Three ABF Scholars Put Rights on Trial in New Book About Employment Civil Rights Litigation
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Understanding how real people experience law is a core tenet of the American Bar Foundation’s research mission. This desire to advance the discussion around access to justice drove ABF researchers Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen to examine the changing dynamics of workplace discrimination law over a decade ago. Berrey, Nelson, and Nielsen are the authors of Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality, a new book that explores the nature of employment discrimination in the modern American workplace.

Berrey, a celebrated sociologist whose research investigates the culture and politics of inequality, race and law, is an ABF-affiliated scholar and assistant professor of sociology at the University of Toronto. Her first book, The Enigma of Diversity: The Language of Race and the Limits of Racial Justice, was based off of her dissertation, which she completed as a doctoral fellow at the ABF. Robert L. Nelson is the MacCrate Research Chair and director emeritus at the ABF, and professor of sociology and law at Northwestern University. He is a leading expert on the legal profession, workplace discrimination law, and the relationship between law and social inequality. Laura Beth Nielsen is a research professor at the ABF and director of legal studies at Northwestern University. Nielsen’s award-winning research focuses on the sociology of law, civil and constitutional rights, and how ordinary people understand and relate to law. Nelson and Nielsen are co-editors of the book Handbook of Employment Discrimination Research: Rights and Realities.

The aim of their research is to offer a comprehensive account of employment discrimination law in a time when discrimination based on race, gender, age, and disability is illegal but still common. “We are scholars of law and inequality, and in particular, we are interested in how law intervenes to try and reduce inequality,” said Nelson. “Given the substantial presence of employment discrimination and litigation, it was very important to examine how that system actually worked.”

Rights on Trial provides a holistic account of workplace discrimination law in action. The book is the culmination of several years of research conducted by Berrey, Nelson, and other collaborators at the ABF, into the efficacy of this legislation and the impact that legal doctrine has on the lives of real people. “Our book synthesizes years of research, both providing a quantitative portrait of employment civil rights litigation, such as who is winning and on what charges, and giving voice to the people who participate in litigation.”

The authors grounded their work in existing data on employment discrimination conducted by researchers from the previous two decades. They drew from real employment discrimination cases filed between 1988 and 2003, which were then categorized and quantitatively analyzed. In addition to coding case files, the researchers drew a random sample of over 1,700 case filings, and then sent research assistants out to the federal record centers to code the contents of those cases. So we learned from that things that other scholars have not,” said Nelson.

The authors conducted over 100 interviews with parties and their lawyers. The interviews effectively give voice to the real individuals involved in the cases and allowed them to share their own experience with workplace discrimination and subsequent civil rights litigation.
The findings from Berrey, Nelson, and Nielsen estimate that less than 1 percent of individuals who perceive discriminatory behavior choose to file a claim with the Equal Employment Opportunity Commission (EEOC), the national body charged with mitigating and enforcing federal laws that prohibit discrimination in the United States. Their study finds:

- There are currently approximately 14,000 claims filed in federal court annually.
- Many of these claims—19 percent—are dismissed early on in the process, “oftentimes before the defendant knows they’re being sued,” said Nielsen.
- About half of cases filed end with employees receiving modest settlements, averaging around $10,000.
- “If they persist to the stage in which there are motions made about summary judgment, which is an argument that defendants can make to say that the plaintiffs have not really presented a meaningful, factual issue,” Nielsen explains, “plaintiffs lose completely and exit the system in 18 percent of the cases.”
- 8 percent of remaining plaintiffs receive a later settlement after motion for summary judgment
- 6 percent of plaintiffs actually make it to trial, and of those, only one-third, or two percent of all cases filed, win at trial.
- Contrary to the so-called windfall for individuals filing workplace discrimination claims, the average award in cases that go to trial is about $150,000. Responsible for sometimes staggering legal fees and bogged down in protracted legal battles, many people feel that they have lost regardless of the outcome of their case. And many are denied the outcome they sought when they took legal action: to restore their professional lives. “Often, what plaintiffs want when they go into a legal case is to get their job back; they’re looking to see some kind of change in the organization,” said Berrey. “Over the process of a lawsuit, especially if they have an attorney, they come to see that those things are usually, in most situations, unrealistic.”

Employee litigants encounter many challenges as they move through the legal system including, perhaps most fundamental of all, access to legal representation. The authors found that lawyers are extremely selective when choosing which cases to take on, ultimately accepting fewer than 10 percent of cases. Yet, plaintiffs in employment civil rights cases fare far better when represented by a lawyer. Their research shows that 23 percent of cases are filed without a lawyer or pro se. Pro se cases are dismissed at a rate of 40 percent, compared to 11 percent for cases with attorney representation. Filing a case as part of a class-action suit, or even with more than one plaintiff, produces an even chance of winning at trial versus a 30 percent chance for plaintiffs overall. However, class action suits are rare, comprising less than 1 percent of all cases filed. Some 93 percent of cases are filed by a lone plaintiff.

The authors believe that discrimination may also be a factor in securing legal representation. They found that African American claimants are 2.5 times more likely to file claims pro se compared to their white peers, and Asian American and Latino/a plaintiffs are 1.9 times more likely to file pro se.

These obstacles may be informed by structural inequalities that people of color face in other aspects of their lives, such as a lack of information about the legal system and limited time and resources to secure legal representation. These individuals’ cases may also be affected by lawyers’ biases, such as lawyers’ assessments of potential clients’ “demeanor” and “credibility,” which may be shaped by stereotypes.

Employer defendants do not face these same challenges when a claim is filed. For one, they always have legal representation. Additionally, they tend to have the infrastructure needed to handle employee claims, such as a human resources department and a team of legal advisers. Employees, in contrast, are tasked with quickly learning and navigating a complex, hierarchical system for the first time. “The plaintiff has gone through typically the hardship of pursuing a lawsuit which can be very expensive, time consuming, and stressful,” says Berrey. “So, in other words, the way that the legal system is designed and enforced is that the responsibility is on the person with the least power in a situation.”

Because these workplace discrimination suits are often seen as a burden on the employer, a fact that is further compounded by a
The Real Voices of Employment Discrimination

KRISTIN BAKER

Kristin Baker suffered egregious sexual harassment for years and made repeated complaints to HR. After she filed a discrimination case, her employer offered her $10,000 to leave the company. Baker recounted her reasons for not leaving. “I didn’t do anything wrong. If I leave at this point, then I am the guilty party because then it looks like I just wanted it for the money,” she said. “And it had absolutely not one thing to do with the money. It had to do with my integrity and who I am.” Baker eventually settled for one dollar, a public apology from the company, and the option to keep her job. Despite cases like this, the majority of defense attorneys interviewed were skeptical about sexual harassment cases. One said, “I’ve been doing this for 20 years and, in sex harassment cases, out of all of the cases I’ve seen throughout the years, I have yet to see a legitimate sex harassment case.”

“The judges wouldn’t touch [the defense counsel] with a ten-foot pole. We asked that he be sanctioned. We asked for judgments by default. Had I been late one time, they’d have kicked it out: ‘You lose.’ With him? Nooo. He never was arrested for anything, I’m thinking the law exists for everybody. You know how they say it’s, ‘Justice’? It’s ‘just us.’ Not justice for all...‘Just us.’”

FRANKLIN WILLIAMS

Franklin Williams, a 38-year-old African American man, worked as a railroad laborer for 15 years. After getting passed over for a performance-based promotion, and being struck in the head by a crane on the job, he was terminated from his position following three infractions that he perceived as unwarranted. His case progressed to trial where he represented himself, along with assistance from his wife who worked as a paralegal. David Lever, a white middle-aged man who served as the railroad company’s inside counsel described Williams’ charge as “completely bogus.” Throughout the trial, Williams felt that the judge’s statements were racially charged and that he granted preferential treatment to the defense team.

“The judges wouldn’t touch [the defense counsel] with a ten-foot pole. We asked that he be sanctioned. We asked for judgments by default. Had I been late one time, they’d have kicked it out: ‘You lose.’ With him? Nooo. Gave him all the time he needed.”

The judge denied Williams claims and ruled in favor of the company, stating in his decision, “Possible circumstantial evidence that would support a discrimination charge is simply nonexistent in this case.”

Williams told the authors, “You know, if it wasn’t for my wife and my children, I’d have did like this [mimes shooting himself in the head]. Because I lost everything, you know, and given the fact that, like I said, I’ve never been arrested for anything, I’m thinking the law exists for everybody. You know how they say it’s, ‘Justice’? It’s ‘just us.’ Not justice for all...‘Just us.’”

Access the audio interviews featured in Rights on Trial at rightsontrial.com/audio.

This year, the American Bar Endowment granted over $3.4 million to the American Bar Foundation to support research designed to expand knowledge and advance justice. This grant was made possible thanks to donated dividends from our generous ABE insureds.

We can’t thank you enough.

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