222	0.035	.b	.b	

Mean dependent var	11.820	SD dependent var	1.346
Pseudo r-squared	0.056	Number of obs	609.000
Chi-square	116.901	Prob > chi2	0.000
Akaike crit. (AIC)	2010.120	Bayesian crit. (BIC)	2093.945

*** p<0.01, ** p<0.05, * p<0.1

APPENDIX B: MATCHING METHODS

I use a matching method to estimate the effect of summary judgment on payouts. Matching methods are appropriate when the question being investigated is the effect of a binary treatment regime on an outcome, but the data reflects non-exogenous treatment assignment (Stuart 2010). “We define matching broadly to be any method that aims to equate (or ‘balance’) the distribution of covariates in the treatment and control groups” (Stuart 2010: 1). Different balancing methods generate different matches and change the measure of the treatment effect (Lunt 2009). Thus, we should use multiple matching methods and report all of their results (King and Neilsen 2016). Matching methods never produce worse estimators than regression and sometimes produce better estimators (Drake 1993; *but see* King and Neilsen 2016). Matching methods also allow causal inference by approximating random treatment assignment by matching observations based on the effects of observed covariates (Stuart 2010). They also allow for some control of unobserved covariates to the extent that those unobserved covariates are correlated with observed covariates (Stuart 2010).

Ultimately, matching methods are appropriate in "settings with a treatment defined at some particular point in time, covariate measured at (or relevant to) some period of time before the treatment, and outcomes measured after the

treatment (Stuart 2010: 7). In this case, the treatment (whether summary judgment was filed) either occurs or does not occur; the outcome (settlement payouts) is always measured (in the treatment group) after the treatment, because if it happened before the treatment, the motion would have never been filed. The covariates are all determined well before treatment (see Table 1, *infra*). So matching methods seem appropriate for this analysis.

Matching proceeds in two stages: stage one defines the covariates that we use to set up the study. Stage two assigns respondents to treatment and control groups, and then uses the covariates already defined to determine which treatment observations match with which control observations. I matched cases using the statutory basis for relief; the number of complainants; whether the plaintiffs had their own counsel and whether that counsel was a private attorney or came from a public interest organization like a union; the circuit governing the case; whether the EEOC sought pecuniary relief (economic damages beyond lost wages and benefits, such as debt incurred because the claimant was unemployed) or non-pecuniary relief (non-economic damages like pain and suffering, emotional distress, or loss of consortium); and a count for issues alleged. Table 1 lays out these variables.

Variable Name	Description
Statutory Bases	Title VII, ADA, ADEA (EPA reference)
Number of Complainants	Count of workers on whose behalf the EEOC brought suit
Private Counsel	1 if one or more complainants intervened through a private attorney
Public Interest Counsel	1 if one or more complainants intervened through an attorney provided by a public interest organization
Pecuniary Relief	1 if the EEOC sought economic damages other than lost wages and benefits
Non-Pecuniary Relief	1 if the EEOC sought non-economic damages
Issues Alleged	Number of types of adverse employment actions alleged by the EEOC

TABLE B.1. Matching covariates.

With the exception of the variables on plaintiff's personal counsel, all of the covariates I measure are counted when the lawsuit is filed, long before a motion for summary judgment is filed. It might be reasonable to include additional variables, but the literature indicates that all other reasonable covariates are improper. For example, including variables that affect the outcome but not the treatment assignment introduces a large bias in the matched groups (Brookhart et al. 2006; Imai, King, and Stuart 2008).

Thus, judicial ideology may affect the settlement, since a conservative judge may be expected to be more likely to grant a defendant's motion for summary judgment. However, judicial ideology cannot be expected to affect *treatment assignment*, since filing a motion for summary judgment is essentially an automatic choice for defense lawyers (Bronsteen 2007; Rave 2006). For most cases, summary judgment *is* trial; the parties put on the full panoply of evidence in order to maximize the likelihood of a favorable outcome (Miller 2003). Similarly, the motion outcome might affect settlement, since a denial produces different incentives from a

partial grant or a pending motion at the time of settlement (Bronsteen 2007).¹ But since the outcome of a summary-judgment motion necessarily occurs *after* the motion is filed, it can't affect treatment assignment. Finally, lawyer quality might affect the outcome, since a *good* motion should induce plaintiffs to lower their expectations. But it should have no effect on treatment assignment, for the same reason judicial ideology doesn't matter (Bronsteen 2007; Rave 2006).

This brings us to the second step in matching methods: assigning observations to treatment and control, and using our already-defined covariates to match treatment and control observations. This involves four steps: defining what counts as a match; implementing the matching method; checking balance; estimating treatment effect. Each of these steps involves choices, and the statistical literature is full of comparisons of the various choices that must be made. I do not claim to have exhausted this literature in this discussion; but I feel comfortable saying that I have adequately captured the variations in the matching process where choices must be made.

In determining what counts as a match, a researcher must decide which method to implement in four dimensions. First, whether to minimize distance between the observations in a pair, or to minimize total distance across all pairs ("greedy matching" versus "optimal matching") (Xing and Rosenbaum 1993).

1 Grants of summary judgment on all claims, of course, don't lead to settlements. These observations were dropped.

Second, how many observations are required to generate a match: either one treatment and one control (1-1 matching), one treatment and multiple controls (1-k matching) or match each observation, treatment and control, with multiple observations from the other group (full matching) (Xing and Rosenbaum 1993).¹

Third, whether to allow an observation that has been used in a match to return to the pool of observations available for matching ("with replacement and without replacement") (Zhao 2004). Finally, determining that a pair of observations are a match, which can involve requiring the observations to have the same values on all covariates (exact matching), minimizing the difference in the logit estimate for the treatment assignment (propensity-score matching), or minimizing the difference in the covariance matrix (Mahalanobis distance matching) (Stuart 2010).²

In choosing the distance minimization, the question becomes whether the study prefers to have pairs that are closely matched, or better balanced data. Optimal matching produces more closely matched pairs, on average, but greedy matching leads to better balance (Xing and Rosenbaum 1993). Since political science studies that use matching methods are testing treatment effects, balanced data is a necessary component, and so I use greedy matching (Boyd, Epstein, and Martin 2010; Imai 2005).

1 One can also implement matching of one control with multiple treatment observations (k-1 matching), but I have found no studies that test this against the other matching structures.

2 One can also use a linear estimate of the propensity score, but this is only appropriate if your treatment variable is continuous (Stuart 2010). As the treatment assignment in this study is binary, linear propensity scores are not appropriate.

In choosing the matching method, the literature is basically unanimous that *ceteris paribus*, full matching is always better than any matching that limits the number of matches on either side (Stuart 2010; King and Nielsen 2016). It produces the best balance, the greatest reduction in bias, and the best measure of the average treatment effect (Stuart 2010; Xing and Rosenbaum 1993). Because it is impossible to implement full matching without replacement, that also answers the question on the third dimension (Xing and Rosenbaum 1993). Fortunately, it is also true that matching with replacement also produces greater reduction in bias and smaller standard errors than matching without replacement (Zhao 2004). I would also note that a practical effect of full matching without calipers is increasing the sample size; effectively, I end up with as many observations in both the treatment and control group as there are total observations in the sample.

In the last dimension, the distance measure, the results are mixed. For treatment models with small numbers of covariates and small biases, Mahalanobis matching is superior, but propensity scores are superior in other situations (Xing and Rosenbaum 1993).¹ But there's also findings that increasing the number of covariates improves the marginal success of Mahalanobis matching over propensity-score matching (Zhao 2004). Therefore, I use both. I've found no studies that

1 A similar distance measure to Mahalanobis distance, Euclidean distance, uses a marginal-effect weighting to determine each covariate's effect on the distance; Mahalanobis distance uses an inverse-covariance weighting to determine each covariate's effect on the distance (Zhao 2004). However, under certain data circumstances, Mahalanobis distance collapses into Euclidean distance, and for all other circumstances, Mahalanobis distance produces better-balanced data (Rubin 1980).

distinguish between model functional form in propensity-score matching, so I use both logit and probit models to determine the propensity score.

Having now defined the matching algorithms I used, the next step is making sure the data is balanced. Making sure the data is balanced is key to making sure that the matching algorithm produced an unbiased measure of the treatment effect. If the data is unbalanced, that is a pretty good indicator that either the treatment model is misspecified or that the matching algorithm is the wrong one (Stuart 2010). All three matching algorithms that I used (Mahalanobis, propensity-score logit, and propensity-score probit) produced identical balance measures. Table 2 reports the means and variances of the matched groups in all algorithms.

Variable Name	Control Means	Treated Means	Control Var.	Treated Var.
EEOC Relief Secured	1,698,271	221,618.4	6.69e+13	8.66e+10
ADA Claims	1.942857	1.913793	.0546584	.0801573
ADEA Claims	1.985714	1.948276	.0142857	.0499093
Title VII Claims	1.042857	1.086207	.0416149	.0801573
EPA Claims	2	2	0	0
Private Counsel	1.014286	1.068966	.0142857	.0653358
Public Interest Counsel	1.985714	1.913793	.0142857	.0801573
Circuit Court	7.357143	8.206897	6.580745	8.096794
Pecuniary Relief	1.057143	1.068966	.0546584	.0653358
Non-Pecuniary Relief	1.028571	1.034483	.0281573	.0338778
Number of Complainants	3.414286	2.5	11.84037	5.763158
Collective-Action Dummy¹	.5285714	.4827586	.252795	.2540835
Issues Alleged	2.142857	2.206897	1.428571	1.430127
n=	128	128	128	128

TABLE B.2: Means and Variances, Treatment and Control Group.

1 The number of complainants and the collective-action dummy were never included in the same matching algorithm; but the means and variances for the other variables did not change when using each one.

The ultimate goal in balance is to create identical covariate means across treatment and control groups; in practice, that is almost never achieved (Stuart 2010). In practice, data is considered balanced as long as the variances in the treatment and control groups indicate that the means are within a standard deviation of each other (Stuart 2010). As Table 2 demonstrates, that is the case for all my covariates. It may seem odd for dummy variables to have means greater than one; these are original EEOC Litigation Project variables, which uses 1 to code "present" and 2 to code "absent." The values of the means don't matter for balancing; only the gap between them and the variances (Stuart 2010). I include the outcome variable for informational purposes only; if the outcome variable was balanced, there would be no treatment effect. Therefore, I proceed to measuring the treatment effect.

Balanced treatment and control groups indicate that the assignment meets the standard for "random assignment" to allow matching to proceed (Stuart 2010). Some judicial politics studies claim to use random assignment to the treatment condition in their matching algorithms (Boyd, Epstein, and Martin 2010; Blake 2012; Hacker, Blake, and Hopwood 2015). Boyd et al. (2010) rely on random assignment of judges to appellate panels, but it appears that "random assignment" is more notional than actual (Levy 2017). Blake (2012) assumes that religion is randomly assigned, but it is hardly so; it is remarkably rare for Catholic parents to have Jewish children. What he means by "random assignment" is "exogenous assignment:" the religion of a justice is based on factors that do not inform the

characteristics of the case, which means the only influence justice religion can have is on the justice themselves. Hacker, Blake, and Hopwood (2015) offer the closest thing to "true random" in determining whether being assigned to the Long Conference in September affects the likelihood of the Supreme Court granting a certiorari petition. Even if we grant that their analysis relies on a truly random assignment of treatment conditions, and not simply an exogenous assignment, it proves only that random assignment is sufficient for matching - not that it is required.

In fact, the political science literature discloses numerous studies that rely on internally-assigned treatment conditions that are assigned by factors exogenous to the outcome (Kam and Palmer 2008; Henderson and Chatfield 2011). In fact, one study's authors concluded that "selection is a serious concern in studying the participatory effects of college attendance and that balance in the covariates and robustness to sensitivity diagnostics should be the ultimate guide for conducting matching analyses" (Henderson and Chatfield 2011: 646). This demonstrates that balance checks are an important step in checking the appropriateness of matching, but that if the covariates are balanced, then matching is appropriate.¹

1 I am indebted to William Blake, Susan Haire, and Rachael Hinkle for bringing this issue to my attention.

APPENDIX C: RESPONSIVE PLEADING CODEBOOK

1. Case Code: The code number assigned to the case in the EEOC Litigation Project Master Data Brick.
2. Docket Number: The docket number assigned to the case by CM/ECF.
3. Short Caption: First plaintiff abbreviated (EEOC) v. first defendant, non-abbreviated.
4. District Court: Abbreviated name of the district court hearing the case.
5. Circuit Court: The circuit court of appeals whose jurisdiction the case lies under.
6. First Answer Downloaded: 1 if the earliest-docketed document does not indicate that it 1) is an amended answer, 2) responds to an amended complaint, or 3) responds to an intervenor complaint; else 0.
7. Number of Answers Downloaded: Count of the number of answers downloaded.
8. Number of Successive Answers: Count of the number of times an answer is superseded by a subsequent pleading.
9. Number of Affirmative Defenses Asserted: Count of all affirmative defenses asserted across all responsive pleadings. Duplicate defenses counted every time they appear.

10. Employment-specific defenses: 1 if any of the affirmative defenses raise *National Banner* issues, legitimate non-discriminatory motives, same-decision defense, failure to exhaust administrative remedies, or other employment-specific defenses; else 0

NOTE: anything concluded to be "other employment-specific defenses" should be amended to the codebook as an errata here.

ERRATA: 8/13/2018; in coding 1, I coded "conduct neither severe or pervasive; did not alter conditions of employment and/or create an abusive and/or hostile work environment" as an Employment Specific Defense.

ERRATA: 8/13/2018; in coding 1, I coded "plaintiff consented" as an Employment Specific Defense.

ERRATA: 8/13/2018; in coding 1, I coded "plaintiff consented and/or participated" as an Employment Specific Defense.

ERRATA: 8/13/2018; in coding 1, I coded "no tangible adverse employment actions" as an Employment Specific Defense.

ERRATA: 8/13/2018; in coding 1, I coded "the conduct was welcome" as an Employment Specific Defense.

ERRATA: 8/13/2018; in coding 1, I coded "Plaintiff provoked the conduct." as an Employment Specific Defense.

ERRATA: 8/14/2018; in coding 2, I coded "exercised reasonable care to prevent and promptly correct any alleged harassing behavior" as an Employment Specific Defense.

ERRATA: 8/14/2018; in coding 2, I coded "plaintiff failed to take advantage of preventative and corrective opportunities" as an Employment Specific Defense.

ERRATA: 8/14/2018; in coding 2, I coded "defendant's actions were take for legitimate, non-discriminatory reasons" as an Employment Specific Defense.

ERRATA: 8/14/2018; in coding 2, I coded "actions were not retaliation" as an Employment Specific Defense.

ERRATA: 8/14/2018; in coding 2, I coded "defendant conducted prompt and thorough investigation and appropriate remedial action was taken to ensure workplace was free of unlawful harassment" as an Employment Specific Defense.

ERRATA: 8/22/2018; in coding 4, I coded "failed to exhaust mandatory internal union procedures prior to filing a charge" as an Employment Specific Defense.

ERRATA: 8/22/2018; in coding 5, I coded "Defendant neither knew nor should have known of any discriminatory conduct nor failed to exercise reasonable diligence to prevent same." as an Employment Specific Defense.

ERRATA: 8/22/2018; in coding 6, I coded "Plaintiffs are precluded, in whole or in part, from recovery of any purported damages because of the after-acquired evidence doctrine of damages defense." as an Employment-Specific Damage.

ERRATA: 8/22/2018; in coding 6, I coded "Subject to proof through discovery, the EEOC cannot establish a pattern or practice of discrimination and/or retaliation because the disputed employment decisions were made by different managers as an Employment-Specific Damage.

ERRATA: 8/14/2018; in coding 6, I coded "Without prejudice to its denials and other statements in its pleadings, Defendant alleges that the EEOC is not entitled to recover punitive damages on behalf of any allegedly injured individuals since defendant cannot be vicariously liable for the discriminatory employment decisions of the managerial agents because those decisions, if any, were contrary to the good faith efforts of the Defendant to comply with the applicable federal, state, and local laws prohibiting employment discrimination." as an Employment-Specific Defense.

ERRATA: 8/22/2018; in coding 7, I coded "Plaintiff was not constructively discharged, but rather, terminated his employment voluntarily." as an Employment-Specific Defense.

ERRATA: 8/22/2018; in coding 8, I coded "Employment 'at-will' and could be terminated by either party for any reason and at any time without notice." as an Employment-Specific Defense.

ERRATA: 8/22/2018; in coding 8, I coded "Actions justified by business necessity" as an Employment-Specific Defense.

ERRATA: 8/22/2018; in coding 8, I coded "All actions by defendant were taken in good faith for legitimate business reasons unrelated to the individual's sex." as an Employment-Specific Defense.

ERRATA: 8/23/2018; in coding 10, I coded "Complaint is barred by reason of Charging Party's fraud." as an Employment-Specific Defense.

ERRATA: 8/23/2018; in coding 10, I coded "To the extent that the complaint-of-incidents occurred (which they did not) they were isolated to a rogu employee.

Immediately upon receiving notice of the allegations, Duane Reade investigated and sought the EEOC's input and guidance in terms of investigation specifically, and on Duane Reade's current anti-sexual harassment policy and practices, including how to make them better, if need be. The EEOC refused, and instead instituted this lawsuit. Under the circumstances, the EEOC is entitled to no injunctive or other equitable relief." as an Employment-Specific Defense.

ERRATA: 8/24/2018; in coding 11, I coded "fails to allege a *prima facie* case of discrimination" as an Employment-Specific Defense.

ERRATA: 8/24/2018; in coding 11, I coded "same actor defense" as an Employment-Specific Defense.

ERRATA: 8/24/2018; in coding 13, I coded "decisions based upon reasonable factors other than age" as an Employment-Specific Defense.

ERRATA: 8/25/2018; in coding 14, I coded "Defendant would show that Plaintiff was not a qualified individual with a disability." as an Employment-Specific Defense.

ERRATA: 8/25/2018; in coding 14, I coded "requested or necessary accommodations would pose an undue hardship on the operation of the Defendant's business" as an Employment-Specific Defense.

ERRATA: 8/25/2018; in coding 14, I coded "Defendant would show that any requested or necessary reasonable accommodation would violate the terms of the Agreement between Sharp Manufacturing Company of America and International Brotherhood of Electrical Workers, AFL-CIO, local 474." as an Employment-Specific

Defense.

ERRATA: 8/25/2018; in coding 14, I coded "In the event Defendant discovers or otherwise learns of evidence after Plaintiff's discharge which would have led to her termination, Plaintiff shall thereafter be barred or limited from recovery or remedy." as an Employment-Specific Defense.

ERRATA: 8/28/2018; in coding 15, I coded "Defendant would have taken the same employment actions with regard to the Plaintiff's and the alleged class of African Americans even in the absence of the alleged impermissible motivating factors." as an Employment-Specific Defense.

ERRATA: 8/28/2018; in coding 15, I coded "Plaintiff's claims of unlawful employment discrimination under Title VII must be strictly confined to the scope of the EEOC charge upon which this action is predicated." as an Employment-Specific Defense.

ERRATA: 8/31/2018; in coding 16, I coded " the former employee's sex was not a substantial or determining factor in any decision made concerning her employment status or any terms and conditions of her employment." as an Employment-Specific Defense.

ERRATA: 8/31/2018; in coding 16, I coded " Defendant avers that the claims brought on behalf of the former employee are barred by her failure to report the alleged acts of sexual harassment to a representative of Defendant during her employment." as an Employment-Specific Defense.

ERRATA: 8/31/2018; in coding 16, I coded " these acts were not unwelcomed

by the former employee." as an Employment-Specific Defense.

ERRATA: 8/31/2018; in coding 16, I coded "any back pay liability it might otherwise have is eliminated and/or limited by after-acquired evidence of wrongdoing by Plaintiff which would have precluded her hire and/or required her termination had it previously been known to Defendant." as an Employment-Specific Defense.

ERRATA: 9/3/2018; in coding 17, I coded "Defendant avers that Plaintiff cannot establish an actionable cause of action for hostile working environment because it cannot establish that the alleged conduct was sufficiently severe or pervasive to alter the conditions of Charging Parties and an alleged class of other aggrieved females' ("Aggrieved Parties") employment." as an Employment-Specific Defense.

ERRATA: 9/3/2018; in coding 17, I coded "Defendant avers that any and all acts, expressions, communications and decisions made by Defendant were taken or made as a result of valid business concerns and/or legitimate, non-discriminatory reasons and were made in good faith, without malice, and were not related to any unlawful basis." as an Employment-Specific Defense.

ERRATA: 9/3/2018; in coding 17, I coded "The issues in this action are governed by policies which the Charging and Aggrieved Parties have not followed." as an Employment-Specific Defense.

ERRATA: 9/3/2018; in coding 17, I coded " Complaint and the alleged acts of discrimination contained therein are untimely" as an Employment-Specific Defense.

ERRATA: 9/3/2018; in coding 17, I coded " As to each and every averment made or sought to be made in Plaintiff's Complaint of a reported unlawful employment practice under Title VII of the Civil Rights Act of 1964, as amended, which was not presented in a charge to the Equal Employment Opportunity Commission within the applicable time period after the averred unlawful employment practice occurred, Plaintiff's averred violations are barred." as an Employment-Specific Defense.

ERRATA: 9/8/2018; in coding 20, I coded "This Defendant denies that it discharged, or took any other materially adverse employment action with respect to Mr. Dillard in July of the year 2000, as averred. This Defendant avers the Plaintiff simply quit the employment without notice to this Defendant. Under such circumstances, Dillard has no valid claim of discrimination under the Americans with Disabilities Act, and as a consequence, neither does the Plaintiff EEOC. In support of this averment and contrary to the assertions contained in the Amended Complaint, the true circumstances surrounding Mr. Dillard's complaint are believed to be as follows: Mr. Dillard never advised this Defendant that he had, or might have, any disability or impairment whatsoever from Mr. Dillard's initial hire with this Defendant through July 27,2000 (the alleged first date of discrimination). On approximately July 28, 2000, the Defendant received voluntary and unsolicited information from the employee's sister, that Mr. Dillard was taking medication for seizure control. This was the Defendant's first knowledge of the possibility that such a condition existed in Mr. Dillard, and did not and could not factually support a

conclusion in the employer, or any other reasonable person, that Mr. Dillard was a person with a disability as defined under the ADA, or that the employer viewed Mr. Dillard as a person with a disability as provided under the Act. Nothing whatsoever was communicated to Dillard by this Defendant concerning any employment action or proposed employment action based in whole or in part on the revelation made by Dillard's sister. On Monday, July 31, 2000, in the morning hours, Mr. Dillard's sister (who was also employed by this Defendant at the same security guard post as Dillard) announced to representatives of Defendant's security client (Maytag) and employees of this Defendant, that she was quitting employment with this Defendant, and that her brother (Dillard) would not be back to work for this Defendant either. With that said, she walked off the job. As predicted by the sister, Mr. Dillard did not appear to perform his job as scheduled on July 31, 2000, or August 1, 2000. This Defendant attempted to contact Mr. Dillard repeatedly during this time and received no response from him. Based upon Mr. Dillard's failure to attend work, and the statements of his sister made on her departure, this Defendant reasonably concluded that Mr. Dillard had quit the Defendant's job voluntarily, as it was his right to do. From and after July 31, 2000, and until October 20, 2000, Mr. Dillard never contacted this Defendant or offered any explanation of any kind to this Defendant concerning his absences from work, or why he was absent, or made any request of this Defendant regarding further employment, reinstatement of employment, altered conditions of employment, or otherwise. This Defendant's next interaction with Mr. Dillard, or his interests, was

the Defendant's receipt of a copy of Mr. Dillard's unsworn charge of discrimination coming from the Plaintiff EEOC on or about October 25, 2000." as an Employment-Specific Defense.

ERRATA: 9/8/2018; in coding 20, I coded " On the foregoing, this Defendant pleads further in the alternative as permitted by F.R.C.P.8(e)(2) as follows: 1.Mr. Dillard was not at the times alleged a disabled person within the meaning of the Americans with Disabilities Act. 2. At the times alleged, the employer did not view Mr. Dillard as a disabled person or as having a disability within the meaning of the Americans with Disabilities Act. 3. The Defendant did not terminate Mr. Dillard, the employee simply quit." as a Employment-Specific Defense.

ERRATA: 9/8/2018; in coding 20, I coded "In the further alternative, and in the unlikely event the employee is found to be a disabled person within the meaning of the Americans with Disabilities Act, the employee had the legal obligation to necessarily inform this Defendant fully concerning his disability and proposed reasonable accommodations which would still permit the employee to perform the essential functions of the job. This Mr. Dillard did not do, and for that reason his claims and those of the Commission are barred." as an Employment-Specific Defense.

ERRATA: 9/8/2018; in coding 20, I coded "Pleading in the further alternative this Defendant says that amongst the essential job functions (qualifications) of the employee's particular job at the material times were as follows: 1. Possession of a valid driver's license. 2. A valid Private Protective Service License (T.C.A. §62-35-

101 *et. seq.*). 3. The ability to safely transport by automobile injured employees of this -- Defendant's client to receive hospital, doctor, and/or emergency medical services. 4. The ability to consistently monitor machinery and equipment in use in the Maytag facility in Cleveland, Tennessee. 5. The ability to be constantly vigilant to detect fire, rupture of equipment or lines, intruders (aggressive or non-aggressive), property damage and/or theft occurring at the Maytag premises which he was employed to patrol as a security guard. In the unlikely event the Plaintiff shows that the employee is an individual with a disability, and further that he was discharged because of that disability (all of which are denied) such claim of disability (epilepsy or seizure disorder) would disqualify him from the essential job functions required in this job. In support whereof this Defendant would show: 1. T.C.A. §55-50-303 sets forth the eligibility requirements for obtaining a valid Tennessee Driver's license. Requirements of the Tennessee Department of Safety, promulgated with respect to the eligibility of applicants for a driver license provides, at Rule 1340-1-4-.06(2)(I) that it is the policy of the Tennessee Department of Safety not to license anyone who suffers from seizure disorders, momentary lapses of consciousness or control and the like, unless and until that person receives and furnishes a favorable determination or statement from a physician. 2. T.C.A. §62-35-117 recites the qualifications for security guards in Tennessee. That code section requires that the applicant "not have any disability which in the opinion of the Commissioner prevents the applicant from performing the duties of a security guard." 3. T.C.A. §62-35-115 makes it unlawful for a

person to act as a security guard without having qualified and registered as a security guard. 4. T.C.A. §62-35-124 requires a licensee under the Private Protective Services Statutes (which this Defendant was at all material times) to notify the Commissioner upon receipt of any information relating to a registrant's continuing ability to hold a registration card. Failure to do so subjects an employer such as this Defendant to criminal penalties and civil sanctions. Since the employee quit the employment, the Defendant did not feel the obligation in law or in fact to make further inquiry or report to either the Tennessee Department of Safety or the Tennessee Department of Commerce and Insurance concerning how these entities would have reacted to information that the employee was (according to the Complaint) subject to or susceptible to seizures. Since the employee quit the employment, and made no request for accommodations, the Defendant perceived it had no obligation to investigate the matter further. Defendant further alleges that if the Plaintiff's claims about Mr. Dillard's disability be true, the employee was not qualified to perform essential job functions or meet the required licensing standards for the job which the Commission would contend he was discharged from performing in the year 2000. In which event, no prohibited discrimination has occurred." as an Employment-Specific Defense.

ERRATA: 9/8/2018; in coding 21, I coded "Upon information and belief, some or all of the persons for whom Plaintiff seeks relief are not aggrieved individuals as defined in the applicable law." as a Employment-Specific Defense.

ERRATA: 9/9/2018; in coding 22, I coded "Without admitting Defendant

discriminated against any person in any fashion, Defendant reserves the right to rely upon a mixed motive defense." as an Employment-Specific Defense.

ERRATA: 9/9/2018; in coding 23, I coded "Defendant avers that the conduct alleged in the Complaint would not be offensive to a reasonable person." as an Employment-Specific Defense.

ERRATA: 9/9/2018; in coding 23, I coded "Defendant avers that the workplace environment of the Plaintiffs was not so intolerable that a reasonable person would be compelled to quit." as an Employment-Specific Defense.

ERRATA: 9/9/2018; in coding 23, I coded "Defendant avers that it did not know, nor should it have known, of conduct alleged by the Defendants as they unreasonably failed to report the alleged acts of harassment in accordance with Defendants harassment policy." as an Employment-Specific Defense.

ERRATA: 9/9/2018; in coding 23, I coded "Defendant, at all times material herein, has made good faith efforts through its adoption of anti-discrimination policies and education of its personnel to comply with the employment discrimination laws." as an Employment-Specific Defense.

ERRATA: 9/9/2018; in coding 24, I coded "Defendant fulfilled all of its obligations as set forth in Title VII and Title I in its attempts to accommodate Defendant and his alleged religious beliefs." as an Employment-Specific Defense.

ERRATA: 9/9/2018; in coding 23, I coded "Defendant could no longer perform the essential functions of the job." as an Employment-Specific Defense.

ERRATA: 9/10/2018; in coding 25, I coded "Defendant is informed and

believes that Plaintiffs claims are barred by the applicable statutes of limitation. This action is barred to the extent the First Amended Complaint seeks monetary relief for any allegedly unlawful employment practice or practices which occurred more than one year prior to the filing of a timely charge in which unlawful employment practices were presented on behalf of the person alleged to be aggrieved by said practice or practices." as an Employment-Specific Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Plaintiff's Complaint, and each and every purported claim for relief thereof, is barred in that Defendant's actions were a just and proper exercise of management discretion, which were undertaken for a fair and honest reason regulated by good faith under the circumstances then existing." as an Employment-Specific Defense.

ERRATA: 9/10/2018; in coding 26, I coded " Defendant is relieved of any liability whatsoever as to Plaintiff's claims for relief because any unlawful conduct alleged against its current and/or former employees occurred outside the course and scope of their employment." as an Employment-Specific Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Plaintiff's Complaint, and each purported claim for relief, is barred in whole or in part because any and all actions taken by Defendant with respect to Plaintiff were job related for the position in question and consistent with business necessity." as an Employment-Specific Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Plaintiff's Complaint, and each purported claim for relief, is barred because, to the extent that any actions of

Defendant or its agents could be construed as unlawful retaliation, harassment or discrimination (which Defendant denies), Defendant took immediate and appropriate corrective action to remedy and stop such conduct." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant is not vicariously liable for any of the acts alleged in the administrative charge filed by the Plaintiff, because the person alleged to have committed such acts was not a supervisor for the Defendant's." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 28, I coded "The agents and employees of the Defendant were not acting within the course and scope of employment when any of the purported harassment or other alleged wrongful acts took place and thus Defendant is not liable for any such acts." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 28, I coded "GRIMMWAY's decision to return the Plaintiff to her employer Esparza Enterprises was related to her performance, and unrelated to any alleged discriminatory, retaliatory or otherwise unlawful practice. As a result, plaintiff is barred from any recovery." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 28, I coded "GRIMMWAY alleges the Complaint is barred by the doctrine of consent and/or plaintiff's active participation in the conduct which the plaintiff now alleges constitutes plaintiff's cause of action." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 28, I coded "GRIMMWAY was not plaintiff's

employer and did not have any authority to terminate, or otherwise affect any terms or conditions of, plaintiff's employment with Esparza Enterprises; and GRIMMWAY did not request any employment-related decision be made by Esparza Enterprises concerning the terms or conditions of plaintiff's employment." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant alleges is would have take the same action against Charging Party even in the absence of the purported discrimination under 42 U.S.C., section 2000e-5(g)(2)(B)." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 28, I coded "The allegations contained in plaintiff's Complaint go beyond the scope of the charge of discrimination filed by the Plaintiff with the EEOC or the Department of Fair Employment and Housing, and to that extent are barred and dismissed." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 29, I coded "The Complaint is barred by the at-will employment provisions of California Labor Code§ 2922." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 30, I coded "Plaintiff was discharged and/or disciplined for good cause." as an Employment-Specific Defense.

ERRATA: 9/12/2018; in coding 30, I coded "Plaintiff was discharged and/or disciplined for willful breach of employment duties." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 32, I coded "The alleged workplace

harassment was not conduct about which Defendant knew or should have known." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 32, I coded "Plaintiff's claims are barred to the extent that she failed to give Defendant an opportunity to investigate and take appropriate remedial action concerning those allegations asserted in Plaintiff's Complaint." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Plaintiff misrepresented his interest in employment when applying for employment with Defendant, rendering the offer and acceptance of employment void or voidable." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Mr. Abdul-Azeez rendered himself ineligible for employment with Defendant by refusing to follow the lawful instructions of management and by failing to follow the lawful policies and procedures of Defendant." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "All of Defendant's qualifications, standards, and policies as they related to Mr. Abdul-Azeez are job related and consistent with business necessity." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Defendant avers that it did not intentionally discriminate against Mr. Abdul-Azeez on the basis of his religion, but rather states that Defendant applies its appearance policy across the board, regardless of religion, and that, at worst, Defendant's facially neutral Appearance Policy had a disparate impact upon Mr. Abdul-Azeez." as an Employment-Specific

Defense.

ERRATA: 9/14/2018; in coding 33, I coded "There is no causal relation between any alleged protected activity and any adverse employment action." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Defendant offered Mr. Abdul-Azeez reasonable accommodation in the form of non-customer contact positions, which he refused." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Granting Plaintiff the requested accommodation would cause Defendant undue hardship." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "The law requires only that Defendant attempt to offer a reasonable accommodation for Plaintiff's religious beliefs, but does not require Defendant to offer the accommodation preferred by Plaintiff." as an Employment-Specific Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Mr. Abdul-Azeez does not have a sincerely held religious belief which requires that he wear a beard." as an Employment-Specific Defense.

ERRATA: 9/16/2018; in coding 36, I coded "Robin Schmidt-Friends did not engage in activity which is protected by Title VII, thus Plaintiff's claim must fail." as an Employment-Specific Defense.

ERRATA: 9/16/2018; in coding 36, I coded "Any belief by Ms. Schmidt-Friends that Defendant engaged in racial discrimination in violation of Title VII was not

reasonable, thus Plaintiff's claim must fail." as an Employment-Specific Defense.

ERRATA: 9/16/2018; in coding 36, I coded "Any belief by Plaintiff-Intervenor Friends that Defendant engaged in retaliatory conduct in violation of Title VII was not reasonable, thus her claims must fail." as an Employment-Specific Defense.

ERRATA: 9/18/2018; in coding 38, I coded "To the extent Plaintiff's Complaint asserts claims other than those raised in Millar's EEOC Charge, the EEOC's investigation, the reasonable cause finding, or the conciliation, these claims are barred." as an Employment-Specific Defense.

ERRATA: 9/18/2018; in coding 39, I coded "Plaintiff's Title VII claims are barred to the extent they exceed the scope of a timely filed charge of discrimination." as an Employment-Specific Defense.

ERRATA: 9/18/2018; in coding 39, I coded "Any wage differential that exists is justified by a bona fide seniority system; a merit system; a system that measures earnings in terms of quantity or quality of production, or other factors other than sex." as an Employment-Specific Defense.

ERRATA: 9/19/2018; in coding 42, I coded "Some or all of Plaintiff's claims are barred because she did not engage in any protected activity." as an Employment-Specific Defense.

ERRATA: 9/19/2018; in coding 42, I coded "Some or all of Plaintiff's claims are barred because Defendant is not an "employer" within the meaning of Title VII of the Civil Rights Act of 1964." as an Employment-Specific Defense.

ERRATA: 9/22/2018; in coding 43, I coded "To the extent the EEOC's

Complaint asserts or attempts to assert claims other than those asserted by Burge in a Timely Charge of Discrimination filed with the EEOC, such claims cannot be sustained." as an Employment-Specific Defense.

ERRATA: 9/22/2018; in coding 43, I coded "To the extent that the EEOC's Complaint was not filed within the prescriptive period allowed by law, the claims are barred as untimely." as an Employment-Specific Defense.

ERRATA: 9/25/2018; in coding 44, I coded " Defendant has engaged in no act, practice, policy, or custom which has denied, abridged, withheld, limited, or otherwise interfered with any Charging Party's rights under Title VII or other law." as an Employment-Specific Defense.

ERRATA: 9/25/2018; in coding 44, I coded "Defendant contends that no discriminatory employment decisions were made in this case. Defendant may not be held vicariously liable for punitive damages under Title VII based on unlawful employment decisions made by its managerial agents, if any are proven, because any such unlawful decisions were contrary to Defendant's policies and good-faith efforts to comply with Title VII and other federal laws." as an Employment-Specific Defense.

ERRATA: 9/25/2018; in coding 44, I coded "The Court lacks jurisdiction under Title VII over all acts and omissions complained of in this action which the Plaintiff has not made the subject of a timely civil action." as an Employment-Specific Defense.

ERRATA: 9/25/2018; in coding 44, I coded "To the extent either that the

misconduct alleged by Plaintiffs was neither severe nor pervasive, or that the alleged misconduct did not occur with sufficient frequency to create an abusive or hostile environment, Plaintiffs' Title VII claims are barred." as an Employment-Specific Defense.

ERRATA: 9/25/2018; in coding 45, I coded "Plaintiff's claims are barred to the extent that Charging Party Dian Paul failed to properly and satisfactorily perform her job duties; any actions which are labeled as retaliatory and/or discriminatory were fully justified by such failure." as an Employment-Specific Defense.

ERRATA: 9/25/2018; in coding 45, I coded "While Defendant expressly denies that it or any employee under its supervision acted in any manner which constitutes unlawful discrimination, if Charging Party Dian Paul's rights were violated, such violation occurred outside the scope of employment and without the consent or knowledge of Defendant. Defendant neither knew nor had reason to know of any such circumstance. Defendant did not condone, ratify, or tolerate any such conduct, but instead prohibited such conduct. Actions entirely outside the course and scope of such employee's employment may not be attributed to Defendant through principles of agency, respondent superior or otherwise." as an Employment-Specific Defense.

ERRATA: 9/25/2018; in coding 47, I coded "Charging Party Diane Cantu did not oppose the alleged practices of Defendant in such a manner so as to be entitled to protection from alleged retaliation under 42 U.S.C. § 2000e-3(a)." as an Employment-Specific Defense.

ERRATA: 9/26/2018; in coding 48, I coded "Defendant's actions with regard to

Laura Shidell were justified as a matter of law." as an Employment-Specific Defense.

ERRATA: 9/26/2018; in coding 48, I coded "Laura Shidell was not treated differently than any other employees who were similarly situated." as an Employment-Specific Defense.

ERRATA: 9/26/2018; in coding 48, I coded "Laura Shidell did not inform Defendant of her pregnancy." as an Employment-Specific Defense.

ERRATA: 9/26/2018; in coding 48, I coded "Defendant had no knowledge regarding Laura Shidell's pregnancy when it made any employment decisions related to her." as an Employment-Specific Defense.

ERRATA: 9/26/2018; in coding 49, I coded "To the extent Defendant discovers facts concerning any individual on behalf of whom relief is sought that would bar such individual from employment with Area or would justify his or her discharge from employment to Area's legitimate policies, no relief is available to such employee beyond the date of such discovery." as an Employment-Specific Defense.

ERRATA: 9/26/2018; in coding 50, I coded "To the extent the EEOC's claims raise issues beyond the scope of the charging parties' charges and /or the EEOC's investigation, they are barred." as an Employment-Specific Defense.

ERRATA: 9/27/2018; in coding 51, I coded "Plaintiffs' claims were transferred from BOLI to the EEOC where several claims were dismissed after a determination that the claims lacked sufficient evidence of any violation of federal statutes and to the extent such dismissal claims are expressly or impliedly included in this

complaint, plaintiffs are barred from bringing these claims in this action." as an Employment-Specific Defense.

ERRATA: 9/27/2018; in coding 55, I coded "The plaintiff, Catherine Darensbourg, and/or putative class members cannot recover because they did not complete a job application." as an Employment-Specific Defense.

ERRATA: 9/27/2018; in coding 55, I coded "The plaintiff, Catherine Darensbourg, and/or putative class members have failed to establish that they have suffered from discrimination on the basis of sex." as an Employment-Specific Defense.

ERRATA: 9/27/2018; in coding 55, I coded "Without conceding that PreferAble has the burden of proof on this issue, no employee of Defendant Preferred or applicant for employment with Defendant Preferred suffered any tangible employment action or damages for which PreferAble is liable." as an Employment-Specific Defense.

ERRATA: 9/28/2018; in coding 57, I coded "Any injuries allegedly suffered by the Charging Parties or similarly situated individuals are due, in whole or in part, to their own misconduct." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 59, I coded "Defendant affirmatively pleads the legs;(sic) doctrine established in *Faragher v. Boca Raton* as a bar or a partial bar to Plaintiff's Complaint." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 59, I coded "Defendant affirmatively pleads the doctrine of poor performance/absenteeism as a bar or a partial bar to Plaintiff's

Complaint." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 59, I coded "Defendant pleads all affirmative defenses as set forth in Title VII of the Civil Rights Act of 1964 and as amended to the Civil Rights Act of 1991." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 60, I coded "White Lodging is not the employer of the referenced applicants as that term is defined under applicable law. The referenced applicants were employees of HSS." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 60, I coded "The referenced applicants never informed White Lodging of their religious beliefs and never requested an accommodation for their religious beliefs. White Lodging had no notice of their request for an accommodation and, therefore, had no ability to consider the request and respond to it." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 61, I coded "Any alleged racial harassment was not severe or pervasive, but isolated and innocuous." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 61, I coded "Any alleged racial harassment was not so intrusive as to interfere with Ricardo Hayden, and/or any class of similarly situated African-Americans', work performance." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 61, I coded "Any alleged racial harassment would not have adversely affected the terms and conditions of employment of a reasonable person in similar circumstances and would not have been offensive to a

reasonable person in similar circumstances." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 63, I coded "Defendant maintains strict policies prohibiting discrimination in any form, including on the basis of gender." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 65, I coded "Defendant was not Ms. Hendrickson's employer as that term is defined under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 66, I coded "To the extent that Plaintiffs retaliation claims relate to a failure to re-hire, any such claims exceed the scope of the charges filed, such that Plaintiff has failed to satisfy the conditions precedent for maintaining this action." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 67, I coded "The Claimants encouraged the co-employee who was allegedly harassing them to engage in sexual banter." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 67, I coded "The alleged harassment was mutually engaged in between the Claimants and the alleged harassing co-employee." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 67, I coded "Claimant Rose Taimanglo was the direct supervisor of the allegedly harassing co-employee and had full authority to warn and/or discipline her." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 67, I coded "The Claimants acted

unreasonably in resigning their employment with LeoPalace." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 67, I coded "The Claimants resigned their employment at LeoPalace after they were fully aware that LeoPalace had terminated the employee who was allegedly harassing the Claimants." as an Employment-Specific Defense.

ERRATA: 9/29/2018; in coding 67, I coded "The Complaint's constructive discharge is barred by the doctrine of avoidable consequences." as an Employment-Specific Defense.

ERRATA:10/1/2018; in coding 68, I coded "Freeman posed a direct threat to the health or safety of himself and others in the workplace." as an Employment-Specific Defense.

ERRATA: 10/1/2018; in coding 69, I coded "Charging party, Lance Whisennand, was terminated by Action because of his failure to show up to work." as an Employment-Specific Defense.

ERRATA: 10/1/2018; in coding 70, I coded "The alleged similarly situated female employees failed to meet some or all of the administrative prerequisites to become members of this lawsuit." as an Employment-Specific Defense.

ERRATA: 10/1/2018; in coding 71, I coded "The Charging Party is not a qualified individual under the ADA." as an Employment-Specific Defense.

ERRATA: 10/1/2018; in coding 72, I coded "Plaintiff's action and/or prayer for relief, are barred in whole or in part by the lack of timely filing and/or the

applicable statutes of limitation." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 74, I coded "Great Plains did not discriminate or retaliate against the employees identified in the Complaint on any illegal basis." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 74, I coded "Any challenged actions were lawful, were privileged or justified, were not done for the purpose of causing injury, and were not motivated by malice, ill-will or malice of law." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 75, I coded "Defendant BOK has not committed any act in violation of Mr. Woodend's civil rights." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 76, I coded "Although liability is expressly denied, to the extent Plaintiff alleges constructive discharge Pizza Hut asserts the right to rely upon a "mixed motive" defense." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 76, I coded "Outback should not be subject to liability for punitive damages, as Outback has made good-faith efforts to prevent any discriminatory conduct by any of its employees and to promptly remedy any improper treatment of its employees." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 78, I coded "To the extent that Plaintiff has failed to exhaust administrative remedies or to satisfy any applicable conditions precedent to suit, its claims are barred." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 78, I coded "To the extent that the

Complainants have failed to exhaust administrative remedies or to satisfy any applicable conditions precedent to suit, its claims are barred." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 78, I coded "Plaintiff has failed to allege sufficient facts to demonstrate that any alleged conduct to which they were subjected to was unwelcome." as an Employment-Specific Defense.

ERRATA: 10/2/2018; in coding 78, I coded "To the extent that Plaintiff demonstrates that the making of a charge or testifying, assisting or participating in any manner in an investigation, proceeding or hearing under Title VII was a motivating factor for any challenged employment action, Defendants would have taken the same action in the absence of such of such motivating factor." as an Employment-Specific Defense.

ERRATA: 10/3/2018; in coding 79, I coded "James Nolan, and all similarly situated individuals, do not have a "disability" in that their alleged physical impairment does not substantially limit one or more of the major life activities of the individual." as an Employment-Specific Defense.

ERRATA: 10/3/2018; in coding 79, I coded "James Nolan, and all similarly situated individuals, are not a "qualified individual with a disability" in that they cannot perform the essential functions of the employment position of "Fitter/Welder," "Machinist," or "Mechanical" of Mid-State even with reasonable accommodation. The essential functions of the employment position of "Fitter/Welder," "Machinist," or "Mechanical" of Mid-State require the employee to

lift materials and equipment in excess of fifty (50) pounds on a regular basis and James Nolan, and all similarly situated individuals, cannot perform this essential function even with reasonable accommodations." as an Employment-Specific Defense.

ERRATA: 10/3/2018; in coding 79, I coded "The application of qualified standards, tests or other selection criteria complained of in the Complaint is job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." as an Employment-Specific Defense.

ERRATA: 10/3/2018; in coding 79, I coded "James Nolan, and all similarly situated individuals, have failed to suggest or request any reasonable accommodations." as an Employment-Specific Defense.

ERRATA: 10/3/2018; in coding 84, I coded "All claims which were not included within an administrative charge of discrimination or were neither investigated nor conciliated by the EEOC, or which were not made the subject of a timely civil action, are barred." as an Employment-Specific Defense.

ERRATA: 10/3/2018; in coding 87, I coded "CRC neither knew or should have known of the actions about which the Plaintiffs complain and therefore has no liability for the actions of the purported harasser." as an Employment-Specific Defense.

ERRATA: 10/3/2018; in coding 87, I coded "Plaintiff consented to any alleged battery." as an Employment-Specific Defense.

ERRATA: 10/4/2018; in coding 88, I coded "Plaintiff was an active and willing

participant in the behavior which he now claims to have been objectionable sexual harassment, and to the extent that the Plaintiff participated and acquiesced in such conduct, has waived and estopped from making a present claim." as an Employment-Specific Defense.

ERRATA: 10/4/2018; in coding 90, I coded "Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands and/or after acquired evidence." as an Employment-Specific Defense.

ERRATA: 10/5/2018; in coding 93, I coded "With respect to all claims, Defendant Checkers is not liable to Plaintiff inasmuch as a) the allegedly discriminating employee(s) was not, at any material time, a principal owner or managing agent of Defendants, and b) Defendant did not commit any independent corporate fault in connection with any of the alleged misconduct of said employee(s)." as an Employment-Specific Defense.

ERRATA: 10/5/2018; in coding 93, I coded "The individuals on whose behalf the Complaint is brought did not make known to Defendant Checkers the conditions of which they complain." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 94, I coded "To the extent the claims asserted by Plaintiff EEOC are based upon, relate or refer to conduct alleged by Plaintiff-in-Intervention Falkowski and/or other unknown or unidentified persons referred to as "similarly situated female employees," such claims are barred in whole or in part because Defendant had no knowledge or reason to know of any alleged tortious propensities of the individual about whom the tortious conduct has been alleged." as

an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 95, I coded "Defendant's actions were consistent with its policies, which were clearly communicated to Herring and which were applied in a non-retaliatory and non-coercive manner." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 95, I coded "Defendants cannot be liable for the alleged tortious or criminal acts of its employee as such acts were not committed during the course of employment and were not committed to further a purpose or interest of Defendant." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 95, I coded "Ms. Herring is estopped to maintain this action because of her conduct during her employment." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 96, I coded "The complaining employee, Ms. Dalby, is not capable of performing the job for which she was hired (i.e., truck driver) due to the restrictions placed upon her by her physician." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 97, I coded "All of the business decisions made by the Defendant and actions taken with respect to Mr. DeLambert were based on legitimate business interests and had nothing to do with Mr. DeLamert's alleged individual and/or collective efforts concerning a female co-worker or any other individuals. More specifically, Mr. DeLambert engaged in unsafe work practice. As a result, for the safety of himself and his fellow employees, Mr. DeLambert was

discharged from his employment." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 97, I coded "Mr. DeLambert's alleged opposition to sexual harassment in the workplace was not expressed or engaged in to protect a female co-worker from alleged sexual harassment but was rather aimed at eliminating the alleged harassers from the workplace for other reasons." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 97, I coded "Mr. DeLambert was a willing participant in horseplay, sexual banter and other activities of which he complains and so too was the female co-worker on whose behalf he allegedly complained." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 98, I coded "Defendant is not a covered employer under the statute(s) referenced in the Complaint." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 98, I coded "Some or all of the employees referenced in the Complaint are not properly included in the lawsuit." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 99, I coded "Any comment or comments made by a co-worker alleged by Plaintiff, if made at all, were not severe and/or pervasive, were not related to her gender, and/or were stray remarks and therefore did not establish a cause of action." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 99, I coded "Decisions made regarding Plaintiff's employment were made for and were independently supported by valid,

job-related reasons, unrelated to the Plaintiff's gender or any other status protected by law." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 100, I coded "At all times, Defendants acted in a reasonable and lawful manner." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 101, I coded "Ms. Holumzer failed to perform her job duties at White and Williams in a satisfactory manner." as an Employment-Specific Defense.

ERRATA: 10/7/2018; in coding 102, I coded "Any alleged conduct on the part of personnel of Shahil, Inc. when discovered was immediately handled and those allegedly involved were terminated from employment." as an Employment-Specific Defense.

ERRATA: 10/7/2018; in coding 102, I coded "The charge of discrimination by Ashley Bowermaster that initiated the filing by the EEOC was defective in that it named a non-existent "co-worker" who was not an employee of Shahil, Inc. or the person responsible for sexual harassment. No supervisory person was ever mentioned. Therefore, there is no basis for the EEOC to broaden its investigation and name supervisory personnel as ultimately responsible." as an Employment-Specific Defense.

ERRATA: 10/7/2018; in coding 102, I coded "The EEOC complaint goes well beyond the allegations that were "related to" the initial charge against a co-worker only named Raja Patel and is not statutorily permitted." as an Employment-Specific Defense.

ERRATA: 10/7/2018; in coding 102, I coded "Employer fired Chintan Patel when he first learned of any allegations of wrong-doing well after the supposed commission of same." as an Employment-Specific Defense.

ERRATA: 10/7/2018; in coding 102, I coded "No Complaints were ever registered by any female student to Supervisory personnel in charge of the running of said store." as an Employment-Specific Defense.

ERRATA: 10/7/2018; in coding 102, I coded "Ashley Bowermaster's conduct was the proximate and sole cause for her leaving her place of employment." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 103, I coded "Plaintiff's claims are barred in whole or in part by Plaintiff's own conduct." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 103, I coded "Plaintiff's claims are barred for lack of jurisdiction in This Court because it did not employ 15 or more employees." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 104 I coded "Plaintiff's claims are barred in whole or in part for the failure of the Plaintiff and/or Mr. D'Oliveira to satisfy the applicable administrative, jurisdictional, timeliness or other prerequisites to the maintenance of an action under the ADA or under any other applicable law." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 104 I coded "Any claims which may be stated in the Complaint in Intervention under the ADA are barred to the extent that the issues, allegations, or individuals raised in the Complaint exceed the proper scope of

issues, allegations, or individuals raised in the administrative proceedings before the Equal Employment Opportunity Commission and/or the Pennsylvania Human Rights Commission." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 104 I coded "Plaintiff's claims are barred to the extent they are preempted by Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 104 I coded "Any claims based on Intervenor's allegations of harassment are barred by *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), and related authority, to the extent that any such alleged treatment did not culminate in any tangible employment action, because Defendant exercised reasonable care to prevent and promptly correct any harassing behavior, and Intervenor unreasonably failed to take advantage of any preventive or corrective opportunities provided by Defendant or to avoid harm Otherwise." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 104 I coded "Any accommodation Intervenor may have requested was unreasonable and/or would impose an undue hardship on Defendant, and/or would constitute a direct threat and would pose a demonstrable and serious threat of harm to Intervenor and others." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 106, I coded "The Plaintiff engaged in wrongdoing that was of such severity that the Plaintiff in fact would have been

discharged on those grounds alone if the Defendant had known of it at the time of the discharge." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 107, I coded "Target's conduct as alleged was neither discriminatory nor unlawful." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 107, I coded "Target acted at all times in good faith, without discriminatory intent, and in accordance with all applicable local, state and federal laws, statutes, ordinances and regulations." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 107, I coded "Some or all of Ms. Hill's claims are barred by Ms. Hill's failure to exhaust administrative remedies, lack of jurisdiction, and the applicable statute of limitations." as an Employment-Specific Defense.

ERRATA: 10/8/2018; in coding 107, I coded "The provisions of the Pennsylvania Human Relations Act, 43 Pa. C.S.A §955 *et.seq.* apply in this case to limit or bar Plaintiff's cause of action." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 108, I coded "Plaintiff's Complaint is barred by plaintiff's failure to plead its cause of action against RMS with specificity." as an Employment Specific Defense.

ERRATA: 10/9/2018; in coding 108, I coded "Plaintiff's Complaint is barred because plaintiff has failed to set forth a prima facie case of national origin discrimination against RMS." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 108, I coded "At all times, RMS treated all employees fairly and with dignity and respect without regard for national origin." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 108, I coded "RMS did not maintain a hostile work environment based on national origin which was regular and pervasive and known to RMS' management." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 108, I coded "RMS did not engage in any intentional discrimination because of national origin at any time." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 110, I coded "Plaintiff's claims for sexual harassment is barred and/or any recovery for damages is precluded because Defendant exercised reasonable care to prevent and correct promptly any alleged harassing behavior." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 110, I coded "Plaintiff's claims for sexual harassment is barred and/or any recovery for damages is precluded because Plaintiff unreasonable failed to take advantage of Defendant's preventative and corrective opportunities or to avoid harm otherwise." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 110, I coded "Plaintiff Renniger's claims under the Pennsylvania Human Rights Act are barred and/or any recover of damages is precluded because the Defendant's exercised reasonable care to prevent and correct

promptly any alleged harassing or retaliatory behavior." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 111, I coded "Defendants properly paid a different wage to a male employee using a differential based on a factor other than sex, and specifically authorized by the Equal Pay Act, that is, that the male employee had significantly greater responsibilities than the Plaintiff." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 111, I coded "Plaintiff's allegations of discrimination, harassment and constructive discharge are irrelevant to the issues raised by her claims." as an Employment-Specific Defense.

ERRATA: 10/9/2018; in coding 112, I coded "Plaintiff failed to perform her job duties at Kvaerner in a satisfactory manner." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 113, I coded "To the extent that the claims sought to be raised were not included within any administrative charge of discrimination filed with the EEOC or the Pennsylvania Human Relations Commission or were not investigated nor conciliated by either Commission, a necessary condition precedent to filing an action under Title VII of the Civil Rights Act of 1964 as Amended (Title VII) and the Pennsylvania Human Relations Act (PHRA) has not met, to the extent that Plaintiff has failed to exhaust administrative remedies the claims are barred." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 113, I coded "To the extent that Plaintiff

attempted to state a cause of action under Title VII or PHRA for alleged acts of discrimination occurring after the allowable time period prior to filing the administrative charge, any claim of action is barred." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 113, I coded "Defendant contends that no discriminatory employment decisions were made in this case. Defendant may not be held vicariously liable for punitive damages under Title VII or PHRA based on unlawful employment decision made by managerial agents if any are proven because any such unlawful decisions are contrary to Defendant's policies and good faith efforts to comply with these laws. Furthermore, Defendant is not liable to the extent that there was an unreasonable failure to report any alleged discrimination or to avoid harm otherwise." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 113, I coded "The individuals identified in Plaintiffs Complaint failed to possess the necessary educational credentials required by the Commonwealth of Pennsylvania Department of Public Welfare." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 113, I coded " The individuals identified in Plaintiffs Complaint failed to possess the necessary educational credentials required by Community Behavioral Health, the managed care organization created by and for the City of Philadelphia." as an Employment-Specific Defenses.

ERRATA: 10/10/2018; in coding 113, I coded "The individual's failure to possess the necessary educational credentials prevented them from being able to

provide the mental health services to consumers using Defendant's services." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 113, I coded "The individual's identified in Plaintiffs Complaint fails to provide a reasonable plan to defendant to remedy the educational deficiencies identified with respect to his/their credentials." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 114, I coded "At all times Creative Playthings acted in good faith with regard to Flanagan and/or the putative class of Black and Hispanic employees, had reasonable grounds for believing its actions were not in violation of law, and would have made the same decision(s) in the absence of any alleged unlawful animus." as an Employment-Specific Defenses.

ERRATA: 10/10/2018; in coding 114, I coded "Any action taken by Creative Playthings with respect to Flanagan and/or any of the putative class of Black and Hispanic employees was for good cause and/or was based on reasons other than race and/or national origin." as an Employment-Specific Defenses.

ERRATA: 10/10/2018; in coding 115, I coded "Charging Party's charge did not give Defendant notice of the class nature of the claim." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Dr. Joseph Hassan, Cross-claim Defendant, the alleged perpetrator of the harassment of Charging Party Stastny and other purported class members was not employed in a "supervisory" capacity with respect to Charging Party Stastny and/or other purported class members, who

at all times material hereto reported to the practice manager/administrator." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any differential between the rate of pay or wages paid to Ms. Martin-Dennis and Kenneth Kunzman ("Kunzman"), a Chubb employee within the establishment where Ms. Martin-Dennis is employed, is not and was not on the basis of sex." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any differential in the rate of pay or wages paid to Ms. Martin-Dennis and Kunzman is not and was not on the basis of race or sex." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any differences in the rate of pay or wages paid to Ms. Martin-Dennis and Kunzman are based on differences in the nature of the work in which they have been engaged and/or in the different levels of skill, effort and responsibility they have brought to and exercised in the positions in which they are, and have been, employed at Chubb." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any differences in the rate of pay or wages paid to Ms. Martin-Dennis and Kunzman are the result of their different working conditions at Chubb." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any differences in the rate of pay or wages between Ms. Martin-Dennis and Kunzman are as the result of differentials based on factors other than sex and are expressly permitted under 29

U.S.C. §206(d)(1)(iv) and under 42 U.S.C. 2000e-2(h) (the “Bennett Amendment”).” as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any differences in the rate of pay or wages between Ms. Martin-Dennis and Kunzman are as the result of permissible and legitimate market factors and conditions which are not violative of the Equal Pay Act or the provisions of Title VII upon which the Commission relies herein." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any differential in compensation paid to the Plaintiff-Intervenor and the compensation paid to Mr. Kunzman, is the result of market factors which affected the rate of compensation required to be paid to Mr. Kunzman at the time of his hiring by Chubb, and is unrelated to the sex or race of the Plaintiff-Intervenor, and is legally justified." as an Employment-Specific Defense.

ERRATA: 10/10/2018; in coding 116, I coded "The education, experience, training and ability of Mr. Kunzman, at the time of his hiring by Chubb, was such that his compensation package was appropriate and was not discriminatory to the compensation being carried at that time, or thereafter, by Plaintiff-Intervenor and was not based on or the result of any impermissible factor, including race or sex." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "Plaintiff's claims, as well as the claims of Tartaglia, Robbins and the purported class members, are barred because

all decisions regarding available positions were made by Defendant according to a bona fide seniority system." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "Defendant denies that it engaged in any wrongful or unlawful conduct and denies that Plaintiff, Tartaglia, Robbins or any purported class members are entitled to any legal or equitable relief." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "This Court lacks jurisdiction over Plaintiff's claims and the claims of Tartaglia and Robbins as well as any purported class members because they failed to exhaust their administrative remedies." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "Plaintiff's claims and the claims of Tartaglia, Robbins and any purported class members are barred because Defendant had no actual or constructive knowledge of any alleged sexual harassment." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "Plaintiff's claims and the claims of Tartaglia, Robbins and any purported class members are barred because Defendant's remedial measures were adequate to respond to any actually or constructively known sexual harassment." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "To the extent Plaintiff's claims or the claims of Tartaglia, Robbins and any purported class members are based in whole or in part upon a "mixed motive" claim and the finder of fact determines, based upon legally sufficient evidence, that gender or alleged protected activity was

a motivating factor in any employment decision at issue (which Defendant absolutely denies), Defendant is entitled to judgment, in whole or in part, because the same employment decisions would have been made irrespective of whether gender or alleged protected activity was considered." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "Tartaglia's and Robbins' claims are barred because no adverse action occurred." as an Employment-Specific Defense.

ERRATA: 10/11/2018; in coding 117, I coded "The provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, apply in this case to limit or bar Plaintiffs' cause of action." as an Employment-Specific Defense.

ERRATA: 10/12/2018; in coding 119, I coded "Plaintiff's claims are barred, in whole or in part, because Defendant complied in all respect with its obligations under all applicable federal and state laws." as an Employment-Specific Defense.

ERRATA: 10/12/2018; in coding 119, I coded "Ms. Versyla would have been terminated regardless whether she engaged in the alleged protected activity." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 120, I coded "The Complainant, Mr. Rumpf, was one of eight individuals whose employment at the Food Gallery Original, Inc. was terminated on or about September 22, 2005." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 120, I coded "Mr. Rumpf and the other terminated employees were all "counter" persons that had been the subject matter of complaints that had been made by patrons of the Carnegie-Mellon Food Court." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 120, I coded "The Food Gallery Original, Inc. had been led to believe by the Parkhurst Corporation that unless the "problems" with the counter personnel were immediately remedied the Food Gallery Original, Inc.'s Lease at the Carnegie-Mellon Food Court would be terminated." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 120, I coded "Upon the basis of the foregoing the termination of Mr. Rumpf and his co-counter workers, as employees at will, was privileged and justifiable." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 120, I coded "A condition precedent to maintaining a cause of action under Title VII is that the "employer" must have employed at least fifteen or more employees for each working day in each of the twenty or more calendar weeks in the current or preceding calendar year." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 120, I coded "At no time did the Food Gallery Original, Inc. employ fifteen or more employees for each working day in each of the twenty or more calendar weeks in the current or preceding calendar year in which Mr. Rumpf's services were terminated." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 120, I coded "At all times relevant to the subject matter of the proceedings neither of the Defendants have been engaged in an industry affecting commerce within the meaning of Sections 701(b), (g) or (h) of Title VII." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 122, I coded "Ms. Brandstatter cannot establish that she was engaged in a protected activity for which she suffered an adverse employment decision." as an Employment-Specific Defense.

ERRATA: 10/13/2018; in coding 124, I coded " The defendant herein asserts the affirmative defense as set forth in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998)." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "To the extent that any employee or agent of NPLC acted unlawfully, such action was outside the scope of any actual, apparent or ostensible agency, authority or employment with Defendant." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Defendant is not responsible for any alleged conduct by any of its employees or agents outside the scope of their actual authority or employment." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "The claims of the Complaint against Defendant are barred in that any acts of harassment which Ms. Pehel alleges to have suffered in the Complaint were unknown by Defendant." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Ms. Pehel's participation at the

golf outing was not within the course or scope of her employment as a hostess with NPLC or NPLC in general." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Mitchell Brewer is not an employee of Defendant; was not Ms. Pehel's co-worker or supervisor; and had never worked with, interacted with or met Ms. Pehel before the events alleged in the Complaint." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Defendant responded in a reasonably prudent manner in response to Ms. Pehel's allegations and took appropriate actions, investigations and cooperated with local authorities in a prudent manner given the circumstances." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Plaintiff's claims are barred because it cannot prove by a preponderance of the evidence that Defendant intentionally discriminated against Ms. Pehel by any action taken by Defendant." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "No *quid pro quo* sexual conduct or harassment occurred, existed, or has been pled; any conduct alleged was not unwelcome; no tangible aspect of Ms. Pehel's employment was affected; and no *respondeat superior* liability applies." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Any alleged harassment or discrimination did not legitimately, detrimentally affect Ms. Pehel subjectively." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Any alleged discrimination did not legitimately affect Ms. Pehel and would not detrimentally affect a reasonable person of the same sex as Ms. Pehel in that position, especially when Ms. Pehel or a woman would voluntarily and willingly agree to accept money to expose her breasts." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "No basis for *respondeat superior* liability exists as to claims of constructive discharge, because no official directions, declarations, acts or measures were taken by any co-worker, supervisor, employee, officer or agent of Defendant against Ms. Pehel." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Plaintiff has failed to show that Ms. Pehel has suffered a tangible employment action and the circumstances under which she left her employment do not meet the requirements for constructive discharge. Plaintiff cannot establish constructive discharge based on a hostile work environment because Plaintiff has not pled and cannot establish that Defendant knowingly permitted conditions of discrimination in the workplace, and that those conditions or discrimination rendered her working conditions so intolerable that a reasonable person would have felt compelled to resign." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "It is specifically denied that Ms. Pehel was within the course or scope of her employment at the time of the alleged events in the Complaint, and it is specifically denied that Mr. Brewer was an

employee or agent of Defendants; however, to the extent it is determined to the contrary Defendant raises the affirmative defense of, and reserves the right to rely upon, the exclusive remedies of the Pennsylvania Workers' Compensation Act to the extent it may be applicable." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Ms. Pehel was a volunteer at a golf outing, a social event outside the course and scope of her employment as a hostess at NPLC or as a NPLC employee generally. The golf outing was not reserved for or limited to NPLC employees and was open to anyone who wished to participate. Mr. Brewer was simply a participant and was not employed by Defendant." as an Employment-Specific Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Plaintiff's claims are barred, in whole or in part, because Ms. Pehel condoned or contributed to the circumstances or environment that she alleges were unwelcome or hostile or otherwise assumed the risk of her actions and behavior." as an Employment-Specific Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Defendant states that at all times relevant, Defendant acted in good faith and has not violated any rights which the individuals represented by the EEOC may have under federal, state or local laws, regulations or guidelines." as an Employment-Specific Defense.

ERRATA: 10/15/2018; in coding 127, I coded "The allegations contained in EEOC Plaintiff's Complaint are not like or related to the allegations contained in the Charges of Discrimination filed with the EEOC and therefore this Court lacks subject matter jurisdiction to entertain same." as a Employment-Specific Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Assuming falsely, but *arguendo*, that individuals represented by Plaintiff EEOC were sexually harassed by a supervisor with immediate (or successively higher) authority over them: Defendant exercised reasonable care to prevent and correct promptly any harassing behavior; the individuals represented by EEOC unreasonably failed to take advantage of any preventative or corrective opportunities provided by the Employer or to avoid harm otherwise; and the individuals represented by EEOC unreasonably failed to participate in Defendant's investigation and opposed corrective action against their alleged harasser(s)." as an Employment-Specific Defense.

ERRATA: 10/15/2018; in coding 127, I coded "The allegations of sexual harassment in Plaintiff's Complaint are broader than the allegations the alleged victims allegedly presented to Defendant and may not be entertained by this Court since the individuals represented by EEOC unreasonably failed to take advantage of any preventive or corrective opportunity provided by Defendant or to avoid harm otherwise, despite the exercise of reasonable care by Defendant." as an Employment-Specific Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Assuming falsely, but *arguendo*, that individuals represented by Plaintiff were subjected to harassment by a person who lacked immediate authority over them, Plaintiff cannot submit a *prima facie* case of sexual harassment since Plaintiff cannot demonstrate, *inter alia*: the conduct was sufficiently severe or pervasive that a reasonable person in the alleged victims' position would find their work environment to be hostile or abusive; at the

time the alleged conduct occurred, and as a result of such conduct, the alleged victims did not believe their work environment to be hostile or abusive; Defendant did not know and should not have known of the alleged conduct giving rise to Plaintiff's claims; Defendant upon learning of certain alleged conduct, investigated and took prompt and appropriate corrective action to end the alleged harassment; and the alleged victims unreasonably failed to participate in Defendant's investigation and opposed corrective action against their alleged harasser(s)." as an Employment-Specific Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Individuals represented by EEOC are estopped to contend that they were constructively discharged due to sexual harassment inasmuch as they voluntarily participated in, and consented to any and all such comments and actions, found same welcome, and failed to protest such comments within appropriate channels." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 128, I coded "IHOP asserts the Ellerth/Faragher affirmative defense to vicarious liability." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 128, I coded "With respect to the acts or omissions complained of in the complaint, IHOP asserts that it acted in good faith in compliance with all provisions of applicable law." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 129, I coded "The Identified Aggrieved Parties' race or prior protected activity were neither determining nor motivating factors in any action taken by KCSR." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 129, I coded "The Commission's claims are barred because KCSR has acted reasonable and in good faith, and in conformity with Title VII." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 129, I coded "The Commission's claims are barred, in whole or in part, because, among other things identified Identified Aggrieved Parties have failed to avail themselves of the grievance procedures outlined in their various collective bargaining agreements." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 130, I coded "Plaintiff is unable to prove pretext as to the reasons stated for Ms. Stein's termination." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 131, I coded "Rite Aid has a written policy prohibiting sex-based discrimination in the hiring, promotion or termination of employees, which bars, or alternatively, reduces any right of recovery on the part of the EEOC herein." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 131, I coded "Rite Aid's basis and reasons for terminating Tiffany R. Blackmon and taking any other employment action were not pretexts for unlawful discrimination." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 131, I coded "The Rite Aid employee who made the decision to terminate Tiffany R. Blackmon did not engage in any sexual harassment of Tiffany R. Blackmon." as an Employment-Specific Defense.

ERRATA: 10/16/2018; in coding 132, I coded "Some of the claims asserted by the EEOC in this matter are not the subject of a timely charge of discrimination and, therefore, this court lacks jurisdiction to entertain such claims and/or the EEOC lacks standing to assert such claims." as an Employment-Specific Defense.

ERRATA: 10/17/2018; in coding 135, I coded "Defendant avers that Plaintiff is estopped and barred from alleging in this action all matters under 42 U.S.C. § 2000(e), *et. seq.*, which were not the subject of a timely charge of discrimination filed with the Equal Employment Opportunity Commission." as an Employment-Specific Defense.

ERRATA: 10/17/2018; in coding 136, I coded "The EEOC and the individuals whom it seeks to represent have failed, in whole or in part, to satisfy and/or exhaust the statutory prerequisites to bringing this lawsuit, included but not limited to failing to file charges of discrimination that fairly encompass the violations alleged in the Complaint in this action; making determinations regarding those charges which were filed which far exceed the bounds of any evidence before the EEOC; and failing to make good faith efforts toward conciliation." as an Employment-Specific Defense.

ERRATA: 10/17/2018; in coding 136, I coded "To the extent that the EEOC seeks to present claims on behalf of individuals other than those who have filed

timely charges of discrimination, there has been a failure to exhaust administrative remedies and statutory prerequisites to filing this lawsuit in their behalf to the extent that the Complaint raises claims that are not like or related to allegations set forth in the five (5) charges of discrimination that were filed with the EEOC." as an Employment-Specific Defense.

ERRATA: 10/17/2018; in coding 137, I coded "Title VII does not apply to discrimination based on sexual orientation." as an Employment-Specific Defense.

ERRATA: 10/17/2018; in coding 138, I coded "Gender was not a factor, determinative or otherwise, in any practice regarding Collins or other individuals described in Plaintiff's Complaint." as an Employment-Specific Defense.

ERRATA: 10/17/2018; in coding 138, I coded "Defendant has business justifications for its decisions." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 139, I coded "The "comparitors" alleged by the EEOC were not similarly situated in all relevant respects, nor was their alleged misconduct nearly identical." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 139, I coded "PHM was not Escher's employer or prospective employer." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 139, I coded "In the alternative, legitimate, non-discriminatory reasons existed for all personnel actions of defendant with respect to Escher which are the subject matter of this lawsuit, which reasons cannot be shown to be pretextuous." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 139, I coded "Under La. C.C. art. 2747, Escher could be dismissed at any time for any reason or no reason at all, by virtue of the employment at-will doctrine in Louisiana." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Any decisions regarding the employment of Woodard and the terms and conditions thereof, were made in a non-discriminatory, non-retaliatory manner. At all times relevant to this lawsuit, Central American acted in good faith and did not violate any provisions of federal, state, or local law, or any rules, regulations, or guidelines." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Plaintiff and Woodard are stopped from pursuing this claim by virtue of their own conduct." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Defendants aver that Rhonda Woodard's damages, if any, are or may be limited by the Doctrine of After-Acquired Evidence." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Central American affirmatively avers that Rhonda Woodard cannot establish an underlying prima-facie case of discrimination under Louisiana State or Federal law." as an Employment-Specific Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Central American affirmatively avers that it neither acted nor relied upon any impermissible factors or unlawful

criteria in any employment decision concerning Rhonda Woodard." as an Employment-Specific Defense.

ERRATA: 10/19/2018; in coding 141, I coded "Rite Aid did not breach any duty or take any wrongful action against Johnny L. Williams in connection with or relating to the termination of her employment with Rite Aid, or any alleged attempt by Johnny L. Williams to seek re-employment with Rite Aid." as an Employment-Specific Defense.

ERRATA: 10/19/2018; in coding 141, I coded "Rite Aid did not breach any duty, violate any law, or engage in any wrongful action or unlawful discriminatory conduct against or concerning Johnny L. Williams or any other qualified female in connection with any alleged attempt by Johnny L. Williams to seek re-employment with Rite Aid between October 1998 and March 1999, or with respect to the hiring of Fred Mitchell in January 1999 to work as a cashier at Rite Aid Store No. 7337 located at 3146 Louisville Street in Monroe, Louisiana." as an Employment-Specific Defense.

ERRATA: 10/20/2018; in coding 145, I coded "Neither EADS, nor any agent or employee harassed the Represented Parties on any basis whatsoever. Alternatively, though EADS denies the occurrence of such conduct, EADS cannot be held liable for any acts of harassment perpetrated by its employees with respect to the Represented Parties." as an Employment-Specific Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Trac-Work denies that Richard Shelton and others were subject to racial discrimination and/or a hostile work

environment that affected a term or condition or privilege of employment." as an Employment-Specific Defense.

ERRATA: 10/21/2018; in coding 149, I coded "All actions taken with respect to Allesha Collins by Defendant were for just cause." as an Employment-Specific Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Defendant paid Intervenor Plaintiff all wages when due." as an Employment-Specific Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff's unearned commissions that are the subject of her Complaint are not "wages" for purposes of Indiana's Wage Payment Statutes." as an Employment-Specific Defense.

ERRATA: 10/22/2018; in coding 150, I coded "Hedrick received equal or more favorable treatment than other similarly situated employees." as an Employment-Specific Defense.

ERRATA: 10/22/2018; in coding 150, I coded "To the extent the conduct and behavior alleged by Hedrick to be inappropriate was consensual, the Plaintiff is barred from recovering damages." as an Employment-Specific Defense.

ERRATA: 10/22/2018; in coding 151, I coded "To the extent the Complaint seeks relief for acts or omissions outside the applicable statute of limitations or administrative charge-filing time frames, the Complaint fails to state a claim against Maddox upon which relief can be granted." as an Employment-Specific Defense.

ERRATA: 10/22/2018; in coding 152, I coded "Defendants allege that Fiserv is not a proper party in this action because Fiserv never employed Jeffrey Stahl." as an Employment-Specific Defense.

ERRATA: 10/22/2018; in coding 153, I coded "Mary Steely has consistently maintained under oath that her employment terminated on or before June 24, 2003, and accepted unemployment benefits based upon the contention that her employment had been terminated on or before June 24, 2003." as an Employment-Specific Defense.

ERRATA: 10/22/2018; in coding 155, I coded "Paradise Plaza's decision was based on a valid and recognized bona fide occupational qualification, which Ms. Jungels was not able to satisfy under the circumstances." as an Employment-Specific Defense.

ERRATA: 10/23/2018; in coding 156, I coded "Plaintiff cannot, as a matter of law, maintain a claim for sex or age discrimination under 42 U.S.C. §1981." as an Employment-Specific Defense.

ERRATA: 10/23/2018; in coding 156, I coded "Plaintiff has failed to properly investigate and/or conciliate the underlying claims." as an Employment-Specific Defense.

ERRATA: 10/23/2018; in coding 156, I coded "All actions taken by Defendant, its representatives and employees, with respect to James Kypreos' employment, and the terms and conditions of his employment, were for legitimate business considerations and were taken in good faith, without any malice and without any

intent to injure or harm James Kypreos, and, therefore, not violative of any law. Thus, Plaintiff has failed to state a claim upon which relief can be granted." as an Employment-Specific Defense.

ERRATA: 10/23/2018; in coding 158, I coded "Plaintiff's claim should be dismissed for the reason that any and all actions of the real party in interest were based upon demonstrated business realities and/or necessity." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Any claim under Title VII which may be asserted in the Complaint is barred in whole or in part because the court lacks subject matter jurisdiction and Plaintiff lacks standing to maintain the action to the extent that the issues and allegations in the Complaint exceed the scope of the administrative proceedings before the EEOC." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Any claim under Title VII which may be asserted in the Complaint is barred in whole or in part because the court lacks subject matter jurisdiction and Plaintiff lacks standing to maintain the action to the extent that the issues and allegations in the Complaint are not reasonably related to the allegations in Pohoski's charge of employment discrimination filed with the EEOC." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Any claim under Title VII which may be asserted in the Complaint is barred in whole or in part because the court lacks subject matter jurisdiction and Plaintiff lacks standing to maintain the

action to the extent that the EEOC failed to comply with the administrative procedures for processing Pohoski's charge of employment discrimination as required by 42 U.S.C. § 2000e-5." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Any claim for relief is barred by the applicable statute of limitations, including but not limited to 42 U.S.C. § 2000e-5 et. seq., and by failure to exhaust administrative remedies, by unreasonable delay on the part of the Plaintiff in instituting this action and/or by the doctrines of unclean hands, waiver, estoppel, and laches." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 163, I coded "The provisions of Title VII are pled as a bar to this action." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 163, I coded "This Court is without jurisdiction over any acts of discrimination alleged in Plaintiff's Complaint that are not stated in Thompson's Charge of Discrimination filed with the Equal Employment Opportunity Commission ("EEOC"). Plaintiff's claims for relief are also barred to the extent that the Plaintiff filed a Complaint containing such claims without having filed an EEOC charge about those claims." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Defendant has not deprived, and is not depriving, Plaintiffs of any rights protected by the Civil Rights Act of 1964 (Title VII) as amended, 42 U.S.C. § 2000(c), et. seq. or 42 U.S.C. § 1981a." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 163, I coded "The employment practices of the Defendant are now, and have been during the period of time referred to in the Complaint, conducted on all respects in accordance with state and federal laws and in good faith." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 164, I coded "The Plaintiff's claims, in whole or in part, are barred by applicable statute of limitations and failure to exhaust mandatory administrative remedies." as an Employment-Specific Defense.

ERRATA: 10/24/2018; in coding 165, I coded "With respect to Paula Caudle and Christine Pinkley-Morris, the defendant did not take adverse employment action against them because of their reports of alleged sexual harassment. The defendant terminated Paula Caudle's employment and Christine Pinkley-Morris' employment because these two employees came to work on August 30, 2000, after consuming alcoholic beverages." as an Employment-Specific Defense.

ERRATA: 10/25/2018; in coding 168, I coded "Any statements made by intervenor about the defendants or their managing agents were protected by § 704(a) of Title VII." as an Employment-Specific Defense.

ERRATA: 10/26/2018; in coding 172, I coded "Plaintiff's claim fails in its entirety because Defendant did not have an open position." as an Employment-Specific Defense.

ERRATA: 10/26/2018; in coding 172, I coded "Plaintiff's claim fails in its entirety because Defendant merely made an employment inquiry. Plaintiff never requested employment or accommodation, never completed any employment

application, never provided any resume or any employment information of any kind.” as an Employment-Specific Defense.

ERRATA: 10/26/2018; in coding 173, I coded "Plaintiff's claims are barred, in whole or in part, by Defendant's good faith compliance with and efforts to detect and deter violations of pertinent federal anti-discrimination statutes." as an Employment-Specific Defense.

ERRATA: 10/26/2018; in coding 175, I coded "To the extent that the EEOC relies on any acts or events occurring more than 180 days prior to the filing of a charge by Mr. Peoples with the EEOC, the provisions of 42 U.S.C. §2000e-5, and any other relevant statutes or regulations prescribing administrative prerequisites or remedies are asserted as a bar to the action and as a bar to any recovery by the plaintiff for any acts or occurrences which occurred more than 180 prior to the filing of the Charge. To the extent that Mr. Peoples has failed to exhaust administrative remedies and to satisfy administrative prerequisites to the claims asserted by the EEOC, and to the extent that the Complaints attempts to assert any Title VII claims not included in a charge of discrimination filed by Mr. Peoples with the EEOC, such claim is barred." as an Employment-Specific Defense.

ERRATA: 10/26/2018; in coding 175, I coded "Mr. Peoples, by his own conduct in participating in racially-oriented comments in the workplace, is estopped from asserting the claims, if any, set forth in the Complaint, and his conduct bars or otherwise estops the EEOC from asserting such claims on his behalf.” as an Employment-Specific Defense.

ERRATA: 10/26/2018; in coding 176, I coded "The proximate cause of plaintiff's injuries, if any, was the conduct of the plaintiff, not the defendant." as an Employment-Specific Defense.

ERRATA: 10/26/2018; in coding 176, I coded "Defendants attempted to make reasonable accommodations for Plaintiff's alleged religious beliefs and, as to certain accommodations, incurred undue hardship in providing these accommodations; and to the extent any accommodations were not made, such failure was due to "undue hardship" which would have resulted from any possible accommodations." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 178, I coded "To the extent that any statutory, regulatory, or other conditions precedent to the filing of the lawsuit were not satisfied, the Plaintiff and those individuals whom it purports to represent in this action are barred from recovery." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 178, I coded "All actions by the Defendants with respect to the employment of any individuals whom the Plaintiff purports to represent were taken, made, and done in good faith and were not impermissibly based upon any unlawful consideration or otherwise the result of any unlawful motive." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 178, I coded "To the extent that it later may be determined that any employee of the Defendants engaged in conduct of a discriminatory nature towards any individuals that the Plaintiff purports to represent, all of which is expressly denied, such conduct was committed without the

knowledge of or authorization of the Defendants, and such conduct was outside the course and scope of any such employee's duties. Accordingly, no liability may be imputed under the doctrine of respondeat superior or otherwise for the alleged wrongful conduct of any such employee." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "HRAmerica did not have supervisory authority or control over Thomas R. Page's or any other similarly situated individual's work, performance or conduct, and did not set wages, hours or terms and conditions of either Thomas R. Page's or any other similarly situated individual's employment." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "HRAmerica has no role in any decision to hire, transfer, supervise, lay off, recall, promote, train or discipline Thomas R. Page or any other similarly situated individual." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "HRAmerica had no role in the decision to terminate Thomas R. Page or any other similarly situated individual." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "Summit Hospitality Group, LTD., had exclusive supervision and control of Thomas R. Page's and any other similarly situated individual's employment." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "Summit Hospitality Group, LTD., made the decision to terminate Thomas R. Page and any other similarly situated individual." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "To the extent that Plaintiff is able to establish that Thomas R. Page or any other similarly situated individual was subjected to illegal acts, and to the extent that Plaintiff is able to establish that an employment relationship existed between Thomas R. Page or any other similarly situated individual and HRAmerica, HRAmerica did not ratify those illegal acts." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "Neither Thomas R. Page or any other similarly situated individual is a member of any protected class, as defined by 42 U.S.C. § 2000(e)." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "To the extent that Plaintiff establishes that Thomas R. Page, or any other similarly situated individual, reported the alleged illegal conduct to HRAmerica's management, the person to whom he/she reported conduct was not high enough in the corporate hierarchy to show that management countenanced, ratified or approved of the behavior." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "To the extent the claims asserted are based on conduct not the subject of the charge of discrimination against Summit Hospitality Group, LTD. occurring 180-days prior to the filing of such charge of discrimination, the claims are barred for failure to exhaust administrative remedies and/or the statute of limitations." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 179, I coded "To the extent that it is determined that improper motive was a determining factor in any adverse employment action relating to Thomas R. Page and the alleged "other similarly situated current and former employees", the action would have been also taken for legitimate, non-discriminatory reasons." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 181, I coded "Plaintiff's claims are barred to the extent that Plaintiff, Patricia Waters, and Carolyn Mancinelli have failed to comply with administrative or procedural prerequisites."

ERRATA: 10/27/2018; in coding 181, I coded "Any alleged sexually harassing/hostile conduct toward Patricia Waters and/or Carolyn Mancinelli did not have the effect of unreasonably interfering with Ms. Walters' or Ms. Mancinelli's environment or work performance." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 181, I coded "Any alleged sexually harassing/hostile conduct toward Patricia Waters and/or Carolyn Mancinelli resulted in no tangible employment action and/or economic loss to Ms. Walters or Ms. Mancinelli." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 183, I coded "Defendant has undertaken good faith efforts to comply with all applicable requirements of federal law." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 183, I coded "Any alleged action taken by defendant as to the alleged discriminatees would have been taken in the absence of

any purported protected characteristic of the alleged discriminatees.” as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 183, I coded "The alleged discriminatees do not sincerely believe that their religion or any religious conviction requires them to attend services on Wednesday evening or on Sunday." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 184, I coded "Upon information believed, each of the named Defendants are and were at all relevant times separate corporations or limited liability companies properly formed and doing business pursuant to the laws of the State of North Carolina. Further, each separate Defendant, upon information believed, employed less than fifteen employees for and during the time periods relevant to the allegations of the Complaint and, therefore, none of the Defendants met or meet the definition of "employer" pursuant to 42 U.S.C. § 2000e, or otherwise. It is respectfully submitted that this Court lacks jurisdiction over the subject matter, whether under 42 U.S.C. § 2000e, 42 U.S.C. § 1981a, or otherwise. Consequently, this action and the Complaint should be dismissed pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure." as an Employment-Specific Defense.

ERRATA: 10/27/2018; in coding 184, I coded "The individual Complainant, Jennifer Grady, was terminated for cause and with justification, and the same is pled in bar to this action.” as an Employment-Specific Defense.

ERRATA: 10/28/2018; in coding 203, I coded "Plaintiff's claims under Title VII of the Civil Rights Act of 1964, are barred because Plaintiff, Ragland, and Kitchens have failed to satisfy the administrative prerequisites and conditions precedent under Title VII." as an Employment-Specific Defense.

ERRATA: 10/28/2018; in coding 204, I coded "Some or all of Plaintiff's claims arising under Title VII are barred due to Hemphill's failure to exhaust administrative remedies, which is a jurisdictional prerequisite to maintenance of an action under Title VII." as an Employment-Specific Defense.

ERRATA: 10/28/2018; in coding 204, I coded "All claims based on alleged violations of Title VII as to which Hemphill failed to file a Charge of Discrimination with the EEOC are barred by Title VII." as an Employment-Specific Defense.

ERRATA: 10/28/2018; in coding 204, I coded "Plaintiff's claims for damages under Title VII are barred to the extent that they are based on conduct that allegedly occurred before November 21, 1991, the effective date of the Civil Rights Act of 1991." as an Employment-Specific Defense.

ERRATA: 10/28/2018; in coding 205, I coded "Any actions taken by Defendant, its representatives and employees with respect to Plaintiff, were non discriminatory, taken in good faith, and were not in violation of any federal or state statute, regulation, rule or ordinance prohibiting discrimination based on race or disability or any other protected category. Accordingly, Plaintiff is barred from recovery in this action." as an Employment-Specific Defense.

ERRATA: 10/29/2018; in coding 214, I coded "Plaintiff cannot state a claim for which relief can be granted under the FMLA because she is not an eligible employee under the FMLA or is otherwise excluded from coverage under the FMLA." as an Employment-Specific Defense.

ERRATA: 10/29/2018; in coding 214, I coded "Plaintiff Jeffrey DiLaura has no standing to assert a claim under the ADA, Title VII, FMLA, or PHRA in that he is not an "employee" as defined by these statutes." as an Employment-Specific Defense.

ERRATA: 10/29/2018; in coding 215, I coded "Plaintiff cannot establish a prima facie case under 29 U.S.C. § 626(b)." as an Employment-Specific Defense.

ERRATA: 10/29/2018; in coding 215, I coded "Plaintiff cannot establish a prima facie case under 29 U.S.C. § 623(a)(1)." as an Employment-Specific Defense.

ERRATA: 10/29/2018; in coding 215, I coded "Plaintiff cannot establish that Defendant's legitimate reasons for its actions were pretextual." as an Employment-Specific Defense.

ERRATA: 10/29/2018; in coding 216, I coded "At all times, Defendant and its agents acted lawfully." as an Employment-Specific Defense.

ERRATA: 10/30/2018; in coding 225, I coded "Plaintiff's claims of harassment are barred because Beverly and the class of females purportedly represented by Plaintiff unreasonably perceived the Defendant's conduct to constitute harassment." as an Employment-Specific Defense.

ERRATA: 10/30/2018; in coding 225, I coded "Any and all conduct of which Plaintiff complains and which is attributed to Defendant, Marshall Management, or its agents or employees, and was undertaken for a fair and honest reason and regulated by good faith and probable cause under the circumstances existing at all times mentioned in Plaintiff's Complaint." as an Employment-Specific Defense.

ERRATA: 10/31/2018; in coding 233, I coded "Even if Plaintiff establishes that Defendant was motivated in part by impermissible reasons in taking adverse actions against Waecter, such action would have been taken in any event and cannot be the basis for an award of damages, including without limitation backpay." as an Employment-Specific Defense.

ERRATA: 10/31/2018; in coding 234, I coded "All actions of Defendant were based upon reasonable, non-discriminatory actions and motives. Even if Yerrick could prove any of her allegations of discrimination, which she cannot, there were alternative, non-discriminatory reasons which were not pretextual for any action taken by Defendant, and Defendant asserts the Mt. Healthy defense." as an Employment-Specific Defense.

ERRATA: 10/31/2018; in coding 235, I coded "The Commission's claims are barred because FLTVT has acted reasonably and in good faith, and in conformity with Title VII." as an Employment-Specific Defense.

ERRATA: 11/1/2018; in coding 237, I coded the First Affirmative Defense in the First Answer based similarities with "Further defending, Enterprise asserts that, to the extent that Anglin has failed to exhaust his applicable administrative

remedies or otherwise meet conditions precedent to this suit, EEOC's claims on his behalf are barred." from the First Affirmative Defense of Answer Two as an Employment-Specific Defense.

ERRATA: 11/1/2018; in coding 237, I coded the Sixth Affirmative Defense in the First Answer based on similarities with "Further defending, to the extent that EEOC asserts claims in this suit which are not reasonably related to the allegations of Anglin's charge of discrimination, such claims are barred for failure to exhaust administrative remedies and/or failure to satisfy conditions precedent to suit." from the Sixth Affirmative Defense of Answer Two as an Employment-Specific Defense.

ERRATA: 11/2/2018; in coding 238, I coded "Defendants at all times acted reasonably and in good faith toward Plaintiff." as an Employment-Specific Defense.

ERRATA: 11/2/2018; in coding 239, I coded "Defendant asserts that the regulations interpreting Title VII are invalid as contrary to Congressional intent and overbroadly interpretative of the statute." as an Employment-Specific Defense.

ERRATA: 11/3/2018; in coding 285, I coded "To the extent that Brigg's and Gaston's claims are based upon conduct not the subject of a charge of discrimination timely filed with the Florida Commission on Human Relations ("FCHR"), such claims are barred for failure to exhaust administrative remedies and / or failure to satisfy conditions precedent to suit." as an Employment-Specific Defense.

11. Equitable defenses: 1 if any of the affirmative defenses raise unclean hands, accord & satisfaction, or other maxims of equity; else 0.

NOTE anything concluded to be "other maxims of equity" should be amended to the codebook as an errata here.

ERRATA: 8/14/2018; in coding 3, I coded "application of the doctrine of laches" as an Equitable Defense.

ERRATA: 8/22/2018; in coding 6, I coded "waiver" as an Equitable Defense.

ERRATA: 8/22/2018; in coding 6, I coded "estoppel" as an Equitable Defense.

ERRATA: 8/23/2018; in coding 10, I coded "ratification" as an Equitable Defense.

ERRATA: 9/3/2018; in coding 17, I coded "Plaintiff is estopped from asserting some or all of the claims alleged in the Complaint due to the Charging Parties' or the Aggrieved Parties' own contributory negligence, actions, omissions, and/or wrongdoing." as an Equitable Defense.

ERRATA: 9/8/2018; in coding 20, I coded "Alternatively, this Defendant avers this action should be equitably barred under the recognized Doctrine of Laches in such cases, since the "charge" was invalid at its inception, the Plaintiff unreasonably and unjustifiably waited nearly four years to prosecute the "charge", and in the meantime, the Defendant has lost valuable evidence, means of contact with and location of important and material witnesses, and has suffered significant other prejudice all of which will be fully shown to the Court." as an Equitable Defense.

ERRATA: 9/10/2018; in coding 25, I coded "Defendant is informed and believes that the claims in the First Amended Complaint are barred, in whole or in part, by the doctrine of unjust enrichment." as an Equitable Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Because of Plaintiffs failure to comply with all statutorily-mandated prerequisites for filing suit, Plaintiff is estopped from making the claims herein." as an Equitable Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant alleges it acted in good faith and did not directly or indirectly perform any acts or fail to perform any acts whatsoever that would constitute a violation of duty or breach of duty, if any, owed to Charging Party by Defendant, sounding in either contract or tort." as an Equitable Defense.

ERRATA: 9/12/2018; in coding 29, I coded "FOAM WORKS asserts the defense of good-faith efforts." as an Equitable Defense.

ERRATA: 9/14/2018; in coding 32, I coded "right to privacy" as an Equitable Defense.

ERRATA: 9/18/2018; in coding 38, I coded "Some of or all Plaintiff's claims should be barred because of undue delay in bringing this action." as an Equitable Defense.

ERRATA: 9/25/2018; in coding 45, I coded "Plaintiff has not suffered irreparable harm" as an Equitable Defense.

ERRATA: 9/25/2018; in coding 45, I coded "Plaintiff has adequate remedies at law and is thus not entitled to equitable relief." as an Equitable Defense.

ERRATA: 9/25/2018; in coding 47, I coded "Plaintiff-Intervenor Canto was a member of management who was responsible for hiring and who was expected to administer and enforce Defendant's policies on equal employment opportunity. Any alleged discrimination was caused by or contributed to by Plaintiff-Intervenor Canto." as an Equitable Defense.

ERRATA: 9/26/2018; in coding 48, I coded "Laura Shidell's conduct, as well as other conduct and events, contributed in whole or in part to her alleged damages." as an Equitable Defense.

ERRATA: 9/26/2018; in coding 50, I coded "Video Only acted in good faith at all times with respect to the EEOC's allegations in the Complaint. Video Only made good faith efforts to apply with all applicable laws, and acted only according to good faith beliefs." as an Equitable Defense.

ERRATA: 9/27/2018; in coding 51, I coded "Plaintiff Emerson expressly waived her right to intervene." as an Equitable Defense.

ERRATA: 9/27/2018; in coding 51, I coded "Plaintiff Emerson released USB from any liability for claims by Emerson after March 27, 2003." as an Equitable Defense.

ERRATA: 9/27/2018; in coding 53, I coded "All or some of plaintiff's claims are or may be barred, in whole or in part, by the doctrines of claims and/or issue preclusion." as an Equitable Defense.

ERRATA: 9/27/2018; in coding 53, I coded "All or some of plaintiff's claims may be barred by settlement and/or accord and satisfaction." as an Equitable Defense.

ERRATA: 9/28/2018; in coding 57, I coded "To the extent Washington Group had any duties or obligations to the Charging Parties or similarly situated individuals, the Company has performed and satisfied such duties and obligations." as an Equitable Defense.

ERRATA: 9/29/2018; in coding 61, I coded "Plaintiff, Ricardo Haven, and/or any class of similarly situated African-Americans have waived any claim they may have to seek relief from WEHR." as an Equitable Defense.

ERRATA: 9/29/2018; in coding 61, I coded "Plaintiff, Ricardo Haven, and/or any class of similarly situated African-Americans are estopped by their own conduct from receiving the relief they request." as an Equitable Defense.

ERRATA: 9/29/2018; in coding 63, I coded "doctrine of consent" as an Equitable Defense.

ERRATA: 10/1/2018; in coding 71, I coded "The Charging Party has taken actions that serve to estop Plaintiff from claiming some or all of the relief set forth in the Complaint." as an Equitable Defense.

ERRATA: 10/3/2018; in coding 81, I coded "The EEOC is bound by legal and factual determinations made by the state court in the lawsuit identified as Case Number 99-02358, Division "B" filed in the Thirteenth Judicial District, Circuit Civil Division, in and for Hillsborough County in the State of Florida. The doctrines

of res judicata and estoppel bar the EEOC's claims in this case." as an Equitable Defense.

ERRATA: 10/4/2018; in coding 90, I coded "Plaintiff is judicially estopped from asserting claims for monetary damages on behalf of Linda Gliotti because Gliotti failed to disclose her discrimination claim herein in her sworn bankruptcy filings and thereby failed to represent herself truthfully before the Bankruptcy Court." as an Equitable Defense.

ERRATA: 10/4/2018; in coding 92, I coded "To the extent Defendant has suffered prejudice as a result of the Plaintiff's or the Named Employee's failure to timely and/or diligently pursue claims against Defendant, said claims should be barred or limited by the doctrine of laches." as an Equitable Defense.

ERRATA: 10/5/2018; in coding 93, I coded "The individuals on whose behalf the Complaint is brought do not make good faith claims of sexual harassment." as an Equitable Defense.

ERRATA: 10/5/2018; in coding 93, I coded "Plaintiff's claims are barred by the doctrine of unclean hands. In particular, the individuals on whose behalf the Complaint is brought failed to avail themselves of opportunities for employment with Defendant Checkers." as an Equitable Defense.

ERRATA: 10/5/2018; in coding 93, I coded "Plaintiff's claims are barred by the equitable doctrine of laches, and because Defendants neither knew nor had reason to know of the alleged acts and omissions complained of in this cause." as an Equitable Defense.

ERRATA: 10/6/2018; in coding 94, I coded "To the extent the claims asserted by Plaintiff EEOC are based upon, relate or refer to conduct alleged by Plaintiff-in-Intervention Falkowski and/or other unknown or unidentified persons referred to as "similarly situated female employees," such claims are barred in whole or in part by the doctrines of comparative negligence, contributory negligence, and/or assumption of risk." as an Equitable Defense.

ERRATA: 10/6/2018; in coding 95, I coded "Ms. Herring's course of conduct during her employment constitutes a waiver of the claims asserted in the Complaint." as an Equitable Defense.

ERRATA: 10/6/2018; in coding 95, I coded "Ms. Herring is estopped to maintain this action because of her conduct during her employment." as an Employment-Specific Defense.

ERRATA: 10/6/2018; in coding 97, I coded "Plaintiff should be collaterally estopped for asserting that he was not discharged for misconduct." as an Equitable Defense.

ERRATA: 10/6/2018; in coding 101, I coded "Plaintiff is not entitled to equitable relief since plaintiff has an adequate remedy at law." as an Equitable Defense.

ERRATA: 10/8/2018; in coding 106, I coded "Plaintiff's claims are barred because all actions of Defendant were proper, privileged, justified, and undertaken in good faith." as an Equitable Defense.

ERRATA: 10/9/2018; in coding 108, I coded "Plaintiff's Complaint is barred by plaintiff's and the charging parties unclean hands and false claims." as an Equitable Defense.

ERRATA: 10/10/2018; in coding 113, I coded "Plaintiff has not suffered any irreparable harm so as to be entitled to injunctive relief in the event that Plaintiff was to be found entitled to any relief, Plaintiff has an adequate remedy at law." as an Equitable Defense.

ERRATA: 10/10/2018; in coding 115, I coded "At all times material hereto, the investigations were conducted in good faith in response to complaints of purported class members and that of Charging Party Stastny." as an Equitable Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Plaintiff's Complaint fails to state a claim upon which the requested injunctive relief may be granted." as an Equitable Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Plaintiff fails to state a claim upon which an award of modification or elimination of Defendant's existing practices, policies or customs is or may be grant" as an Equitable Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Plaintiff is not entitled to injunctive relief on the Complaint." as an Equitable Defense.

ERRATA: 10/16/2018; in coding 129, I coded "The Commission's claims are estopped, in whole or in part, because they have previously released KCSR from liability." as an Equitable Defense.

ERRATA: 10/16/2018; in coding 131, I coded "The EEOC's claims are barred by the doctrines of estoppel, waiver and/or unclean hands by reason of the actions and conduct of Tiffany R. Blackmon prior to and following the termination of her employment with Rite Aid." as an Equitable Defense.

ERRATA: 10/16/2018; in coding 131, I coded "The EEOC is not entitled to injunctive, equitable or other relief because there is no substantial or real risk of any recurrence of the acts or omissions alleged and set forth in the EEOC's Complaints and no risk of irreparable or other injury supports the entry or award of such relief to the EEOC." as an Equitable Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Trac-Work denies each and every allegation of the Complaint except as may be expressly admitted herein and demands strict proof of each and every material allegation as required by the Constitution and laws." as an Equitable Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Third party plaintiff's claim against ERII is barred as there is no coverage under the ERII policies for the claims asserted against third party plaintiff because of its delay of nearly two years in providing notice to ERII of the employment claim first made against it by Richard Shelton." as an Equitable Defense.

ERRATA: 10/21/2018; in coding 149, I coded "The EEOC's claims are barred by estoppel in that Allesha Collins acted in a manner that reasonably caused and induced Defendant to lawfully engage in conduct now the subject of the EEOC's Complaint." as an Equitable Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff negotiated and agreed to a binding settlement, waiving all claims against Defendant. Accordingly, Intervenor Plaintiff has waived her claims." as an Equitable Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff negotiated and agreed to a binding settlement, waiving all claims against Defendant. Accordingly Intervenor Plaintiff's claims are barred by estoppel." as an Equitable Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff failed and refused to timely sign a document required as a condition precedent to her eligibility to receive unearned commissions and has therefore waived her claim to unearned commissions." as an Equitable Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff failed and refused to timely sign a document required as a condition precedent to her eligibility to receive unearned commissions and is therefore estopped from claiming unearned commissions." as an Equitable Defense.

ERRATA: 10/22/2018; in coding 151, I coded "Maddox has acted at all times with a good faith belief that its acts or omissions were not in violation of any applicable law." as an Equitable Defense.

ERRATA: 10/22/2018; in coding 155, I coded "Plaintiff's claims for injunctive relief should be denied as moot." as an Equitable Defense.

ERRATA: 10/26/2018; in coding 171, I coded "Defendant is not subject to affirmative equitable relief, including hiring or reinstatement of employees, for

reasons including the fact that the availability of any such relief is moot." as an Equitable Defense.

ERRATA: 10/27/2018; in coding 179, I coded "Summit Hospitality Group, LTD. acted in good faith at all times in accordance with applicable laws and regulations." as an Equitable Defense.

ERRATA: 10/31/2018; in coding 233, I coded "Injunctive relief is unnecessary and unsupported by the allegations of the Complaint, nor by the facts upon which those allegations are supposedly based." as an Equitable Defense.

ERRATA: 11/2/2018; in coding 238, I coded "Plaintiffs, by their own acts and/or omissions, are estopped from asserting and maintaining any action against these Defendants." as an Equitable Defense.

ERRATA: 11/2/2018; in coding 238, I coded "Plaintiffs are estopped to maintain the claims asserted in the Complaint by their course of conduct and after their employment." as an Equitable Defense.

ERRATA: 11/3/2018; in coding 273, I coded "Mr. Hulsinger is estopped to maintain the claim asserted in the Complaint by his course of conduct during and after his employment." as an Equitable Defense.

ERRATA: 11/3/2018; in coding 285, I coded "The Claimants damages, if any, have been caused in whole or in part by the Claimant's own actions. The Plaintiff's claims should therefore be barred because of their unclean hands." as an Equitable Defense.

12. Arbitration: 1 if any of the affirmative defenses assert the existence of an arbitration agreement; else 0.

ERRATA: 9/12/2018; in coding 30, I coded "In the event that Plaintiff signed an agreement to Arbitrate all claims arising from this incident, Arbitration is demanded pursuant to the terms of the agreement and in accordance with California Code of Civil Procedure §1280 through 1298.8" as Arbitration.

ERRATA: 9/29/2018; in coding 64, I coded "The Court lacks subject matter jurisdiction of any claims involving the employment relationships of Cochran, Centers, Howard and Reese in light of the mandatory arbitration provisions to which they are subject." as Arbitration.

ERRATA: 9/29/2018; in coding 64, I coded "Any claims involving the employment relationship of Cochran, Centers, Howard and Reese are subject to the Federal Arbitration Act." as Arbitration.

ERRATA: 10/5/2018; in coding 93, I coded "Plaintiff's claims are governed by arbitration agreements. In particular, the individuals on whose behalf the Complaint is brought agreed to settle sexual harassment claims such as the instant dispute through arbitration." as an Arbitration Defense.

ERRATA: 10/28/2018; in coding 202, I coded "All of the claims asserted by the Plaintiff-Intervenor in her Complaint are subject to binding, mandatory arbitration pursuant to the pre-dispute arbitration agreement she executed as the inception of her employment with Ryan's." as an Arbitration Defense.

13. Damages: 1 if any of the affirmative defenses raise a failure to mitigate damages, a lack of provable damages, or other defenses related to the plaintiff's damages rather than the defendant's liability; else 0.

NOTE: anything concluded to be "other defenses related to damages" should be amended to the codebook as an errata here.

ERRATA: 8/13/2018; in coding 1, I coded "no damages or injuries" as a Damages Defense.

ERRATA: 8/13/2018; in coding 1, I coded "acted in good faith, without malice or intent to harm" as a Damages Defense.

ERRATA: 8/13/2018; in coding 1, I coded "claims for mental and/or physical damages under Title VII and the New York State Executive Law are barred by the exclusivity provisions of the New York State Workers Compensation Law" as a Damages Defense.

ERRATA: 8/14/2018; in coding 6, I coded "Plaintiffs caused, in whole or in part, whatever damages they may have suffered." as a Damages Defense.

ERRATA: 8/14/2018; in coding 8, I coded "election of remedies" as a Damages Defense.

ERRATA: 8/22/2018; in coding 4, I coded "not entitled to the remedies it seeks" as a Damages Defense.

ERRATA: 8/23/2018; in coding 9, I coded "fails to plead facts necessary to support a claim for an award of punitive damages" as a Damages Defense.

ERRATA: 8/23/2018; in coding 10, I coded "Plaintiff's bad faith" as a Damages Defense.

ERRATA: 8/23/2018; in coding 10, I coded "Defendant did not act with malice or reckless indifference to the federally protected right of the Charging Parties." as a Damages Defense.

ERRATA: 8/24/2018; in coding 11, I coded "any damages alleged by Plaintiffs were the result of their own action or inaction" as a Damages Defense.

ERRATA: 8/25/2018; in coding 14, I coded "Defendant would show that any award of punitive damages against the Defendant in this case would violate certain provisions of the Constitution of the United States, including, but not limited to, Article I, Section X; the Fifth and Fourteenth Amendments, which guarantee Defendant due process of law and which would be violated by the operation of vague, imprecise and impermissible standards and laws as those upon which the subject punitive damages claim is based; the Fourteenth Amendment, which guarantees Defendant equal protection of the laws and which would be violated by the imposition of punitive damages in that such a sanction is discriminatory and arbitrary, and violates the Fourth, Fifth and Sixth Amendments. To the extent that Defendant is subject to a penal sanction through punitive damages, the burden of proof required to impose the same should be beyond a reasonable doubt, and punitive damages should not be awarded without affording Defendant the full range of procedural safeguards guaranteed by the United States Constitution. Defendant further pleads, in addition to the above, the imposition of

any punitive damages in this cause would violate similar and related provisions of the Constitution of the State of Tennessee." as a Damages Defense.

ERRATA: 8/25/2018; in coding 14, I coded "Plaintiff is not entitled to injunctive relief especially from front pay and benefits." as a Damages Defense.

ERRATA: 8/28/2018; in coding 15, I coded "Pursuant to 42 U.S.C. 2000e-5(g)(1), back pay liability for any aggrieved person shall not accrue from a date more than two (2) years prior to the filing of the EEOC charge with the Commission upon which this action is predicated." as a Damages Defense.

ERRATA: 8/28/2018; in coding 15, I coded " To the extent that the Complaint seeks compensation for nonpecuniary losses, including emotional pain, suffering, inconvenience and mental anguish alleged to be suffered by Defendant and/or members of the alleged class of African Americans at any time during the course of their employment and/or as part of the employment relationship with Defendant, that action is barred to the extent that the sole and exclusive remedy of such claims is governed by the Tennessee Workers' Compensation Act." as a Damages Defense.

ERRATA: 8/28/2018; in coding 15, I coded "Defendant did not engage in unlawful intentional discrimination and, therefore, neither Defendant nor any member of the alleged class are entitled to compensatory or punitive damages as to any employment practice alleged to violate Title VII, pursuant to 42 U.S.C. § 1981a(a)(1)." as a Damages Defense.

ERRATA: 8/28/2018; in coding 15, I coded "Plaintiff is not entitled to recover punitive damages as to any employment practice alleged to violate Title VII, pursuant to 42 U.S.C. § 1981a(b)(1)." as a Damages Defense.

ERRATA: 8/28/2018; in coding 15, I coded "The total amount of compensatory and punitive damages that Plaintiff may recover for any alleged violation of Title VII arising from the acts and/or omissions alleged in the Complaint may not exceed the applicable limits set forth in 42 U.S.C. § 1981a(b)(3)." as a Damages Defense.

ERRATA: 8/31/2018; in coding 16, I coded " in reference to the matters and things alleged in the Intervenor's Complaint were unintentional so as to bar or reduce recovery herein." as a Damages Defense.

ERRATA: 8/31/2018; in coding 16, I coded " violates Defendant's right to protection from excessive fines as provided by in the Eighth Amendment of the United States Constitution, and Defendant's right to procedural and substantive due process of law as provided in the Fifth Amendment to the United States Constitution, and therefore, fails to state a cause of action supporting the punitive damages claim." as a Damages Defense.

ERRATA: 8/31/2018; in coding 16, I coded "any back pay amounts allegedly owed to the former employee must be offset by her interim earnings and/or amounts earnable by the individual with reasonable diligence." as a Damages Defense.

ERRATA: 8/31/2018; in coding 16, I coded "acts were outside the scope of employment for any employee found to have committed such acts, and Defendant

cannot be held liable for such acts which it never authorized nor ratified." as a Damages Defense.

ERRATA: 9/3/2018; in coding 17, I coded " The Employer would show that it is not liable to Plaintiff for any damages alleged, or that could have been alleged. Furthermore, the Employer specifically denies that it has engaged in any act, practice or conduct which could be construed as a violation of the Title VII of the Civil Rights Act of 1964, as amended, or the Civil Rights Act of 1991, and strict proof is demanded if the rights of the Employer are to be affected." as a Damages Defense.

ERRATA: 9/3/2018; in coding 17, I coded "In the event Defendant is found liable to the Charging Parties or the Aggrieved Parties, the Plaintiff may not recover damages for any period of time in which the Charging Parties or the Aggrieved Parties did not make reasonable efforts to obtain comparable employment subsequent to their voluntary resignation with Athletes Foot and any recovery by the Plaintiff must be reduced by the amount of money the Charging Parties or the Aggrieved Parties received or could have received after exercising reasonable efforts from all sources subsequent to the voluntary resignation of their employment with Defendant." as a Damages Defense.

ERRATA: 9/8/2018; in coding 20, I coded "This Defendant admits that it is a corporation doing business in the State of Tennessee, and at material times it had more than fifteen (15) employees. This Defendant pleads the limitation of 42

U.S.C.A. 1981(a), in the unlikely event that any of the allegations of the Plaintiff's Amended Complaint are found to be meritorious." as a Damages Defense.

ERRATA: 9/8/2018; in coding 20, I coded " This Defendant would further aver upon information and belief that the employee sought disability benefits and entitlements from other governmental agencies in the years 2000 and 2001 based upon his contention and claim that he was disabled and unable to work. Under such circumstances, the employee and the Commission are now estopped and/or barred from claiming the he is a qualified individual under the Americans with Disabilities Act." as a Damages Defense.

ERRATA: 9/8/2018; in coding 21, I coded "Defendant denies that Plaintiff is entitled to the relief sought but, to the extent that Plaintiff obtains any recovery, such recover is limited by the provisions of 42 U.S.C. § 1981a" as a Damages Defense.

ERRATA: 9/9/2018; in coding 22, I coded "The Complaint must be dismissed to the extent it attempts to allege a cause of action for compensatory or punitive actions, because the averments of the Complaint are insufficient upon which to base such an award, and the averments with respect thereto should be stricken." as a Damages Defense.

ERRATA: 9/9/2018; in coding 23, I coded "Defendant avers that Plaintiff's claims for exemplary and/or punitive damages are barred because it cannot prove by clear and convincing evidense that Defendant acted with malice." as a Damages Defense.

ERRATA: 9/9/2018; in coding 23, I coded "Defendant avers that claims for punitive damages or other contractual damages is not constitutionally permissible under either the Tennessee Constitution or the United States Constitution." as a Damages Defense.

ERRATA: 9/10/2018; in coding 25, I coded "The First Amended Complaint is barred, in whole or in part, to the extent that Plaintiff seeks punitive damages because Defendant had suitable anti-discrimination and anti-harassment policies in effect at its facility at all times material to the allegations in the First Amended Complaint." as a Damages Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Plaintiff's purported claims for emotional distress damages are barred because the exclusive remedy for Plaintiff's alleged emotional distress and other injuries, if any, is before the California Workers' Compensation Appeals Board pursuant to the exclusive remedy provisions of the California Workers' Compensation Act (see California Labor Code section 3600 et seq.). Plaintiff's Complaint alleges an injury compensable under the California Workers' Compensation Act because Plaintiff alleges that her injuries: (1) occurred at a time when both Plaintiff and Defendant were subject to Labor Code section 3600(a); (2) occurred in the course of and incidental to her employment; and (3) were proximately caused by the employment." as a Damages Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Any recovery on Plaintiff's Complaint, or on each purported claim for relief alleged therein, is barred by California Labor Code sections 2854 and 2856 in that Plaintiff failed to use ordinary

care and diligence in the performance of her duties and failed to comply substantially with the reasonable directions of her employer." as a Damages Defense.

ERRATA: 9/10/2018; in coding 26, I coded "The Complaint, and each purported claim for relief alleged therein, fails to state a claim or claims for relief for punitive damages against Defendant because any alleged discriminatory or retaliatory conduct by Defendant's employees (which Defendant denies) was contrary to Defendant's anti-discrimination and anti-retaliation policies, which Defendant implemented in good faith and fairly and adequately enforced." as a Damages Defense.

ERRATA: 9/12/2018; in coding 28, I coded "GRIMMWAY did not engage in any conduct warranting injunctive relief or any form of relief whatsoever." as a Damages Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Plaintiff is not entitled to an award of costs." as a Damages Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant alleges that the Charging Party failed to exercise reasonable and ordinary care, caution or prudence and that the alleged injuries and damages, if any, were proximately caused and/or contributed to by Charging Party's own negligence and/or intentional conduct and therefore, any recovery to which Plaintiff or Charging Party might otherwise be entitled must be reduced by reason of Charging Party's contributory or comparative negligence and/or intentional conduct." as a Damages Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant alleges Charging Party's exclusive remedy for her alleged physical, mental, and/or emotional injuries including claims of emotional distress injury, to the extent such injuries are alleged to have arisen out of the parties' employment relationship, is under California Worker's Compensation Act, Labor Code section 3600, *et. seq.*, and this court is divested of jurisdiction inasmuch as an employer/employee relationship existed subject to worker's compensation coverage, Charging Party's conduct was within the course and scope of her employment, and the alleged injury, if any injury exists, was proximately caused by the employment." as a Damages Defense.

ERRATA: 9/12/2018; in coding 29, I coded " Any award of punitive damages as sought by Plaintiff would violate the due process and excessive fine clauses of the Fifth, Eighth and Fourteenth Amendments of the United States Constitution, as well as the Constitution of the State of California." as a Damages Defense.

ERRATA: 9/13/2018; in coding 31, I coded "Any remedies sought by the Plaintiff should be limited as required by law, because at all pertinent times in this lawsuit, the Defendant had less than one hundred employees in its employment." as a Damages Defense.

ERRATA: 9/14/2018; in coding 32, I coded "Plaintiff's claim for punitive damages is barred because Defendant has not engaged in any practice with actual malice, or wanton or willful disregard for Plaintiff's rights" as a Damages Defense.

ERRATA: 9/14/2018; in coding 32, I coded "Plaintiff's claim for punitive damages, if viable, is subject to the applicable statutory limitations on such awards." as a Damages Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Defendant is entitled to set-offs with respect to some or all of Mr. Abdul-Azeez's alleged damages." as a Damages Defense.

ERRATA: 9/15/2018; in coding 34, I coded "Any claims of alleged punitive damages against this Defendant may not be imputed to this Defendant, and further, the allegations do not rise to the level sufficient for a claim of punitive damages." as a Damages Defense.

ERRATA: 9/15/2018; in coding 34, I coded "Some or all of the monetary damages sought by Intervenor may be barred by Intervenor's own wrongful conduct, including breach of her duties to the Defendant." as a Damages Defense.

ERRATA: 9/16/2018; in coding 36, I coded "Defendant shows that federal punitive damages statutes violate the United States Constitution on the following basis: they are penal in nature and provide for the imposition of damages serving the function as criminal penalties, and any awards thereunder are in effect a private fine. Said statutes further contain no discernable standards for the award of damages and allows the entry of damages on a random, unpredictable, arbitrary, capricious and excessive basis. Said statutes further allow the entry of awards on the basis of proof that fails to establish the entitlement therefore beyond a reasonable doubt. Said statutes further fail to accord to parties the other basic

federal constitutional rights accorded to defendants in criminal or penal matters, including without limitation, the right against self-incrimination." as a Damages Defense.

ERRATA: 9/16/2018; in coding 37, I coded "Plaintiff has failed to state a claim upon which relief may be granted for punitive damages." as a Damages Defense.

ERRATA: 9/18/2018; in coding 38, I coded "Plaintiff may not recover punitive damages under Title VII because Defendant did not intentionally discriminate against Millar in the face of a perceived risk that its acts or omissions would violate federal law." as a Damages Defense.

ERRATA: 9/18/2018; in coding 38, I coded "Defendant is not liable for compensatory or punitive damages because Plaintiff-Intervenor has failed to plead with particularity facts supporting these damages." as a Damages Defense.

ERRATA: 9/19/2018; in coding 42, I coded "Some or all of Plaintiff's claims are barred to the extent that Plaintiff requests relief which exceeds that available under applicable law." as a Damages Defense.

ERRATA: 9/25/2018; in coding 44, I coded "Defendant is not liable for punitive damages because Defendant made a good-faith effort to comply with Title VII." as a Damages Defense.

ERRATA: 9/25/2018; in coding 44, I coded "Defendant may not be held liable for any alleged injuries or damages resulting from the effects of any Charging Party's preexisting emotional, psychological, or physical conditions not the result of any act or omission of Defendant." as a Damages Defense.

ERRATA: 9/25/2018; in coding 44, I coded "Plaintiff's allegations fail to state a claim for either compensatory or punitive damages upon which relief can be granted." as a Damages Defense.

ERRATA: 9/25/2018; in coding 44, I coded "Plaintiffs' claims may be barred in whole or in part by the exclusive remedy of the Georgia Workers' Compensation Act." as a Damages Defense.

ERRATA: 9/25/2018; in coding 44, I coded "Any claim for punitive damages is barred because the acts and omissions, if any, of Defendant do not rise to the level required to sustain an award of punitive damages, do not evince a reckless or callous indifference to any of Plaintiffs' protected rights, and are not so wanton and willful as to support an award of punitive damages as a matter of law." as a Damages Defense.

ERRATA: 9/25/2018; in coding 46, I coded "Plaintiff's claims for mental and emotional distress, pain, suffering or other physical, emotional, or mental injury are barred by the Georgia Workers' Compensation Act, O.C.G.A. §§ 34-9-1, *et seq.*" as a Damages Defense.

ERRATA: 9/25/2018; in coding 46, I coded "Any award of punitive damages against Defendant in this action would violate Defendant's rights under the United States and Georgia Constitutions." as a Damages Defense.

ERRATA: 9/26/2018; in coding 48, I coded "Defendant's actions were not intentional, willful, wanton, malicious, and/or outrageous or with evil motive or with reckless indifference to the rights of Laura Shidell." as a Damages Defense.

ERRATA: 9/26/2018; in coding 48, I coded "Plaintiff and/or Laura Shidell are not entitled to punitive damages or damages for emotional distress." as a Damages Defense.

ERRATA: 9/26/2018; in coding 49, I coded "Assuming arguendo that liability is established and damages awarded, compensatory and/or punitive damages are limited by 42 U.S.C. § 1981a." as a Damages Defense.

ERRATA: 9/27/2018; in coding 55, I coded "The defendant did not willfully commit any alleged violation of federal, state, or local laws." as a Damages Defense.

ERRATA: 9/27/2018; in coding 55, I coded "Without conceding that PreferAble has the burden of proof on this issue, an award of punitive damages would constitute a denial of PreferAble's constitutional rights including its right to due process, equal protection, and protection from excessive fines and penalties pursuant to the United States Constitution and the Constitution of the Commonwealth of Massachusetts." as a Damages Defense.

ERRATA: 9/28/2018; in coding 58, I coded "If, and to the extent Plaintiff suffered any damages, such damages are too speculative to be recovered." as a Damages Defense.

ERRATA: 9/29/2018; in coding 63, I coded "Plaintiffs claim for punitive damages is precluded by the due process guarantees of the United States and Kentucky Constitutions." as a Damages Defense.

ERRATA: 9/29/2018; in coding 63, I coded "Plaintiff has failed to plead facts sufficient to entitle it to recover the special damages alleged." as a Damages Defense.

ERRATA: 10/1/2018; in coding 71, I coded "Plaintiff's Amended Petition fails to state a cause of action upon which either punitive or exemplary damages can be awarded because it violates the United States and/or Oklahoma Constitutions." as a Damages Defense.

ERRATA: 10/2/2018; in coding 74, I coded "Plaintiff is not entitled to recover the relief requested in the Complaint." as a Damages Defense.

ERRATA: 10/2/2018; in coding 74, I coded "The employees identified in the Complaint have not suffered the damages alleged in the Complaint." as a Damages Defense.

ERRATA: 10/2/2018; in coding 78, I coded "Defendants are entitled to a set off for any amounts recovered for or by the Complainants through their efforts to mitigate damages." as a Damages Defense.

ERRATA: 10/2/2018; in coding 78, I coded "Defendants are entitled to a set off from any economic damages suffered by the Complainants arising from the alleged retaliation for any amounts recovered for or by the Complainants through their efforts to mitigate damages." as a Damages Defense.

ERRATA: 10/4/2018; in coding 89, I coded "Further defending, plaintiff-intervenors' harassment claims do not support their prayers for "lost income, raises,

promotions, and other benefits" or reinstatement or front pay and, accordingly, those prayers should be stricken." as a Damages Defense.

ERRATA: 10/4/2018; in coding 90, I coded "Plaintiff's claims are barred to the extent that it seeks back pay, front pay, and/or reinstatement on behalf of Virginia Rylance, in that Rylance declined and/or failed to accept Wal-Mart's offers of unconditional reinstatement of back pay, and thereby waived any claim for back pay, front pay, and/or reinstatement." as a Damages Defense.

ERRATA: 10/4/2018; in coding 90, I coded "Plaintiff lacks standing to pursue monetary damages on behalf of Linda Gliotti. In light of Linda Gliotti's Petition for Bankruptcy filed with the United States Bankruptcy Court, Ms. Gliotti's claim for damages is the property of her bankruptcy estate, and the only individual with standing to pursue a claim on her behalf is Bankruptcy Trustee." as a Damages Defense.

ERRATA: 10/4/2018; in coding 92, I coded "Defendant believed in good faith that its conduct was in compliance with state and federal law." as a Damages Defense.

ERRATA: 10/4/2018; in coding 92, I coded "Defendant took all reasonable steps to make certain that all of its actions were in compliance with state and federal law." as a Damages Defense.

ERRATA: 10/5/2018; in coding 93, I coded "The individuals on whose behalf the Complaint is brought have not been damaged by the conduct complained of." as a Damages Defense.

ERRATA: 10/6/2018; in coding 94, I coded "To the extent the claims asserted by Plaintiff EEOC are based upon, relate or refer to conduct alleged by Plaintiff-in-Intervention Falkowski and/or other unknown or unidentified persons referred to as "similarly situated female employees," such claims are barred in whole or in part by relevant provisions of Florida's Workers' Compensation statute." as a Damages Defense.

ERRATA: 10/6/2018; in coding 94, I coded "Falkowski's damages claims may be barred in whole or in part on grounds the EEOC also filed a Complaint-of-Intervention seeking monetary damages on her behalf and Falkowski cannot recover double damages for her alleged claims." as a Damages Defense.

ERRATA: 10/6/2018; in coding 94, I coded "Herring's exclusive remedy for the injury and damage in Count IV is contained in Chapter 440 of the Florida Statutes, Florida's Workers' Compensation Statute." as a Damages Defense.

ERRATA: 10/6/2018; in coding 100, I coded "The damages demanded in the Complaint and/or the Complaint in Intervention, if any, are limited by applicable federal statutes and case law interpreting them." as a Damages Defense.

ERRATA: 10/6/2018; in coding 101, I coded "Plaintiff's claim for punitive damages is barred by the Constitution of the United States and the Commonwealth of Pennsylvania." as a Damages Defense.

ERRATA: 10/6/2018; in coding 101, I coded "None of Defendant's actions were malicious or were committed with reckless indifference to the federally protected rights of any employees." as a Damages Defense.

ERRATA: 10/8/2018; in coding 104, I coded "Plaintiff's claims are barred to the extent they are precluded by the exclusivity provisions of the Pennsylvania Workers' Compensation Act." as a Damages Defense.

ERRATA: 10/8/2018; in coding 104, I coded "Any claims for punitive damages are barred by *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999), because Defendant did not act with malice or reckless indifference to Intervenor's federally protected rights, in that any allegedly discriminatory employment decisions of Defendant's agents, if any occurred, were contrary to Defendant's good-faith efforts to comply with the ADA and all other applicable laws." as a Damages Defense.

ERRATA: 10/8/2018; in coding 107, I coded "The provisions of the Pennsylvania Workman's Compensation Act, 79 Pa. C.S.A. §481(a) apply in this case to limit or bar Plaintiff's cause of action." as a Damages Defense.

ERRATA: 10/9/2018; in coding 110, I coded "At all times relevant hereto, Defendant has acted in good faith and has not violated any rights which may be secured to Plaintiff under any federal, state or local laws, rules, regulations or guidelines." as a Damages Defense.

ERRATA: 10/9/2018; in coding 111, I coded "Defendants' actions or inactions were not the proximate, legal or substantial cause cause of any damage, injury or loss allegedly suffered by plaintiff." as a Damages Defense.

ERRATA: 10/9/2018; in coding 111, I coded "Plaintiff fails to state a claim for liquidated damages under the Wage Payment and Collection Law." as a Damages Defense.

ERRATA: 10/9/2018; in coding 111, I coded "Plaintiff fails to state a claim for liquidated damages under the Equal Pay Act." as a Damages Defense.

ERRATA: 10/9/2018; in coding 112, I coded "Plaintiff has not been damaged." as a Damages Defense.

ERRATA: 10/9/2018; in coding 112, I coded "Plaintiff's claim for punitive damages is barred by the Constitution of the United States and the Commonwealth of Pennsylvania." as a Damages Defense.

ERRATA: 10/10/2018; in coding 113, I coded "Any award of punitive damages will violate the substantive and procedural safeguards guaranteed to the Defendant by the United States and Pennsylvania Constitutions; any such award for such damages is therefore barred." as a Damages Defense.

ERRATA: 10/10/2018; in coding 113, I coded "Defendant denies that any individual identified in Plaintiffs Complaint suffered any emotional, psychological and/or physical damage as a result of any action taken or not taken by it either individually or collectively. Any emotional, psychological and/or physical damage suffered by those individual identified in Plaintiffs Complaint is attributable to a cause or causes wholly independent of the Defendant's actions." as a Damages Defense.

ERRATA: 10/10/2018; in coding 113, I coded "The pre-existing emotional and/or psychological conditions of the individual identified in Plaintiffs Complaint prior to the alleged acts of misconduct, same being denied, were such that the

Defendant's alleged acts did not proximately cause or contribute in any manner to the alleged injuries and/or damages." as a Damages Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Charging Party Stastny failed to use such means as are reasonable under the circumstances to avoid or minimize the damages that may have resulted from violations of Title VII and the Civil Rights Act." as a Damages Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Plaintiff's Complaint fails to state a claim upon which relief may be granted as to costs and/or attorney's fees." as a Damages Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Any compensation disparity which is found to be actionable was caused by an erroneous belief on the part of Chubb that the qualification of the individuals, the jobs in question, and the market factors which affected hiring decisions were sufficiently different to justify said disparities and were made in good faith with a reasonable belief that the decisions did not violate the Equal Pay Act, Title VII, or any other statute alleged to be violated in Intervenor's Complaint. Thus, no disparity shall serve as a basis for any award of liquidated damages, punitive damages or the like." as a Damages Defense.

ERRATA: 10/13/2018; in coding 122, I coded "Ms. Brandstatter is not entitled to and may not recover the relief prayed for in the Complaint and therefore is no factual or legal basis for compensatory, punitive or other damages." as a Damages Defense.

ERRATA: 10/13/2018; in coding 122, I coded "No actions of Novartis with

respect to Ms. Brandstatter's employment constitute a willful or reckless disregard of her rights and, indeed, at all times, Novartis has acted diligently to uphold the employment laws through the widespread dissemination of its anti-discrimination policies and training on those policies. As such, Ms. Brandstatter is precluded from recovering punitive damages." as a Damages Defense.

ERRATA: 10/13/2018; in coding 123, I coded "LiVecchi is not entitled to recover any punitive damages based upon the Statement of Claims in the Complaint." as a Damages Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Any claim for lost wages, which is specifically denied, is limited or barred, in whole or in part, because Ms. Pehel intended to terminate her employment with NPLC shortly after August 1, 2005 to return to college as a full-time student and therefore would have no lost wages or benefits." as a Damages Defense.

ERRATA: 10/15/2018; in coding 127, I coded "To the extent Plaintiff seeks recovery for either the denial or recovery of employee benefits, the claim and recovery is preempted by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, *et seq.*" as a Damages Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Plaintiff's claims for emotional distress contained in Plaintiff's Complaint are barred by the exclusivity provisions of the Workers' Compensation laws in the State of Illinois because any such emotional distress arose in connection with the employment of the individuals represented by Plaintiff." as a Damages Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Compensatory and/or punitive damages which may arguably be available to Plaintiff are subject to the limitations of 42 U.S.C. §1981a(b)(3)." as a Damages Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Plaintiff's prayer for front pay and other equitable remedies are not triable to a jury." as a Damages Defense.

ERRATA: 10/16/2018; in coding 130, I coded "Defendant alleges all defenses to punitive damages available under Kolstad." as a Damages Defense.

ERRATA: 10/16/2018; in coding 130, I coded "Ms. Stein cannot show sufficient hostility or animosity to entitle her to front pay." as a Damages Defense.

ERRATA: 10/16/2018; in coding 131, I coded "Alternatively, Rite Aid avers that Tiffany R. Blackmon suffered or sustained no damages, losses or injury as a result of any allegation or statements described in EEOC's Complaints." as a Damages Defense.

ERRATA: 10/16/2018; in coding 131, I coded "Any claims for damages asserted by the EEOC or on behalf of Tiffany R. Blackmon are subject to the limitations of 42 USC 1981a(b)(3) or any other applicable law." as a Damages Defense.

ERRATA: 10/16/2018; in coding 132, I coded "Defendants deny that Plaintiff is entitled to any relief requested in the Complaint." as a Damages Defense.

ERRATA: 10/16/2018; in coding 132, I coded "Notwithstanding Defendants' denial of liability, to the extent the EEOC seeks to recover compensation for past or future pecuniary losses, including, but not limited to, back pay on behalf of Ms.

McGrew and/or such other individuals have failed to make reasonable efforts to mitigate their damages. Furthermore, all amounts earned or earnable with reasonable diligence since the time of Ms. McGrew's termination from employment with Defendants must be offset against, and reduce the monetary recovery sought in this case." as a Damages Defense.

ERRATA: 10/17/2018; in coding 133, I coded "And now further answering, defendant avers in the alternative that the damage alleged by plaintiff, if any exist, which is specifically denied, were caused solely by the fault and negligence of the plaintiff, or others for whom the defendant has no responsibility, all of which precludes and bars plaintiff's recovery herein." as a Damages Defense.

ERRATA: 10/17/2018; in coding 133, I coded "And now further answering, defendant avers in the alternative that, if it is found that plaintiff suffered damages as the result of the negligence of anyone for whom the defendant could or might be responsible, or because of the unseaworthiness of any vessel for which defendant was responsible, all of which is specifically denied, the damages of plaintiff were caused by and/or contributed to by and/or aggravated by plaintiff's own negligence, and/or the negligence of others for whom defendant is not responsible, and defendant is entitled to have any award or recovery mitigated and reduced accordingly." as a Damages Defense.

ERRATA: 10/17/2018; in coding 134, I coded "Under the circumstances of this case, an award of punitive damages would be improper and unconstitutional." as a Damages Defense.

ERRATA: 10/17/2018; in coding 134, I coded "Defendant did not act with malice or reckless indifference to the rights of Robert White or any other prospective employee, and Defendant has made good faith efforts to enforce its anti-discrimination policies." as a Damages Defense.

ERRATA: 10/17/2018; in coding 135, I coded "Defendant avers that its acts, if any, in reference to the matters and things alleged in the Amended Complaint were unintentional so as to bar or reduce recover herein." as a Damages Defense.

ERRATA: 10/17/2018; in coding 135, I coded "With respect to Plaintiff's alleged damages under Title VII, such damages are barred to the extent they exceed the \$300,000 maximum in 42 U.S.C. § 1981a(b)(3)." as a Damages Defense.

ERRATA: 10/17/2018; in coding 135, I coded "Defendant avers that it has neither acted nor failed to act in any manner entitling Plaintiff to punitive damages." as a Damages Defense.

ERRATA: 10/17/2018; in coding 137, I coded "The relief sought by Plaintiff is unavailable for some or all of its claims." as a Damages Defense.

ERRATA: 10/17/2018; in coding 138, I coded "Plaintiff is not entitled to any award of punitive damages in that defendant has implemented and maintained policies and practices designed and intended to prevent harassment and retaliation." as a Damages Defense.

ERRATA: 10/18/2018; in coding 139, I coded "In the alternative, defendant is entitled to a set off against any claim for damages in any amounts which Escher did or could have earned through reasonable efforts, did or could have obtained through

unemployment compensation, and any amounts paid to or on behalf of Escher by defendant." as a Damages Defense.

ERRATA: 10/18/2018; in coding 140, I coded "To the extent that any of plaintiff's claims are grounded in negligence, those claims are barred by the exclusive remedy provision of the Louisiana Worker's Compensation Statute." as a Damages Defense.

ERRATA: 10/18/2018; in coding 140, I coded "In the event it is determined by this Honorable Court that Central American in any way violated any Louisiana or Federal law regarding discrimination or retaliation with respect to Rhonda Woodard, which is expressly denied, Central American avers that its actions were not intentional, and were without malice or reckless indifference." as a Damages Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Assuming *arguendo* that Rhonda Woodard is awarded any compensatory and/or punitive damages as a result of the allegations in the Complaint, which Central American expressly denies should occur, then said damages should be limited pursuant to the applicable maximum permitted in 42USC §1981a(b)(3)." as a Damages Defense.

ERRATA: 10/18/2018; in coding 140, I coded "To the extent any of Central American's managers or supervisors are found to have acted with malice or reckless indifference to Rhonda Woodard's rights, that manager or supervisor acted contrary to Central American's good faith efforts to comply with Louisiana State and Federal

law. Accordingly, plaintiff Rhonda Woodard is not entitled to recover punitive damages." as a Damages Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Plaintiff is not entitled to any award of punitive damages under Louisiana State law." as a Damages Defense.

ERRATA: 10/19/2018; in coding 141, I coded "The EEOC's claims are barred by the doctrines of estoppel, waiver and/or unclean hands by reasons of the statements made by Johnny L. Williams in submission and application to the Social Security Administration in which she stated under penalty of perjury and in her own handwriting that she was totally disabled from performing any work following the termination of her employment with Rite Aid in October 1998, and by reason of Johnny L. Williams' actual disability and significant physical impairments and limitations at all relevant times." as a Damages Defense.

ERRATA: 10/19/2018; in coding 142, I coded "Defendant's Counter-Claim seeks relief under 42 USC 1988(b) for which the Defendant is not entitled in the present cause of action." as a Damages Defense.

ERRATA: 10/19/2018; in coding 143, I coded "Defendant believes and therefore alleges that complainant has failed to litigate(*sic*) her damages, as required by law." as a Damages Defense.

ERRATA: 10/20/2018; in coding 145, I coded "Any alleged damages of the Represented Parties were caused solely by their own acts or omissions." as a Damages Defense.

ERRATA: 10/20/2018; in coding 145, I coded "Defendant specifically denies that the Represented Parties sustained any injury as alleged." as a Damages Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Trac-Work affirmatively pleads that claims herein are subject to a cap or limit on the total of any compensatory and punitive damages which may be awarded not exceed \$100,000 collectively. 42 USC 1981(a)(b)(3)(B)." as a Damages Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Third party plaintiff's claim against ERII is barred to the extent it seeks recover of damages that do not constitute Loss under the intendment of the policy." as a Damages Defense.

ERRATA: 10/20/2018; in coding 146, I coded "The denial of coverage by ERII is reasonable and has been asserted in good faith such that its assertion does not give rise to a claim for penalties or attorney fees." as a Damages Defense.

ERRATA: 10/22/2018; in coding 152, I coded "Defendants allege that Plaintiff has failed to plead the requisite factual circumstances necessary to support a claim for punitive damages." as a Damages Defense.

ERRATA: 10/22/2018; in coding 153, I coded "Damping Technologies states that Mary Steely had filed a claim for unemployment insurance benefits with the Indiana Department of Workforce Development on or about June 24, 2003 claiming that her employment relationship with Damping Technologies had been terminated prior to June 24, 2003, and that she was entitled to unemployment benefits;

accordingly, Damping Technologies could not have retaliated against Mary Steely by allegedly discharging her on or about July 21, 2003." as a Damages Defense.

ERRATA: 10/22/2018; in coding 154, I coded "Plaintiff's claim for punitive damages is barred because such damages are violative of the United States and Indiana Constitution." as a Damages Defense.

ERRATA: 10/22/2018; in coding 154, I coded "Plaintiff's claim for punitive damages is barred because Defendant maintained a policy prohibiting discrimination and harassment, and a complaint procedure." as a Damages Defense.

ERRATA: 10/22/2018; in coding 155, I coded "As a matter of law and public policy, punitive damages should not be awarded against Paradise Plaza." as a Damages Defense.

ERRATA: 10/23/2018; in coding 156, I coded "Plaintiff's claims for compensatory and punitive damages are limited by statute." as a Damages Defense.

ERRATA: 10/23/2018; in coding 157, I coded "Subject to a reasonable opportunity for investigation and discovery, Merrill Gardens acted in good faith and with reasonable grounds to believe that its actions did not violate any statute cited in Plaintiff's Amended Complaint. Merrill Gardens asserts a lack of willfulness to violate any statute cited in the Amended Complaint as a defense to any claim by Plaintiff for punitive damages." as a Damages Defense.

ERRATA: 10/23/2018; in coding 158, I coded "Plaintiff's claim for punitive damages not available under the applicable laws." as a Damages Defense.

ERRATA: 10/23/2018; in coding 158, I coded "Defendant at all times acted in

good faith and with reasonable grounds to believe that its actions did not violate any applicable law and, thus, there exists a lack of willfulness or intent to violate any applicable law as defense to any claim by Plaintiff for compensatory, punitive, or liquidated damages." as a Damages Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Plaintiff's claim for punitive damages is barred to the extent that the lack of clear standards makes the imposition of punitive damages against Defendant unconstitutionally vague and/or overbroad." as a Damages Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Plaintiff's claim for punitive damages is barred to the extent that any discriminatory conduct was directly contrary to Defendant's good faith efforts to comply with Title VII." as a Damages Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Plaintiff's claims for punitive damages is barred to the extent that Defendant did not act with actual malice when it took the employment actions at issue." as a Damages Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Defendant specifically incorporates by reference any and all standards or limitations regarding the determination and enforceability of punitive damage awards as set out in the relevant decisions of the United States Supreme Court." as a Damages Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Paula Thompson failed to exercise reasonable diligence and ordinary care to minimize her damages, and Defendant, therefore, pleads the doctrine of unavoidable consequences and the

defense of failure to mitigate damages in bar of Plaintiff's claims against Defendant." as a Damages Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Defendant has in good faith complied with all applicable laws and regulations and having so complied, acted without improper motive, and any injury occurring to the Plaintiff, the existence of which is explicitly denied, is not actionable." as a Damages Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Defendant's alleged conduct did not proximately cause Thompson or Plaintiff any harm." as a Damages Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Plaintiff's claims against Defendant are barred because Plaintiff is unable to prove that Defendant violated any legal rights of Plaintiff giving rise to a valid claim and a collectible judgement." as a Damages Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Plaintiff's claims for punitive damages are barred in whole or in part by the limitations on punitive damages set out in N.C.G.S. §§1D-1, et. seq." as a Damages Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Defendant pleads the limitations contained in 42 U.S.C. § 1981a(b) in bar of Plaintiff's recovery under Title VII." as a Damages Defense.

ERRATA: 10/24/2018; in coding 166, I coded "Defendants engaged in good-faith efforts to comply with Title VII of the Civil Rights Act of 1964, precluding an award of punitive damages." as a Damages Defense.

ERRATA: 10/24/2018; in coding 166, I coded "The claim for punitive damages

is barred. There was no discrimination, and specifically there was no intentional discrimination with malice or reckless indifference. There should not be liability for alleged acts of employees which were neither authorized or ratified and for alleged acts of employees committed outside the scope of their employment." as a Damages Defense.

ERRATA: 10/24/2018; in coding 166, I coded "Yvette McGill has not suffered any damages as a result of the conduct alleged in the Complaint." as a Damages Defense.

ERRATA: 10/24/2018; in coding 166, I coded "To the extent that Yvette McGill has suffered damages from the conduct alleged in the Complaint, which BASF denies, BASF's conduct was not the legal or proximate cause of the damages." as a Damages Defense.

ERRATA: 10/26/2018; in coding 172, I coded "Plaintiff's claim for alleged damages suffered as a result of alleged discrimination is barred because Defendant did not act intentionally." as a Damaged Defense.

ERRATA: 10/26/2018; in coding 172, I coded "Defendant alleges the Plaintiff has not alleged sufficient facts to constitute a claim for punitive damages under federal or North Carolina law." as a Damages Defense.

ERRATA: 10/26/2018; in coding 171, I coded "The relief sought by Plaintiff is subject to statutory maximums." as a Damages Defense.

ERRATA: 10/26/2018; in coding 173, I coded "The Defendant acted at all times in good faith, without any wrongful intent and with a reasonable belief that

its conduct did not give rise to any tort or violate any public policy or law of North Carolina or the United States." as a Damages Defense.

ERRATA: 10/26/2018; in coding 173, I coded "The Plaintiff's claims for damages are barred, reduced, and/or limited pursuant to applicable statutory provisions and common law doctrines regarding limitations of awards, caps on recovers, and setoffs." as a Damages Defense.

ERRATA: 10/26/2018; in coding 173, I coded "The Plaintiff is not entitled to some or all of the relief requested as a matter of law." as a Damages Defense.

ERRATA: 10/26/2018; in coding 175, I coded "The defendant acted at all times in good faith and with reasonable grounds to believe that its actions with respect to Mr. Peoples did not violate Title VII, and a lack of willfulness or intent to violate Title VII is asserted as a defense to any claim for liquidated damages or punitive damages." as a Damages Defense.

ERRATA: 10/26/2018; in coding 175, I coded "An award of compensatory damages for "non-pecuniary losses" such as those specified by the plaintiff, is not proper pursuant to the provisions of Title VII, 42 U.S.C. § 2000e et seq." as a Damages Defense.

ERRATA: 10/27/2018; in coding 181, I coded "All actions taken by Defendant with respect to Patricia Walters and Carolyn Mancinelli were justified; reasonable; in good faith; without any improper motive, purpose, or means; without any hatred, ill will, malice, or intent to injure; and without reckless indifference to their federally protected rights." as a Damages Defense.

ERRATA: 10/27/2018; in coding 181, I coded "John A. Warren, John C. Warren, and any other person whom the plaintiff attempts to represent in this action may have failed to fulfill their respective duty to mitigate their putative entitlement to actual damages by seeking, entering into, and maintaining interim employment." as a Damages Defense.

ERRATA: 10/27/2018; in coding 183, I coded "Plaintiff's claims against defendant are barred, in whole or in part, by the exclusivity provisions of the North Carolina Workers' Compensation Act." as a Damages Defense.

ERRATA: 10/28/2018; in coding 202, I coded "To the extent front-pay is sought as a result of the allegations contained in the Complaint, any entitlement to that relief is barred by Ryan's offer of re-employment." as a Damages Defense.

ERRATA: 10/28/2018; in coding 202, I coded "Plaintiff cannot prove a willful violation of the Equal Pay Act, 29 U.S.C. § 209." as a Damages Defense.

ERRATA: 10/28/2018; in coding 204, I coded "Plaintiff's claims for punitive damages under Title VII are barred because Sara Lee has undertaken good faith efforts to develop and enforce its antidiscrimination policies with the requirements of Title VII." as a Damages Defense.

ERRATA: 10/29/2018; in coding 214, I coded "Plaintiff's claim for damages is barred because of Defendant's good faith efforts to identify and provide a reasonable accommodation in compliance with the ADA pursuant to 42 U.S.C. §1981a(a)(3)." as a Damages Defense.

ERRATA: 10/30/2018; in coding 225, I coded "Neither Beverly nor a class of females purportedly represented by Plaintiff has suffered pecuniary losses or non-pecuniary losses including emotional pain, suffering, depression, anxiety, loss of enjoyment of life, or humiliation, as a result of Marshall Management's alleged conduct." as a Damages Defense.

ERRATA: 10/30/2018; in coding 225, I coded "The alleged damages of Beverly and the alleged class of females which Plaintiff purports to represent are speculative and thus unavailable as a matter of law." as a Damages Defense.

ERRATA: 10/30/2018; in coding 225, I coded "The allegations contained in Plaintiff's Complaint, or any purported cause of action contained therein, fail to state any claims upon which relief can be granted with respect of loss of income and loss of employment benefits, front pay, medical expenses, physical suffering, mental anguish, inconvenience, humiliation, embarrassment, damage to her reputation, attorney's fees, or costs." as a Damages Defense.

ERRATA: 10/31/2018; in coding 235, I coded "FLTVT states that it neither communicated nor published false information about Plaintiff-Intervenor Sylvester Cole and if it did, such communication was privileged and was made neither with actual malice nor with intent to injure." as a Damages Defense.

ERRATA: 11/1/2018; in coding 236, I coded "At all times referred to in Plaintiff's Complaint, Defendant dealt with Maines in good faith and in no way acted wantonly, maliciously, or oppressively." as a Damages Defense.

ERRATA: 11/1/2018; in coding 237, I coded "Anglin's entitlement to back pay ended on the day that Enterprise discovered that Anglin misrepresented information on his job application, and Anglin's misrepresentation or falsification of information on Enterprises' employment application also bars any claims for front pay or reinstatement." as a Damages Defense.

ERRATA: 11/2/2018; in coding 240, I coded "Defendant asserts that Plaintiff has not undertaken adequate efforts to secure substantially equivalent replacement employment and benefits since his separation from employment with the Defendant." as a Damages Defense.

ERRATA: 11/3/2018; in coding 269, I coded "Defendant states that Plaintiffs are not entitled to double recovery of compensatory or punitive damages under 42 U.S.C. § 1981a and 42 U.S.C. § 1981." as a Damages Defense.

14. Procedural defenses: 1 if any of the affirmative defenses raise procedural defects, such as improper venue, lack of jurisdiction, joinder issues, or other defenses grounded in the rules of civil procedure; else 0.

NOTE: anything concluded to be "other procedural defenses" should be amended to the codebook as an errata here.

ERRATA: 8/13/2018; in coding 1, I coded "fails to state cause of action" as a Procedural Defense.

ERRATA: 8/13/2018; in coding 1, I coded "statute of limitations" as a Procedural Defense.

ERRATA: 8/13/2018; in coding 1, I coded "fails to establish requisite elements for class action" as a Procedural Defense.

ERRATA: 8/14/2018; in coding 2, I coded "fails to state a claim" as a Procedural Defense.

ERRATA: 8/14/2018; in coding 2, I coded "can not recover attorney's fees under 42 U.S.C. 2000e *et sec* or 42 U.S.C. § 1981a" as a Procedural Defense.

ERRATA: 8/14/2018; in coding 3, I coded "charge not filed within the statutory filing period" as a Procedural Defense.

ERRATA: 8/14/2018; in coding 3, I coded "EEOC's failure to engage in meaningful, effective conciliation efforts" as a Procedural Defense.

ERRATA: 8/22/2018; in coding 4, I coded "not entitled to a jury trial" as a Procedural Defense.

ERRATA: 8/22/2018; in coding 5, I coded "failure to conciliate" as Procedural Defense.

ERRATA: 8/22/2018; in coding 5, I coded "To the extent that any of hte Plaintiffs claims arise out of conduct with occurred more than 300 days prior to the filing of the administrative charge, such claims are barred" as a Procedural Defense.

ERRATA: 8/22/2018; in coding 6, I coded "Subject ot proof through discovery, hte EEOC cannot establish a claim of systemic discrimination or any basis for class-based relief because Plaintiff and any other allegedly injured individuals are not similarly situated in all material respects." as a Procedural Defense.

ERRATA: 8/22/2018; in coding 8, I coded "The statutory prerequisites for filing some or all of the claims have not been satisfied." as a Procedural Defense.

ERRATA: 8/25/2018; in coding 14, I coded "Any complaints or allegations of discrimination prohibited by the American with Disabilities Act of 1990, 42 U.S.C §12101 et seq., not appearing on the face of Charge No. 250-2004-03122 as filed with the Equal Employment Opportunity Commission are barred by the applicable statutory prerequisites for bring an action pursuant to that statue." as a Procedural Defense.

ERRATA: 8/25/2018; in coding 14, I coded "Plaintiff's claim for punitive damages against Defendant be deferred by way of a bifurcated proceeding." as Procedural Defense.

ERRATA: 8/25/2018; in coding 14, I coded "Defendant avers that this action in whole or in part is frivolous, unreasonable, and groundless, and accordingly, Defendant is entitled to attorney's fees and other costs associated with the defense of this action." as a Procedural Defense.

ERRATA: 8/31/2018; in coding 16, I coded "lacks standing" as a Procedural Defense.

ERRATA: 9/3/2018; in coding 17, I coded "All or some of Plaintiff's claims are barred by reason of the Charging Parties' or the Aggrieved Parties' failure to fulfill all conditions precedent." as a Procedural Defense.

ERRATA: 9/8/2018; in coding 20, I coded " The Amended Complaint fails to state a claim upon which relief can be granted." as a Procedural Defense.

ERRATA: 9/8/2018; in coding 20, I coded "This Defendant acknowledges being served with the Plaintiff's Amended Complaint, pursuant to F.R.C.P. 4(d). However, this Defendant has never been served with any original Complaint, and knows nothing of its contents. To the extent any relief, penalty, or other thing is averred against it in any original Complaint, this Defendant pleads lack of proper service and seeks dismissal thereof pursuant to F.R.C.P. 12(b)(4) and (5)." as a Procedural Defense.

ERRATA: 9/8/2018; in coding 20, I coded "This Defendant denies that the intervening Plaintiff filed a valid or timely charge of discrimination, and would further say that there is no Exhibit A attached to the intervening Plaintiff's Intervening Complaint, nor is such Exhibit A filed of record in this cause. This Defendant demands strict proof of the existence of a valid charge of discrimination in this case. This Defendant admits receiving an Amended Complaint filed by the Equal Employment Opportunity Commission on or about August 12, 2004. This Defendant has not been served with any other summons or Complaint by the original Plaintiff, EEOC, and accordingly demands strict proof of the allegations of any other Complaint filed by the EEOC, which was according to the Intervening Plaintiff's Complaint, allegedly filed on or about July 22, 2004. This Defendant says that the allegations of the EEOC's Amended Complaint speak for themselves, and all of same have been previously answered by this Defendant, which Answer is specifically incorporated herein by reference." as a Procedural Defense.

ERRATA: 9/8/2018; in coding 21, I coded "Defendant is not a proper party to this lawsuit and should be dismissed." as a Procedural Defense.

ERRATA: 9/8/2018; in coding 21, I coded "Plaintiff has failed to abide by the statutory prerequisites for the prosecution of this action." as a Procedural Defense.

ERRATA: 9/10/2018; in coding 26, I coded "To the extent that Plaintiff's purported Claims for Relief are based on alleged verbal harassment, or other statements or communications, such claims are barred because the actions complained of were protected by the free speech provisions of the United States and California Constitutions." as Procedural Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Plaintiff's Complaint, and each purported claim for relief, is barred in whole or in part because Plaintiff failed to exhaust her administrative remedies under Title VII of The Civil Rights Act of 1964, 42. U.S.C. §§ 2000e, *et seq.*" as a Procedural Defense.

ERRATA: 9/10/2018; in coding 26, I coded " Plaintiffs have not and cannot satisfy the requirements of California Code of Civil Procedure section 382 and/or Federal Rule of Civil Procedure 23." as Procedural Defense.

ERRATA: 9/10/2018; in coding 26, I coded "This case is not appropriate for class certification because the facts and law common to the case are insignificant compared to the individual facts and issues particular to the Plaintiffs and purported class members." as a Procedural Defense.

ERRATA: 9/10/2018; in coding 26, I coded "This case is not appropriate for class certification because the claims of Plaintiffs are not typical of the claims of the alleged class." as a Procedural Defense.

ERRATA: 9/10/2018; in coding 26, I coded "This case is not appropriate for class certification because Plaintiffs are not able to fairly and adequately protect the interests of all members of the putative class." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Plaintiff did not notify GRIMMWAY that charge had been filed by Claimant within ten (10) days of the date such charge was received by the EEOC (42 USC 2000e-5(b)) and therefore has not satisfied a jurisdictional prerequisite to institution of this lawsuit, and/or cannot establish a necessary element of its claim." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Plaintiff has not conducted a legally sufficient investigation of the charges, or made a determination of reasonable cause which encompasses all of the allegations contained within the Complaint (42 USC 2000e-5(b)), and therefore has not satisfied a jurisdictional prerequisite to institution of this lawsuit, and/or cannot establish a necessary element of its claim." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 28, I coded "GRIMMWAY did not engage in any conduct warranting an award of attorneys' fees, costs, or any other form of relief whatsoever." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 28, I coded "The allegations and causes of action in Plaintiff's complaint are frivolous, unreasonable or groundless, and entitle

GRIMMWAY to an award of reasonable and necessary attorneys' fees, expenses and costs that it has incurred in defending this suit." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant alleges Plaintiff's claims are barred for failing to timely serve the Complaint on the Defendant as required under Federal Rule of Civil Procedure 4(m)." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant alleges the Complaint it too uncertain to provide Defendant with adequate notice of the claims against the Defendant" as a Procedural Defense.

ERRATA: 9/12/2018; in coding 28, I coded "Defendant alleges Plaintiff lack the requisite standing and/or capacity to bring the claims alleged on behalf of the Charging Party." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 29, I coded "FOAM WORKS affirmatively pleads that Plaintiff's claims for punitive or exemplary damages are precluded because any alleged act or omission by FOAM WORKS was done in good faith, and FOAM WORKS had reasonable grounds to believe that their actions did not violate any provisions of United States or California law." as a Procedural Defense.

ERRATA: 9/12/2018; in coding 30, I coded "The complaint fails to set forth sufficient facts to constitute a claim for relief against this answering defendant." as a Procedural Defense.

ERRATA: 9/15/2018; in coding 35, I coded "Charging party Christy Hamlin did not file her charge with Plaintiff within 180 days of the alleged sexual

harassment, and thus Plaintiff's charges with respect to Christy Hamlin should be dismissed" as a Procedural Defense.

ERRATA: 9/16/2018; in coding 37, I coded "Plaintiff may not recover remedies for similarly situated black employees who failed to file a timely charge under Title VII of the Civil Rights Act of 1964 as amended." as Procedural Defense.

ERRATA: 9/17/2018; in coding 40, I coded "The Defendant or Defendants named herein are improper parties." as a Procedural Defense.

ERRATA: 9/18/2018; in coding 38, I coded "Defendant is not liable for compensatory or punitive damages because Plaintiff-Intervenor has failed to plead with particularity facts supporting these damages." as a Procedural Defense.

ERRATA: 9/19/2018; in coding 42, I coded "Plaintiff is not entitled to attorneys' fees, costs, or expenses." as a Procedural Defense.

ERRATA: 9/22/2018; in coding 43, I coded "To the extent that Burge and/or the EEOC failed to satisfy required conditions precedent to the claims in the Complaint, such claims are barred." as a Procedural Defense.

ERRATA: 9/25/2018; in coding 44, I coded " Plaintiff's purported claims are barred to the extent they involve transactions or events, or seek damages for periods, outside applicable limitations periods." as a Procedural Defense.

ERRATA: 9/25/2018; in coding 44, I coded "Plaintiff's claims are barred to the extent that any administrative prerequisites have not been met." as a Procedural Defense.

ERRATA: 9/25/2018; in coding 47, I coded "Plaintiff-Intervenor Canto's claims are frivolous, unreasonable and groundless." as a Procedural Defense.

ERRATA: 9/26/2018; in coding 49, I coded "The Plaintiff has failed to join an indispensable party or parties, those parties being labor organizations that represent many of the Defendant's employees. Many of Defendant's employment practices are dictated by collective bargaining agreements, and the relief requested by Plaintiff may affect the rights and duties arising under such agreements." as a Procedural Defense.

ERRATA: 9/26/2018; in coding 49, I coded "The EEOC failed to reasonably investigate the charge of discrimination filed by Giles Jefferson." as a Procedural Defense.

ERRATA: 9/26/2018; in coding 49, I coded "The EEOC's right to a trial by jury is limited to legal claims only. Non-legal relief is not subject to trial by jury." as a Procedural Defense.

ERRATA: 9/27/2018; in coding 52, I coded "Defendant alleges that this matter has not been commenced in the time allowed by statute." as a Procedural Defense.

ERRATA: 9/27/2018; in coding 52, I coded "Defendant alleges that the complaint fails to set forth facts sufficient to constitute a claim." as a Procedural Defense.

ERRATA: 9/27/2018; in coding 55, I coded "Catherine Darensbourg is not similarly situated to the putative class members, and as such should not be part of any collective action under the authorities." as a Procedural Defense.

ERRATA: 9/27/2018; in coding 55, I coded "This case is not appropriate for class certification because the facts and law more common to the case, if any, are insignificant compared to the individual facts and issues of law particular to Catherine Darensbourg and to the putative class members." as a Procedural Defense.

ERRATA: 9/27/2018; in coding 55, I coded "Plaintiff cannot establish or maintain a collective action because it cannot demonstrate that a collective action is superior to other methods available for adjudicating the controversy." as a Procedural Defense.

ERRATA: 9/28/2018; in coding 56, I coded "The Complaint should be dismissed as Plaintiff has failed to join a necessary party or parties." as a Procedural Defense.

ERRATA: 9/29/2018; in coding 59, I coded "Defendant pleads all affirmative defenses as set forth in Federal Rule 8(c) as they may be applicable herein." as a Procedural Defense.

ERRATA: 9/29/2018; in coding 59, I coded "Defendant affirmatively pleads statute of limitations, lack of jurisdiction, and failure to properly exhaust or commence administrative remedies as a bar to Plaintiff's Complaint." as a Procedural Defense.

ERRATA: 9/29/2018; in coding 60, I coded "Plaintiff failed to name an indispensable party in HSS and is time-barred from amending its pleadings to do so." as a Procedural Defense.

ERRATA: 9/29/2018; in coding 61, I coded "The Complaint fails to state a claim upon which an award of attorney's fees can be granted." as a Procedural Defense.

ERRATA: 9/29/2018; in coding 62, I coded "The claims of Plaintiff, Home and the alleged class members are barred, in whole and/or in part, by the lack of subject matter jurisdiction." as a Procedural Defense.

ERRATA: 9/29/2018; in coding 65, I coded "This action should be dismissed for failure to join a necessary and indispensable party, Aerotek, Inc., which was the employer of Ms. Hendrickson." as a Procedural Defense.

ERRATA: 10/1/2018; in coding 68, I coded "EEOC's claims are barred in whole or in part to the extent the agency did not timely, properly, and fully fulfill its responsibilities, and do so in good faith, regarding the investigation and attempted conciliation of Freeman's administrative charge of discrimination." as a Procedural Defense.

ERRATA: 10/1/2018; in coding 69, I coded "EEOC's action, is barred by the doctrines of waiver, laches, estoppel, and any applicable statute of limitations." as a Procedural Defense.

ERRATA: 10/2/2018; in coding 76, I coded "Plaintiff's claims, in whole or in part, are time barred." as a Procedural Defense.

ERRATA: 10/2/2018; in coding 77, I coded "The Commission is not entitled to recover any damages under the Fair Labor Standards Act for any period on which the statute of limitations set therein has run." as a Procedural Defense.

ERRATA: 10/2/2018; in coding 77, I coded " The Commission is not entitled to recover any damages under Title VII for any period on which the statute of limitations set therein has run." as a Procedural Defense.

ERRATA: 10/2/2018; in coding 78, I coded "Plaintiff's suit is barred, in part, by its failure to satisfy conditions precedent required by 42 U.S.C. § 2000e-5, including, but not limited to, notice and conciliation." as a Procedural Defense.

ERRATA: 10/4/2018; in coding 88, I coded "Plaintiff Weir did not object to, or refuse to participate in, any activity, policy, or practice of the employer which was in violation of a law, rule, or regulation, and thus fails to state a claim under Florida's Whistleblower Act, § 448.102, Florida Statutes." as a Procedural Defense.

ERRATA: 10/6/2018; in coding 94, I coded "Plaintiff's allegations regarding any determination reached by the EEOC at the administrative level are irrelevant to and inapplicable any matters in this litigation." as a Procedural Defense.

ERRATA: 10/6/2018; in coding 98, I coded "The court lacks subject matter jurisdiction with respect to some or all of the claims asserted in the Complaint." as a Procedural Defense.

ERRATA: 10/6/2018; in coding 100, I coded "The claims alleged and right to damages are barred in whole or in part to the extent that there has been a failure to satisfy the statutory and/or prerequisites for the institution of an action under the statutes cited in the Complaint and/or the Complaint in Intervention." as a Procedural Defense.

ERRATA: 10/7/2018; in coding 102, I coded "A former claim of discrimination was mediated and resolved by another employee and the EEOC agreed to terminate their investigation on 6/22/05 and not use that charge as a jurisdictional basis for a civil action. To the extent that any such information was used in this charge brought by the EEOC, this action is tainted." as a Procedural Defense.

ERRATA: 10/7/2018; in coding 102, I coded "Any defendant named or referred to in the EEOC's charge of discrimination not specifically referred to in the charge of discrimination by Ashley Bowermaster can not form the basis of a charge of harassment especially if said complaint originated from a mediated case when the EEOC agreed to not use that information as a basis for a lawsuit." as a Procedural Defense.

ERRATA: 10/7/2018; in coding 102, I coded "The determination issued by the EEOC does not refer to a named party as being responsible and relies heavily on the information given by Devon Given. Said information is prohibited by virtue of a mediation agreement signed on 6/22/05." as a Procedural Defense.

ERRATA: 10/7/2018; in coding 102, I coded "The majority of the allegations of this Complaint are based in part on information taken from Devon Given to form a jurisdictional basis for this civil action. Any facts so used would violate the letter and spirit of the settlement and mediation agreement dated 06/22/2005 with the EEOC and that complainant." as a Procedural Defense.

ERRATA: 10/8/2018; in coding 104, I coded "Plaintiff has failed to satisfy its statutory obligations to attempt to eliminate or resolve any alleged unlawful

employment practice by informal methods of conference, conciliation, and persuasion, prior to the institution of this action." as a Procedural Defense.

ERRATA: 10/8/2018; in coding 105, I coded "Plaintiff has failed to satisfy the procedural requisite under Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act by filing a charge of discrimination with the EEOC or PHRC respectfully within the time limits set forth under the respective statutes." as a Procedural Defense.

ERRATA: 10/8/2018; in coding 107, I coded "Plaintiff's claims are barred and/or this court lacks jurisdiction over this matter as Plaintiff has failed to properly serve Defendant with the Complaint." as a Procedural Defense.

ERRATA: 10/8/2018; in coding 107, I coded "Plaintiff's claims are barred, *inter alia*, by the doctrines of waiver and estoppel, because Plaintiff did not engage in a genuine effort to conciliate this matter prior to litigation." as a Procedural Defense.

ERRATA: 10/8/2018; in coding 107, I coded "Plaintiff is not entitled to a jury trial for the claims arising under the Pennsylvania Human Relations Act as there is no right to a jury trial under that act." as a Procedural Defense.

ERRATA: 10/9/2018; in coding 111, I coded "Plaintiffs fail to state a claim against Jack Ott for violations of the Wage Payment and Collection Law." as Procedural Defense.

ERRATA: 10/10/2018; in coding 114, I coded "The charge filed by Flanagan, a white male, with plaintiff did not purport to seek relief on behalf of a class of

persons, Black or Hispanic, and plaintiff's purported class accusations are improper." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 114, I coded "Plaintiff's claims should be dismissed and/or transferred to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1404 and the doctrine of *forum non conveniens*." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 114, I coded "Plaintiff's Complaint should be dismissed for insufficiency of service of process." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "The purported class is not so numerous that joinder of all members isn't impracticable under F.R.C.P. 23." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Plaintiff's Complaint fails to establish that common questions of law and/or fact that the class exists." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "The claims and defenses of the representative Charging Party are not typical of the claims or defenses of the purported class." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "The representative Charging Party Stastny will not fairly and adequately protect the interest of the purported class." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "The purported class is not maintainable within the meaning of F.R.C.P. 23." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "The monetary relief sought by the within action is otherwise inappropriate for a class action treatment under F.R.C.P. 23." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Stastny's Complaint fails to stated a claim upon which relief may be granted pursuant to the Pennsylvania Human Relations Act." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 115, I coded "Stastny's Title VII claims are or may be jurisdictionally barred by the numerosity requirements to invoke the Title VII claims." as a Procedural Defense.

ERRATA: 10/10/2018; in coding 116, I coded "Counts I, II, IV, V and VI of the Intervenor's Complaint should be dismissed or severed as being improperly joined with the Complaint of the Equal Employment Opportunity Commission herein." as a Procedural Defense.

ERRATA: 10/11/2018; in coding 117, I coded "Damages incurred by Tartaglia and Robbins, which Defendant denies, are not the nature or extent alleged by Tartaglia and Robbins in their Complaint." as a Procedural Defense

ERRATA: 10/11/2018; in coding 117, I coded "The complaints to plaintiff, and this proceeding, were brought in bad faith." as a Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded " The Food Gallery Original, Inc.'s termination of Mr. Rumpf and his co-workers was pursuant to the directives of Parkhurst Corporation as the agent of Carnegie-Mellon University with regard to

the operation and control of the Carnegie-Mellon Food Court." as Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded "A "class" action cannot be properly maintained under Title VII where there exist only eight individuals whose identities and addresses are known." as a Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded "A "class" action cannot exist where none of the purported members of the class, other than Mr. Rumpf, wish to be involved in the lawsuit." as a Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded "No jurisdiction exists in this Court upon the basis of which a Title VII action can be properly maintained." as a Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded "The Defendants, Original Hot Dog Shops, Inc. and Food Gallery Original, Inc. are separate and distinct corporate entities." as a Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded "In a misguided effort to attempt to establish a basis for pursuing the causes of action asserted in the Amended Complaint where none otherwise exists, the Plaintiff has improperly designated the separate Defendants as a single "employer" when, in fact, they are separate and distinct legal entities." as a Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded "The Amended Complaint must be dismissed based upon lack of subject matter jurisdiction." as a Procedural Defense.

ERRATA: 10/13/2018; in coding 120, I coded "The Amended Complaint must be dismissed for failure to have joined the Parkhurst Corporation and Carnegie-Mellon University as necessary parties to the litigation." as a Procedural Defense.

ERRATA: 10/14/2018; in coding 126, I coded "Plaintiffs' claims are barred to the extent that they have failed to meet administrative and/or statutory prerequisites to filing suit." as a Procedural Defense.

ERRATA: 10/14/2018; in coding 126, I coded "To the extent that Plaintiffs are alleging that the Defendant discriminated against "a class of female employees," the Complaint and the allegations in the Complaint fail to meet the prerequisites to a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Further, there are no set of facts that can be proven that would meet the class action criteria of Rule 23 of the Federal Rules of Civil Procedure." as a Procedural Defense.

ERRATA: 10/15/2018; in coding 127, I coded "Plaintiff EEOC failed to execute its duties and obligations as the enforcement agency of Title VII and its claims are, therefore, barred." as a Procedural Defense.

ERRATA: 10/16/2018; in coding 129, I coded "The Commissions' claims are barred, in whole or in part, by its failure to satisfy all conditions precedent to the institution of this action and/or its failure to exhaust administrative remedies." as a Procedural Defense.

ERRATA: 10/16/2018; in coding 129, I coded "To the extent that the Commission requests such damages as emotional damages, the standard used to determine such damages, if any, is vague and overly arbitrary, and, as such,

supplies no notice of potential repercussions of the alleged misconduct, thereby denying KCSR due process under the Fifth and Fourteenth Amendments to the United States Constitution. KCSR also affirmatively asserts that any request for arbitrary emotional distress damages and/or subsequent imposition of such damages violates KCST's right under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution." as a Procedural Defense.

ERRATA: 10/16/2018; in coding 129, I coded "To the extent that the Commission requests punitive damages, the standard by which KCSR is to be evaluated for determining the amount of punitive damages, if any, is vague and overly arbitrary, and, as such, supplies no notice to KCSR of potential repercussions of its conduct, thereby denying KCSR due process under the Fifth and Fourteenth Amendments to the United States Constitution." as a Procedural Defense.

ERRATA: 10/16/2018; in coding 129, I coded "To the extent the Commission seeks relief for additional individuals in like and related circumstances, the Commission's claims may not be properly maintained or certified as a class action." as a Procedural Defense.

ERRATA: 10/16/2018; in coding 130, I coded "Plaintiff has failed to set forth a claim for a class action, to the extent it references "similarly situated females", as it has failed to set forth sufficient indicia under FRCP 23 regarding such class actions, including but not limited to numerosity." as a Procedural Defense.

ERRATA: 10/16/2018; in coding 131, I coded "The EEOC's claims are barred by the applicable statutes of limitations and/or by the doctrine of laches." as a Procedural Defense.

ERRATA: 10/16/2018; in coding 131, I coded "Any request for punitive or exemplary damages is barred, or alternatively limited, by Article III of the United States Constitution as well as the rights and protections afforded by the Fifth, Eighth, Fourteenth and Eighteenth Amendments of the United States Constitution, and/or the applicable provisions of the Constitution and laws of the State of Louisiana. Alternatively, punitive damages cannot be sustained or upheld under the circumstances of the claims at issue in this lawsuit and without strict compliance with the due process, equal protection and other protections and rights afforded by the Constitutions of the United States and the State of Louisiana and any other applicable statute, law, regulation, right or protection." as a Procedural Defense.

ERRATA: 10/17/2018; in coding 134, I coded "Intervenor has failed to satisfy the prerequisites to have any issue tried by jury." as a Procedural Defense.

ERRATA: 10/17/2018; in coding 135, I coded "Defendant avers that this action is frivolous, unreasonable, and groundless, and accordingly, Defendant is entitled to attorneys fees and costs associated with the defense of this action." as a Procedural Defense.

ERRATA: 10/17/2018; in coding 136, I coded "The allegations of intentional discrimination set forth in the Complaint are so vague and incomplete that they fail

to put the Defendant on adequate notice of the allegedly discriminatory conduct being complained of and therefore, fail to state a claim on which relief may be granted." as a Procedural Defense.

ERRATA: 10/17/2018; in coding 136, I coded "The allegations of disparate impact discrimination set forth in the Complaint are so vague that they fail to put the Defendant on adequate notice of the particular employment practices alleged to have caused disparate impact and therefore, fail to state a claim on which relief may be granted." as a Procedural Defense.

ERRATA: 10/17/2018; in coding 136, I coded "On the basis of information and belief, the EEOC's lawsuit is further barred in that it is the result of an unlawful, biased, arbitrary and capricious investigation by the EEOC, conducted in violation of the Administrative Procedures Act and/or premised on violation by the EEOC of the Defendant's rights, including the right to due process under the Fourth Amendment of the United States Constitution." as a Procedural Defense.

ERRATA: 10/17/2018; in coding 136, I coded "The actions of the EEOC in connection with the filing of this Complaint and the administrative processing if the underlying charge violate the due process clause of the Fourth Amendment of the United States Constitution in their impact on the rights of TIC." as a Procedural Defense." as a Procedural Defense.

ERRATA: 10/17/2018; in coding 138, I coded "Plaintiff's claims are barred in whole or in part for failure to exhaust administrative prerequisites to filing suit." as a Procedural Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Rhonda Woodard failed to comply with the notice requirements of Louisiana Revised Statutes § 23:303(C) prior to initiating this claim and lawsuit." as a Procedural Defense.

ERRATA: 10/18/2018; in coding 140, I coded "Plaintiff and Rhonda Woodard failed to exhaust their administrative remedies as required by 42 USC § 2000e-5, and the EEOC violated the non-disclosure provisions therein." as a Procedural Defense.

ERRATA: 10/18/2018; in coding 140, I coded "At all times relevant to this suit, Central American had reasonable grounds for believing its actions with respect to Rhonda Woodard were not in violation of any law, rule, regulation, or guideline." as a Procedural Defense.

ERRATA: 10/19/2018; in coding 141, I coded "Because the EEOC cannot establish that Rite Aid unlawfully discriminated against a qualified female based on her gender, there is no justiciable case or controversy as required by Article III of the United States Constitution, and the EEOC's Third Amended Complaint and its Fourth Amended Complaint fail to state a claim for relief against Rite Aid." as Procedural Defense.

ERRATA: 10/19/2018; in coding 142, I coded "Defendant's Counter-Claim for judgment of attorney's fees has not been properly plead." as a Procedural Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Defendant, Trac-Work, Inc. moves to strike the allegations of the Complaint which purport to state claims of unknown and identified persons identified in the Complaint only as "other affected

African Americans" on the grounds of vagueness and failure to state a claim and failure to conform to applicable notice pleading requirements." as a Procedural Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff's wage payment claim is premature in that the commissions claimed have not yet been earned and are not yet due." as a Procedural Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff's wage payment claim is barred because she has failed to obtain the required statutory authorization pursuant to I.C. § 22-2-9-4." as a Procedural Defense.

ERRATA: 10/22/2018; in coding 152, I coded "Defendants allege that Plaintiff failed to follow the administrative requirements including failure to give proper notice, failure to appropriately investigate, failure to make an appropriate determination and failure to conciliate this claim and, therefore the matter should be dismissed." as a Procedural Defense.

ERRATA: 10/22/2018; in coding 152, I coded "Defendants allege that Plaintiff has failed to plead the facts necessary to support a claim under Title I of the Americans with Disabilities Act. " as a Procedural Defense.

ERRATA: 10/22/2018; in coding 154, I coded "Plaintiff's Complaint is barred, in whole or in part, because this Court does not have subject matter jurisdiction over some of the claims asserted in Plaintiff's Complaint." as a Procedural Defense.

ERRATA: 10/22/2018; in coding 154, I coded "Plaintiff's Complaint is barred, in whole or in part, because it was not brought within the time prescribed by law

from the date on which the cause of action, if any, accrued." as a Procedural Defense.

ERRATA: 10/23/2018; in coding 157, I coded "Merrill Gardens specifically objects to a jury determination of any equitable issue in this action, including, but not limited to, front pay." as a Procedural Defense.

ERRATA: 10/23/2018; in coding 160, I coded "Intervening Plaintiffs have failed to obtain service of process upon the Defendants, and, accordingly, Intervening Plaintiffs' claims are properly dismissed." as a Procedural Defense.

ERRATA: 10/24/2018; in coding 162, I coded "Any claims under Title VII which may be stated in the Complaint are barred to the extent that Pohoski and/or the EEOC failed to comply with all conditions precedent to the institution of a civil action as required by 42 U.S.C. § 2000e-5." as a Procedural Defense.

ERRATA: 10/24/2018; in coding 163, I coded "Plaintiff's Title VII claims against the Defendant are barred to the extent that Plaintiff failed to bring this action within ninety (90) days of the Plaintiff's receipt of a right-to-sue letter." as a Procedural Defense.

ERRATA: 10/24/2018; in coding 166, I coded "Defendants Furniture Distributors, Inc., Kimbrell's of Statesville, N.C., Inc. and Kimbrell's Incorporated were not named in the EEOC charge filed by Robin W. Drye and, thus, any action against them is barred." as a Procedural Defense.

ERRATA: 10/24/2018; in coding 166, I coded "To the extent Robin W. Drye failed to comply with the administrative process or procedure required by Title VII

in connection with this action, the Court lacks jurisdiction over the subject matter of the Complaint, and said Complaint is barred." as a Procedural Defense.

ERRATA: 10/24/2018; in coding 166, I coded "Plaintiff's action is frivolous, unreasonable and without foundation." as a Procedural Defense.

ERRATA: 10/25/2018; in coding 168, I coded "The Court lacks jurisdiction over the subject matter." as a Procedural Defense.

ERRATA: 10/26/2018; in coding 171, I coded "Defendant shows, on information and belief, that certain members of the proposed class are not entitled to the relief sought by Plaintiff because, among other things, the class of persons Plaintiff purports to represent are not similarly situated." as a Procedural Defense.

ERRATA: 10/26/2018; in coding 171, I coded "Plaintiff's action should be dismissed based upon the absence of personal jurisdiction." as a Procedural Defense.

ERRATA: 10/26/2018; in coding 171, I coded "Plaintiff's action should be dismissed based upon improper venue." as a Procedural Defense.

ERRATA: 10/26/2018; in coding 171, I coded "Plaintiff's actions should be dismissed for failure to satisfy conditions precedent." as a Procedural Defense.

ERRATA: 10/26/2018; in coding 172, I coded "The Defendant has complied in good faith with all applicable laws and regulations. To the extent that Defendant may have violated any federal law, which is expressly denied, any act or omission constituting a violation was made in good faith and Defendant had reasonable grounds for believing such act or omission was not a violation, was not done for

improper motive, and any injury accruing to Plaintiff, the existence of which is specifically denied, is not actionable.” as a Procedural Defense.

ERRATA: 10/27/2018; in coding 178, I coded "The Plaintiff's allegations and the filing of this civil action are frivolous, unreasonable, groundless, without foundation, and have been made and done in bad faith." as a Procedural Defense.

ERRATA: 10/28/2018; in coding 204, I coded "This action should be dismissed for insufficiency of process on the proper defendant." as a Procedural Defense.

ERRATA: 10/29/2018; in coding 215, I coded "Plaintiff may be barred from pursuing the allegations in its Complaint because it failed in whole or in part to satisfy the conditions subsequent to jurisdiction." as a Procedural Defense.

ERRATA: 10/29/2018; in coding 216, I coded "Charging Parties' Complaints are improperly joined." as a Procedural Defense.

ERRATA: 10/30/2018; in coding 225, I coded "Marshall Management denies that Plaintiff's jury demand is proper in this case." as a Procedural Defense.

ERRATA: 10/30/2018; in coding 225, I coded "Plaintiff's class action claim is defective because no other purported class member has properly submitted an administrative charge with Plaintiff, EEOC, and therefore cannot bypass EEOC's administrative process and "piggyback" on Beverly's claim." as a Procedural Defense.

ERRATA: 10/30/2018; in coding 225, I coded "No other purported class member was subjected to sexual harassment that was like or related to the situation of Beverly." as a Procedural Defense.

ERRATA: 10/30/2018; in coding 225, I coded "Beverly's claims of sexual harassment and retaliation are so highly individualistic and fact-specific, that they cannot be joined with the claims of other putative plaintiffs to be certified as a "class action"." as a Procedural Defense.

ERRATA: 10/30/2018; in coding 225, I coded "The Court is without jurisdiction as to those matters and/or individuals for which no charge of discrimination was timely filed with the EEOC, or could have been timely filed with the EEOC under the doctrine of "piggybacking", or for which other conditions precedent to jurisdiction are lacking." as a Procedural Defense.

ERRATA: 10/30/2018; in coding 225, I coded "Plaintiff's Complaint fails to state a claim upon which relief may be granted as to Plaintiff's claim for violation of the Pennsylvania Human Relations Act, 43 P.S. § 951 et. seq.." as a Procedural Defense.

ERRATA: 10/31/2018; in coding 233, I coded "The Commission failed to conduct a reasonable investigation into the allegations of Waecter's charge." as a Procedural Defense.

ERRATA: 10/31/2018; in coding 233, I coded "Plaintiff conducted an inadequate and incomplete investigation before issuing a "cause" determination on Waecter's charge of discrimination." as a Procedural Defense.

ERRATA: 11/1/2018; in coding 236, I coded "Plaintiff's claim under Florida's Private Sector Whistleblower Act is pre-empted by, and/or Plaintiff's exclusive

remedy is under, Title VII and the Florida Civil Rights Act." as a Procedural Defense.

ERRATA: 11/1/2018; in coding 237, I coded "Anglin is not permitted to bring claims under 42 U.S.C. . § 1981 because they are time barred." as a Procedural Defense.

ERRATA: 11/2/2018; in coding 238, I coded "This Court lacks jurisdiction over the Plaintiff's pending claims." as a Procedural Defense.

ERRATA: 11/3/2018; in coding 269, I coded "Defendant alleges that the Complaint and each purported cause of action asserted against Defendant therein, fails to set forth facts sufficient to support a claim for race or national origin discrimination against Defendant under Title VII of the Civil Rights Act of 1964 as amended, by the Civil Rights Act of 1991, 42 U.S.C. §2000e et seq." as a Procedural Defense.

ERRATA: 11/3/2018; in coding 285, I coded "To the extent that Briggs and / or Gaston filed a Florida Civil Rights Act claim within 180 days of filing their / her charge(s) of discrimination with the FCHR, such claim is barred for failure to exhaust administrative remedies and / or failure to satisfy conditions precedent to suit." as a Procedural Defense.

15. Other defenses:

ERRATA: 8/22/2018; in coding 4, I coded "The alleged disclosure by Local 804 that plaintiff asserts violated the ADA, if made, was a lawful privileged communication." as an Other Defense.

ERRATA: 8/23/2018; in coding 9, I coded "Defendant reserves the right to assert additional affirmative defenses as Plaintiff's claims are clarified in the course of this litigation." as an Other Defense.

ERRATA: 9/10/2018; in coding 25, I coded "Defendant is informed and believes that the damages alleged in the First Amended Complaint were proximately caused by or contributed to by acts, or failures to act, of persons other than this answering Defendant, which acts or failures to act constitute an intervening and superseding cause of the damages and injuries alleged in the First Amended Complaint." as an Other Defense.

ERRATA: 9/10/2018; in coding 25, I coded "Defendant alleges that the claims in the First Amended Complaint, or some of them, are barred by operation of the managerial immunity doctrine." as an Other Defense.

ERRATA: 9/10/2018; in coding 26, I coded "The injuries which Plaintiff alleges in her Complaint, and each claim for relief thereof, if they exist at all, resulted from a cause or causes not proximately related to any act or omission by Defendant." as an Other Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Defendant is relieved of any liability whatsoever as to Plaintiff's claims for damages set forth in the Complaint to the extent Plaintiff seeks redress for physical and emotional injuries arising from preexisting physical or mental conditions." as an Other Defense.

ERRATA: 9/10/2018; in coding 26, I coded "Because the Complaint is couched in conclusory terms, Defendant can not fully anticipate all defenses that may be

applicable to the within action. Accordingly, the right to assert additional defenses, if and to the extent that such defenses are applicable, is hereby reserved." as an Other Defense.

ERRATA: 9/12/2018; in coding 30, I coded "Plaintiff's complaint is barred by the statute of frauds California Civil Code §1624(a)" as an Other Defense.

ERRATA: 9/14/2018; in coding 33, I coded "Defendant's manuals, policies, and procedures are not contractual." as an Other Defense.

ERRATA: 9/17/2018; in coding 40, I coded "Defendant breached no legal duty owing to either Plaintiff with the result that the Plaintiff may not recover." as an Other Defense.

ERRATA: 9/17/2018; in coding 40, I coded "Defendants violated no provisions of the United States Constitution, of the Constitution of the state of Georgia, or federal or state law with the result that the Plaintiff's may not recover." as an Other Defense.

ERRATA: 9/17/2018; in coding 40, I coded "No action or omission on the Defendant's part was the proximate cause of any damage suffered by the Plaintiffs." as an Other Defense.

ERRATA: 9/27/2018; in coding 53, I coded "All or some of plaintiff's claims may be preempted by federal labor law." as an Other Defense.

ERRATA: 9/27/2018; in coding 55, I coded "The defendant states that the Complaint should be dismissed because the defendant is misnamed. The proper name is Preferred Labor LLC." as an Other Defense.

ERRATA: 9/27/2018; in coding 55, I coded "The Amended Complaint is barred by the Statute of Frauds and and the Parol Evidence Rule." as an Other Defense.

ERRATA: 9/27/2018; in coding 55, I coded "The defendant states that to the extent that it had any obligations to the plaintiff-in-crossclaim, such obligations have been fully, completely and properly performed in every respect." as an Other Defense.

ERRATA: 9/28/2018; in coding 57, I coded "Any injuries allegedly suffered by the Charging Parties or similarly situated individuals are due, in whole or in part, to the acts of individuals over whom Washington Group had no authority, responsibility, or control." as an Other Defense.

ERRATA: 9/28/2018; in coding 58, I coded "Some of Plaintiff's claims may pertain to acts or statements for which the Defendant is not legally responsible." as an Other Defense.

ERRATA: 9/28/2018; in coding 58, I coded "Defendant reserves the right to raise additional affirmative defenses following discovery and following the time in which the EEOC identifies the "other similarly situated individuals" and the individuals comprising the "class of African American employees" referenced, but not identified by name, in the Complaint." as an Other Defense.

ERRATA: 10/3/2018; in coding 80, I coded "Any improper, illegal, or discriminatory acts by any employee of Defendant or agent as alleged by Plaintiff but denied by Defendant are independent, intervening and unforeseeable acts." as an Other Defense.

ERRATA: 10/3/2018; in coding 87, I coded "Any alleged damages claimed by the Plaintiffs resulted from an action of a third party or forces not associated with CRC, which are intervening causes and are beyond the control of CRC." as an Other Defense.

ERRATA: 10/3/2018; in coding 87, I coded "The conduct of Defendants alleged in the Complaint was not the proximate or direct cause of the harm Plaintiff alleges to have suffered." as an Other Defense.

ERRATA: 10/6/2018; in coding 94, I coded "To the extent the claims asserted by Plaintiff EEOC are based upon, relate or refer to conduct alleged by Plaintiff-in-Intervention Falkowski and/or other unknown or unidentified persons referred to as "similarly situated female employees," such claims are barred in whole or in part because the tortious conduct alleged about certain employees of Rare was unforeseeable." as an Other Defense.

ERRATA: 10/6/2018; in coding 94, I coded "Herring's alleged damages in Counts II, III, IV, V, and IX are due in whole or in part to the alleged acts of third party tortfeasors who are not parties to this lawsuit and are not under the control of the Defendant, Norstan." as an Other Defense.

ERRATA: 10/8/2018; in coding 106, I coded "The Defendant's actions or inactions were not the proximate, legal, or substantial cause of any damages, injury or loss suffered by Plaintiff, the existence of which is denied." as an Other Defense.

ERRATA: 10/9/2018; in coding 108, I coded "At all times, RMS has provided assistance to its employees above and beyond the employer-employee relationship,

including, but not limited to, providing personal interest free loans, use of its facilities for social functions, use of its facilities rent free for housing equipment and a truck for a personal business of several employees and providing below market rental housing for several of its employees." as an Other Defense.

ERRATA: 10/9/2018; in coding 110, I coded "No employment contract, agreement or covenant, either verbal or written, express or implied, existed at any time between Plaintiff and Defendant." as an Other Defense.

ERRATA: 10/13/2018; in coding 123, I coded "The alleged Acts or omissions of Defendant were not the proximate cause of or a contributing factor to any injuries or damages allegedly suffered by LiVecch" as an Other Defense.

ERRATA: 10/14/2018; in coding 125, I coded "No basis for *respondeat superior* liability exists as to any action alleged in this Complaint." as an Other Defense.

ERRATA: 10/14/2018; in coding 125, I coded "No basis for *respondeat superior* liability exists as to Ms. Pehel's claims because there was no real or apparent agency between Mr. Brewer and Defendant." as an Other Defense.

ERRATA: 10/14/2018; in coding 125, I coded "Plaintiff's claims and/or certain evidence of facts are barred pursuant to the applicable Pennsylvania Dead Man's Act as it pertains to Gregory Maggio, deceased, in his capacity as an individual or an officer of Greg & Deb's, Inc." as an Other Defense.

ERRATA: 10/16/2018; in coding 128, I coded "IHOP asserts any and all available defenses under 42 USC § 2000 e et seq and 42 USC § 1981 et seq." as an Other Defense.

ERRATA: 10/16/2018; in coding 131, I coded "The EEOC has no standing to claim for any technical violation of any applicable federal or state law or regulation under the circumstances involved in the lawsuit." as an Other Defense.

ERRATA: 10/16/2018; in coding 131, I coded "The sole, or alternatively, contributing, cause of the claims asserted in the EEOC's Complaints was the fault, negligence, conduct, action and omissions of Tiffany R. Blackmon, which bars, or alternatively, reduces the EEOC's right of recovery herein." as an Other Defense.

ERRATA: 10/16/2018; in coding 131, I coded "Rite Aid pleads all applicable provisions of Title VII, including 42 USC 1981a, 42 USC 1988, 42 USC 2000e, 42 USC 2000e-2, 42 USC 2000e-3, 42 USC 2000e-4 and 42 USC 2000e-5, and any other applicable law, statute or regulation in response and in defense to the EEOC's claim." as an Other Defense.

ERRATA: 10/16/2018; in coding 132, I coded "Notwithstanding Defendants' denial of liability, some or all of Ms. McGrew's alleged were caused by fellow servants for whom Defendants have no respondeat superior or vicarious liability." as an Other Defense.

ERRATA: 10/17/2018; in coding 134, I coded "Plaintiff's claims are barred by 42 U.S.C. 12133 subp. (a) and (b)." as an Other Defense.

ERRATA: 10/19/2018; in coding 141, I coded "Because the EEOC cannot demonstrate that Rite Aid unlawfully discriminated against a qualified person based on her gender when Rite Aid hired Fred Mitchell as a cashier in January 1999 at Rite Aid Store No. 7337 located at 3146 Louisville Street in Monroe,

Louisiana, or when Rite Aid declined to hire Johnny L. Williams as a cashier at Rite Aid Store No. 7397 located at Desiard Street in Monroe, Louisiana, the EEOC has no right or standing to seek or recover any relief requested in EEOC's Third Amended Complaint and Fourth Amended Complaint." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "A choice of law assessment is required to be conducted to determine which law applies to this insurance claim, under which ERII respectfully submits Texas Law should apply in the event any conflict in the laws of Louisiana and Texas on pertinent issues are found to exist." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Third party plaintiff's claim is barred as a result of its failure to satisfy an express condition precedent of coverage contained in the policies at issue." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Third party plaintiff's claim against ERII is barred on the basis of the 23-month delay in providing notice to ERII is a violation of the clear and unambiguous policy provision that requires written notice of employment claims to be sent to the addressee specified in the policy as soon as practicable." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Under the rule of strict construction, which the U.S. Fifth Circuit Court of Appeals has consistently applied to claims made policies such as the ones issued by ERII, third party's claim against ERII is barred as, constructive notice of the claim does not satisfy the policy's reporting and notice requirements." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Third party plaintiff's claim against ERII is barred on the basis that a reference to the Shelton employment claim on an attachment to a policy renewal application set to the underwriter for purposes of renewing a policy does not constitute compliance with reporting and notice provisions expressly requiring, as a condition precedent to exercising rights under a policy, that notice be given to the claims department." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Third party plaintiff's claim against ERII is barred on the basis that the September 19, 2002 Charge of Discrimination and the Civil Complaint filed by EEOC against Trac-Work, Inc., is an Interrelated Wrongful Act or a Related claim under the terms of the ERII policies, such that they are treated as a single claim that was first made against the insured on June 25, 2002, a claim for which there is no coverage because notice was not provided as soon as practicable." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Third party plaintiff's claim against ERII is barred under the policy in effect for the policy period of 7/10/02-7/10/03 as, according to the policy renewal application for that term, made a part of the policy, any claim arising from any claims, facts, circumstances or situations required to be disclosed in response to its past activities, as sought in questions 9.a) and/or 9.b), is excluded from the proposed insurance." as an Other Defense.

ERRATA: 10/20/2018; in coding 146, I coded "Given the vague language use in the third party complaint, ERII expressly reserves its right to assert further affirmative defenses or revise its responses to the enumerated paragraphs as a

result of the failure of third party plaintiff to expressly identify the policy, the policy period, the date of the Charge of Discrimination, or any other term used in the third party complaint." as an Other Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff's claims are barred by settlement." as an Other Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Intervenor Plaintiff negotiated and agreed to a binding settlement, waiving all claims against Defendant. Accordingly, Intervenor Plaintiff's claims are barred by settlement." as an Other Defense.

ERRATA: 10/21/2018; in coding 149, I coded "Defendant maintained a clear and unambiguous policy that regular commissions are earned only at such time that a transaction closes and that a sales consultant must be employed at the time the transaction closes to be entitled to receive such compensation. This policy was fully communicated to and accepted by Intervenor Plaintiff." as an Other Defense

ERRATA: 10/24/2018; in coding 163, I coded "Plaintiff's claims against Defendant are barred because Defendant adhered to the prevailing standard of care at all times." as an Other Defense.

ERRATA: 10/30/2018; in coding 225, I coded "The injuries that Plaintiff alleges in its Complaint, and in each and every purported cause of action, if they exist at all, resulted from a cause not proximately related to any act or omission by HORA." as an Other Defense.

ERRATA: 10/31/2018; in coding 233, I coded "Waecter breached his duty of loyalty to the Defendant." as an Other Defense.

ERRATA: 10/31/2018; in coding 235, I coded "FLTVT states that any statements communicated or published to any third parties about Plaintiff-Intervenor Sylvester Cole are true and were made in good faith." as an Other Defense.

ERRATA: 10/31/2018; in coding 235, I coded "FLTVT states that it was legally justified in communicating or publishing any statements about Plaintiff-Intervenor Sylvester Cole to any third parties." as an Other Defense.

ERRATA: 11/3/2018: in coding 262, I coded "defendant Creative Networks asserts plaintiff's identified complainants have failed to mitigate damages or otherwise avoid harm, plaintiff's Complaint fails to state a claim upon which relief can be granted, estoppel, statute of limitations, waiver, failure to engage in good faith conciliation, laches, and such other affirmative defenses as may become apparent during discovery of this litigation matter." as an Other Defense.

Addendum: On 9/5/2018; Where responsive pleadings do not delineate specific paragraphs as defenses or affirmative defenses, any paragraph which directly references an enumerated paragraph of the Complaint it responds to should be treated as a responsive pleading and not coded. All other paragraphs should be coded as affirmative defenses and listed as errata.

Addendum: On 9/19/2018; I added a variable to represent the number of answers that were downloaded but stricken from the docket sheet via order of the court.

Addendum: On 10/26/2018; I added a variable to represent the number of answers that were downloaded and were answers to a counterclaim.

