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Three ABF Scholars Put *Rights on Trial* in New Book About Employment Civil Rights Litigation

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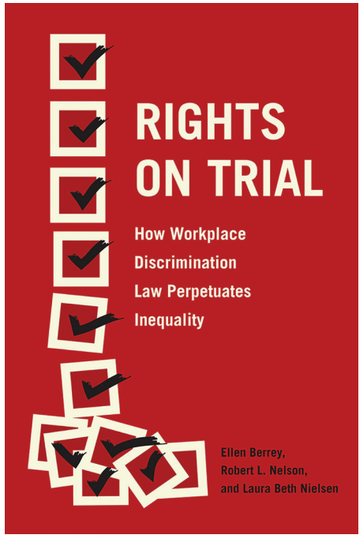
Understanding how real people experience law is a core tenet of the American Bar Foundation's research mission. This desire to advance the discussion around access to justice drove ABF researchers **Ellen Berrey**, **Robert L. Nelson**, and **Laura Beth Nielsen** to examine the changing dynamics of workplace 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.



Rights on Trial was released by the University of Chicago Press in July 2017.

The Civil Rights Act of 1964 marked an important judicial and legislative victory for the surging American Civil Rights Movement. On July 2, 1964, in front of Congress and television cameras, President Lyndon B. Johnson signed the landmark legislation introduced by his predecessor John F. Kennedy. In a speech before Congress in June 1963, Kennedy stated: "…Enactment of the Civil Rights Act of 1963 at this session of the Congress—however long it may take and however troublesome it may be— is imperative...I therefore ask every member of Congress to set aside sectional and political ties, and to look at this issue from the viewpoint of the Nation. I ask you to look into your hearts—not in search of charity, for the Negro neither wants nor needs condescension—but for the one plain, proud and priceless quality that unites us all as Americans: a sense of justice."

A key component of the US Civil Rights Act of 1964 is Title VII, which prohibits discrimination based on race, color, gender, religion, or nationality in the workplace. Since the law was passed, however, extensive research has shown that while it has slowed more overt forms of discriminatory behavior and has spawned a system of administrative policies, it has not halted persistent discriminatory behavior against protected classes at work.

The authors of *Rights on Trial* are sociologists and professors whose research is focused on understanding inequality in a legal context. Ellen 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 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, Nielsen, and other co-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 deviated from prior work in this area to interview real individuals involved in these cases—the plaintiffs alleging discrimination, plaintiffs lawyers, employer defendants, and defense attorneys. "We didn't just start with opinions, or published opinions, which most research does, but instead actually 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.

Ellen Berrey

Laura Beth Nielsen

Robert L. Nelson

These interviews, coupled with data that shows just how rare successful legal recourse is for targets of workplace discrimination, paint a picture of a challenging path to justice for employees who claim discrimination.

A Closer Look at Case Outcomes

The findings from Berrey, Nelson, and Nielsen's research challenge many common myths about contemporary workplace discrimination and reveal new insights into the realities of pursuing legal action. One of the most frequent misconceptions the authors came up against was the idea, regularly reinforced by mainstream media, of the highly litigious American employee. The reality, the authors found, is starkly different.

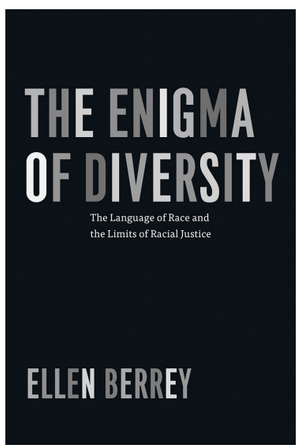
Only a tiny fraction of workers who feel they have been discriminated against take any form of legal action. The adversarial nature of employment discrimination law means that targets who make a claim of discrimination in the workplace are frequently vilified by their managers and colleagues. Some lose their jobs outright when they chose to move forward with their case.

"The outcomes of the cases are really important for the question of whether or not this system is in fact working to create more equality in the workplace and less discrimination," said Nielsen.

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 $30,000.
- "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," Nielson 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."



Ellen Berrey's 2015 book, *The Enigma of Diversity*, published by the University of Chicago Press.

"We decided to write our book *Rights on Trial* because we wanted to understand how well the system of litigation and how the legal system more generally is remedying inequality in the workplace."

– Ellen Berrey

Resource Disparity

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 in the workplace, and then they are confronted with 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

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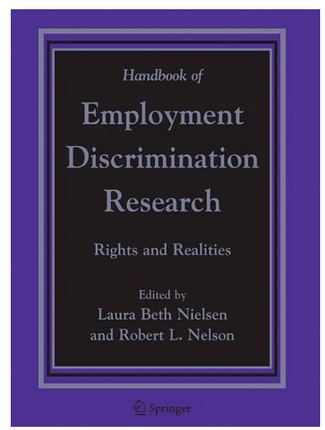
– Laura Beth Nielsen



The Handbook of Employment Discrimination Research Rights and Realities, (Springer, 2005) co-edited by Robert Nelson and Laura Beth Nielsen.

Rights on Trial authors Nielsen, Nelson, and Berrey discuss the findings of their research at a reception for the book at the ABF this fall.

low success rate among plaintiffs litigating these claims, employers are not motivated to make real change in their work environments. "Defendants feel unfairly put upon. As one defense lawyer told us, they feel like they're being held-up by plaintiffs in these cases—that they're being put through nuisance litigation that is without merit. Employers repeatedly told us that if they see discrimination in the workplace, they fix it. But this does not square with plaintiffs' accounts of their experiences of discrimination," said Nelson.

Nielsen further emphasizes that, without a culture of consequences, organizations are more able to dismiss claims of discrimination and employees' legal protections: "Fundamentally, civil justice works when, if a claim is filed and an employing organization is found to have discriminated, they have to pay and they have to make meaningful structural changes in the workplace to prevent further discrimination. And it only works if other organizations look at these lawsuits and sort of say, 'If we're not careful about monitoring and preventing discrimination, we're going to have to pay that money and make reforms, too.'"

Rights on Trial points to a deeply flawed system that fails to uphold the promise of civil rights protections, one that ultimately comes to reinforce the systems of inequality that it was created to combat. The authors hope that by daylighting a problematic system, we can begin to remedy it. "The research here can be read as very negative and discouraging. But our law stands for the proposition that people should not be discriminated against in the workplace on the basis of their sexual orientation, their race, their age, their disability status, pregnancy status, family status, all of these axes of inequality," said Nielsen. "That fact, that discrimination is illegal, has a very important symbolic effect. It defines who we are as a country."

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To learn more about *Rights on Trial*, please visit **rightsontrial.com**.

This research was supported by the American Bar Foundation, the National Science Foundation, the Searle Foundation, the Center for Advanced Study in the Behavioral Sciences, and the Ford Foundation.

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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."**

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."**

Willams 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**.

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PRESIDENT
Ellen J. Flannery

DIRECTOR
Ajay K. Mehrotra

WRITER | EDITOR
Jennifer Montagne

COPY EDITOR
Cheyenne Blount

DESIGNER
Weiher Creative

CONTACT
Email: cblount@abfn.org
Phone: 312.988.6515
americanbarfoundation.org

ABF American Bar Foundation
EXPANDING KNOWLEDGE • ADVANCING JUSTICE

750 North Lake Shore Drive
Chicago, IL 60611

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