

JUDICIAL AND AGENCY ENFORCEMENT OF NONDISCRIMINATION LAWS

By

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To my peers, who are encouraging and supportive

and

To my husband, who is loving, caring, and patient

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LIST OF ABBREVIATIONS

ADA: Americans with Disabilities Act
ADEA: Age Discrimination Employment Act
AFDC: Aid to Families with Dependent Children
CPS: Current Population Survey
DD: difference-in-differences
DDD: triple-differences
EEOC: Equal Employment Opportunity Commission
EPA: Environmental Protection Agency
FEPA: Fair Employment Practices agencies
FOIA: Freedom of Information Act
GSS: General Social Survey
MSPB: Merit Systems Protection Board
NACIS: North American Industry Classification System
NBER: National Bureau of Economic Research
NSLCS: National Survey of Lawyer's Career Satisfaction
OLS: Ordinary Least Squares
OSHA: Occupational Safety and Health Administration
POWDA: Protecting Older Workers Against Discrimination Act
SES: Senior Executive Service
TERO: Tribal Employment Rights offices
2SLS: two-stage least squares model

INTRODUCTION

Equality in the workplace and equal opportunity to join the workforce are values that American society expects and promotes. Nationwide acceptance of such values is evident in state and federal government actions taken to promote equality and in the large amount of civil litigation resulting from such actions. Preventing and remedying discrimination are now tasks that each branch of the federal government plays an active role in, and this dissertation analyzes the active roles of the federal courts and of the Equal Employment Opportunity Commission (“EEOC”).

Under Title VII of the Civil Rights Act., it is illegal to discriminate against employees based on sex, race, national origin, color, and religion. Following the Supreme Court’s 1986 decision, *Meritor Savings Bank v. Vinson*, employers can be liable for sexual harassment in the workplace as a form of sex discrimination under Title VII. In Chapter I, I provide empirical evidence that supports the Supreme Court’s current standard for employer liability in sexual harassment cases under the 1998 U.S. Supreme Court cases *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*. Specifically, I empirically analyze a sexual harassment survey of federal employees finding that employees that have been harassed in the workplace are more likely to experience adverse employment action following the harassment if they report the harassment and if they are harassed by their supervisor. This evidence supports the elevated standard of vicarious liability for the employer if the harasser is the victim’s supervisor, but it does not support the narrowing of the affirmative defense that the employer receives if the victim does not report the harassment.

Under Title VII, every charge alleging discrimination under Title VII and other nondiscrimination statutes, including the Americans with Disabilities Act (“ADA”), must first be filed with the EEOC before the claim can be filed in federal court. Generally, scholars,

practitioners, and judges have expressed concern over the prevalence of frivolous employment discrimination charges filed with the EEOC and in the federal courts (Bennett 2013). In addition, when adopting a strict but-for causation standard in *University of Texas Southwestern Medical Center v. Nassar*, a five justice majority of the Supreme Court expressed concern that both the federal courts and the EEOC would be overwhelmed by frivolous charges if it adopted the weaker mixed-motive standard. In Chapter II, I present the first empirical analysis of whether federal courts can affect the filing of frivolous employment discrimination charges. By analyzing the universe of EEOC changes using difference-in-differences analyses, I provide empirical evidence that a but-for causation standard can decrease the filing of frivolous charges and a weak mixed-motive standard can increase these filings.

In the final chapter of my dissertation, I develop empirical evidence showing whether EEOC actions and charges, which may or may not be influenced by federal court decisions, in turn deter discrimination in the workplace. Unlike other enforcement agencies, such as the Environmental Protection Agency (“EPA”), the EEOC cannot promulgate regulations to attempt to decrease discrimination in the workplace. The EEOC’s power to affect discrimination in the workplace instead rests with the investigations of each charge and its ability to litigate certain charges. In Chapter III, I include rates of EEOC action in analyses of wage equations finding that the rate of charges that include a charge of race discrimination filed in an industry in a state two years earlier positively affects the wages of black male employees. However, I do not find a positive relationship between race charges and black female wages or between EEOC litigation and black wages. Overall, this result suggests that the EEOC can play a beneficial role in deterring potentially discriminatory acts by decreasing the white/black wage gap for males.

CHAPTER I

DETERMINANTS OF ADVERSE EMPLOYMENT ACTIONS AFTER WORKPLACE SEXUAL HARASSMENT

INTRODUCTION

While it is difficult to estimate the number of individuals that have experienced sexual harassment in the workplace, it is known that the overwhelming majority of sexual harassment instances in the workplace is not reported to employers, supervisors, or any outside agency. Only 19% of the over 2,000 employees who responded to the 1994 Merit Systems Protection Board sexual harassment survey that they had been sexually harassed in the previous two years reported the harassment. In addition, a 2013 survey of 1,000 adults conducted by the Huffington Post found that 30% of the respondents who had ever been harassed reported the harassment (Berman and Swanson 2013). In this chapter, I seek to understand why such a large percentage of workplace harassment goes unreported by examining a potential fear of employees when they decide whether to report the harassment: the prospect of experiencing an adverse employment action following the harassment. In this chapter, I present the first empirical analysis of workplace retaliation following incidents of sexual harassment. To determine what characteristics of sexual harassment increase the likelihood that a victim experiences an adverse employment action, I analyze the 1994 Merit Systems Protection Board (“MSPB”) survey, which provides information on how victims of harassment responded to the harassment and how the employer reacted to that response. In this analysis, I find that employees who were harassed are statistically significantly more likely to experience an adverse employment action if they report the harassment as compared to those who do not report and if they are harassed by their supervisor as compared to their coworker.

Currently, under the 1998 U.S. Supreme Court cases *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, if an employee is harassed by his or her supervisor and the

harassment resulted in a tangible employment action, then the employer is automatically liable for the harassment. While this standard should help address the fact that supervisor harassment is more likely to result in a tangible employment action, the employer has an affirmative defense if the employee does not reasonably take advantage of workplace procedures in place to prevent harassment.¹ In addition, lower courts continually expand this defense by broadly interpreting “reasonably” and altering the standard for one-time occurrences. The Supreme Court also decreased the likelihood of employer liability when it narrowly defined “supervisor” in the 2013 case, *Vance v. Ball State University*. In this chapter, I discuss how these standards can and should be tailored based on my empirical results, which show that employees often have a reasonable fear of experiencing an adverse employment, especially when they report the harassment and when they are harassed by their supervisors. The empirical results of this chapter suggest that the *Faragher* and *Ellerth* defense should be narrowed instead of broadened, and this is the solution I suggest in the legal implications section of this chapter.

I first present a review of how the legal system currently addresses employer liability for sexual harassment and a literature review covering the law, psychology, and economic literature on sexual harassment in the workplace. I then present a conceptual framework of a harassment victim’s decision to report the harassment and an employer’s response to that harassment. The conceptual framework incorporates legal standards and the social science literature related to these decisions to make predictions regarding how the employer will respond. I then explore these predictions through an empirical analysis of the employer’s response to workplace sexual harassment that addresses each decision of the conceptual framework. Based on the empirical findings, I conclude this chapter by discussing how the current sexual harassment legal framework

¹ The defense also requires that the employer take precautions to prevent workplace harassment.

can be tailored to address the fact that reporting harassment and being harassed by one's supervisor greatly increases the likelihood of experiencing an adverse employment action following instances of sexual harassment.

LEGAL BACKGROUND

Courts, Congress, and the Equal Employment Opportunity Commission ("EEOC") have continually modified sexual harassment law since the Supreme Court of the United States recognized it as a form of sex discrimination under Title VII of the Civil Rights Act in the 1986 case, *Meritor Savings Bank v. Vinson*. Congress drafted Title VII with such vague language that it has become known as a common-law enabling statute (Lemos 2010). As a result, the federal courts have played a major role in defining sexual harassment and in determining an employer's liability for sexual harassment in the workplace. In *Meritor Savings Bank v. Vinson*, the Court recognized and defined two forms of sexual harassment. *Quid pro quo* harassment occurs when an employer makes a workplace decision because of an employee's submission to or rejection of sexual harassment, and hostile work environment harassment is defined as unwanted sexual conduct that is so severe or pervasive that it alters an employee's workplace conditions. While the Supreme Court addressed what forms of harassment are actionable in *Meritor*, it did not explicitly address when an employer should be liable for such harassment.

In 1998 the Supreme Court explicitly addressed and defined employer liability for sexual harassment. Under the Supreme Court decisions *Faragher* and *Ellerth*, if an employee experiences a tangible employment action after being harassed by her supervisor, then the employer will be vicariously liable for that harassment. However, if the employer has taken measures to prevent the harassment and the victim does not take advantages of the procedures in place by reasonably reporting the harassment, then the employer will likely not be liable because the employer also has

an affirmative defense under *Faragher* and *Ellerth*. The employer will also not be liable if the employee is harassed by her coworker and the employee does not take advantage of workplace harassment procedures because the current standard for employer liability for coworker harassment is whether the employer knew or should have known about the harassment and whether the employer took reasonable steps to prevent the harassment.

Each of these standards created by the Supreme Court left room for the lower courts to interpret the requirements for both employer liability and actionability of sexual harassment. Disagreements between the courts of appeals have led to several circuit splits regarding sexual harassment standards and definitions. After *Meritor* was decided in 1986, circuit splits first developed regarding the actionability of harassment. Courts and legal scholars first disagreed over interpretations of the severe and pervasive requirement. For example, a circuit split arose over whether the severe and pervasive standard should be looked at from the perspective of a reasonable person or a reasonable woman, if the victim is a female (Druhan 2013). Legal scholars disagreed over this interpretation as well (Juliano and Schwab 2001).

Today, courts continue to disagree over the enforcement of the *Faragher* and *Ellerth* defense. Courts have narrowed the liability standard and expanded the affirmative defense such that legal scholars have expressed concern for the tension that exists between the standards for liability and actionability. White (2006) recognized the conflict that exists between the requirement that the harassment be pervasive and the affirmative defense if the victim does not reasonably respond to the harassment. Following *Faragher* and *Ellerth*, several courts expanded the affirmative defense, such that the victim must timely report the harassment, and these interpretations further increased the presence of the conflict between actionability and liability.

Herbert (2007) noted that several courts have held that victims who did not report the harassment in as little as two weeks were unreasonable. In addition, some courts have held that concerns about embarrassment, discomfort, or even workplace consequences were unreasonable reasons for not reporting. Instead, these courts required more than an “unsupported subjective fear that the employee would suffer physical harm” (Herbert 2007). While the EEOC recognizes several reasonable explanations for why an employee may not follow her employer’s procedures after harassment, including the fear of retaliation, these courts have elevated the standard in such a way that it competes with the actionability requirement that the harassment be pervasive.

An additional interpretation adopted by several courts of appeals narrows the defense even further. Some circuits (at least the Second, Fourth, and Eighth) only require the employer to meet the first prong of the *Faragher* and *Ellerth* defense when the harassment is a one-time severe incident (Neals 2013). In these circuits, the employer will not be liable for this supervisor harassment if the employer “promptly exercise[s] reasonable care to prevent and correct any sexually harassing behavior.” These courts argue that this interpretation helps to avoid strict liability and advocates fairness (Neals 2013). The Supreme Court also recently narrowed the liability standards of *Faragher* and *Ellerth*. In the summer of 2013, the Supreme Court settled a circuit split over what employees qualify as “supervisors” under *Ellerth* and *Faragher*. In *Vance*, the Supreme Court narrowly interpreted supervisor as an employee who is empowered to make employment decisions against the victim. The Supreme Court’s definition of supervisor and the circuit decisions that expand the affirmative defense greatly lessen the likelihood that an employer will be liable for supervisor harassment under *Faragher* and *Ellerth*.

Ultimately, since *Faragher* and *Ellerth*, many lower courts, and even the Supreme Court have made it substantially less likely that the employer will be liable for actionable sexual

harassment. Several scholars have expressed similar concerns over the expansion of the *Faragher* and *Ellerth* defense and suggested solutions, including White (2006), Herbert (2007), and Bankers (2014). Herbert (2007) suggested that courts should take a reasonable woman approach when they determine whether a victim was reasonable instead of “finding a harassed employee’s failure to formally report sexual harassment to the employer to be unreasonable.” White (2006) suggested that courts reverse decisions requiring employees to report harassment in all situations and in a very timely fashion. Bankers (2014) suggested that in *Faragher* and *Ellerth*, the Supreme Court actually established that the affirmative defense is unavailable when the harasser is a proxy for the employer (Bankers 2014). However, lower courts have not determined when an employee is a “proxy,” nor do they often follow this standard.² Perhaps, when adopting one of these solutions or a different solution, the courts could look to empirical evidence, including the results of this chapter, to stop and reverse the expanding of the *Faragher* and *Ellerth* defenses.

SEXUAL HARASSMENT LITERATURE AND LIMITATIONS

Sexual Harassment Datasets

In this chapter, I present the first study of the empirical relationships between the characteristics of harassment, including the employee’s response to harassment, and adverse employment actions following harassment. To uncover this relationship, it is necessary to survey a sample of employees who have experienced harassment and elicit information on the characteristics of that harassment, including their response to that action and how the employer responded to the harassment. Very few surveys ask individuals to report their experience with sexual harassment, and even fewer surveys ask individuals about the employer’s response. The nationally representative surveys that have included questions regarding sexual harassment in the

² Bankers (2014) suggested that an employee is a proxy when they have the ability to impute the intent of the employer.

workplace generally only ask about the existence of harassment in the respondent's workplace and whether the respondent has been sexually harassed. Two national representative surveys have included a sexual harassment survey question. The General Social Survey ("GSS") included a sexual harassment question in its 1994, 2002, and 2006 surveys. However, the sexual harassment questions were limited to one question asking if the individual had experienced any form of sexual harassment in the previous twelve months or ever.³ The 1990 National Survey of Lawyer's Career Satisfaction ("NSLCS") also simply included a question addressing the prevalence of sexual harassment in the workplace. Because the sexual harassment questions in these surveys only refer to whether the respondent had been sexually harassed, neither of these surveys can be used to analyze a victim's response to harassment, the employer's response, or the effect of harassment on the workplace.

A large number of sexual harassment surveys with smaller and non-representative samples have been conducted primarily by psychology and sociology researchers. While these surveys often elicit information about the characteristics of sexual harassment in the workplace and its consequences, a major limitation of these surveys is the size of their sample and the representativeness of the sample. Examples of these surveys can be found in Chan et al. (2008). Chan et al. (2008) conducted a meta-analysis of 49 sexual harassment studies and found that sexual harassment in general leads to an increased likelihood of negative health and productivity effects. The 49 studies that Chan et al. (2008) included in their meta-analysis are listed in the article, along with the sample sizes of each. The largest sample analyzed is the Armed Services Gender Relations Survey, discussed below. Though several additional studies analyzed by Chan et al. (2008) had sample sizes over 1,000 observations, these studies are not nationally representative because they

³ The 1994 survey asked if the respondent had ever experienced sexual harassment, and the 2002 and 2006 surveys asked if the respondent had experienced sexual harassment in the previous twelve months.

are limited to employees of one company. For example, Mueller et al. (2001) analyzed a dataset consisting of employees of a large national telephone company, and Lim and Cortina (2005) analyzed a dataset consisting of employees of a federal judicial circuit. Gettman and Gelfand (2007) analyzed a large sample of employees who work for a national grocery store chain. An additional important limitation of these studies is the fact that they also did not elicit information on adverse employment consequences. Each of these studies found that an increase in the presence of sexual harassment in the workplace was associated with lower job satisfaction and self-reported well-being; however, none of these samples included information on whether an individual experienced retaliation following the sexual harassment.

Additional sexual harassment studies have analyzed surveys and experiments primarily composed of college students. While these surveys and experiments often elicit information such as how a hypothetical victim would respond to harassment, these surveys are limited in two ways: they are not nationally representative or comparable to the workplace, and they are, of course, hypothetical. As a result, one cannot discern the actual consequences of sexual harassment in the workplace. An example of such studies can be found in Katz et al. (1996). Katz et al. (1996) analyzed the responses of 197 students, finding that men and women were less likely to believe that an action constituted sexual harassment when the harasser was a friend or coworker as compared to a supervisor.

The largest publicly available sexual harassment dataset is the Armed Services Gender Relations Survey of Active Duty Members, which the Department of Defense issued in 1995, 2002, 2006, and 2010. While this survey asks very similar questions to the MSPB survey that I analyze, including questions about retaliation, the survey is limited to harassment in the military, which is not representative of private or public employment in the United States. Because of the

described data limitations, to analyze an employee's likelihood of being harassed, perceptions of being harassed, the consequences of harassment, and the victim's response to harassment on a nationally representative sample, the best and available dataset is the 1994 MSPB survey, discussed in detail in the empirical framework section below.

MSPB Survey Literature

While several studies have empirically analyzed the MSPB sexual harassment survey, no one has empirically analyzed the respondent's answers to the questions addressing the employer's responses to sexual harassment. The studies that have analyzed the MSPB generally analyzed the answers to the questions regarding what workplace and personal characteristics influence an employee's likelihood of experiencing workplace sexual harassment and what influences the respondent's perceptions of sexual harassment. For example, Antecol and Cobb-Clark (2003) found that based on the 1994 MSPB survey responses, sexual harassment training may lead to more sensitive perceptions of sexual harassment. Newman et al. (2003) analyzed the 1994 MSPB survey and concluded that an employee's personal characteristics had the greatest effect on the likelihood that the employee is sexually harassed. Jackson and Newman (2004) also used the 1994 survey to analyze how the percentage of men in the workplace affects the likelihood of sexual harassment; they found that women more frequently received unwanted sexual attention as the percentage of male employees in their workplace increased and that men were more likely to experience harassment as the ratio of women to men in their workplace increased. Druhan (2013) also analyzed the 1994 survey and found that women were significantly more likely than men to believe certain unwanted actions constitutes sexual harassment and that respondents were significantly more likely to believe that unwanted actions by a supervisor constitute harassment as compared to a coworker. To date, scholars have not used the MSPB survey to analyze a victim's

decision to report the harassment or to analyze the consequences of the harassment, including experiencing an adverse employment action.

Literature on Victim's Response to Harassment

Though no scholar has empirically analyzed a victim's decision to report sexual harassment using nationally representative data such as the MSPB survey, scholars have theoretically modeled a victim's decision to report. In these models, one of the main factors presented as a factor the victim will consider when deciding whether to report the harassment is the probability that the employer will change her employment status. Knapp et al. (1997) constructed a theoretical model of the victim's decision to report and suggested that whether an employee avoids, copes with, confronts, or seeks advocacy for harassment depends on the harassment policy of the firm, the severity of the harassment, and the victim's level of distress. Knapp et al. (1997) also argued that the employee's perceived outcome of the employer's reactions to the harassment directly affects her response.

Empirical evidence on an actual victim's decision to report sexual harassment is limited. Alexander and Prasad (2014) analyzed a 2009 survey of workplace safety violations and found that three of the top four reasons that employees did not report workplace violations (one of which was related to sexual harassment) were related to retaliation fears. In addition, several social scientists have analyzed a hypothetical victim's decision to report through laboratory experiments. Through these experiments and hypothetical surveys, social scientists have empirically analyzed what factors influence a victim's decision to report harassment. For example, Perry et al. (1997) presented 434 individuals with hypothetical scenarios and found that the personal power of the victim and the organization's previous reactions to harassment affected the respondent's likelihood of reporting harassment. Espinoza and Cunningham (2010) surveyed 183 individuals and found

that individuals who associate with more liberal ideologies and those who observed harassment were more willing to report it. These results show that several characteristics of employees and employers are likely to affect a victim's decision to report, and that individuals are less likely to report sexual harassment if they believe there is a high probability that they experience negative consequences after reporting.

Literature on Sexual Harassment Consequences

In addition to examining what characteristics affect a victim's response to sexual harassment, social scientists have examined how sexual harassment affects the victim's position and performance in the workplace. As discussed above, the meta-analysis conducted by Chan et al. (2008) found that sexual harassment in general leads to an increased likelihood of negative health and productivity effects. Herbert (1994) also discussed the major economic consequences of sexual harassment found in several studies. Herbert (1994) analyzed the 1980 MSPB survey and reported that 36% of the respondents had negative thoughts about work following sexual harassment and 11% of the respondents had decreased work attendance following sexual harassment. Herbert (1994) also reported that the 1979 Working Women's Institute study found that 75% of the respondents reported that following the harassment, they experienced distraction and loss of motivation that interfered with the workplace. In addition, when noting that women who do not report almost always have a reasonable fear of harassment, Herbert (2007) cited several studies that found that women who reported harassment were labeled as troublemakers and that women who took more assertive responses experienced negative job-related and health-related consequences.⁴ In addition, Hersch (2011) found that employees who work in industries with high rates of harassment actually received a compensating differential for working in such

⁴ The studies that Herbert (2007) cites include the 1995 Department of Defense sexual harassment study.

environments. This result suggests that the consequences of sexual harassment are so negative that employees must be compensated to withstand its presence. This result also suggests that it might be cheaper to incur these wage costs than to control harassment.

This literature review has provided insight into the probability that an individual experiences sexual harassment, potential reasons for why victims do not report harassment, and certain negative consequences of harassment in the workplace. However little is known about additional consequences of harassment, including the employer's reaction to workplace sexual harassment. We also know little about the consequences of the response of a victim to harassment and the relationship between certain characteristics of harassment and the likelihood of experiencing an adverse employment action. In this chapter, I utilize the 1994 MSPB survey, the most comprehensive sexual harassment dataset currently available, to analyze the employer's response to workplace sexual harassment by developing a conceptual framework that addresses the employer's response to harassment and the victim's decision to report and by empirically testing the predictions developed in this framework.

CONCEPTUAL FRAMEWORK

In this section, I lay out a conceptual framework, which will motivate the following empirical model. This framework models the victim's choice to report and the probability that the victim experiences retaliation following that decision. Before an employee must decide to report the harassment, an employee is harassed. While this framework does not model an employee's likelihood of being harassed, several characteristics have been shown to affect the likelihood that an employee is harassed, including characteristics of the workplace and the employee. As discussed above, studies that analyzed MSPB surveys found that women are more likely to be harassed in male dominated workplaces (Newman et al. 2003; Druhan 2013). In addition, age, sex,

education level, and marital status each affect the likelihood that an individual experiences sexual harassment (Newman et al. 2003). Scholars also found that sexual harassment training does not influence sexual harassment in the workplace, but that it may affect perceptions of sexual harassment (Newman et al. 2003; Antecol and Cobb-Clark 2003). Each of these characteristics will influence whether an employee is harassed, but this initial stage of being harassed is not formally modeled below.

Assume an employee is harassed. Following the harassment, the victim must decide how to respond. While this decision could involve many choices and a combination of choices, the victim will always have to decide whether to formally report the harassment. In this framework, the employee's decision is a dichotomous decision to report the harassment or to not report the harassment. Throughout this framework, the following notation is followed: Capital letters indicate components unique to the victim's decision and lower case letters indicate components unique to the employer's decision. In addition, if a component is common to both parties, but slightly different for each party, the number 1 indicates the victim's component, and the number 2 indicates the employer's component.

Employee's Response to Harassment

Let R denote the victim's decision to report, and NR denote the victim's decision to not report. The victim will ultimately choose the option with the highest expected payoff (EP_i for $i = NR, R$). Each payoff will be comprised of costs and benefits. The victim will consider how this decision changes her health (μ_i), which decreases with probability Q . The health of the victim includes mental health, which can be affected by suffering a loss in reputation or the conscious pressure to report. This model assumes that the employee will suffer a change in health in both

scenarios. As such, Q does not vary with whether the victim reports, but μ_i will be larger in one of the scenarios and is thus indexed by $i = NR, R$.

The victim's decision will also depend on and affect the costs associated with experiencing a change in employment, and the victim's total compensation for the job is denoted as X . A change in employment occurs with probability P_i for $i = NR, R$. This model assumes the victim either keeps or loses X in whole. As a result, X does not vary with the victim's decision to report, but P does. The final component of the victim's decision is the expected payoff from litigation if the victim decides to file a claim of harassment or discrimination against his or her employer.⁵ The expected payoff from litigation is made up of the following components: the expected damages Φ_i , which is equivalent to the probability that the plaintiff prevails times the amount the judge or jury awards.⁶ The victim views this expected damages with error, ε_l . The total expected payoff is comprised of $\Phi_i + \varepsilon_l$ minus the expected costs of the litigation, (C_l), including attorney's fees and opportunity costs. The victim will choose to report the harassment only if the expected payoff from reporting is greater than the expected payoff from not reporting.⁷

$$EP_R > EP_{NR}$$

$$-P_R (X) - Q^*(\mu_R) + \Phi_R + \varepsilon_l - C_l > -P_{NR} (X) - Q^*(\mu_{NR}) + \Phi_{NR} + \varepsilon_l - C_l$$

⁵ Note that this model assumes that the victim always considers the expected payoff from litigation. In reality, a victim of harassment may only consider the expected payoff of litigation if the victim is aware of sexual harassment law and Equal Employment Opportunity Commission ("EEOC") procedures. The victim will also only consider this payoff if the victim is considering filing a lawsuit. As a result, the victim must be motivated to file a claim, which likely occurs if the victim is fired and if the victim reports (as these are components that affect the expected payoff of litigation). However, the victim does not have to report or be fired for litigation to occur or for the victim to consider the expected payoff of litigation. For the charge to result in actual litigation, the charge must first proceed through the EEOC. For the purposes of this model, settlement during the EEOC process is considered a litigation payoff that is also affected by the same components that affect payoff from an actual trial.

⁶ Although not modeled here, this payoff could also include their desire to deter the employer from any future harassment.

⁷ Note that this model assumes that the employee and employer are risk neutral.

Note that C does not vary whether or not the victim reports, nor does Q , X , or P . However, each of the other factors are dependent on the victim's decision. Though this model assumes that the damages of the victim will not be affected by whether the victim reports, because the probability that the victim prevails is affected by current liability standards, Φ_i certainly varies with this decision. Even though the victim views Φ_i with error, the victim will know (if aware of current legal standards) that almost always Φ_R will be greater than Φ_{NR} ; the employer is almost always more likely to be liable for sexual harassment in the workplace due to the current employer liability standards. In fact, in many jurisdictions, the employer will have a strong affirmative defense to liability if the victim does not timely report. Φ_i is also affected by several other characteristics of the harassment, including the severity of the harassment. Because this component also affects the employer's response, how Φ_i changes based on the employer's reaction is discussed following the employer's decision.

It is difficult to predict the size of μ_i in each scenario because it likely depends on a variety of factors, including characteristics of the workplace, the harassment, and the victim. However, it is assumed that the victim perfectly views the size of μ_i because these characteristics are known to the victim. Because μ_R and μ_{NR} are known to the victim and Φ_R will almost always be greater than Φ_{NR} , the only remaining comparison is P_R and P_{NR} . This probability is solely in the hands of the employer; as a result, the victim will view it with uncertainty. However, several common and known factors make it such that the victim can make a comparison by using backwards induction to predict with uncertainty how the employer will act (what the size of P_R and P_{NR} will be).

Employer's Response to Harassment

At the next stage of this framework, the employer will determine how to respond to the harassment. It is important to note that it is not the case that the employer only learns of the

harassment if the victim reports the harassment. Instead, it is assumed that the employer will learn about the harassment through a variety of measures, including from other employees. Because the purpose of this model is to predict when the employer will act against the harasser, this model assumes that the employer has two choices: fire the victim (fv) or fire the harasser (fh). The employer, like the victim, will choose the option with the largest expected payoff. Each expected payoff will be made up of the following factors, and if a component varies with the response, then it is indexed by $j = h, v$.

Let rc_j represent the cost of replacing the harasser or victim, which is a function of the harasser's or victim's education (y_k for $k = h, v$) and the supervisor status of the harasser or victim (s_k for $k = h, v$). If the employer fires the victim, the employer must pay all of $rc_{fv}(r_v, s_v)$ to replace the victim. If the employer fires the harasser, then the employer must pay all of $rc_{fh}(y_h, s_h)$ to replace the harasser. When determining how to respond, the employer will also consider the expected costs of future harassment ($\alpha_j * f$). The costs of future harassment, f , occurs with probability α_j , which varies with each option. The costs of future harassment are a function of the severity of the harassment (λ): $f(\lambda)$. If the employer fires the harasser, then α_v becomes zero, and as a result, this component is only present if the employer fires the victim.

Much like the victim, the employer will also consider the expected costs of the litigation. The expected costs of litigation are comprised of the probability that the victim sues the employer (q_j), the costs of the litigation C_2 , the expected damages awarded, Φ_j , which is equivalent to the probability that the jury or judge awards the plaintiff damages times the amount awarded. The employer also views Φ_j with error, ε_2 . q_j and Φ_j both vary with the employer's response. In addition, Φ_j is a function of the victim's decision to report (r), the severity of the harassment (λ), and the supervisor status of the harasser (s_h). Note that C_2 is not dependent on any of these characteristics.

Ultimately, the employer will choose to fire the victim if the expected payoff is greater than the expected payoff from firing the harasser:

$$ep_{fv} > ep_{fh}$$

$$-rc_{fv} - q_{fv}(C_e + \Phi_{fv} + \varepsilon_2) - \alpha_{fv} * f > -rc_{fh} - q_{fh}(C_2 + \Phi_{fh} + \varepsilon_2)$$

Where rc_j can be written $rc_j(y_k, s_k)$, f can be written as $f(\lambda)$, and Φ_j can be written as $\Phi_j(\lambda, r, s_h)$. Because the employer knows y_k , s_k , λ and r , the employer can make an educated decision, even though the employer will view the expected costs of a lawsuit with error.

rc is increasing in both y_k and s_k . As a result, if the employee is a supervisor with a high education, his replacement cost will be high. f is increasing in λ , meaning more severe harassment costs more. In addition, due to current sexual harassment standards, Φ_j is increasing in λ , r , and s_h . If the harasser is the supervisor, then the vicarious liability standard developed in *Faragher* and *Ellerth* apply, however, this higher standard will only apply if the victim reports the harassment. If the harasser is a coworker, then the liability standards are lower, but the employer is still more likely to be liable if the victim reports the harassment because the employer will be aware of the harassment. In addition, if λ is high, the employer is more likely to be liable because the harassment is likely actionable under *Meritor Savings Bank v. Vinson*.

The employer will also know how certain factors vary based on his decision to act. For example, q_{fv} will always be higher than q_{fh} because the victim will have more motivation to sue his employer if he has been fired, partly because his likelihood of prevailing at trial (Φ_i) is higher. Knowing each of these relationships, the employer's decision will be strongly motivated by rc_{fv} and rc_{fh} . Because legal liability is always viewed with some uncertainty, ε_2 , if the employer is certain that rc_{fv} is high due to the high education (y_h) and supervisor status of the harasser (s_h), then the employer will be more likely to act against the victim. On the other hand, if certain

characteristics of the harassment are present that make it more likely that the employer will be liable for the harassment (increasing Φ_k and decreasing ε_k) including the harassment being severe (λ high), the harasser being the supervisor (s_h), and the victim reporting the harassment (r), then the employer will be more likely to fire the harasser.⁸ Even though, s_h increases both rc_{fh} and Φ_k , firing the victim results in an increase in the probability that a victim files a claim because they want to react ($-\alpha_{fv} * f$). In addition, due to the employment standards that are dependent on an adverse employment action occurring, firing the victim increases both q_{fg} and Φ_k . As a result, the only components that make it likely that rc_{fh} outweighs those additional risks, is s_h and y_h . As a result, if the harasser is a supervisor with high education, it is more likely than in any other scenario that the employer will act against the victim ($P_R(E)$ is higher if the harasser is a supervisor with high education).

Knowing that the employer will be less likely to act against her if she reports the harassment, the victim should be more likely to report. However, this result also completely depends on the victim being aware of the nuances of the law, which is likely a stronger assumption than the employer being aware of the legal standards. As a result, especially if the victim was harassed by the supervisor (making rc_{fh} high and therefore increasing $P_R(E)$), the victim may be less likely to report due to fears that making the employer aware of the instance will increase the likelihood of experiencing an adverse employment action.

While the current legal standards alter some of the basic theoretical predictions, the MSPB survey analyzed in this chapter occurred in 1994, before *Faragher* and *Ellerth*, as a result, only *Meritor* governed employer liability. As a result, the supervisor status of the harasser would only affect rc_h , and not the likelihood that the employer is liable (Φ_k), and it should always be the case

⁸ This result completely depends on the employer being aware of these legal standards, which because the employer may consult legal counsel before making that decision is not a very strong assumption.

that, all things constant, including the severity of the harassment and whether the victim reported the harassment, the employer should be more likely to act against the victim if the harasser was a supervisor. Because the liability standards were previously dependent on the victim reporting the harassment, it should be the case that the victim should at least not be more likely to experience retaliation if she reports, all things constant, however, this result heavily depends on knowledge of the legal standards. In my empirical analysis, I seek to answer the following questions: (1) does being harassed by a supervisor increase the likelihood that a victim experiences an adverse employment action? (2) does reporting harassment increase the likelihood of experiencing an adverse employment action? and (3) does reporting supervisor harassment have an additional effect on experiencing an adverse employment action?

EMPIRICAL FRAMEWORK

Empirical Specification

The effects of certain harassment characteristics on the employer's response can be empirically tested by estimating the following reduced form equation:

$$(1) \text{ Adverse Action} = \beta_0 + \beta_1 \text{Reported} + \beta_2 \text{Supervisor Harasser} + X'\beta_e + Y_1'\beta_4 + Z'\beta_5 + \varepsilon$$

Adverse Action is a dichotomous variable equal to one if the victim experiences an adverse employment action following the harassment. *Reported* is a dichotomous variable equal to one if the victim reported the harassment, and *Supervisor Harasser* is a dichotomous variable equal to one if the victim was harassed by his or her supervisor. *X* is a vector of harassment characteristics, *Y* is a vector of the victim's personal characteristics at the time of the harassment, and *Z* is a vector of the characteristics of the victim's workplace at the time of the harassment.

To estimate the effect of *Reported* on *Adverse Action*, it is likely necessary to estimate this specification using several different models. This is likely necessary because the relationship

between each of the decisions of the conceptual framework can result in both endogeneity bias and selection bias when empirically analyzing the employer's response to the harassment. To correct for these biases, I utilize instrumental variable models and selection models applying Heckman correction. A discussion of these models, tests of the requirements of these models, and estimates from these models follow in the results section.

Data

To estimate each of the specifications discussed above, I use the 1994 MSPB sexual harassment survey. The 1994 MSPB sexual harassment survey is the most recent and most comprehensive sexual harassment dataset available. The MSPB is a federal agency that Congress created in 1978 to monitor prohibited employment practices in the federal workplace. As part of a Congressional mandate, the agency issued sexual harassment surveys to investigate the prevalence of sexual harassment in the workplace, the effectiveness of sexual harassment training, and the agencies' responses to sexual harassment in 1978, 1987, and 1994. I utilize the 1994 survey in this analysis, as it is the most recent and comprehensive of the three. The 1978 study did not ask detailed questions about an employer's response to sexual harassment. The 1987 survey asked respondents to report whether they had experienced a range of unwanted behavior, but not specifically whether they had experienced sexual harassment. In the 1994 survey, the employees actually answered whether they have experienced "sexual harassment."

In 1994, the MSPB mailed surveys to thousands of federal employees to complete anonymously. The response rate was 61%. Other harassment surveys, including a 1995 Department of Defense survey, had similar response rates (58%). This is a high response rates, but in cause there are concerns that it is not, scholars have proposed that the response rate of most surveys does not affect the validity of similar empirical results (Holbrook et al. 2007). The final

1994 MSPB dataset contains 8,081 observations, 4,259 females and 3,560 males. Of these respondents, 48% of the females and 24.5% of the males had experienced some form of workplace sexual harassment in the previous two years. This statistic is similar to the percent of respondents that responded that they have experienced some form of workplace sexual harassment in the 1978 and 1987 responses, and scholars who have studied the surveys report that sexual harassment rates did not change over this time period (Newman et al. 2003; Antecol 2004).

Each of the variables included in Equation (1) are constructed from the respondent's answers to the 1994 MSPB survey questions. Most importantly, the respondent reports whether she experienced sexual harassment in the past two years and describes her most prominent harassment experience during that time frame.⁹ Specifically, after being directed to skip 18 questions if the respondent has not received any uninvited and unwanted sexual attention, the respondent answers the following question: "During any particular experience, a person may receive more than one kind of unwanted sexual attention. During the experience you selected to describe here, which of the following happened to you? Mark all that apply." In this section, I provide a description of the variables created from the 18 sexual harassment questions that follow this question. In the following paragraph, I describe the specific variables used in Equation (1). The names of these variables that I include in Equation (1) are listed in parentheses. The variables are also defined in Table 1.

The dataset includes how the victim responded to the harassment (*Reported Within, Formal Action, Reported Outside*). If the victim responds in either of these ways, then the victim is coded as having reported the harassment (*Reported*). *Reported* is an explanatory variable in Equation (1). The dataset also includes how the employer reacted to the harassment (*Work Worse, Denied*

⁹ While men and women responded to this survey, I use female pronouns for simplicity.

Promotion, Reassigned, and Fired). If the employer takes any of these actions, then the victim is coded as having experienced an adverse employment action (*Adverse Action*). *Adverse Action* is the dependent variable in Equation (1).

The respondent also describes the action that occurred during the most prominent harassment experience, and these harassment variables are independent variables found in *H* in Equation (1): attempted or actual sexual assault (*Assault*), pressure for sexual favors (*Favors*), pressure for dates (*Dates*), sexual comments or teasing (*Teasing*), sexual looks or gestures (*Looks*), unwanted touching (*Touching*), or stalking (*Stalking*). Importantly, the respondent also reports the characteristics of the harasser or harassers, including whether there were multiple harassers (*Multiple Harassers*), the sex of the harassers (*Male Harasser, Female Harasser, Harassers Both Sexes*), and whether the harasser was the victim's supervisor (*Supervisor Harasser*). The respondent also answers questions addressing the intensity of the harassment: whether the duration of the harassment was greater than three months (*Dur >3 months*) and whether the frequency of the harassment was greater than one month (*Freq > 1 a month*). Each of the variables described in this paragraph make up *H* in Equation (1).

If the respondent was harassed, she provides personal demographics corresponding to the time she was harassed. These demographics are controlled in *X*: marital status (*Single, Married, Divorced/Widowed*), employment type (*Management/Professional, Clerical/Blue Collar, Trainee/Other Job*), pay grade level collapsed into four levels (*Pay Grades 1-4, 5-10, 11-15, SES* (Senior Executive Service)), education level (*Less than College Degree, College Degree, Grad Degree*), age (*16-24, 25-34, 35-44, Over 45*), and supervisor status (*Supervisor*). The respondent also reports workplace demographics at the time of the harassment, which make up *Z* in Equation (1), including the sex of her supervisor (*Male Supervisor, Female Supervisor*) and

whether the agency that the respondent was employed by has sexual harassment training (*Training*). If the respondent was not harassed, she reports these demographics based on her current employment.

Summary Statistics

This section and the tables discussed in it report descriptive statistics of the sample of MSPB respondents analyzed in Equation (1). Each of the summary statistics presented in this section and the mentioned tables has been weighted with a sample weight provided by the MSPB to correct for the oversampling of females, certain pay grades, and certain agencies. Table 2 reports summary statistics on retaliation that are limited to victims who experienced harassment. These statistics show what response an employer chose to take against the male and female victims following the prominent harassment experience. Again, *Adverse Action* is a variable that is equal to one if the employee was denied a promotion, received work worse assignments, was reassigned, or was fired.¹⁰ 12.9% of the female victims and 10.6% of the male victims experienced an adverse action following the harassment.¹¹

The conceptual framework developed in this chapter predicted that both the demographic variables and the variables describing the harassment could influence the employer's response to the harassment. Tables 3a and 3b illustrate the hypothesized relationships by showing that the average number of victims that reported certain characteristics is substantially and statistically

¹⁰ Although not every court agreed with the definition of adverse employment action in 1994, each of these actions are considered "adverse employment actions" in current EEOC Guidance developed in 1998 and under the 2006 case, *Burlington Northern & Santa Fe Railway Co.* In addition, alternative definitions of *Adverse Action* and many other variables does not change the results reported below. Certain definitions that were changed include excluding terminated from adverse employment action, excluding "work became worse" from adverse employment action, and including additional agencies.

¹¹ It is difficult to get fired from the federal government (Cauchon 2011), and in fact, only 0.3% of the male victims and 0.3% of the female victims were fired following the harassment. While these employees may in fact be outliers, these observations are included in *Adverse Action* because being fired following harassment is an even more severe reaction. However, excluding these observations does not change the results.

higher for victims who experienced an adverse employment action as compared to all of the victims. Table 3a reports summary statistics that illustrate this relationship for female victims, and Table 3b reports the male victim summary statistics. Column 1 of these tables reports the percentage of the total MSPB sample with these characteristics, and Column 2 reports the percentage of the sample of respondents that was harassed with that characteristic. Columns 3 and 4 further breakdown these statistics by reporting the percentage for the respondents that did not experience an adverse action and those that did experience an adverse action, respectively. Finally, Column 5 reports the difference between the statistics reported in Columns 3 and 4. The statistical significance of this difference is also indicated.¹²

Tables 4a and 4b continue this comparison. However, the statistics presented in these tables are limited to the sample of respondents who were harassed, as the characteristics described in this table only apply to the respondents who were harassed. Column 1 reports the statistic for the total sample of victims, Column 2 is limited to the victims that did not experience an adverse action, and Column 3 is limited to the victims that did experience an adverse action. Column 4 reports results of a t-test, testing the equivalence of the summary statistics reported in Columns 3 and 4, as was conducted in Tables 3a and 3b.

Many of these statistics are interesting and statistically significant. However, I will focus on the statistics and t-test results that illustrate the predictions of the conceptual framework. For example, the theoretical model predicted that victims with higher education and pay grades would be less likely to experience an adverse action because of their higher replacement cost. As reported in Table 3a, a larger percentage of the female victims who did not experience an adverse action were supervisors as compared to the percentage of female victims who did experience an adverse

¹² Note that these differences are slightly off due to rounding.

action, and this difference of 4.8 percentage points is statistically significant. In addition, a larger percentage of the female victims who did experience an adverse action (15.6% to 7.1%) was in the lowest pay grade, Pay Grade 1-4. As for the male sample, the percentage of victims who experienced an adverse action with a graduate degree is 17.6 percentage points less than the percentage of victims who did not experience an adverse action. In addition, the percentage of victims in the professional or management occupation that experienced an adverse action is 23.9 percentage points less. Both of these differences are statistically significant.

More specifically, the above-described conceptual framework and the current legal system predict that the supervisor status of the harasser and the victim's response to the harassment likely influence the employer's response. This relationship can be seen in the summary statistics. For example, as illustrated in Table 4a, 68.6% of the female victims who experienced an adverse employment action were harassed by their supervisor, as compared to 23.7% of the sample of victims that did not experience an adverse action. The difference between these groups is 44.8 percentage points, which is statistically significant at the one percent level. Comparatively, the difference for individuals harassed by their coworker is an insignificant difference of 2.9 percentage points. In addition, 46.6% of the female victims who experiences an adverse employment action reported the harassment by either reporting the harassment within the workplace or filing a formal harassment action. Only 17.1% of the sample of victims that did not experience an adverse action reported the harassment. This difference is also statistically significant at the ten percent level.

As illustrated in Table 4b, the male statistics illustrate similar relationships. 53.1% of the male victims who experienced an adverse employment action were harassed by their supervisor, but only 9.7% of the male victims that did not experience an adverse action were harassed by their

supervisor. This difference of 43.5 percentage points is statistically significant at the one percent level. In addition, 36.4% of the male victims who experienced an adverse employment action reported the harassment, but only 11.3% of the male victims that did not experience an adverse action reported the harassment. This difference is also significant at the five percent level.¹³

To determine the causal relationship between an employer's response to harassment and the characteristics of the harassment, including the supervisor status of the harasser and the victim's response, it is necessary to isolate the relationships through the equation discussed in the beginning of this section. The details of these empirical specifications and the empirical results from the estimations are presented below.

Regression Results

I estimated Equation (1) using ordinary least squares (OLS) regressions separately for males and females, and the results are reported in Table 5.¹⁴ I estimated the equation separately for males and females because the results of a Chow test indicated that there were structural differences between the coefficients for the two samples.¹⁵ Column 1 of Table 5 reports the

¹³ The fact that only 36.4% of the male victims and 46.6% of the female victims who experienced adverse employment actions reported the harassment shows that it is not the case that an employer can only adversely act against the victim if the victim reports. One may wonder how an employer could respond to the harassment if they are not aware of it. However, there are many ways that the employer can become aware of the harassment without the victim reporting it. For example, a coworker could notify the employer, the experience could change the victim's work performance, or the employer could have witnessed it. In addition, if the harasser is the supervisor, then the supervisor may be the one responsible for the employment decision. This is in fact a reason why it is likely that being harassed by your supervisor increases the likelihood that you experience an adverse action, and why the law is tailored to address that relationship.

¹⁴ While some may argue that probit is preferred to OLS because, as a nonlinear model, it limits the predicted values to values between 0 and 1 (Lynch 2007), it is accepted that OLS provides consistent marginal effects (Angrist and Pischke 2008). In addition, I report robust standard errors, which lessens concerns about heteroskedasticity. As expected, marginal effects from probit regressions are very similar in size, magnitude, and direction. OLS is also the preferable estimation, because due to the small sample, I cannot compute selection corrections for the male sample nonlinearly.

¹⁵ Though a Chow test suggests that the specifications be run separately for men and women, when I pool the regressions, the direction and significance of the coefficients on the variables of interest (*Reported* and *Supervisor*) are very similar.

estimates for the female sample, and Column 2 reports the estimates for the male sample. The specifications also include indicator variables for missing values.¹⁶

The empirical results confirm many of the relationships illustrated by the summary statistics, follow many of the predictions from the conceptual framework, and support potential changes in how the law addresses employer liability for sexual harassment. The conceptual framework predicted that conditional on being harassed, a victim with lower education and with a role with less responsibility will be more likely to experience an adverse employment action because of the lower replacement cost. In fact, the empirical results confirm that prediction for female victims: female victims of pay grades lower than Senior Executive Service (“SES”) are statistically significantly more likely than their SES counterparts to experience an adverse action, perhaps because of their lower value to the company. Females in Pay Grade 1-4, 5-10, and 11-15 are statistically significantly more likely to experience an adverse action than their SES counterpart, as are all other pay grades. Also, females in clerical or management positions are statistically significantly less likely than their counterparts in training occupations to experience adverse action.

The conceptual framework also predicted that because of the possibility that severe harassment would greatly decrease the productivity of the victim, an employer may be more likely to act against a victim if the harassment was severe. However, this prediction was muddled by alternative predictions such as the fact that this harassment is more likely to occur again and that an employer is more likely to be liable for such harassment. The empirical results also do not

¹⁶ These indicators are included to increase the number of observations analyzed, which is a standard process. If a variable was missing from an observation, I coded the variable as equal to zero, but then included indicator variables for the missing variables. However, when the indicators are excluded and the missing variables are omitted from the sample, the size, magnitude, and significance of the results remains the same, though the number of observations decreases.

suggest a clear relationship between severe harassment and experiencing an adverse action. For example, the more frequent the harassment for female victims, the more likely a victim is to experience an adverse employment action. Female victims who experience harassment that occurred more than once a month are 7 percentage points more likely to experience an adverse action. However, this result is not present for males. In addition, the duration of the harassment does not statistically significantly affect the probability that a victim experiences an adverse action.¹⁷ The fact that these variables do not have a statistically significant impact confirms the inability to predict how the severity of the harassment would affect a victim's outcome.

The strongest prediction of the conceptual framework was that without a legal framework tailored according to the supervisor status of the harasser, a victim who is harassed by their supervisor is more likely to experience an adverse employment action because the supervisor has a higher replacement cost, making the supervisor more valuable to the company. The percentage of victims harassed by their supervisor was higher for individuals who experienced an adverse employment action. The empirical results further support this prediction, showing that victims who were harassed by their supervisor as compared to their coworker are statistically significantly more likely to experience an adverse employment action. Female victims who were harassed by their supervisor are 18.3 percentage points more likely to experience an adverse action and male victims harassed by their supervisor are 32.7 percentage points more likely. These results are statistically significant at the one percent level. These estimates indicate that the probability of experiencing adverse employment actions following harassment increases from 12.93% to 30.93% for females

¹⁷ A few types of harassment statistically affect the likelihood that a victim experiences an adverse action. For example, if a female victim experiences teasing or receives calls or letters she is actually more likely to experience an adverse action. Alternatively, if a male employee experiences touching or is asked on a date, then he is less likely to experience an adverse action. Perhaps these results support the hypothesis that an employer is more likely to act against a supervisor who acts with severe harassment.

who are harassed by their supervisor and from 10.62% to 43.32% for males who are harassed by their supervisor.

The model also predicted that victims who report the harassment should not be more likely to experience an adverse employment action because the employer would be more likely to be liable for the harassment. Despite this prediction, the empirical results show that victims who report harassment are more likely to experience an adverse action. Female victims who reported the harassment are 10.0 percentage points more likely to experience an adverse employment action compared to those that did not report the harassment. Male victims who reported the harassment increased their likelihood of experiencing an adverse action by 12.7 percentage points. These results are significant at the one percent level for females and ten percent level for males. These estimates indicate that the probability of experiencing adverse employment actions following harassment increases from 12.93% to 22.93% for females who report the harassment and from 10.62% to 22.82% for males who report the harassment.

It is possible that reporting the harassment only has a statistically significant effect if victims reported the harassment of their supervisor, because of the strong role of the supervisor in employment decisions and because of the supervisor's high replacement cost. To explore whether the statistically significant coefficient on *Reported* is driven by victims who were harassed by their supervisor and reported the harassment, alternate specifications include a variable that interacts the two variables (*Reported*Supervisor*).¹⁸ The results from OLS estimations of these specifications are presented in Table 6. Column 1 reports the results for the female specifications, and Column 2 reports the results for the male specifications. The results confirm that for the female

¹⁸ Additional interaction terms were included in alternative specifications to explore whether other results were influenced by reporting harassment or by being harassed by a supervisor, however, none of the coefficients on these interactions was statistically significant.

sample, the *Reported* result was driven by victims who report supervisor harassment: the coefficient on *Reported* is no longer significant, but the coefficient on *Reported*Supervisor* is a statistically significant 25.7 percentage points. Note that the results show that the *Supervisor* result is not driven by those who report harassment, as the coefficient on *Supervisor* also remains significant, meaning that the *Supervisor* result is not limited to those who report the harassment. The significance of *Reported* for the male specifications was also affected by the inclusion of this interaction term. The coefficient on *Reported*Supervisor* is not statistically significant, and the coefficient *Supervisor* is identical to that of the original specification, the coefficient on *Reported* is no longer significant. These estimates confirm the strong prediction that all things constant, being harassed by a supervisor increases the likelihood of a harassment victim experiencing an adverse employment action. However, as indicated in the theoretical framework, victims likely anticipate possible adverse actions in response to reporting, which means that the effect of reporting on adverse outcomes may be conflated due to endogeneity. In the next section I examine this possibility.

Instrumental Variable Model and Results

When determining whether to report the harassment, the victim uses backwards induction to predict how the employer will respond to the harassment before the victim chooses whether to report the harassment. As a result, estimates of the coefficients on each variable in Equation (1) may be biased due to the endogeneity of *Reported* and *Adverse Action*. It is likely that a victim will be less likely to report the harassment if the victim anticipates that the employer is more likely to respond adversely to the harassment, which would bias the coefficient on *Reported* downwards.¹⁹ Though I am less concerned about endogeneity because the choice is made before

¹⁹ Results from the hypothetical experiments such as Perry et al. (1997) support this likely relationship.

the adverse action occurs, I took several measures to test for and correct for the bias and test for the presence of the bias. To reduce the presence of this bias, I used an instrumental variable model, which estimates the following equation as the first stage of a two-stage least squares model (“2SLS”).

$$(2) \text{Reported}_i = \beta_0 + \beta_1 V_i + \beta_2 \text{Supervisor Harasser}_i + X_i' \beta_3 + Y_i' \beta_4 + Z_i' \beta_5 + \varepsilon$$

V is an instrumental variable for *Reported*. This variable must be correlated with the endogenous variable, *Reported*, and as a result, the coefficient on V must be statistically significant in this first stage estimation. However, the instrument must also meet the exclusion restriction for instrumental variables: V cannot affect the likelihood that a victim experiences an adverse employment action following the harassment. The remaining independent variables are defined in Equation (1). The 2SLS model uses the estimates for the endogenous variable (*Reported*) from Equation (2) as the covariates when estimating Equation (1).

The first step in this process is to find a valid instrument. The instrument I use is whether the victim believed that sexual harassment in the workplace is an attempt by one person to exercise power over another (*Harassment Power*). Before answering the harassment questions, the respondent also provides several opinions on sexual harassment. For example, the respondent answers whether she strongly agrees that sexual harassment in the workplace is an attempt by one person to exercise power over another. *Harassment Power* is a dichotomous variable equal to one if the victim agrees strongly agreed with that statement. This instrument met the first-stage requirement in both the specifications analyzing the male and female samples. The first stage requirement is that the instrumental variable be correlated with the potentially endogenous variable (whether the victim reported the harassment, *Report*). *Harassment Power* had a statistically

significant positive effect on whether a victim chose to report the harassment. The first stage results for the specifications that analyze the female specifications are reported in Column 2 of Table 7.²⁰

It is possible that this instrument does not satisfy the exclusion restriction of a 2SLS model, which requires that the instrument not be correlated with the error term in the original specification. Perhaps individuals who believe that harassment is an attempt by one person to exercise power over another are more likely to be the target of an adverse employment action. However, the employer would have to be aware of this belief, through the victim's actions, for this consideration to affect the analysis. Believing that this instrument is likely valid, I used two-stage least squares (2SLS) specifications, to correct for the endogeneity bias likely present in the OLS specifications. The results from the 2SLS model are reported in Column 1 of Table 7. Note that with the exception of *Reported*, the potentially endogenous variable, the coefficients are quite similar to the OLS coefficients reported in Column 1 of Table 5. The F-statistic on the excluded instruments in the first stage with the *Harassment Power* instrument was 5.07.

One would expect the coefficient on *Reported* to be larger than the coefficient in the original specification because it was predicted that victims who are more likely to experience harassment would not report the harassment, thus the endogeneity should bias the coefficient downwards. The coefficient on *Reported* in the 2SLS specifications is larger than the coefficient reported in Table 5. This increase and the fact that the coefficient is very close to significant at the ten percent level (but for the large increase in standard errors) suggests that this estimation strategy may have corrected for the predicted bias.

Assuming that this instrument was valid, I also investigated whether the specifications were actually likely to suffer from endogeneity bias using Durbin-Wu-Hausman tests for endogeneity.

²⁰ I do not report the results for the specifications that analyze the male samples because the instrument is too weak to justify using 2SLS at all.

The p-value from this test is reported in Table 7. The null hypothesis in a Durbin-Wu-Hausman test is that the estimates of the same equation without 2SLS corrections would yield consistent results. The Durbin-Wu-Hausman tests resulted in a large p-value, suggesting that *Reported* is not endogenous, and as a result, suggesting that the 2SLS specifications are not necessary and that the estimates of Equation (1) reported in Table 5 remain valid.

Selection Model and Results

The conceptual framework also predicted that because an individual must first be harassed before an employer can respond to the harassment, estimates of Equation (1) may suffer from selection bias. To be more specific, because each empirical specification is limited to individuals who responded to the MSPB survey saying that they have been sexually harassed in the workplace during the past two years, the specifications may suffer from selection bias. It may be the case that individuals who did not formally report the harassment and did experience an adverse employment action after the harassment are less likely to answer the question positively on the survey. Under that scenario, those individuals would be missing from the specification, which would bias the coefficient on *Reported* upwards. Other scenarios could bias the specification downwards. For example, individuals who do not report the harassment may wish to finally come clean and may be more likely to answer the question positively on the survey.

To correct for the potential selection bias in the estimation of Equation (1), I estimated Heckman selection models. In this first stage, *Harassed* (an indicator for whether the employee was harassed in the past two years and therefore included in the sample used to estimate Equation (1)) is regressed upon variables that are likely to affect the probability that an employee is harassed. These models analyze the entire 1994 MSPB sample, as the model is not conditioned on being harassed. The first-stage equation, Equation (3), follows:

$$(3) \text{ Harassed}_i = \beta_0 + W_a' \beta_1 + X_i' \beta_2 + Y_i' \beta_3 + Z_a' \beta_4 + \varepsilon$$

The source of variation in the Heckman selection model is found in the vector W . The variables in this vector should predict the likelihood that an employee is harassed,²¹ but not the likelihood that a victim experiences an adverse employment action. The remaining independent variables are defined following the presentation of Equation (1). The Heckman selection model uses predicted values from Equation (3) to incorporate an additional independent variable, the inverse Mill's ratio, in Equation (1).

The first-stage equation includes indicator variables for the sex of the workplace (*More Women, Equal Men/Women*) as the identification (W), because the sex of the workplace significantly affects the employee's likelihood of being harassed, but not a victim's likelihood of experiencing an adverse employment action. The coefficients on these variables were not significant when included in the main empirical specification, suggesting that the integration of the workplace does not affect a victim's likelihood of experiencing an adverse action.

The Heckman results for both the male and female specifications are reported in Table 8. The large p-values on the Wald statistics suggest that I cannot reject the null hypothesis that the equations are independent at the ten percent level for the specifications that analyze the male sample, suggesting that selection is not a problem. Although the p-value on the Wald statistic for the female sample suggests that I can reject the null hypothesis at the ten percent level, I cannot reject the null hypothesis at the five percent level. In addition, the fact that the coefficients are similar to the OLS coefficients is evidence that selection bias is not a concern for the female and male specifications. As a result, the OLS estimates reported in Table 5 are likely valid.

²¹ The results presented in Druhan (2013) and Newman et al. (2003) suggest that the sex integration of the workplace could be a potential instrumental variable.

LEGAL IMPLICATIONS

The main empirical results of this chapter showed that victims who were harassed by their supervisor and victims who report the harassment, especially those who report supervisor harassment, were statistically significantly more likely to experience an adverse employment action. These results have implications that can inform how the legal system currently addresses an employer's liability for sexual harassment in the workplace and how those legal standards could be altered to address these severe consequences of sexual harassment. Currently, under *Ellerth* and *Faragher*, if an employee is harassed by his or her supervisor and experiences an adverse employment action, then the employer will be vicariously liable for the harassment.²² However, if no tangible employment action occurred and the employer had procedures in place to prevent the harassment and the employee did not reasonably take advantage of those procedures, then the employer will not be liable because of the affirmative defense. If an employer is harassed by a coworker, the defense also applies because the employer is only liable if the employer was aware of the harassment and did not have preventative measures in place.

The empirical results support the higher standard for supervisor harassment adopted in *Faragher* and *Ellerth* because victims are much more likely to experience an adverse employment action after harassment if they are harassed by their supervisor. In fact, the Supreme Court established the higher standard for supervisor harassment in *Faragher* and *Ellerth* for a very similar theoretical reason:

The agency relationship affords contact with an employee subjected to a supervisor's sexual harassment, and the victim may well be reluctant to accept the risks of blowing the whistle on a superior. When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment,

²² Of course, the victim must also establish that the unwanted conduct was sexual harassment, by meeting the standards of *Meritor v. Savings Bank*: unwanted sexual conduct that is so severe or pervasive it alters an employee's workplace conditions.

his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise—[which may be] to hire and fire, and to set work schedules and pay rates—does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion."²³

While this quote shows that the Supreme Court acknowledged the supervisor's power, which could result in an increase in adverse employment actions, the Court suggested that they did not acknowledge that power with the creation of the affirmative defense created in *Ellerth* and *Faragher*. My empirical results call into question the employer's affirmative defense if the victim is not reasonable in responding to the harassment, the expansion of the defense to a one prong defense when the harassment is severe, and the Supreme Court's narrowing of the definition of supervisor in *Vance*.

Because it is beneficial for courts to encourage employees to report harassment, I do not advocate that this affirmative defense be abolished. However, the fact that reporting the harassment substantially increases the likelihood of experiencing an adverse employment action (particularly if the harasser is the supervisor) calls into question several lower court interpretations of the *Ellerth* and *Faragher* defense. Certain lower courts have elevated the plaintiff's responsibility to reasonably respond to the harassment, such that an employee who was reasonable (given that these results show that they have a reasonable fear of retaliation when reporting) will be left without recourse. Several legal scholars have recognized the courts' tendencies to overlook the reasonable fear of retaliation (White 2006; Herbert 2007). These scholars were concerned that many courts overlooked the employees' reasonable fears of retaliation that prevented them from reporting the

²³ This quote is from *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998).

harassment and in turn allowed the employer to have an affirmative defense. My empirical results substantiate this literature by empirically showing that reporting harassment substantially increases the likelihood of experiencing an adverse employment action. This result is even stronger when female victims reported supervisor harassment. These results suggest that victims of harassment have a reasonable fear that the harassment will result in an adverse action if they report it. As a result, while it is beneficial to encourage reporting²⁴, the reasonability requirement should not be interpreted in such a strict manner.

The strength of the relationship between being harassed by a supervisor as opposed to a coworker and experiencing an adverse employment action also calls into question the expansion of the *Faragher* and *Ellerth* defense when the harassment is a one-time event. Federal courts of appeals that only require the employer to meet the first prong of the defense when the harassment is not pervasive substantially broaden the defense, by only requiring employers to take preventative measures. This substantially lowers the probability that an employer will be liable for supervisor harassment, making it likely that the *Faragher* and *Ellerth* standard will not decrease the relationship between supervisor harassment and adverse employment actions.

The Supreme Court enforced an additional interpretation that has strengthened the supervisor harassment liability standard in favor of the employer in the 2013 decision, *Vance v. Ball State University*. In *Vance*, the Supreme Court narrowly interpreted supervisor as one who is empowered to make employment decisions against the victim. It is likely that the MSPB respondents considered individuals their “supervisor” when they did not have the ability to fire

²⁴ The EEOC describes this incentive as: “The Supreme Court’s rulings in *Ellerth* and *Faragher* create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures. The rulings also create an incentive for employees to alert management about harassment before it becomes severe and pervasive. If employers and employees undertake these steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statutes.” Hook (2008) actually suggests that the *Ellerth* and *Faragher* affirmative defense should also be adopted in Title VII retaliation claims so that employers also have an incentive to prevent retaliatory action towards employees that report Title VII violations.

them. Unfortunately, the MSPB survey respondents do not provide information concerning who acted against them or had the power to act against them. However, the strength of the relationship between being harassed by a supervisor and experiencing an adverse employment action (which is not contingent on reporting the harassment) does not support a strict definition of supervisor.²⁵

One potential solution based on this empirical result is to make the affirmative defense for supervisor harassment unavailable in most circumstances. Bankers (2014) suggested that *Faragher* and *Ellerth* established that the affirmative defense is unavailable when the harasser is a proxy for the employer and suggested that an employee is a proxy when they have the ability to impute the intent of the employer. Perhaps corporate intent can be seen by the increase in the likelihood of experiencing an adverse employment action when an individual is harassed by his or her supervisor as compared to a coworker. Ultimately, the empirical results of this chapter suggest that while the elevated standard for supervisor harassment created by the Court in *Faragher* and *Ellerth* is justified, the *Faragher* and *Ellerth* affirmative defense should be limited. After all, scholars have even noted that it is currently “easy as pie” for employers to meet the defense in most courts (Bhatheja and Jackson 2014).

I am aware that the court does not always look to empirical evidence to establish standards, but instead relies on legal theories, such as agency law, the empirical results presented in this study could have significant legal implications. Because sexual harassment law is a continually developing area of the law, and sexual harassment has such a prominent and negative effect on the

²⁵ It is possible that because the data analyzed in this chapter was collected before the Supreme Court created this standard in *Faragher* and *Ellerth*, the relationship between supervisor harassment and the reporting of harassment adverse employment actions may have decreased because of this heightened standard if both are met. If this is the case, then one would be less concerned about these heightened standards. Unfortunately, data limitations make it impossible to answer this very interesting question. In addition, it is likely that employees still fear retaliation as a result of reporting, as a recent 2013 harassment survey found that only 30% of victims reported the harassment (Berman and Swanson 2013).

workplace, perhaps the courts and Congress could turn to such evidence for support when reversing the expansion of the *Faragher* and *Ellerth* affirmative defense.

CONCLUSION

It has been documented that victims of sexual harassment do not report the harassment. A likely reason for the underreporting is the victims' fear of experiencing adverse employment actions. Unfortunately, this study confirms this fear—sexual harassment victims are statistically significantly more likely to experience an adverse employment action if they report the harassment, especially when the harasser is the victim's supervisor. In addition, even if they do not report the harassment, sexual harassment victims are statistically significantly more likely to experience an adverse employment action when they are harassed by their supervisor.

The consequences of sexual harassment in the workplace are severe, and the consequences are even greater when an adverse employment action occurs. While the law has protections in place to reduce the likelihood of workplace harassment and the likelihood of experiencing an adverse employment actions, including the discrimination and anti-retaliation provisions of Title VII, certain standards could be tailored to address the prevalence of adverse employment actions in the workplace with support from the empirical results of this study. For example, federal courts should avoid narrowing employer liability under the *Faragher* and *Ellerth* standard by narrowly defining important terms, such as supervisor, and broadening the affirmative defense. The likelihood of employer liability for harassment and retaliation must be raised to lessen the prevalence of workplace harassment and corresponding adverse employment actions, and to encourage victims to report.

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Table 1. Definitions of MSPB Variables

Variables	Definition
Employment Action	
Work Worse	Indicator: After harassment employee received worse work assignments
Denied Promotion	Indicator: After harassment employee was denied a promotion, pay increase, or good performance rating
Reassigned	Indicator: After harassment employee was reassigned, detained, or transferred
Fired	Indicator: After harassment employee was fired
Adverse Action	Indicator: After harassment employee received worse assignments, was denied a promotion, was reassigned, or was fired
Response to Harassment	
Reported Within Formal Action	Indicator: After the harassment employee reported to supervisor or to EEOC
Reported	Indicator: After the harassment the employee took formal legal actions
Best Report	Indicator: After the harassment the employee reported the harassment or took formal legal actions
Harassment Power	Indicator: Employee believes the best response to harassment is to report
	Indicator: Employee strongly believes that sexual harassment in the workplace is an attempt by one person to exercise power over another
Personal Demographics	
Age	Indicators: Age 16-24, Age 25-34, Age 35-44, & Age > 45
Education	Indicators: Less than College Degree, College Degree, & Graduate Degree
Pay Grade	Indicators: Pay Grade 1-4, Pay Grade 5-10, Pay Grade 11-15, & Pay Grade SES
Female	Indicator: Employee was female
Marital Status	Indicators: Married, Single, and Divorced/Widowed.
Occupation Supervisor	Indicators: Trainee/Other Job, Clerical/BlueCollar, & Professional/Management
	Indicator: Victim was a supervisor
Type of Harassment	
Assault	Indicator: Attempted or actual assault occurred during harassment
Favors	Indicator: Unwanted pressure for sexual favors from harasser(s)
Touching	Indicator: Unwanted touching or cornering occurred during harassment
Looks	Indicator: Unwanted sexual looks or gestures occurred during harassment
Calls	Indicator: Unwanted letters or phone calls sent during harassment
Dates	Indicator: Unwanted pressure for dates from harasser(s)
Teasing	Indicator: Unwanted sexual jokes or teasing occurred during harassment
Stalking	Indicator: Stalking from supervisor occurred
Experience	Indicator: Whether the employee was harassed in the previous 2 years
Harassment Characteristics	
Supervisor Harasser	Indicator: Harasser was employee's supervisor
Coworker Harasser	Indicator: Harasser was employee's coworker
Female Harasser	Indicator: Harasser was female
Male Harasser	Indicator: Harasser was male
Harassers Both Sex	Indicator: Harassers were male & female
Multiple Harassers	Indicator: There were multiple harassers
Freq > 1 a Month	Indicator: Harassment occurred more than once a month
Dur > 3 Months	Indicator: Harassment lasted for more than three months
Workplace Characteristics	
More Men	Indicator: Workplace was composed of mostly men
Equal Men/Women	Indicator: Workplace was equally male and female
More Women	Indicator: Workplace was composed of mostly women
Male Supervisor	Indicator: Employee's supervisor was male
Female Supervisor	Indicator: Employee's supervisor was female
DOD	Indicator: Agency is part of the Department of Defense
Current Training	Indicator: Agency required employees to attend sexual harassment training

Table 2. MSPB Retaliation Summary Statistics for Females and Males

Variable	Harassed Females (1)	Harassed Males (2)
Employment Action	(n=1,551)	(n=467)
Work Worse	.101	.072
Denied Promotion	.067	.041
Reassigned	.023	.019
Fired	.003	.003
Adverse Action	.129	.106

Source: 1994 U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: Weighted means are reported. *n* corresponds to the number of observations.

Table 3a. MSPB Summary Statistics for Female Sample: Personal Demographics

Variables	Full Sample (1)	Harassed (2)	No Adverse Action (3)	Adverse Action (4)	Difference (3)-(4) (5)
Education	(n=3,733)	(n=1,524)	(n=1,320)	(n=198)	
Less than College Degree	.669	.612	.605	.635	-.030
College Degree	.244	.293	.300	.271	.027
Graduate Degree	.087	.095	.095	.094	.001
Marital Status	(n=3,884)	(n=1,596)	(n=1,308)	(n=207)	
Single	.210	.254	.253	.268	-.015
Married	.556	.481	.490	.433	.057
Divorced/Widowed	.234	.265	.257	.299	-.042
Age	(n=3,961)	(n=1,605)	(n=1,314)	(n=206)	
Age 16-24	.029	.054	.057	.023	.034**
Age 25-34	.207	.255	.262	.264	-.003
Age 35-44	.349	.418	.406	.480	-.074
Age > 45	.415	.273	.275	.232	.043
Pay Grade	(n=4,213)	(n=1,626)	(n=1,325)	(n=211)	
Pay Grades 1-4	.081	.083	.071	.156	-.086*
Pay Grades 5-10	.619	.589	.599	.511	.088
Pay Grades 11-15	.299	.326	.328	.332	-.005
Pay Grades SES	.001	.002	.004	.000	.002
Occupation	(n=3,878)	(n=1,589)	(n=1,306)	(n=205)	
Clerical/Blue Collar	.520	.505	.513	.552	-.040
Professional/Management	.445	.461	.456	.387	.068
Other Job/Trainee	.035	.034	.031	.060	-.029
Supervisor	.149	.144	.143	.094	.048*
(F=3,880, H=1,591, NA=1,303, A= 209)					
Workplace Characteristics					
Male Supervisor	.628	.673	.660	.825	-.165***
(F=3,857, H=1,578, NA=1,295, A=204)					
Female Supervisor	.372	.327	.340	.175	.165***
(F=3,857, H=1,578, NA=1,295, A=204)					
DOD	.391	.432	.426	.528	-.102*
(F=4,227, H=1,620, NA=1,321, A=209)					
Training			.138	.232	-.093*
(H=1,202, NA=1,004, A=139)					
Workplace Sex Integration	(n=3,895)	(n=1,599)	(n=1,309)	(n=209)	
More Men	.345	.429	.423	.503	-.080
Equal Men/Women	.357	.303	.314	.207	.108**
More Women	.298	.268	.263	.290	-.028

Source: U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: Weighted means are reported. Columns (1)–(4) are labeled with the sample analyzed. Column 5 reports the difference between columns (3) and (4) and the statistical significance of that difference according to a *t*-test. *, **, *** indicate significance at the 10, 5, and 1 percent levels. *F* represents the full sample of females, *H* is short for harassed females, *NA* is short for the sample of females that did not experience an adverse action, and *A* is short for the sample that experienced an adverse action. The numbers following *H*, *NA*, *A*, and *n* are the number of observations for the respective group.

Table 3b. MSPB Summary Statistics for Male Sample: Personal Demographics

Variables	Full Sample (1) (n=3,067)	Harassed (2) (n=469)	No Adverse Action (3) (n=389)	Adverse Action (4) (n=44)	Difference (3)-(4) (5)
Education	(n=3,067)	(n=469)	(n=389)	(n=44)	
Less than College Degree	.489	.466	.438	.650	-.212**
College Degree	.331	.370	.379	.344	.036
Graduate Degree	.179	.164	.182	.006	.176***
Marital Status	(n=3,203)	(n=499)	(n=409)	(n=53)	
Single	.130	.226	.213	.310	-.097
Married	.755	.612	.619	.655	-.036
Divorced/Widowed	.115	.163	.168	.034	.134***
Age	(n=3,278)	(n=499)	(n=409)	(n=54)	
Age 16-24	.007	.018	.021	.008	.013
Age 25-34	.155	.211	.203	.228	-.025
Age 35-44	.323	.441	.442	.504	-.062
Age > 45	.515	.331	.355	.261	.074
Pay Grade	(n=3,521)	(n=502)	(n=409)	(n=54)	
Pay Grades 1-4	.036	.060	.052	.099	-.046
Pay Grades 5-10	.398	.363	.358	.464	-.106
Pay Grades 11-15	.559	.574	.585	.437	.147
Pay Grades SES	.007	.003	.004	.000	.004*
Occupation	(n=3,200)	(n=496)	(n=407)	(n=52)	
Clerical/Blue Collar	.370	.385	.363	.527	-.164
Professional/Management	.584	.577	.603	.365	.239**
Other Job/Trainee	.046	.038	.034	.108	-.074
Supervisor	.297	.277	.291	.226	.064
(F=3,206, H=496, NA=407, A= 54)					
Workplace Characteristics					
Male Supervisor	.855	.769	.772	.747	.025
(F=3,189, H=495, NA=406, A=53)					
Female Supervisor	.145	.231	.228	.253	-.025
(F=3,189 H=495, NA=406, A=53)					
DOD	.521	.449	.442	.578	-.136
(F=3,541, H=501, NA=409, A=53)					
Training			.101	.106	-.005
(H=506, NA=298, AA=36)					
Workplace Sex Integration	(n=3,895)	(n=500)	(n=410)	(n=53)	
More Men	.611	.496	.468	.634	-.166
Equal Men/Women	.142	.197	.199	.124	.074
More Women	.247	.306	.333	.241	.092

Source: U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: Weighted means are reported. Columns (1)–(4) are labeled with the sample analyzed. Column 5 reports the difference between columns (3) and (4) and the statistical significance of that difference according to a t-test. *, **, *** indicate significance at the 10, 5, and 1 percent levels. *F* represents the full sample of females, *H* is short for harassed males, *NA* is short for the sample of males that did not experience an adverse action, and *A* is short for the sample that experienced an adverse action. The numbers following *H*, *NA*, *A*, and *n* are the number of observations for the respective group.

Table 4a. MSPB Summary Statistics for Female Sample: Harassment Characteristics

Variable	Harassed (1)	No Adverse Action (2)	Adverse Action (3)	Difference (2)-(3) (4)
Type of Harassment	(n=1,642)	(n=1,338)	(n=213)	
Assault	.016	.011	.057	-.046
Favors	.090	.081	.162	-.081**
Teasing	.665	.658	.839	-.181***
Looks	.484	.454	.657	-.203***
Calls	.160	.142	.300	-.158***
Dates	.194	.187	.220	-.033
Touching	.484	.473	.597	-.124**
Stalking	.105	.095	.197	-.102**
Harasser Characteristics				
Supervisor Harasser (H=1,533, NA=1,260, A=206)	.291	.237	.686	-.448***
Coworker Harasser (H=1,533, NA=1,260, A=206)	.532	.540	.510	.029
Female Harasser (H=1,566, NA=, 1,303, A=195)	.012	.010	.024	-.014
Male Harasser (H=1,566, NA=1,303, A=195)	.934	.932	.945	-.012
Harassers Both Sexes (H=1,566, NA=1,303, A=195)	.054	.058	.032	.026
Multiple Harassers (H=1,500, NA= 1,240, A=197)	.217	.199	.335	-.136**
Freq >1 a Month (H=1,613, NA=1,325, A=207)	.419	.379	.716	-.337***
Dur > 3 Months (H=1,584, NA=1,303, A=210)	.437	.410	.695	-.285***
Response to Harassment				
Reported (H=1,531, NA=1,274, A=200)	.205	.171	.459	-.289***
Harassment Power (H=1,441, NA=1,171, A=200)	.428	.398	.631	-.233***

Source: U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: Weighted means are reported. Columns (1)–(3) are labeled with the sample analyzed. Column 4 reports the difference between columns (2) and (3) and the statistical significance of that difference according to a t-test. *, **, *** indicate significance at the 10, 5, and 1 percent levels. *H* is short for harassed females, *NA* is short for the sample of females that did not experience an adverse action, and *A* is short for the sample that experienced an adverse action. The numbers following *H*, *NA*, *A*, and *n* are the number of observations for the respective group.

Table 4b. MSPB Summary Statistics for Male Sample: Harassment Characteristics

Variable	Harassed (1) (n=506)	No Adverse Action (2) (n=412)	Adverse Action (3) (n=55)	Difference (2)-(3) (4)
Type of Harassment				
Assault	.016	.003	.041	-.038
Favors	.073	.082	.059	.023
Teasing	.578	.589	.610	-.020
Looks	.377	.361	.475	-.114
Calls	.166	.156	.197	-.041
Dates	.154	.163	.045	.118***
Touching	.373	.407	.331	.077
Stalking	.107	.084	.236	-.152*
Harassment Characteristics				
Supervisor Harasser (H=467, NA=390, A=51)	.157	.097	.531	-.435***
Coworker Harasser (H=467, NA=390, A=51)	.633	.685	.335	.352***
Female Harasser (H=471, NA=395, A=49)	.659	.662	.514	.148
Male Harasser (H=471, NA=395, A=49)	.231	.219	.405	-.187*
Harassers Both Sexes (H=471, NA=395, A=49)	.109	.120	.081	.039
Multiple Harassers (H=453, NA=382, A=47)	.185	.184	.271	-.087
Freq > 1 a Month (H=494, NA=408, A=55)	.285	.273	.514	-.242**
Dur > 3 Months (H=478, NA=397, A=54)	.372	.341	.677	-.336***
Response to Harassment				
Reported (H=461, NA=385, A=51)	.139	.113	.359	-.246**
HarassmentPower (H=446, NA=366, A=50)	.240	.229	.355	-.125

Source: 1994 U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: Weighted means are reported. Columns (1)–(3) are labeled with the sample analyzed. Column 5 reports the difference between columns (2) and (3) and the statistical significance of that difference according to a t-test. *, **, *** indicate significance at the 10, 5, and 1 percent levels. *H* is short for harassed males, *NA* is short for the sample of males that did not experience an adverse action, and *A* is short for the sample that experienced an adverse action. The numbers following *H*, *NA*, *A*, and *n* are the number of observations for the respective group.

Table 5. OLS Regression Results
Dependent Variable: *Adverse Action*

Variable	Female (1)	Male (2)
Reported	0.100*** (0.036)	0.127* (0.071)
Supervisor Harasser	0.183*** (0.032)	0.327*** (0.075)
Favors in Experience	-0.026 (0.055)	-0.040 (0.054)
Touching in Experience	0.039 (0.025)	-0.078** (0.035)
Looks in Experience	0.025 (0.023)	0.054 (0.040)
Calls in Experience	0.109*** (0.039)	0.034 (0.055)
Dates in Experience	-0.016 (0.032)	-0.100** (0.047)
Teasing in Experience	0.043* (0.025)	-0.042 (0.035)
Stalking in Experience	0.075 (0.055)	0.094 (0.075)
Frequency > Once a Month	0.070** (0.028)	-0.017 (0.043)
Duration > 3 Months	0.006 (0.029)	0.072 (0.045)
Harassers Both Sexes	-0.043 (0.055)	-0.234* (0.124)
Female Harasser	0.099 (0.135)	0.007 (0.047)
Multiple Harassers	0.017 (0.040)	0.127 (0.111)
Training	0.023 (0.038)	0.035 (0.043)
DOD	0.031 (0.025)	0.089*** (0.033)
Pay Grade 1-4	0.550*** (0.159)	0.113 (0.124)
Pay Grade 5-10	0.405*** (0.154)	0.008 (0.076)
Pay Grade 11-15	0.451*** (0.153)	-0.018 (0.064)
Age 25-34	0.116** (0.048)	0.047 (0.110)
Age 35-44	0.139*** (0.050)	0.104 (0.110)

Age > 45	0.131** (0.052)	0.093 (0.109)
Male Supervisor	0.069*** (0.023)	-0.002 (0.035)
Clerical / Blue Collar	-0.159* (0.087)	-0.160 (0.129)
Professional/Management	-0.193** (0.088)	-0.126 (0.129)
Supervisor	-0.004 (0.028)	0.010 (0.029)
College	0.019 (0.028)	0.004 (0.041)
Grad School	0.003 (0.037)	-0.057 (0.041)
Single	0.022 (0.030)	-0.001 (0.042)
Divorced/Widowed	0.020 (0.031)	-0.098** (0.042)
Constant	-.5178*** (.1644)	0.069 (0.174)
Number of Observations	1,465	430
R- Squared	0.247	0.423

Source: 1994 U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. The dependent variable is *Adverse Action*. Robust standard errors are reported in parentheses, and the regressions include a weighting variable. Indicator variables for missing values for each of the variables, but *Adverse Action*, are included in the specifications, but the coefficients are not reported. Omitted categories are *Assault*, *Coworker Harasser*, *Male Harasser*, *Pay Grade SES*, *Age 16-24*, *Female Supervisor*, *Trainee/Other Job*, *Less than College Degree*, and *Married*.

Table 6. OLS Regressions Results with Interaction Variable
Dependent Variable: *Adverse Action*

Variable	Female (1)	Male (2)
Reported	0.015 (0.033)	0.123 (0.075)
Supervisor Harasser	0.130*** (0.025)	0.323*** (0.077)
Supervisor Harasser*Reported	0.257*** (0.086)	0.063 (0.161)
Constant	-0.456*** (0.153)	0.070 (0.174)
Number of Observations	1,465	430
R-Squared	0.266	0.423

Source: 1994 U.S. Merit Systems Protection Board Sexual Harassment Survey.
Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. The dependent variable is *Adverse Action*. Robust standard errors are reported in parentheses, and the regressions include a weighting variable. Column 1 reports results for the specifications analyzing the female sample, and Column 2 reports results for the specifications analyzing the male sample. Each variable controlled for in the specifications presented in Table 5 are controlled for in these specifications.

Table 7. 2SLS Regression Results for Female Sample

Variable	IV (1)	IV First Stage (2)
Reported	0.610 (0.459)	
Supervisor Harasser	0.164*** (0.042)	0.042 (0.036)
Favors in Experience	-0.013 (0.081)	-0.050 (0.075)
Touching in Experience	0.017 (0.044)	0.076** (0.032)
Looks in Experience	0.006 (0.034)	0.026 (0.031)
Calls in Experience	0.043 (0.069)	0.102* (0.053)
Dates in Experience	-0.026 (0.050)	0.008 (0.051)
Teasing in Experience	-0.001 (0.050)	0.078** (0.035)
Stalking in Experience	0.032 (0.090)	0.119* (0.064)
Frequency > Once a Month	0.024 (0.055)	0.099*** (0.036)
Duration > 3 Months	0.028 (0.043)	-0.026 (0.035)
Harassers Both Sexes	-0.020 (0.059)	-0.022 (0.074)
Female Harasser	-0.044 (0.255)	0.331** (0.143)
Multiple Harassers	0.006 (0.051)	0.004 (0.045)
Training	0.018 (0.053)	0.008 (0.050)
DOD	0.004 (0.046)	0.061* (0.034)
Pay Grade 1-4	0.320 (0.260)	0.413** (0.186)
Pay Grade 5-10	0.159 (0.260)	0.447*** (0.171)
Pay Grade 11-15	0.191 (0.268)	0.475*** (0.165)
Age 25-34	0.133* (0.081)	-0.015 (0.079)
Age 35-44	0.141* (0.085)	0.014 (0.081)

Age > 45	0.174** (0.085)	-0.057 (0.080)
Male Supervisor	0.072** (0.035)	0.012 (0.035)
Clerical / Blue Collar	-0.168 (0.125)	0.024 (0.095)
Professional/Management	-0.181 (0.124)	-0.015 (0.092)
Supervisor	0.006 (0.042)	-0.022 (0.040)
College	0.031 (0.039)	-0.049 (0.038)
Grad School	0.012 (0.045)	-0.056 (0.050)
Single	0.053 (0.044)	-0.039 (0.037)
Divorced/Widowed	0.029 (0.041)	0.001 (0.039)
Harassment Power		0.066** (0.033)
Constant	-0.321 (0.290)	-0.457** (0.192)
Number of Observations	1,294	1,361
F-Stat of Excluded Instruments	5.07	
Cragg-Donald Wald F Statistic	11.157	
Durbin-Wu-Hausman test for Endogeneity P-Value	0.633	

Source: 1994 U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. The dependent variable in the first stage is *Reported*. The dependent variable in the second stage is *Adverse Action*. *Harassment Power* is the instrumental variable. Robust standard errors are reported in parentheses, and the regressions include a weighting variable. Indicator variables for missing values for each of the variables, but *Adverse Action*, are included in the specifications, but the coefficients are not reported. Omitted categories are *Assault*, *Coworker Harasser*, *Male Harasser*, *Pay Grade SES*, *Age 16-24*, *Female Supervisor*, *Trainee/Other Job*, *Less than College Degree*, *Married*, and *More Men*.

Table 8. Heckman Selection Regression Results for Male and Female Samples

Variable	Female Heckman First (1)	Female Heckman Second (2)	Male Heckman First (3)	Male Heckman Second (4)
Reported		0.099*** (0.035)		0.126* (0.067)
Supervisor Harasser		0.184*** (0.031)		0.327*** (0.071)
Favors in Experience		-0.029 (0.054)		-0.040 (0.052)
Touching in Experience		0.039 (0.024)		-0.078** (0.033)
Looks in Experience		0.025 (0.023)		0.054 (0.038)
Calls in Experience		0.110*** (0.039)		0.034 (0.052)
Dates in Experience		-0.016 (0.031)		-0.100** (0.045)
Teasing in Experience		0.044* (0.025)		-0.042 (0.034)
Stalking in Experience		0.076 (0.054)		0.094 (0.071)
Frequency > Once a Month		0.069** (0.028)		-0.018 (0.041)
Duration > 3 Months		0.006 (0.029)		0.072* (0.042)
Harassers Both Sexes		-0.041 (0.055)		-0.234** (0.117)
Female Harasser		0.102 (0.133)		0.006 (0.045)
Multiple Harassers		0.016 (0.039)		0.127 (0.105)
Training		0.023 (0.037)		0.035 (0.040)
DOD	0.131* (0.072)	0.026 (0.025)	-0.116 (0.093)	0.090*** (0.032)
Pay Grade 1-4	-0.904 (0.691)	0.575*** (0.162)	0.317 (0.392)	0.108 (0.121)
Pay Grade 5-10	-0.883 (0.679)	0.431*** (0.157)	0.173 (0.325)	0.005 (0.076)
Pay Grade 11-15	-0.674 (0.674)	0.470*** (0.156)	0.202 (0.310)	-0.022 (0.065)
Age 25-34	-0.500** (0.204)	0.127*** (0.048)	-0.253 (0.342)	0.050 (0.106)
Age 35-44	-0.548***	0.152***	-0.143	0.106

	(0.203)	(0.050)	(0.342)	(0.104)
Age > 45	-1.092***	0.160***	-0.642*	0.100
	(0.205)	(0.052)	(0.343)	(0.114)
Male Supervisor	0.059	0.065***	0.002	-0.226**
	(0.080)	(0.023)	(0.039)	(0.113)
Clerical / Blue Collar	-0.164*	0.193	-0.165	0.356*
	(0.087)	(0.188)	(0.125)	(0.192)
Professional/Management	-0.195**	0.075	-0.129	0.269
	(0.088)	(0.191)	(0.124)	(0.194)
Supervisor	-0.002	-0.043	0.009	0.067
	(0.028)	(0.097)	(0.028)	(0.106)
College	0.014	0.160*	0.004	-0.016
	(0.028)	(0.092)	(0.039)	(0.116)
Grad School	0.001	0.066	-0.057	-0.083
	(0.037)	(0.120)	(0.039)	(0.137)
Single	0.015	0.271***	-0.005	0.359***
	(0.029)	(0.089)	(0.048)	(0.116)
Divorced/Widowed	0.008	0.452***	-0.101**	0.315**
	(0.030)	(0.088)	(0.046)	(0.147)
Equal Men & Women	-0.319***			0.213
	(0.090)			(0.144)
More Women	-0.306***			0.263**
	(0.086)			(0.105)
Constant	-0.525***	1.074		0.060
	(0.172)	(0.715)		(0.175)
Number of Observations	3,562	3,562		430
Wald Test of Independent Equations (Prob > chi2)		0.083		0.887

Source: 1994 U.S. Merit Systems Protection Board Sexual Harassment Survey.

Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. The first stage Heckman variables are regressed on *Harassed* (whether the employee was harassed in the previous 2 years). The dependent variable in each second stage is *Adverse Action*. Robust standard errors are reported in parentheses, and the regressions include a weighting variable. Indicator variables for missing values for each of the variables, but *Adverse Action*, are included in the specifications, but the coefficients are not reported. Omitted categories are *Assault*, *Coworker Harasser*, *Male Harasser*, *Pay Grade SES*, *Age 16-24*, *Female Supervisor*, *Trainee/Other Job*, *Less than College Degree*, *Married*, and *More Men*.

CHAPTER II

STOPPING THE NUISANCE: EMPIRICAL EVIDENCE THAT FEDERAL COURTS CAN DETER FRIVOLOUS EEOC CHARGES

INTRODUCTION

In the 2013 case *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court expressed concern that the liberal retaliation standard adopted by the Fifth Circuit would encourage the filing of frivolous claims, stating, “lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat.”²⁶ While the court is correct to worry about the presence of frivolous claims, as scholars have discussed the severe consequences of such claims for decades, in support of this statement, the Supreme Court cited an increase in the total number of retaliation charges filed with the Equal Employment Opportunity Commission (“EEOC”) since 1997. While suggestive, this evidence actually only established that retaliation claims have increased over time. In theory one may expect a positive relationship between liberal court decisions and the filing of frivolous claims, or nuisance suits, in court or charges with federal agencies, such as the EEOC, but little empirical evidence exists establishing this relationship. In this chapter, I provide the first empirical analysis of whether this relationship exists. By taking advantage of the variation created by two employment law circuit splits directly related to the Supreme Court’s *Nassar* decision, in this chapter, I empirically test whether federal court decisions affect the filing behavior of affected employees and applicants. Specifically, I test whether the adoption of a liberal standard that favors employees increases frivolous charges, distinguished by

²⁶ Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013). The Supreme Court of the United States has cited its worry about a floodgate of litigation when adopting certain legal standards since as early as 1908, and during 2010–2013, the Court addressed this concern at least fourteen times (Levy 2013).

a label given by the EEOC, and whether the adoption of a strict standard that favors the employer decreases such charges.

Under Title VII of the Civil Rights Act, a charging party must file any Title VII charge with the EEOC before the Title VII claim can be filed in federal court. Approximately one hundred thousand employees file employment discrimination charges with the EEOC each year (Selmi 2001; EEOC Litigation Statistics). While only twenty thousand of these charges are ever filed in court (Selmi 2001; EEOC Litigation Statistics), the filing of a frivolous charge with the EEOC still wastes the resources of the government, the employee, and the employer, as the agency is required to investigate each claim and attempt to mediate each claim. The employer also must respond to the claim and investigation, generally with the assistance of an attorney, and because of these costs, an employer may choose to settle a frivolous claim, resulting in an unjust transfer of wealth.

Theoretically, all else equal, a liberal employment discrimination standard (one that is favorable for the plaintiff, or the employee) should increase the probability that a plaintiff prevails at trial, and thus, increase the number of charges, including those with less merit, filed with the EEOC between 2007 and 2013.²⁷ On the other hand, a stricter standard (one that is favorable to the employer) should decrease the filing of frivolous charges.²⁸ In this chapter, I empirically test this hypothesis by analyzing a dataset comprised of every charge filed with the EEOC. This dataset includes the claims made by each charging party and the outcomes of the EEOC process. Several outcomes of the EEOC process can provide information on whether the agency views a charge as

²⁷ I analyze years 2007–2013, so that I can analyze three years of data before and after the decisions that I analyze.

²⁸ While such standards may affect charges of merit, in this chapter, I focus on the number of charges filed and whether these charges included frivolous charges, as these charges are the charges that waste resources. In addition, frivolous charges are the most likely to be affected by a change in circuit court decisions because they are the marginal charges—the charges where a change in the probability of success would greatly affect the likelihood that an affected party files a charge.

frivolous, where frivolous is defined as having a very low probability of succeeding at trial. These outcomes include whether the EEOC finds cause and the processing label that the EEOC assigns a charge at the beginning of its process. These processing categories include whether, based on the charge alone, the EEOC believes the charge is likely to be dismissed.

In this chapter, I use difference-in-differences specifications that take advantage of the timing of the decisions of courts of appeals and the fact that these decisions only affect one circuit to isolate the effect of the adoption of a certain employment law standard on the filing of charges with the EEOC. In particular, I analyze two circuit splits regarding causation standards for retaliation claims filed under Title VII and claims filed under the ADA that were directly related to the Supreme Court's decision in *Nassar*. Through this analysis, I find evidence that liberal standards can increase the rate of charges filed with the EEOC and that decisions that favor the employer can decrease such filings. In addition, there is evidence that more liberal standards increase the probability that the EEOC labels a charge as likely to be dismissed or finds no cause and that the employer-friendly charges actually decrease these probabilities—suggesting that liberal standards can increase frivolous claims and strict standards can decrease them. These results also suggest that the Supreme Court's fears that led it to reject a more liberal retaliation causation standard in *Nassar* may have been justified.

I begin by discussing frivolous charges and the relevant literature that models a plaintiff's decision to file a frivolous claim and the consequences of such claims being filed. I then provide background information on the EEOC, including a discussion of how an affected employee may consider relevant circuit law when filing a charge and how the EEOC process can be used to determine whether a charge is frivolous. Before discussing my empirical strategy, I review the circuit splits that I empirically analyze and the framework used to analyze the effect of federal

court decisions on EEOC charge filings and outcomes. The empirical results provide statistical evidence suggesting that courts of appeals decisions affect EEOC proceedings and filings. I conclude by discussing the potential mechanisms of the specific results and the consequences that can be drawn from the results.

BACKGROUND ON FRIVOLOUS CLAIMS: RELEVANT LITERATURE

Much like the Supreme Court, legal and economic scholars have expressed concerns over the presence of frivolous lawsuits for quite some time. The frivolous lawsuit literature has primarily addressed potential mechanisms to prevent the filing of such lawsuits and the consequence of such lawsuits. There is also substantial law and economics literature that theoretically models the filing of frivolous claims.

The Supreme Court has expressed a concern over the costs associated with frivolous law suits for years, and it has taken several measures to prevent the filing of such claims, including adopting strict standards and developing and strengthening Rule 11 of the Federal Rules of Civil Procedure.²⁹ Rule 11 states that sanctions are warranted if a claim does not have reasonable legal and factual support. This rule was designed to reduce the filing of frivolous lawsuits due to the costs associated with them. Theoretically, these costs include efficiency costs, including wasted financial resources and time, and fairness concerns that result when unworthy plaintiffs recover for frivolous claims during settlement due to the costs of litigation (Katz 1990). However, some scholars have also suggested, that theoretically, frivolous lawsuits may still assist in optimal deterrence because the threat of frivolous suits increases as harmful action increases due to the

²⁹ Other mechanisms adopted to prevent such claims include rule of professional conduct and tort reform.

assumption that frivolous suits often accompany or follow legitimate suits (referred to as “piggybacking”) aligning social and private incentives to take care (Miceli and Stone 2014).

Bone (1997) provided a very good summary of the law and economics literature that models the decision to file a frivolous claim. These models often begin with a definition of what is considered a frivolous lawsuit, including a suit with a very small probability of success or a suit with a negative expected value. The models then seek to determine the circumstances under which a plaintiff will file a frivolous lawsuit and potential mechanisms that can decrease the filing of such suits. For example, Rosenberg and Shavell (1985) found that because of the costs of responding to litigation and the promise of settlement, under the American system of the allocation of attorney’s fees, where litigant’s pay their own fees, a plaintiff may still file a claim if the defendant is aware that it is frivolous (even if information is perfect). Because defendants can often simply respond to a frivolous claim with a blanket denial with little costs if the defendant is aware of the merits of the case, Katz (1990) introduced imperfect information to explain why plaintiffs continue to file frivolous claims. Bone (1997) expanded these models by addressing both scenarios and the wealth of knowledge of a plaintiff, and concluded that when the plaintiff or defendant has critical private information, it is very likely that either unjustified settlement occurs or a frivolous claim is filed in court. To avoid these fairness and efficiency costs, Bone (1997) suggested that regulation is often necessary in any situation of asymmetric information. In an EEOC claim, one party almost always has more factual information about the claim than another. The regulation suggested by Bone (1997) includes penalties, such as Rule 11, strict pleading standards, much like the Supreme Court later adopted in *Bell Atlantic Corporation v. Twombly* (2007)³⁰ and *Ashcroft v.*

³⁰ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

Iqbal (2009),³¹ and early screening of claims by the court. While early screening occurs in EEOC administration through the labeling process, defendants are actually not aware of that process or the investigation results, and as a result they do not learn any private information known by the plaintiff.³² In addition, Guthrie (2000) modeled frivolous claims using prospect theory and behavioral economics, concluding that a plaintiff is likely to prefer trial due to the risk-seeking behavior that plaintiffs who file frivolous claims exhibit.

There is a lack of empirical evidence on the effect of court decisions or standards such as Rule 11 on frivolous claims. However, several surveys have been conducted to determine whether Rule 11 has the potential to reduce such claims. Surveys of federal and state judges have found that Rule 11 in its previous form did decrease frivolous suits (Bone 1997). Theoretically, Polinsky and Rubinfeld (1993) walked through the economic framework of sanctioning frivolous claims, including a defendant's decision to challenge a claim as frivolous and a plaintiff's decision to file the claim, and they concluded that certain sanctions can deter future frivolous claimants. However, the authors did not provide empirical support of this conclusion. Several studies have analyzed the effect of the elevated pleading standard created by the Supreme Court in *Twombly* and *Iqbal* on filings for dismissal and dismissal rates (Seiner 2010; Hannon 2008). Generally, these studies found that the elevated standard increased dismissal rates and motions to dismiss. In fact, Seiner (2010) found that the elevated standard increased the dismissal of Title VII claims. However, these studies did not analyze whether the case strength was altered, and they actually suggest that the elevated standard did not improve the quality of pleadings.

³¹ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

³² Although an employer may infer the strength of a charge based on the EEOC's investigation, the process is still one of imperfect information.

Scholars, practitioners, and judges have also expressed a concern over the prevalence of frivolous employment discrimination charges. Recently, Judge Bennett (2013) pointed out the great increase in summary judgment in employment discrimination partly due to a rise in frivolous claims, comparing the claims to prison rights cases.³³ Other scholars also recognized the move toward an increase in granting motions for arbitration and an increase in awarding attorney's fees to employers, all in response to the overwhelming increase in frivolous claims. Some even fear that there is a moral hazard effect of Title VII or that employers would not hire members of a protected class out of fear of frivolous lawsuits (Coleman et al. 2008). However, Coleman et al. (2008) used the Multi-City Study of Urban Inequality, in which minority respondents reported whether they had experienced racial discrimination to confirm that nearly all of the black workers who said they had experienced workplace discrimination experienced some form of wage discrimination.³⁴ Of course, this article did not disprove the presence of frivolous employment law claims, and in fact, it found that the majority of white females who complained of discrimination did not have evidence of wage discrimination.

Despite all of this focus on the prevalence of and high costs associated with frivolous claims, there is a general consensus that there is a lack of empirical evidence that supports the adoption of certain standards or rules to address this problem, even in the employment discrimination literature (Levy 2013). An empirical analysis of the effect of a legal standard on the filing of a charge and the merit of a charge is very difficult, as there are almost no publically available datasets that report detailed information about claims filed in federal court, including the outcome of the claim. While one could look at published opinions, published opinions are

³³ Judge Bennett is a judge for the U.S. District Court Judge in the Northern District of Iowa.

³⁴ The authors constructed wage equations using the information provided from this survey to test for wage discrimination.

generally not representative of all litigation, and analyses of such decisions, especially in the employment law context can produce biased results (Clermont and Eisenberg 2002). In this chapter, I overcome these difficulties and provide empirical evidence of whether adopting a strict standard (in this study, a but-for causation standard) can decrease the presence of frivolous lawsuits (or whether the adoption of a liberal standard—in this study, a mixed-motive causation standard can increase this presence) using data that is representative and not subject to the selection bias: the universe of charges filed with the EEOC between 2007 and 2013.

BACKGROUND ON THE EEOC: HOW FEDERAL COURTS COULD AFFECT EEOC FILINGS

Federal courts require the claimant to timely file a charge with the EEOC and receive a “right to sue” notice before filing a Title VII claim in federal court (Macfarlane 2011), and Title VII actually mandates this filing.³⁵ Every charge is filed with a local EEOC office, and each office is located in a specific federal circuit. As laid out in Title VII, the charge may then be filed in the district court in the state where the alleged action occurred or where the employment records of the employer are kept. If filed in federal court, the charges filed in federal court according to these limitations will clearly be affected by the decisions of the circuit in which they are filed.³⁶ As a result, there is always a substantial possibility that federal court interpretations will affect the outcome of Title VII cases filed in court.³⁷ The relevant circuit law consists of the decisions of the

³⁵ The EEOC must also issue a right to sue notice even if it does not find cause. If the state where the charging party files a charge has a Fair Employment Practices Agency (“FEPA”), then the charging party can file the claim with the FEPA, who will then communicate with the EEOC through their worksharing agreements.

³⁶ In the 1990 case *Yellow Freight System, Inc. v. Donnelly*, the Supreme Court held that federal and state courts have concurrent jurisdiction over all Title VII claims. As a result, a charging party can file a Title VII claim in state court after exhausting the agency procedures. Historically, civil rights plaintiffs have favored filing their charges in federal court (Powley 1991). However, even if plaintiffs favor state court due to recent precedent in either venue or convenience, the employer always has the ability to remove the entire action to federal court under subject matter jurisdiction, and very often they choose to do so (Moberly 1997). In addition, though not bound by the decisions of the courts of appeals, state courts often look to those decisions for persuasive authority.

³⁷ Unfortunately, there is no way to know the percentage of Title VII cases filed in federal court as opposed to state court due to data limitations (Burbank et al. 2014). Burbank et al. (2014) reported that California tends to have more discrimination cases filed in state court than federal court, however these cases are not limited to Title VII claims and

federal circuit with jurisdiction over the charge. Each of these requirements and circumstances also applies to charges and claims filed under the ADA.

Before the EEOC process begins, an affected individual must decide to file a charge. Knowing that relevant circuit law will likely affect the outcome of his or her claim, when making this decision, the affected individual may consider that law. If a court decision favors an affected party and applies in the district where the party would file a potential lawsuit and to the potential case that the charging party would bring, then the affected party should be more likely to file a charge with the EEOC following that decision. In addition, the charges most likely to be affected by a change in circuit law are frivolous charges, as these are the marginal charges—the charges where a small change in the probability of success could increase the likelihood that an affected individual decides to file the charge. Of course, this prediction assumes that the affected party is aware of relevant court decisions.³⁸ Because the majority of charging parties are not represented by an attorney when first filing a charge with the EEOC, this may be a strong assumption (Selmi 1996). However, in the data I analyze in this chapter, at least 10% of the sample is represented by an attorney.³⁹ In addition, employees can learn of changes in the law through other sources, such as learning through the experience of peers who filed a claim in court (who will be more likely to win if a more liberal standard is adopted), consulting human resource offices, and

the estimates were roughly computed from previous estimations of the percentage of charges filed with the state agency that are filed in court, again not limited to Title VII claims. Alternatively, Marchand (2009) found that class action plaintiffs in Michigan prefer to file employment claims in federal court.

³⁸ Finding evidence of this effect on EEOC charges would suggest that courts could have an even greater effect on frivolous charges filed in federal court. The Supreme Court has mentioned this concern in other cases. For example, the Court showed concern that a per se rule in antitrust law would promote frivolous claims and thus increase litigation cost in *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007). In addition, scholars have noted that some courts regard this statement from *Nassar* as a holding and have relied on it when interpreting other claims (Sperino and Thomas 2014).

³⁹ This data does not include whether a charging party is represented by an attorney, nor has this data ever been presented in any other study. However, in this data, approximately 10% of the charging parties request a right to sue notice before the investigation is complete. It is very unlikely that a party would know to make this request or would chose to make this request without having counsel.

consulting nonprofit organizations designed to promote awareness about filing employment discrimination claims. Also, as noted in the introduction, five of the current justices of the Supreme Court of the United States believe that a liberal employment law decision can increase the number of charges, even frivolous charges, filed with the EEOC.⁴⁰ Although such a liberal standard increases the probability that a plaintiff wins in court by changing the causation standard, it does not change the fact pattern individual cases. As a result, it is very likely that such a decision could increase the filing of frivolous claims to the extent that affected employees believe they have a higher probability of success. However, this is an empirical question that has yet to be answered.

The fact that a court decision can change both the rate of and nature of the charges filed with the EEOC also complicates the ability to predict how a circuit court decision will affect the outcome of EEOC charges. The following section discusses the EEOC process and what EEOC outcomes can signal whether the relevant charges were frivolous or not. The next section also previews potential changes within the labor market and the EEOC process that could complicate this analysis, making it more difficult to predict the effect of a liberal standard on filing behavior.

EEOC Administration and How It Reveals the Strength of a Charge

In this chapter, I also test whether the adoption of a liberal standard increases the likelihood that frivolous charges are filed. There are two stages that are illustrative of the merit of a charge filed with the EEOC. In 1995, the EEOC adopted a Priority Case Handling Process, in which an EEOC complaint specialist assigns a charge an A, B, or C code based on the charge's likelihood of resulting in a reasonable cause finding (Nielsen et al. 2008). The EEOC assigns this label very soon after receiving a charge. An "A" charge is expected to result in a reasonable cause finding, a

⁴⁰ Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531–2532 (2013).

“B” charge will likely result in a reasonable cause finding, and a “C” charge has “uncertain merit.” This determination affects the amount of attention and investigation that each charge will receive. For example, as discussed below, “C” charges may not be eligible for mediation. Receiving a “C” charge is indicative of a frivolous charge.⁴¹ In fact, in the data analyzed in this chapter, the EEOC labels such charges as likely to be dismissed, and these charges fare much worse during the EEOC process (Nielsen et al. 2008).⁴²

The most determinative stage of the administration of a charge is likely the EEOC’s determination of reasonable cause. After a charge is labeled, the EEOC then will attempt to mediate the claim, and if mediation fails, the EEOC will begin an investigation. Following the investigation, the EEOC must determine whether a charge has cause or not. The EEOC will find reasonable cause if it believes that an unlawful employment practice more likely than not occurred under Title VII. This determination has several important consequences, including whether the EEOC will attempt to conciliate a claim and whether the charging party decides to file the charge in federal court. If the EEOC finds cause, the EEOC must then attempt to conciliate the charge with the employer. If the EEOC does not find cause, it does not necessarily mean that the charge was frivolous. However, because the EEOC almost always adopts a liberal standard (Lemos 2010) and likely considers its promotion of those standards when considering a charge’s merit, if the

⁴¹ One benefit of looking at this labeling to determine the nature of the charge filed is that these labels are likely not affected by the court decisions of each circuit. The EEOC complaint specialist is not always a lawyer (Green 2001; EEOC Mediation). Although the specialist should still be versed in the law and able to understand relevant precedent, it is not likely that this officer makes such determinations such as whether the relevant circuit court made a recent decision.

⁴² While Nielsen et al. (2008) does not find that “C” cases fair worse when they are filed in federal court, this is likely due to the selection of cases that are ever filed.

EEOC does not find cause, it is suggestive of a charge's lack of merit. In the data analyzed in this chapter, the EEOC codes whether it found "no cause."⁴³

Mechanism Complications

There are two prominent factors that could complicate the analysis performed in this chapter. All else equal, a liberal standard should increase the filing of affected claims and the number of frivolous charges labeled as frivolous by the EEOC, however, the response of employers and the actions of the EEOC could complicate this prediction. A decision that is favorable to an employee is also unfavorable to an employer. As a result, it may be the case that an employer responds to such a decision by changing the workplace to prevent discriminatory actions, such as retaliation. This decision should then lower the instances of retaliation, which would lower the number of retaliation charges filed. If employers respond in this manner, then I should be less likely to find that an increase in frivolous charges occurred due to the adoption of a liberal standard.

The EEOC's consideration of relevant circuit law could affect its labeling of a charge and its cause determinations. It should be the case that a more liberal decision would lead to the EEOC less likely to label a cause as likely to dismiss. If this is the case, then this consideration would make it more difficult to determine the effect of a strict standard on frivolous charges because a decrease in dismiss labels may not suggest a lack of frivolous charges. Again, if this analysis nonetheless finds a decrease in the probability that a charge is labeled frivolous following the

⁴³ Lemos (2010) labels a charge as "liberal" if it favors the plaintiff and finds that of 98 issues which the EEOC and the Supreme Court both addressed, the Court and the EEOC disagreed one-third of the time, and the EEOC's position was liberal 91% of the time.

adoption of a certain standard, then this consideration would not negate the conclusion that the standard decreased the number of frivolous charges filed with the EEOC.

Fortunately, there is evidence that the EEOC does not consider circuit law when making such decisions. This makes it less likely that this consideration would complicate the analysis of this chapter. Instead, there is evidence that the EEOC only considers its own position and interpretation of the law. The EEOC frequently issues guidance in which it takes a strong position on certain employment discrimination standards that have not been settled by the Supreme Court. Perhaps the most direct evidence that the EEOC promotes its own policies and interpretations when administering EEOC charges and determining the merit of the charge appears in a footnote of a guidance document that addresses employer liability for sexual harassment. In this footnote, the EEOC directly disagrees with the Fourth Circuit's interpretation of the definition of "tangible employment action," a term used by the Supreme Court to reference the employer liability standard, stating, "It is the Commission's view that the Fourth Circuit misconstrued [the Supreme Court's meaning in] *Faragher* and *Ellerth*."⁴⁴

Additional evidence that the EEOC considers its own policies when making decisions is found in how the EEOC determines whether it would like to represent a charging party in federal court, a right the EEOC has had since the Equal Employment Opportunity Act of 1972. In 1996, the EEOC adopted a national enforcement plan in response to the recently developed Task Force on Charge Processing. The resulting plan identified priorities of the EEOC, including "[c]ases having the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes enforced by the Commission." These cases of priority include "[c]ases

⁴⁴ *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 472 (1998).

involving legal issues where there is a conflict in the federal circuit courts on a Plan priority or in which the Commission is seeking Supreme Court resolution of such issue.” The fact that the EEOC prioritizes these cases specifically shows that it considers the decisions in a way contrary to the merit-based-decision approach discussed above. This consideration could alter the EEOC’s behavior by making it more likely to label a charge an “A” charge in circuits that have adopted standards that contradict their policies, or in undecided circuits.⁴⁵ As a result of this complication, I do not analyze likely cause labels in this chapter.⁴⁶

Although anecdotal evidence and theoretical modeling is helpful in predicting how federal court decisions affect EEOC outcomes, empirical evidence is necessary due to the presence of these complications. In the following section, I empirically analyze two recent causation circuit splits expected to affect the outcome of federal court cases using difference-in-differences analysis to see whether federal court decisions with the potential to affect trial outcomes can actually affect the outcome of EEOC charges or individual filing behavior.

⁴⁵ Moss et al. (2001) actually found that the office where the charge was filed explained 42% of the variation in whether the EEOC labeled a charge an “A” charge. However, they did not find this effect for “C” labels. The authors attribute this variation to variations in culture, leadership, and what each office prioritizes. While this is a possible explanation, an additional explanation would be that the EEOC considers relevant circuit law.

⁴⁶ Although this hypothetical scenario may seem farfetched, in my research of the EEOC, I have frequently heard of the EEOC “fast-tracking cases” and pursuing cases that directly conflict relevant circuit law. For example, recently, the Northern District of Iowa ordered the EEOC to pay attorney’s fees of 4.7 million dollars because it did not substantiate its claim. A Wall Street Journal article recently recognized this case and the growing concern of court sanctions (Gersham 2014). This article referenced *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2010 WL 520564 (N.D. Iowa Feb. 9, 2010). In fact, the Supreme Court recently heard arguments in the case *EEOC v. Mach Mining* regarding whether federal courts can investigate EEOC procedures when they file claims in federal court, as many courts are concerned they do not do proper investigations and conciliation attempts before filing (Bravin and Trotman 2015). However, this standard should really only affect a small portion of EEOC charges, as the EEOC only represents a charging party in approximately 300 cases a year. This number has declined recently. In 2012 and 2013, the EEOC only represented a charging party in 155 and 148 cases respectively.

EMPIRICAL ANALYSIS: DO FEDERAL COURT DECISIONS AFFECT FILING OF EEOC CHARGES?

Relevant Circuit Court Decisions

Congress used many vague and undefined terms to draft Title VII, making Title VII what scholars refer to as a common-law enabling statute (Lemos 2010). Because of this language, it is the federal courts' responsibility to interpret the provisions of the statute during case-by-case adjudications. These interpretations range from determining what actions constitute sex discrimination to determining how detailed EEOC investigations should be. However, not all of these interpretations and resulting standards are strong enough that they are expected to affect trial outcomes, much less the outcomes of EEOC charges and EEOC filings. As a result, I analyze two circuit splits that were expected to have "bite" in both arenas. Both splits are directly related to the causation standard decided by the Supreme Court in *University of Texas Southwestern Medical Center v. Nassar*.

Generally, courts, including the Supreme Court of the United States, have adopted two different causation standards for plaintiffs to satisfy when proving their case under nondiscrimination statutes. While these standards vary from statute to statute and slightly vary with evidentiary requirements, they can be generally described as the mixed-motive causation standard and the but-for causation standard. A mixed-motive causation standard requires the plaintiff to show that the fact that he or she was a member of a protected class (including the disabled under the ADA) was a factor in the employer's adverse action against the plaintiff. On the other hand, the much stricter but-for standard requires the plaintiff to prove that the employer would not have made the decision to act adversely against the plaintiff if the plaintiff was not a member of a protected class (or a disabled individual). It is generally understood that the but-for standard is much more employer friendly, as it is difficult to prove and easy for the employer to

rebut. The analysis that I present in this chapter studies the effect of the but-for standard as adopted by the Seventh Circuit with respect to claims filed under the ADA and the effect of a lenient mixed-motive standard adopted by the Fifth Circuit with respect to retaliation claims brought under Title VII. Both of these decisions are directly related to the Supreme Court's adoption of the but-for standard for retaliation claims in *Nassar*.

In *Nassar*, the five justice majority held that to establish a retaliation claim under the anti-retaliatory provision of Title VII, the charging party must prove that they would not have experienced the relevant adverse employment action but for the fact that they are a member of a protected class no matter whether the employee presents direct or circumstantial evidence. As described by Tananbaum (2013), before *Nassar*, it was not clear what causation standard applied to Title VII retaliation charges. In 1989 the Supreme Court decided *Price Waterhouse v. Hopkins* to address what evidence was necessary to prove that an adverse action was “because” the plaintiff was a member of a protected class under Title VII.⁴⁷ The Court held that claims in which the action that occurred was based on a discriminatory action and a nondiscriminatory action (mixed motive) were allowed if direct evidence was shown, but that the employer can overcome this burden if he proves that the action would have occurred even if the member was not a member of the protected class. While this case did not apply to other nondiscrimination statutes or Title VII retaliation claims, circuit courts began to apply this standard in cases that brought retaliation claims, claims under the ADA, and claims under Age Discrimination Employment Act (“ADEA”).

Following *Price Waterhouse*, Congress amended Section 107 of the Civil Rights Act in 1991.⁴⁸ The section now states that when being a member of a protected class was a motivating

⁴⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁴⁸ 42 U.S.C. § 2000e-2.

factor for discrimination, the action is an unlawful employment practice even if other factors motivated the action, and even if the employer can show that he would have acted if not for the discrimination.⁴⁹ Because this section did not directly state that it applied to retaliation claims filed under Title VII, the circuit courts continued to apply the standard developed in *Price Waterhouse* (Rupe et al. 2014). As a result, if direct evidence was shown, mixed-motive retaliation cases could be entertained under Title VII, but if the plaintiff relied on circumstantial evidence, the courts required the employee to establish “but-for” causation.

Similarly, courts have been split regarding the causation standard applicable for all claims filed under the ADA since its passage in 1990, and the Supreme Court has not decided this issue. Early in the ADA’s history, circuits were split as to whether a motivating factor standard, much like the standard that applies to Title VII claims, should apply or whether a “solely because of” standard should apply (Schlesinger 2014). Similar to the original language in Title VII, the ADA simply says that the employer may not discriminate “because of” a disability. However, after the adoption of the 1991 amendments, the circuits that previously adopted the solely because of standard slowly began to reverse the standard, and the overwhelming majority of the circuits that addressed this issue applied the mixed-motive standard under *Price Waterhouse* with the exception of the Sixth Circuit.⁵⁰

In 2009, the law became even more muddled for both Title VII retaliation claims and ADA claims when the Supreme Court adopted a much stricter standard for causation, when interpreting

⁴⁹ Note that following the adoption of these amendments, the circuit courts were still split as to whether direct evidence was required to shift the burden and apply *Price Waterhouse*. The Supreme Court held that direct evidence was not required in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

⁵⁰ The Sixth Circuit continued to apply the “solely because of” standard until it adopted the but-for standard in 2012. As a result, the Sixth Circuit is omitted from my analysis. In addition, the Tenth Circuit and the Eleventh Circuit occasionally applied a but-for standard, and as a result, those circuits are also omitted from the analysis.

“because of age” for claims filed under the ADEA. In *Gross v. FBL Financial Services, Inc.*,⁵¹ the Supreme Court held that no matter what evidence is presented, a but-for causation standard applies to claims brought under the ADEA. The Supreme Court explained that because Congress did not amend the ADEA to include the language of Section 107 of Title VII when it amended Title VII in the 1991, the mixed-motive standard did not apply to ADEA claims. While this decision did not address ADA claims or Title VII retaliation claims, following *Gross*, it was now an acceptable argument that a but-for standard should apply and uncertainty resulted in every circuit. However, only two circuits were quick to directly address the resulting ambiguity soon after the decision.

Following *Gross*, the Seventh Circuit was the only circuit to quickly address the uncertainty and to adopt this but-for causation standard for claims filed under section 201 of the Civil Rights Act.⁵² The Seventh Circuit based its decision on the fact that Congress did not address this statute when amending Title VII. The Seventh Circuit made this position even clearer and stronger when it later applied this standard to ADA claims in *Serwatka v. Rockwell Automation, Inc.*⁵³ The Seventh Circuit had not previously spoken directly to the causation standard of the ADA. In *Serwatka*, the court suggested that this logic applied to all federal claims, however, the holding explicitly applied to ADA claims.⁵⁴ I hypothesize that following the adoption of this standard in *Serwatka*, employees should be less likely to file ADA charges with the EEOC in the Seventh Circuit and that the rate of frivolous charges should also decrease. Figure 1 illustrates the dates of the relevant ADA standards and decisions and the relevant comparison groups.

⁵¹ *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

⁵² *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009).

⁵³ *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

⁵⁴ Though many courts continue to apply the mixed-motive standard under the ADA, the Seventh Circuit and the Sixth Circuit are the only courts to have adopted the but-for standard, and the Supreme Court has not decided this split (Schlesinger 2014). The Sixth Circuit adopted this in May of 2012.

On the other hand, in the 2010 case, *Smith v. Xerox*, the Fifth Circuit, while still recognizing that Section 107 did not apply to retaliation claims, instead held that a much lower standard applies for Title VII retaliation claim.⁵⁵ The Fifth Circuit held that a plaintiff did not need direct evidence to entertain a mixed-motive retaliation claim. The court only required the plaintiff to prove a mixed-motive theory, or that being a member of a protected class was one of the employer's reasons for acting against the plaintiff.⁵⁶ Previously, the Fifth Circuit, as with the other circuits that had addressed causation in retaliation claims, held that the *Price Waterhouse* burden-shifting standard applied, requiring the plaintiff to establish "but-for" causation for retaliation claims if only circumstantial evidence is shown. Of course, the Supreme Court rejected both standards and directly overruled this decision in *Nassar*.⁵⁷ I hypothesize that before *Nassar* and after the adoption of the mixed-motive standard, individuals should be more likely to file a retaliation claim in the Fifth Circuit. In addition, as predicted by the Supreme Court, it is likely that this increase in claims is due to an increase in frivolous claims. Figure 2 illustrates the dates of the relevant Title VII retaliation standards and decisions and the relevant comparison groups.

Two characteristics of these standards make them ideal for the analysis in this chapter. First, this circuit split is expected to have bite. Not only has the Supreme Court spoken to these causation standards, but experimental studies have shown that causation standards do affect jury verdicts and awards (Rupe et al. 2014; Sherwyn et al. 2014). In addition, following the Supreme Court's adoption of the elevated but-for standard in *Nassar* and *Gross*, scholars have expressed

⁵⁵ *Smith v. Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010).

⁵⁶ While many courts had applied a mixed-motive theory to Title VII retaliation claims before *Gross* (Sperino and Thomas 2014), this standard generally required direct evidence. To succeed on a mixed-motive claim, these courts required direct evidence to then apply the *Price Waterhouse* test. The Fifth Circuit was the only court to directly hold that a mixed-motive retaliation claim did not require direct evidence to shift the burden. The Supreme Court previously held that direct evidence is not required in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

⁵⁷ *Smith v. Xerox* was the only case mentioned and overruled by the Supreme Court.

concern that this standard will make it very difficult for charging parties to succeed. For example, Curry (2014) referred to overcoming the but-for standard as “an onerous task.” Finally, Congress has also shown concern over the standard; after *Gross*, it proposed the Protecting Older Workers Against Discrimination Act (“POWDA”⁵⁸), which would expand the mixed-motive language found in Section 107 of Title VII to the ADA, ADEA, and Title VII retaliation claims (Sherwyn et al. 2014).

Secondly, in 1998, the EEOC issued guidance that suggested that its position was that a mixed-motive standard applies to Title VII retaliation claims and to ADA retaliation claims.⁵⁹ This guidance illustrate that the EEOC has its own agenda which it may enforce in this area, which makes it more likely that the EEOC will not enforce the stricter standard adopted by the Seventh Circuit when finding cause or labeling a charge.⁶⁰ This factor makes it less likely that the EEOC’s consideration of the circuit law will bias the results of this analysis to no effect.

Data

The data I use to analyze the effect of these two circuit court decisions on employment discrimination filing behavior were compiled from a Freedom of Information Act (“FOIA”) request to the EEOC. Through the FOIA process, I received data on every discrimination charge filed with the EEOC from 1985 through August 2013.⁶¹ The information provided for each charge includes the state where it was filed and the date it was filed, from which I can discern whether it was filed in a circuit with a certain standard in effect at the time. Before looking at the empirical

⁵⁸ Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-3721>.

⁵⁹ While it is not clear that the EEOC supported a mixed-motive standard for ADA claims at this time, it is likely that they did due to this and other guidance.

⁶⁰ While this consideration may also make it more likely that the EEOC labels a charge likely cause or finds cause, this analysis focuses on dismiss labels.

⁶¹ This dataset is comprised of over two million charges, however, this analysis is limited to charges filed after 2007.

strategy used to isolate this effect, it is necessary to describe the available data and define the key variables used in my analysis.

Currently, when the EEOC receives a charge, it first conducts an intake interview with the charging party. From this interview, the agency obtains detailed information that is later entered into a computerized data system. Through my FOIA request, I was able to obtain all of the information that was not confidential due to privacy restrictions recorded by the EEOC during this process for all charges filed since 1985, thus covering the period of this analysis (2006–2013). The EEOC records the date that the charge was received and what local office received the charge. For each charge, the EEOC also records characteristics of the charging party, including, his or her date of birth, race, national origin, and gender. The EEOC also records information about the employer, including the industry of the employer (recorded as North American Industry Classification System (“NAICS”) codes), the city and state of the employer, and the number of employees of the employer, which is recorded as a range.

From the intake interview and the formal intake charge that the charging party completes, the EEOC also records important information about the claim the charging party is making. The EEOC records what statute or statutes the charging party is filing under and the basis or bases of the claim. The basis is essentially the type of violation that the charging party is claiming occurred, for example, sex discrimination, age discrimination, sexual harassment, or disability discrimination to name a few. The EEOC also records the issue or issues that the charging party claims illustrated this basis. For example, the charging party could complain that he or she was fired, denied a promotion, transferred, received less pay, or was not accommodated. It is important to recognize that charging parties often filed charges with more than one basis and more than one issue. Very often, retaliation charges are filed with additional charges. In fact, during the years

analyzed in this chapter, only 20% of charges that included a retaliation charge did not include any other bases. Comparatively, approximately 60% of the charges that included a disability basis (under the ADA) did not include any other bases.

In this empirical analysis, I analyze whether a circuit court decision can affect the percentage of charges of a certain type filed with the EEOC. The Seventh Circuit's but-for standard is expected to affect ADA claims, and the Fifth Circuit's mixed-motive standard should only affect retaliation charges. If a claim in my data includes a retaliation charge, then the variable *Retaliation Charge* is equal to one. Similarly, if claim includes a charge filed under the ADA, *ADA Charge* is equal to one.

Following the intake interview, the EEOC also records the priority case code that the intake officer assigns the charge. As discussed above, these codes are based on the likelihood that the EEOC finds cause or litigates the charge, and these codes are generally "A", "B", and "C" labels. For the purpose of this analysis, I analyze a variable equal to one if the charge was labeled a C charge because it was suitable for dismissal (*Dismiss Label*) because I believe it is the most likely signal that a charge is frivolous. The summary statistics presented in Tables 1 and 2 include the percentage of claims, by the sample analyzed, that received a dismiss label. Approximately 12% of ADA charges and 12% of retaliation charges receive a dismiss label.⁶²

The EEOC also updates this computerized data as a charge is resolved. A charge can be resolved in several ways. The charge could be mediated, and the EEOC would code the resolution as "successful mediation." Alternatively, the charge could be resolved because the charging party did not cooperate with the investigation. Importantly, the EEOC also records the outcome of its

⁶² These statistics are also presented for the full sample in Table A of the Appendix.

cause determinations. Although the above legal discussion focused on the EEOC issuing reasonable cause findings, because the EEOC does this in other situations, such as when the charging party requests to file litigation on their own, the EEOC actually records whether it found that the charge had no cause. Again, the EEOC makes this determination following an investigation of a charge, and as such, it have more information regarding the charges merit. In this chapter, I also analyze a variable equal to one if the EEOC does not find cause (*No Cause Finding*). As seen in Tables 1 and 2, approximately 65% of the ADA charges and 65% that are evaluated for a charge receive a no cause finding. This variable provides further support that a charge might be frivolous; if a charge receives a no cause finding, then after the investigation, the EEOC believed it did not merit a day in court.

Empirical Analysis

To isolate the effect of these standards on the filing of frivolous charges with the EEOC, I use difference-in-differences estimation (“DD”). As is illustrated in Figure 2, only charges filed in the Fifth Circuit following the 2010 *Smith v. Xerox* decision and before the *Nassar* decision should be affected by the mixed-motive standard. A DD technique isolates this effect by subtracting the difference between the types of circuits before the adoption of a standard from the difference between the types of circuits after the adoption of a standard. For example, to analyze the Fifth Circuit’s mixed-motive standard alone without the consideration of any other standard, one takes the difference of the means of the charges filed in the Fifth Circuit before the standard was adopted in *Xerox* to those of other circuits at the same time period and compares that difference to the difference between the means of the charges filed in the Fifth Circuit and the other circuits after the adoption of the standard in *Xerox*. The only assumption necessary for this estimation is that there was not a distinct shock to the number of charge filings in the Fifth Circuit or to the number

filed in other circuits (and not the Fifth Circuit) at the time the court decided *Xerox*.⁶³ The means needed to construct the differences for this technique are provided in Table 1.⁶⁴ For the purposes of Table 1, which provides summary statistics according to this design, if the charge was filed after the date of the *Xerox* decision, then the variable *PostXerox* is equal to one.

As is illustrated in Figure 1, only charges that should be affected by the but-for standard were filed in the Seventh Circuit following the 2010 *Serwatka v. Rockwell* decision. Table 2 provides the means of each outcome before and after *Serwatka* within and out of the Seventh Circuit. For the purposes of Table 2, if the charge was filed following the date of *Serwatka*, then *PostSerwatka* is equal to one.⁶⁵ Each of the total samples is limited to charges filed after 2007 and before the Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar* in June 2013.

Looking at the means, the adoption of the mixed-motive standard by the Fifth Circuit seems to have a very small effect on the rate of Title VII retaliation charges filed.⁶⁶ Note that before the adoption of the standard, the percentage of retaliation charges in the Fifth Circuit was 1.1 percentage points higher than the percentage in all other circuits. Following the adoption of mixed-motive standard, that difference increased to 2.2 percentage points, implying a DD estimate of a 1

⁶³ The control group used to compare to the Fifth Circuit is all other circuits but the Seventh Circuit, which adopted the but-for standard in *Serwatka* three months before the Fifth Circuit decided *Xerox*, which could have decreased retaliation charges.

⁶⁴ Each analysis does not include “duplicates” from the data. I consider an observation a duplicate if the date of filing, date of resolution, city of charge, and date of birth are the same for an observation. While this process drops approximately 5% of each sample, results remain very similar when these observations are included. I drop these duplicates for each analysis. When analyzing “no cause findings,” my analysis is also limited to charges that were not dropped because of no jurisdiction, because the charging party failed to respond, or because the charging party sought a right to sue letter. Each of these decisions would not affect the merit of the charge.

⁶⁵ All of the other circuits did not change their standard during the time period. The control group used to compare to the Seventh Circuit is all other circuits but the Eleventh, Tenth, and Sixth Circuits, which applied the but-for standard or a solely because of standard during this time period without explicitly adopting it.

⁶⁶ While occasionally I refer to these claims simply as retaliation claims, this analysis is limited to retaliation claims filed under Title VII, as they are the only ones addressed in *Xerox* and *Nassar*.

percentage point increase in the rate of retaliation charges. Table 2 also shows evidence that the Seventh Circuit's adoption of the but-for standard may have decreased ADA charges: the difference in the percentage of ADA claims between the Seventh Circuit and all other circuits was 2.1 percentage points and that difference decreased to 0.5 percentage points following the adoption of the but-for standard, implying a DD estimate of a 1.6 percentage point decrease in the rate of ADA charges.⁶⁷

To determine how these standards affect the probability that a charge filed is considered frivolous, in addition to comparing the differences between circuit and year, I can also compare the differences between the type of charge that should be affected and all other charges. This technique is known as triple-difference (“DDD”). In this estimation, the only assumption necessary to isolate the effect is that there was not an unobserved shock at the time of the adoption that affected retaliation charges and no other charges. Table 4 illustrates this technique for the effect of the Seventh Circuit's but-for standard on ADA charges by presenting each difference in the means. The means are also presented in the bottom panel of Table 2. To get the DDD estimate, I difference the means of charges that include an ADA charge and those that do not before and after *Serwatka* in the Seventh Circuit (the treated circuit). I then compare that total difference to the same difference constructed from all other circuits that were not treated, and the DDD estimate is -4.3 percentage points.⁶⁸ This result suggests that the adoption of the but-for standard decreased dismiss labels for ADA claims by 4.3 percentage points. Table 3, which provides the same estimation for

⁶⁷ Because these statistics report a percentage of claims, and a floodgate is often associated with raw numbers, it is also worthwhile to look at the number of retaliation charges filed in each circuit and each time period. Table 1 also provides those statistics. Note the decrease in ADA charges that occurred after the *Serwatka* decision in the Seventh Circuit and the very large increase that occurred in the other circuits, likely due to the ADA Amendments adopted in 2008.

⁶⁸ Note that this analysis does not include the Sixth, Tenth, or Eleventh Circuits because of complications due to their application of a standard similar to a but-for standard.

the Fifth Circuit’s standard suggests that the Fifth Circuit’s adoption of the mixed-motive standard increased the percentage of dismiss labels for retaliation charges by 4.4 percentage points. Similar constructions performed for no cause findings suggest similar, though much smaller estimates. The means presented in Table 3 are also presented in the bottom panel of Table 1.

While these summary statistics are interesting and suggest certain patterns, many differences in characteristics between circuits and time can affect these results, such as a decision related to the definition of retaliation, and this comparison assumes that the trends in these characteristics are the same in the treated and non-treated groups. As a result, to further isolate the effect through a DD or DDD estimation, I use regression analysis to estimate DD and DDD empirical specifications.

Regression Framework

A regression framework using DD and DDD models further isolate the effect of these standards on filing behavior by controlling for additional observables, including time and year fixed effects and characteristics of the charges. The DD specification isolates the policy effect by controlling for circuit-invariant changes due to differences over time, and time-invariant changes due to differences in the laws specific to a circuit. My ideal specification for analyzing the effect of the Fifth Circuit’s mixed-motive standard on the filing of retaliation charges with the EEOC follows below.

$$(1) \text{ Retaliation Charge} = \beta_0 + \beta_1 \text{Post} + \beta_2 \text{FifthCircuit} + \beta_3 \text{PostXerox} \times \text{FifthCircuit} \\ + Z'\beta_4 + Y'\beta_5 + \varepsilon$$

Retaliation Charge, a variable equal to one if the charge filed is a retaliation charge, is the dependent variable. *PostXerox* is a variable equal to one if the observation was filed following the *Xerox* decision, and *FifthCircuit* is a variable equal to one if the observation was filed in a state

that is part of the Fifth Circuit (Louisiana, Texas, and Mississippi). $PostXerox \times FifthCircuit$ is the interaction between these two terms, and thus is only equal to one if the observation was filed in the Fifth Circuit after the court decided *Xerox*. In this specification, the coefficient on β_3 is the DD estimate. If this coefficient is positive and statistically significant, then the mixed-motive standard increased the rate of retaliation charges filed as compared to all other charges filed with the EEOC which should not have been affected by that decision. This regression framework allows me to control for characteristics of each year and circuit that could affect the result, such as a change in political administration or an additional relevant employment law decision in a circuit court: Z is the vector of year fixed effects and Y is the vector of circuit fixed effects. This specification controls for time-invariant characteristics of a circuit that may affect charge filings and circuit-invariant characteristics of time that may affect filings.

When analyzing the potential effect of the Seventh Circuit's but-for standard on ADA claims the specification is very similar:

$$(2) \quad ADA \text{ Charge} = \beta_0 + \beta_1 PostSerwatka + \beta_2 SeventhCircuit + \beta_3 PostSerwatka \times SeventhCircuit + Z'\beta_4 + Y'\beta_5 + \varepsilon$$

$ADA \text{ Charge}$ is equal to one if the charge filed included an ADA claim. $Seventh \text{ Circuit}$ is equal to one if the charge was filed in the $SeventhCircuit$, and $PostSerwatka$ is equal to one if the charge was filed after the decision. Again, the DD estimate is the coefficient on the interaction of these two variables, and if it is negative and statistically significant, then the Seventh Circuit's but-for standard decreased the rate of ADA charges filed in the circuit. All other variables are defined the same as in Equation (1).

The above-described specifications test the likelihood that a circuit court decision changes the rate of filings of a certain type of charge following a decision, however, it cannot tell us

anything about the merit of the charge filed. In an attempt to answer this question, I also estimate the effect of circuit court decisions on the probability that the charge receives a dismiss label and the probability that a charge receives a no cause finding. Because I also have the ability to isolate time- and circuit-invariant differences due to charge type differences, I estimate this effect using triple-differences (DDD). The following specifications are a DDD specification that I use to estimate the DDD coefficients for the two causation standards.

$$(3) \text{ ChargeLabel} = \beta_0 + \beta_1' \text{PostXerox} + \beta_2 \text{FifthCircuit} + \beta_3 \text{RetaliationCharge} + \beta_4 \text{PostXerox} \times \text{FifthCircuit} + \beta_5 \text{PostXerox} \times \text{RetaliationCharge} + \beta_6 \text{FifthCircuit} \times \text{ChargeType} + \beta_7 \text{PostXerox} \times \text{FifthCircuit} \times \text{RetaliationCharge} + X' \beta_8 + Z' \beta_9 + Y' \beta_{10} + \varepsilon$$

$$(4) \text{ ChargeLabel} = \beta_0 + \beta_1 \text{PostSerwatka} + \beta_2 \text{SeventhCircuit} + \beta_3 \text{ADACHarge} + \beta_4 \text{PostSerwatka} \times \text{SeventhCircuit} + \beta_5 \text{PostSerwatka} \times \text{ADACHarge} + \beta_6 \text{SeventhCircuit} \times \text{ADACHarge} + \beta_7 \text{PostSerwatka} \times \text{SeventhCircuit} \times \text{ADACHarge} + X' \beta_8 + Z' \beta_9 + Y' \beta_{10} + \varepsilon$$

I use the above equations to analyze two dependent variables: *DismissLabel* and *NoCauseFinding*. *ChargeLabel* is a stand in for these two variables. The main difference between this equation and Equation (1) is the inclusion of the triple interactions.⁶⁹ The coefficient on the interaction between all three of the variables (*PostXerox* x *FifthCircuit* x *RetaliationCharge* and *PostSerwatka* x *SeventhCircuit* x *ADACHarge*) of interest (β_7) is the DDD estimate. β_7 represents the effect of the relevant decision, controlling for the unobserved differences associated with the difference in circuit, the difference in types of charges, and the difference in time (before and after the decision). In these specifications, I also control for a vector of charge characteristics (X), such as personal demographics of the charging party and the other bases brought by the party that can be expected

⁶⁹ When analyzing the effect of the mixed-motive standard on retaliation charges in equation (3), these interactions include *PostXerox* x *RetaliationCharge* and *FifthCircuit* x *RetaliationCharge*. When analyzing the effect of the but-for standard in equation (4) on ADA charges, these interactions include: *PostSerwatka* x *ADACHarge* and *SeventhCircuit* x *ADACHarge*.

to affect the outcome of a charge and could be affected by unobserved shocks.⁷⁰ A positive and statistically significant β_7 suggests an increase in the probability that a charge of a certain type (the charge type expected to be affected) receives a certain label due to the standard adopted by the court/or courts.

The data includes all of the information necessary to isolate the true effect of the above circuit court decisions on filing outcomes by estimating Equations (1)–(4). In the following paragraphs, I define each of the additional variables used to estimate Equations (1)–(4) to analyze the effect of each standard as created from this EEOC data. The names of each of these variables are provided in italics and in parentheses.

When estimating Equations (3) and (4), X includes the characteristics of the charging party, including age of the charging party when the charge was filed (*Age*), the sex of the charging party (*Female*), the race of the charging party (*Asian, White, Indian, Black, Other Race*), and the national origin of the charging party (*Hispanic NO, Mexican NO, Asian NO, Eastern NO, African NO, and Arab NO*). X also includes whether the employer was federal or state government (*Education Employer, Federal Government Employer, and State Government Employer*).⁷¹ Additionally X includes legal information about the charge: the basis or bases of charge (*Race Basis, Sex Basis, Sexual Harassment Basis, National Origin Basis, Age Basis, Pay Male Basis, Pay Female Basis, Religion Basis, Color Basis, Mental Disability Basis, Marital Status Basis, and Sexual Orientation Basis*) and the employment issue or issues that support the charge (*Terms Issue, Hiring Issue,*

⁷⁰ I control for these characteristics to lessen any concerns that certain factors that could affect the outcome of a charge at the same time of this decision. I do not control for these characteristics in Equations (1) and (2), because I do not believe they should affect the type of charge filed. In addition, I am interested in the total change in charge filings, not the change controlling for whether an individual of a certain type filed a charge. However, if I include this information, the results remain the same in size, significance, and direction.

⁷¹ The data includes also includes two digit NAICS codes for industry when available (23 industry categories, labeled industry). However, because these codes are frequently missing, I only control for industry in specifications that I estimated for robustness checks.

Demotion Issue, Discharge Issue, Wages Issue, and Discipline Issue). In the ADA analyses, *X* also includes types of disability claims (*Hearing Basis, Vision Basis, Mental Retardation Basis, Physical Basis, and Alcohol or Drug Basis*).⁷² *X* also includes whether the charge was filed in an EEOC office (*EEOC Office*) as opposed to a state agency office. Table A in the Appendix provides the means of each of these variables for each EEOC charge filed during the time period analyzed, 2007–2013.

Regression Results

The empirical results provide evidence that suggests that circuit court decisions affect the filing of charges with the EEOC. Each analysis was conducted using Ordinary Least Squares (“OLS”) estimations of Equations (1)–(4). Table 5 provides the DD and DDD estimates from the estimations of Equations (1) and (3), which analyze the effect of the Fifth Circuit’s mixed-motive standard on retaliation charges. Table 6 provides the DD and DDD estimates from the estimations of Equations (2) and (4), which analyze the effect of the Seventh Circuit’s but-for standard on ADA claims. Full results from these regressions are provided in Tables B and C of the Appendix.

There is evidence that the adoption of the mixed-motive standard in the Fifth Circuit increased the share of charges that are retaliation charges. The results provided in Table 5 suggest that the adoption of the mixed-motive standard increased the probability that a charge filed is a retaliation charge by 1 percentage point. This result is statistically significant at the 5% level and suggests a 3.1 percent increase. These results provide some evidence that the Supreme Court’s fear of an increase in retaliation charges due to the adoption of a mixed-motive causation standard could have been warranted.

⁷² None of these categories are exhaustive, however, they are the most common categories represented in the data and the most relevant to this analysis. As a result, the omitted category in the data is simply all other issues, bases, or disability type.

Table 6 provides evidence that the Seventh Circuit's adoption of the but-for standard decreased the percentage of ADA filings. In each specification where the Seventh Circuit's standard is analyzed, the coefficients on *SeventhCircuit x PostSerwatka* are negative and statistically significant. The results suggest a 1.4 percentage point decrease, implying a 5.5 percent decrease in ADA claims. These results suggests that the but-for causation standard adopted in the *Serwatka* decision decreased ADA charges and that, therefore, *Nassar* could have decreased the rate of retaliation charges filed with the EEOC. But, these results do not tell us whether the charges that the mixed-motive standard increased and the but-for standard decreased were frivolous.

Tables 5 and 6 provide results that suggest that the charges that were affected by the standards were frivolous charges. The results suggests that the mixed-motive standard increased the probability that a retaliation charge receives a dismiss label by 4.1 percentage points. These results are statistically significant and amount to increases of 34.2% in the rate of charges that are considered frivolous. The fact that the standard did not increase no cause findings is not too surprising, as often charges that receive a "C" label may not continue throughout the entire process. Ultimately, these results suggest that the weak standard increased the probability that a charge was considered frivolous.

There is also strong evidence that the adoption of the but-for standard decreased the probability that an ADA charge received a dismiss label. The results suggest that the but-for standard decreased dismiss labels by 4.5 percentage points and no cause findings by 1.3 percentage points for ADA claims. These results translate into a decrease of 32.4% for dismiss labels and 2.2% for no cause findings. These results clearly indicate that this employer-friendly standard decreased the percentage of frivolous charges filed. The difference in percentage effect for dismiss

labels and no cause findings is not surprising, because the majority of frivolous charges may not ever reach this stage, and the majority of charges that reach this point receive a no cause finding.

Each of the results discussed above are robust when several characteristics of the estimated specifications or samples are altered. Each of the specifications discussed above do not include controls for industry because a large percentage of the observations (close to 50% of the sample for the causation specifications) are missing an industry variable. Alternative specifications include industry controls, and the results remained very similar in size, direction, and significance. In addition, each of the *Post* variables was constructed such that the actual date of the decision marks the beginning of the post period. Alternatively, it could be assumed that it takes several months for a decision to affect filing behavior as the affected parties must learn of the change. In alternative specifications, I alter the creation of these variables such that the post period does not begin until three months after the decision and, in other specifications, until six months after the decision. Again, this alteration does not change the significance, or direction of the coefficients. To address additional changes were made to address concerns that the control group is generally much larger than the affected circuit, I randomly drop circuits from the control group, and again, the coefficients remained similar. In addition, the results provided that address the retaliation causation standard are for estimations of each specification limited to charges filed after 2007; however, limiting this analysis to charges filed after 2009 (the *Gross* decision) does not alter the results.⁷³

⁷³ In addition, the relevant coefficients were not statistically significant in falsification tests in which the affected group of charges was altered to a different type of charges or to different circuits.

IMPLICATIONS, EXPLANATIONS, AND CONCLUSIONS

Levy (2013) called for the Supreme Court to justify its fear of opening the litigation floodgates with empirical evidence of a likely increase in litigation rates and empirical evidence of a likely burden resulting from that increase.⁷⁴ While he acknowledged that the need to protect branches of government (which would include the EEOC and the executive branch) may justify the Court's fear, the empirical results (and strategy) provided in this chapter could also assist the Court in answering Levy's call. The evidence in this chapter suggests that the adoption of a strict standard can decrease the filing of charges by up to 5%. As a result, when the Supreme Court adopted the but-for standard in *Nassar*, it may have decreased the number of (likely frivolous) charges by up to 1,500 charges a year.⁷⁵ If one considers the full effect on the labeling of a charge, the effect could be closer to a 30% decrease on the number of frivolous charges. This evidence could also be relevant to Congress's potential adoption of POWDA,⁷⁶ which proposes the expansion of the mixed-motive language found in Section 107 of Title VII to the ADA, ADEA, and Title VII retaliation claims (Sherwyn et al. 2014).

The results that I presented in this chapter suggest a small increase in the probability that a charge filed included a retaliation charge and a large increase in the likelihood that these charges are without merit. This is not good news, as frivolous charges likely expend government and potentially court resources and result in unfair settlements.⁷⁷ In addition to evidence of a potential increase in the number of charges, there is clear evidence that the probability that a retaliation

⁷⁴ In this article, the author also recognized that when this fear was based on state courts it was justified in constitutional doctrine.

⁷⁵ This is 5% of the total number of retaliation charges filed during the analyzed time period divided by six years.

⁷⁶ Protecting Older Workers Against Discrimination Act, H.R. 3721, 111th Cong. (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-3721>.

⁷⁷ However, there could also be benefits of such filings if one believes that EEOC charges have a deterrent effect despite their merit.

charge received a dismiss label or a no cause finding increased due to the Fifth Circuit's adoption of the mixed-motive standard, suggesting that these charges were frivolous. This suggests that the standard did increase the percentage of retaliation charges that the EEOC views as meritless. The Fifth Circuit's adoption of this standard was the only clear adoption of a mixed-motive standard following *Gross* and it was the first adoption of a standard that did not require direct evidence; however, other lower courts continued to apply a mixed-motive standard if direct evidence was shown. The fact that this adoption was not a clear change, but it still had an effect on the labeling of a charge, suggests that a clearer adoption of a liberal standard, such as the first adoption of a mixed-motive standard could have an even greater effect.

It is also clear from the analysis that the decrease in ADA charges due to the Seventh Circuit's adoption of the but-for standard was a decrease in frivolous charges, as the probability that a charge was labeled as likely to be dismissed by the EEOC decreased by upwards of 30%. It has been proven through experimental evidence that a but-for causation standard can change the outcome of lawsuits by decreasing the likelihood that a plaintiff prevails in trial or lowering the damages they receive (Rupe et al. 2014; Sherwyn et al. 2010). As a result, it is not surprising that such a strong standard can affect the filing behavior of individual parties. Overall, these results suggest that the Supreme Court's adoption of the but-for causation standard for Title VII retaliation claims in *Nassar* likely did decrease the number of frivolous retaliation charges filed in all of the circuits that had not adopted such a standard. While this hypothesis cannot be empirically tested in this analysis because the case was decided in June 2013, the results suggest that such a standard would likely decrease the total number of retaliation charges filed and decrease the probability that the charges filed were considered frivolous by the EEOC.

Earlier in this chapter, I mentioned alternative considerations that could conflate this analysis—the EEOC could consider circuit law and employers could react to a change in standards. These results suggest that the EEOC does not follow relevant circuit law when labeling a charge or finding cause. If the EEOC considered the but-for standard when labeling ADA claims in the Seventh Circuit, then it should be more likely to label a charge likely to dismiss. If the EEOC considered the mixed-motive standard in the Fifth Circuit, then it should be less likely to label a charge likely to dismiss. The results contradict this potential consideration. In addition, the fact that the Fifth Circuit’s mixed-motive standard did slightly increase the number of charges filed suggests that employers did not respond to the liberal standard by changing policies and reducing retaliation. However, the decrease in ADA charges following the Seventh Circuit’s adoption of the but-for standard suggests that employers did not respond by lowering protections and increasing retaliation in the workplace.⁷⁸

One consideration that further complicates the results and could result in each of the changes in the EEOC’s labeling process and cause findings is the EEOC altering behavior with the desire to promote its own policies. The EEOC had adopted guidance supporting a mixed-motive standard for retaliation charges under each statute well before these courts adopted this standard. As a result, when the Seventh Circuit adopted the but-for standard, the EEOC could have been less likely to label a charge likely to dismiss, as the results suggested. In addition, with the hopes of changing the law following *Gross*, the EEOC may have been less likely to dismiss a charge in circuits that were undecided. If this was the case, then this change could have also affected the results suggesting an increase in frivolous charges in the Fifth Circuit. Recently, the

⁷⁸ Of course, these results do not rule out this possibility as the change in filing behavior could have outweighed the change in employer behavior that occurred.

EEOC's behavior when promoting pregnancy discrimination claims and arrest record charges that goes against federal court precedent in certain circuits suggests that the EEOC could act in such a manner. I believe that the large effects on dismiss labels suggested by these results could be the result of both of these mechanisms, but that it cannot be the result of just the EEOC's change of behavior.⁷⁹ Such a change in behavior should only affect charges that the EEOC wishes to litigate, and the EEOC litigates less than 300 charges a year. In addition, in a similarly constructed analysis, I found that there was actually no evidence that the EEOC increased likely cause labels for ADA claims following *Serwatka*.⁸⁰ Ultimately, individual filing behavior was likely affected (as is suggest by the empirical results of the but-for standard decreasing ADA and retaliation charge filings) but the EEOC could also have reacted by promoting its policies.⁸¹

Both potential mechanisms of the results of this study, an increase in frivolous charges or the EEOC's promotion of its own polices, have negative consequences. When a liberal standard is adopted, the EEOC should be less likely to label a charge a "C" charge because the standard favors the employee. If instead the EEOC is more likely to label a charge frivolous, then a charge with merit might not see its day in court. In addition, if the EEOC promotes its own policies by being more likely to find merit in a charge in a circuit where the court is less likely to find merit, then the EEOC greatly wastes resources as those charges may be filed in court only to be dismissed. As

⁷⁹ While the results could be explained by both positions, the numbers actually align such that change in frivolous charges can mostly be explained by a change in filing behavior (or fully in the Seventh Circuit). The increase in retaliation charges and decrease in ADA charges can be fully explained by the change in frivolous charges. A 34.2% increase in dismiss labels equates to an increase of approximately 597 charges in the Fifth Circuit, and a 32.4% decrease in dismiss labels in the Seventh Circuit equates to a decrease of approximately 273 charges. In addition the 3.1% increase in retaliation charges equates to 409 charges in the Fifth Circuit, and the 5.5% decrease in ADA charges also equates to a decrease of 409 charges.

⁸⁰ In fact, there was evidence that the likely cause labels decreased following this adoption, perhaps because the EEOC did consider how the relevant decision raised the standard. There was no evidence that the Fifth Circuit's *Xerox* decision affected the probability that a retaliation charge received a likely cause label.

⁸¹ The fact that the effect on labeling is much larger than the effect on number of charges suggests that some additional shift in policy may explain this difference.

illustrated by the concerns of the Supreme Court and legal and economic scholars, an increase in frivolous charges clearly wastes resources because they expend the EEOC's resources when the EEOC is required to investigate and attempt to mediate each charge and increase the possibility that an unjust transfer of wealth occurs through settlement. Unfortunately, there is no Rule 11 that prevents such a filing with the EEOC or any other federal agency.⁸²

It is possible that these results depend on the decisions being analyzed. A but-for standard is easily understood by judges as it is a very common standard for determining causation in tort law cases (Wright 1985). Other standards such as the definitions of sexual harassment or an adverse employment action may be more difficult for lower courts to implement, and thus, changes in these standards may be less likely to affect EEOC behavior or the filing of frivolous charges by an affected party. I leave this question to be answered by a later study. However, this chapter, as the first empirical study of whether court decisions can affect the filing of frivolous lawsuits, provides evidence that decisions can do just that; liberal decisions with "bite" are likely to increase the presence of frivolous claims, and strict decisions are likely to decrease them. As a result, courts may be warranted when they consider the consequences of frivolous suits and how their creation of certain standards may affect them.

⁸² Rule 11 of the Federal Rules of Civil Procedure sanctions attorneys for making frivolous arguments in a complaint.

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Figure 1. Illustration of the Seventh Circuit’s But-For ADA Causation Standard

	2007	2008	2009	2010	2011	2012	2013
First Circuit							
Second Circuit							
Third Circuit							
Fourth Circuit							
Fifth Circuit							
Seventh Circuit				<i>Serwatka v. v. Rockwell Automation, Inc.</i>			
Eighth Circuit							
Ninth Circuit							
DC Circuit							

Notes: The dark grey represents the but-for causation standard, and the white represents the mixed-motive standard under *Price Waterhouse* or uncertainty.

Figure 2. Illustration of the Fifth Circuit’s Mixed-Motive Retaliation Causation Standard

	2007	2008	2009	2010	2011	2012	2013 <i>Nassar</i>
First Circuit							
Second Circuit							
Third Circuit							
Fourth Circuit							
Fifth Circuit				<i>Smith v. Xerox Corporation</i>			
Sixth Circuit							
Eighth Circuit							
Ninth Circuit							
Tenth Circuit							
Eleventh Circuit							
DC Circuit							

Notes: The dark crosshatch represents the strictest but-for standard adopted by the Supreme Court in *Nassar*, the grey represents the mixed-motive requirement of direct evidence or uncertainty, and the white represents the Fifth Circuit’s standard that mixed-motive cases do not require direct evidence.

Table 1. Summary Statistics of the Impact of the Seventh Circuit’s Mixed-Motive Standard on Retaliation Charges

	Fifth Circuit		Not Fifth Circuit		All Circuits
	Pre Xerox	Post Xerox	Pre Xerox	Post Xerox	
Retaliation Charge	.321 [13,185] (41,077)	.347 [14,872] (42,858)	.310 [71,106] (229,675)	.325 [77,899] (239,761)	.320 [177,084] (553,439)
Dismiss Label	.150 (40,909)	.193 (42,449)	.099 (229,182)	.120 (238,110)	.119 (550,650)
Retaliation Charge	.133 (13,133)	.212 (14,763)	.095 (71,010)	.124 (77,483)	.120 (176,389)
No Retaliation	.159 (27,776)	.183 (27,686)	.100 (158,172)	.118 (160,627)	.118 (374,261)
No Cause Finding	.754 (36,094)	.787 (35,929)	.728 (201,512)	.751 (201,889)	.744 (475,424)
Retaliation Charge	.749 (11,076)	.793 (12,022)	.717 (60,463)	.750 (63,624)	.740 (147,185)
No Retaliation	.755 (25,018)	.784 (23,907)	.733 (141,049)	.751 (138,265)	.746 (328,239)

Source: EEOC Charge Data, 2007–2013 (*Nassar*), all Circuits but the Sixth.
Notes: All duplicates have been dropped. For the *No Cause Finding* statistics, all charges that were dismissed because there was no jurisdiction, because the charging party asked for a right to sue letter, or because the charging party failed to respond were also dropped.

**Table 2. Summary Statistics of the Impact of the Seventh Circuit's
But-For Causation Standard on ADA Charges**

	Seventh Circuit		Not Seventh Circuit		All Circuits
	Pre <i>Serwatka</i>	Post <i>Serwatka</i>	Pre <i>Serwatka</i>	Post <i>Serwatka</i>	
ADA Charge	.249 [7,451] (29,924)	.276 [8,620] (31,232)	.229 [36,093] (157,610)	.271 [51,232] (189,047)	.253 [103,194] (407,881)
Dismiss Label	.132 (29,879)	.237 (31,113)	.123 (157,012)	.145 (187,510)	.143 (405,581)
ADA Charge	.113 (7,451)	.158 (8,603)	.121 (35,970)	.113 (50,764)	.120 (102,788)
No ADA	.138 (22,428)	.266 (22,510)	.124 (121,066)	.156 (136,789)	.150 (302,793)
No Cause Finding	.705 (26,655)	.772 (27,748)	.733 (137,751)	.757 (157,203)	.745 (349,399)
ADA Charge	.679 (6,653)	.721 (7,556)	.714 (31,382)	.720 (41,945)	.715 (87,536)
No ADA	.713 (20,002)	.791 (20,192)	.739 (106,386)	.771 (115,283)	.755 (261,863)
Source: EEOC Charge Data, 2007–2013, all circuits but the Sixth, Tenth, and Eleventh.					
Notes: All duplicates have been dropped. For the <i>No Cause Finding</i> statistics, all charges that were dismissed because there was no jurisdiction, because the charging party asked for a right to sue letter, or because the charging party failed to respond were also dropped.					

**Table 3. DDD Estimates of the Impact of the Seventh Circuit’s
Mixed-Motive Standard on Retaliation Charges
Variable of Interest: Dismiss Labels**

Circuit \Time Period	Pre <i>Xerox</i>	Post <i>Xerox</i>	Difference over Time
A. Treated Group: Fifth Circuit			
Retaliation Charges	0.133	0.212	0.079
	[13,133]	[14,763]	
Non Retaliation Charges	0.159	0.183	0.024
	[27,776]	[27,686]	
Location Difference at Time	-0.026	.029	0.055
Difference-in-Difference	0.055		
B. Control Group: All Other Circuits (Less 7th)			
Retaliation Charges	0.095	0.124	-0.029
	[71,010]	[77,483]	
Non Retaliation Charges	0.100	0.118	-0.018
	[158,172]	[160,627]	
Location Difference at Time	-0.005	0.006	0.011
Difference-in-Difference	0.011		
DDD	0.044		
Source: EEOC Charge Data, 2007–2013, all circuits but the Sixth Notes: Means of <i>DismissLabel</i> are reported and the number of observations for each cell are reported in brackets.			

**Table 4. DDD Estimates of the Impact of the Seventh Circuit’s
But-For Standard on ADA Charges
Variable of Interest: Dismiss Labels**

Circuit \Time Period	Pre <i>Serwatka</i>	Post <i>Serwatka</i>	Difference over Time
A. Treated Group: Seventh Circuit			
ADA Charges	0.113	0.158	0.045
	[7,451]	[8,603]	
Non ADA Charges	0.138	0.266	0.128
	[22,428]	[22,510]	
Location Difference at Time	-0.025	-0.108	
Difference-in-Difference	-0.083		
B. Control Group: All Other Circuits (Less 6th, 10th, and 11th)			
ADA Charges	0.121	0.113	-0.008
	[35,970]	[50,764]	
Non ADA Charges	0.124	0.156	0.032
	[121,066]	[136,789]	
Location Difference at Time	-0.003	-0.043	
Difference-in-Difference	-0.040		
DDD	-0.043		
Source: EEOC Charge Data, 2007–2013, all circuits but the Sixth, Tenth, and Eleventh. Notes: Means of <i>DismissLabel</i> are reported and the number of observations for each cell are reported in brackets.			

Table 5. Estimates from OLS Regressions Estimating the Effect of the Fifth Circuit’s Mixed-Motive Causation Standard on Retaliation Charges

	Retaliation Charge (1)	Dismiss Label (2)	No Cause Finding (3)
<i>DD Analysis</i>			
FifthCircuit*PostXerox	0.010** (0.004)		
<i>DDD Analysis</i>			
FifthCircuit*PostXerox*		0.041*** (0.004)	0.001 (0.006)
RetaliationCharge			
Number of Observations	550,337	501,671	434,337

Source: EEOC Charge Data, 2007–2013, all circuits but the Seventh.

Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. Robust standard errors clustered by circuit are reported in parentheses and the numbers of observations are reported in brackets. The coefficients reported in each row panel and each column are from individual regressions. Each regression presented includes the controls presented in columns 1, 2, and 3 respectively of Table A in the Appendix. All duplicates have been dropped. For the No Cause Finding regressions, all charges that were dismissed because there was no jurisdiction, because the charging party asked for a right to sue letter, or because the charging party failed to respond were also dropped.

Table 6. Estimates from OLS Regressions Estimating the Effect of the Seventh Circuit’s But-For Causation Standard on ADA Charges

	ADA Charge (1)	Dismiss Label (3)	No Cause Finding (3)
<i>DD Analysis</i>			
SeventhCircuit x Post <i>Serwatka</i>	-0.014** (0.0005)		
<i>DDD Analysis</i>			
SeventhCircuit x Post <i>Serwatka</i> X ADA Charge		-0.045*** (0.007)	-0.013*** (0.006)
Number of Observations	405,372	368,268	318,045

Source: EEOC Charge Data, 2007–2013, all circuits but the Sixth, Tenth, and Eleventh.

Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. Robust standard errors clustered by Circuit are reported in parentheses and the numbers of observations are reported in brackets. The coefficients reported in each row panel and each column are from individual regressions. Each regression includes the controls presented in columns 2 and 3 respectively of Table A in the Appendix. All duplicates have been dropped. For the *No Cause Finding* regressions, all charges that were dismissed because there was no jurisdiction, because the charging party asked for a right to sue letter, or because the charging party failed to respond were also dropped.

APPENDIX

Table A: Descriptive Statistics

Variable	All Charges	ADA Charges	Retaliation Charges
Dismiss Label	0.126 [611,408]	0.108 [151,118]	0.123 [225,043]
No Cause Finding	0.659 [597,689]	0.633 [146,623]	0.630 [219,331]
ADA Basis	0.247	--	0.161
Retaliation Basis	0.368	0.307	--
Race Basis	0.355	0.137	0.338
Sex Basis	0.297	0.122	0.355
NO Basis	0.113	0.042	0.118
Age Basis	0.228	0.192	0.160
Pay Female Basis	0.009	0.003	0.009
Pay Male Basis	0.0008	0.0003	0.00006
Marital Basis	0.00005	0.00	0.00004
Sex Orientation Basis	0.00002	0.00004	0.0004
Religion Basis	0.037	0.021	0.045
Arrest Conviction Basis	0.00004	0.00	0.00
Color Basis	0.027	0.013	0.036
Sexual Harassment Basis	0.084	0.020	0.154
Asian	0.023	0.016	0.027
Black	0.407	0.257	0.408
Indian	0.009	0.011	0.010
Other Race (not white)	0.013	0.009	0.013
Eastern NO	0.004	0.002	0.005
Arab NO	0.008	0.004	0.010
Hispanic NO	0.055	0.045	0.058
Mexican NO	0.033	0.028	0.035
African NO	0.020	0.010	0.022
Female	0.548	0.518	0.586
Age	44.54	46.04	43.40
Terms Issue	0.244	0.215	0.317
Hiring Issue	0.059	0.059	0.029
Demotion Issue	0.031	0.027	0.037
Discharge Issue	0.545	0.593	0.547
Wages Issue	0.061	0.031	0.064
Discipline Issue	0.134	0.124	0.192
Education Employer	0.049	0.053	0.055
Federal Gov't Employer	0.0007	0.0001	0.00009
State Gov't Employer	0.100	0.114	0.119
EEOC Office	0.982	0.981	0.983
Hearing Basis	0.008	0.030	--
Vision Basis	0.006	0.023	--
Mental Retardation Basis	0.002	0.007	--
Alcohol or Drug Basis	0.003	0.012	--
Number of Observations	614,358	151,803	225,867

**Table B. The Effect of the Fifth Circuit's Mixed-Motive
Causation Standard on Retaliation Charges**

Variable	Retaliation Charge (1)	Dismiss Label (2)	No Cause Finding (3)
FifthCircuit x PostXerox x RetaliationCharge		0.041*** (0.004)	0.001 (0.006)
FifthCircuit x PostXerox	0.010** (0.004)	0.005 (0.005)	0.008 (0.005)
Post Xerox	-0.007 (0.004)	-0.004 (0.008)	0.001 (0.006)
Retaliation Charge		-0.001 (0.004)	-0.008 (0.006)
Post Xerox x Retaliation Charge		0.008* (0.004)	0.008 (0.006)
Fifth Circuit x Retaliation Charge		-0.016*** (0.004)	0.013 (0.007)
Fifth Circuit	0.071*** (0.002)	0.102*** (0.004)	0.014*** (0.004)
Race Any Basis		-0.015*** (0.003)	0.033*** (0.004)
Sex Any Basis		-0.009*** (0.002)	0.004 (0.005)
NO Any Basis		0.000 (0.006)	0.028*** (0.006)
Age Basis		-0.015*** (0.002)	0.012*** (0.003)
Pay Female Basis		-0.041*** (0.005)	-0.011 (0.012)
Pay Male Basis		0.005 (0.015)	0.039 (0.022)
Marital Status Basis		-0.050*** (0.013)	-0.279*** (0.024)
Sex Orientation Basis		-0.034 (0.023)	-0.141 (0.094)
Religion Basis		0.025** (0.011)	-0.001 (0.006)
Arrest Conviction Basis		0.004 (0.018)	-0.800*** (0.019)
Color Basis		0.023*** (0.005)	-0.002 (0.008)
Sexual Harassment Basis		-0.051*** (0.004)	-0.086*** (0.007)
ADA Charge		-0.033*** (0.004)	-0.029*** (0.002)
Asian		-0.003 (0.010)	-0.025 (0.014)
Black		0.022*** (0.005)	0.022*** (0.004)
Indian		0.035***	0.026***

		(0.009)	(0.007)
Other Race		-0.010	-0.008
		(0.006)	(0.010)
Eastern NO		0.005	0.029**
		(0.013)	(0.013)
Arab NO		0.012	-0.005
		(0.022)	(0.014)
Hispanic NO		0.002	0.013
		(0.008)	(0.008)
Mexican NO		0.011**	-0.002
		(0.004)	(0.007)
African NO		-0.016	0.010
		(0.013)	(0.014)
Female		-0.009***	-0.009**
		(0.002)	(0.003)
Age		0.001***	-0.000
		(0.000)	(0.000)
Terms Issue		-0.039***	-0.020***
		(0.005)	(0.003)
Hiring Issue		-0.051***	0.020**
		(0.006)	(0.007)
Demotion Issue		-0.039***	-0.030***
		(0.004)	(0.005)
Discharge Issue		-0.003	0.038***
		(0.003)	(0.003)
Wages Issue		-0.046***	-0.038***
		(0.007)	(0.006)
Discipline Issue		-0.019***	0.024***
		(0.001)	(0.003)
Education Employer		0.007**	0.044***
		(0.003)	(0.005)
Federal Gov't Employer		-0.147***	0.330***
		(0.025)	(0.021)
State Gov't Employer		0.014**	0.066***
		(0.005)	(0.005)
EEOC Office		0.090***	-0.016
		(0.013)	(0.022)
Constant	0.230***	-0.039*	0.715***
	(0.004)	(0.020)	(0.020)
Number of Observations	550,337	501,671	434,337
R-Squared	0.004	0.029	0.021

Source: EEOC Charge Data, 2006–2013, all circuits but the Sixth.

Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. Robust standard errors clustered by Circuit are reported in parentheses. Each regression controls for year and circuit fixed effects. Indicators for whether a charge did not include race or national origin are included.

Table C. The Effect of the Seventh Circuit’s But-For Causation Standard on ADA Charges

Variable	Retaliation Charge (1)	Dismiss Label (2)	No Cause Finding (3)
SeventhCircuit x Post <i>Serwatka</i>	-0.014** (0.005)	0.094*** (0.009)	0.048*** (0.006)
SeventhCircuit x Post <i>Serwatka</i> x ADACharge		-0.045*** (0.007)	-0.013** (0.004)
ADA Charge		-0.015*** (0.004)	-0.016*** (0.002)
Post <i>Serwatka</i>	0.002 (0.002)	-0.001 (0.013)	0.005 (0.010)
Seventh Circuit	-0.045*** (0.003)	0.093*** (0.006)	-0.016*** (0.004)
Post <i>Serwatka</i> x ADACharge		-0.037*** (0.005)	-0.023*** (0.003)
SeventhCircuit x ADACharge		-0.025*** (0.005)	-0.008** (0.003)
Hearing Basis		-0.028*** (0.004)	-0.028** (0.012)
Vision Basis		-0.024** (0.007)	-0.031*** (0.007)
Mental Retardation Basis		0.007 (0.010)	-0.018 (0.017)
Alcohol or Drug Basis		0.011* (0.006)	0.019 (0.014)
Race Basis		-0.016** (0.005)	0.033*** (0.004)
Sex Basis		-0.013** (0.004)	0.000 (0.002)
NO Basis		0.004 (0.008)	0.033*** (0.007)
Age Basis		-0.005 (0.008)	0.014*** (0.003)
Pay Female Basis		-0.043*** (0.004)	-0.011 (0.015)
Pay Male Basis		0.016 (0.018)	0.060** (0.026)
Marital Basis		-0.042* (0.020)	-0.264*** (0.037)
Sex Orientation Basis		-0.007 (0.027)	-0.178 (0.116)
Religion Basis		0.031* (0.014)	0.004 (0.006)
Color Basis		0.027*** (0.005)	-0.001 (0.006)
Sexual Harassment Basis		-0.058*** (0.005)	-0.092*** (0.005)
Retaliation Charge		0.002 (0.003)	-0.001 (0.004)

Asian		0.002 (0.014)	-0.023 (0.017)
Black		0.028** (0.009)	0.027*** (0.008)
Indian		0.038** (0.014)	0.017 (0.012)
Other Race		-0.001 (0.008)	-0.008 (0.013)
Eastern NO		0.001 (0.015)	0.034** (0.013)
Arab NO		0.029 (0.026)	-0.011 (0.016)
Hispanic NO		0.015 (0.009)	0.020 (0.011)
Mexican NO		0.019** (0.006)	0.005 (0.011)
African NO		-0.001 (0.012)	0.021** (0.007)
Female		-0.007** (0.003)	-0.011*** (0.003)
Age		0.001** (0.000)	0.000 (0.000)
Terms Issue		-0.040*** (0.006)	-0.022*** (0.004)
Hiring Issue		-0.068*** (0.013)	0.015 (0.011)
Demotion Issue		-0.047*** (0.006)	-0.038*** (0.007)
Discharge Issue		-0.010 (0.009)	0.029*** (0.008)
Wages Issue		-0.059*** (0.012)	-0.039*** (0.009)
Discipline Issue		-0.021*** (0.002)	0.021*** (0.004)
Education Employer		0.006 (0.004)	0.039*** (0.007)
Federal Gov't Employer		-0.175*** (0.031)	0.304*** (0.028)
State Gov't Employer		0.018** (0.007)	0.068*** (0.006)
EEOC Office		0.096*** (0.019)	-0.000 (0.033)
Constant	0.287*** (0.004)	-0.072** (0.027)	0.686*** (0.030)
Number of Observations	405,372	368,268	318,045
R-Squared	0.007	0.034	0.023

Source: EEOC Charge Data, 2007—2013, all circuits but the Sixth, Tenth, and Eleventh. Notes: *, **, *** indicate significance at the 10, 5, and 1 percent levels. Robust standard errors clustered by Circuit are reported in parentheses. Each regression controls for year and circuit fixed effects. Indicators for whether a charge did not include race or national origin are included.

CHAPTER III

THE EEOC'S POSITIVE EFFECT ON REDUCING THE WHITE/BLACK WAGE GAP

INTRODUCTION

“The EEOC has been widely viewed as ineffective since its inception” (McCormick 2009). This statement is the prevailing attitude found in legal analyses of the Equal Employment Opportunity Commission (“EEOC”), and it is also the sentiment of national media (Wall Street Journal Sept. 11, 2013). Title VII of the Civil Rights Act of 1964 made it illegal to discriminate against employees based on sex, race, national origin, color, and religion. Title VII also created the EEOC, an administrative agency tasked with monitoring employment discrimination by managing all charges of such discrimination.⁸³ Critics of the agency point to the inefficiencies and ineffectiveness of the agency as the result of a system flawed at inception. Generally, these critiques are founded in theoretical and anecdotal arguments, and the primary sources of data supporting the arguments are summary statistics on the persistent, large backlog of charges that have not been resolved. This chapter introduces empirical evidence that shows some success for the EEOC in the beginning of the twenty-first century: specifically, a higher rate of race charges filed within an industry and state leads to higher wages for black male employees in that industry and state and decreases in the white/black wage gap following that action.

The EEOC's procedural mandate is described in Section 706 of Title VII.⁸⁴ This section mandates that each discrimination claim filed under Title VII be first filed with and reviewed by the EEOC. Unlike other enforcement agencies, the EEOC cannot promulgate regulations to

⁸³ Today, the EEOC also handles age discrimination charges (under the Age Discrimination in Employment Act), disability discrimination and accommodation charges (under the Americans with Disability Act), and charges alleging unequal pay due to gender (under the Equal Pay Act).

⁸⁴ Now codified in 42 U.S.C 2000e-5(f).

attempt to decrease discrimination in the workplace. Instead, the EEOC's power to affect discrimination in the workplace rests with its investigations and conciliation attempts of each charge and its ability to litigate certain charges. However, it is not clear that these processes actually reduce potential discriminatory acts. This chapter provides evidence of whether the risk of liability for discriminatory acts or potential exposure as a firm that discriminates decreases the white/black wage gap, which is often associated with discrimination. I proxy for this risk with the rate of race charges filed against a firm in an industry and a specific state and with the EEOC's litigation of a claim.

Some empirical analyses of the agency's deterrent effect have been performed (see, e.g., Beller 1978; Wilhem 2002; Hirsh 2009), either finding no deterrent effect or recently finding an improvement for black females in wages or occupational segregation. Recent analyses have focused on the effect of EEOC action on gender disparities; however, this chapter focuses on the effect of EEOC action on the white/black wage gap. This chapter updates these previous analyses by using more recent data, constructing the action measure by industry and state, and analyzing the additional effect of EEOC litigation and the merit of the charge filed as determined by the EEOC. While I cannot provide direct evidence that the EEOC is efficient or effective, I do provide some evidence of EEOC success and the first evidence that EEOC action may decrease the white/black wage gap for men.

I begin this chapter by describing the literature that has analyzed whether nondiscrimination laws, including Title VII, have improved employment outcomes for employees that are protected under such statutes and the literature that has studied the deterrent effect of the actions of federal agencies. In particular, I discuss previous analyses that directly analyzed the EEOC's effectiveness soon after the adoption of Title VII and more recently. I then discuss the

EEOC, its roles, and its powers that have the potential to deter discrimination in the workplace. Next, I discuss the data that I use to construct rates of EEOC action, how these rates vary by industry and state, and the empirical analysis, which utilizes individual wage equations to isolate the impact of the EEOC. I conclude by presenting the results of the empirical analysis and the implications of the results.

PREVIOUS ANALYSES OF NONDISCRIMINATION LAWS AND THE EEOC

Measuring the Impact of Nondiscrimination Laws on Employment Outcomes

Scholars have studied the impact of civil rights laws on employment outcomes of minority individuals since the federal government adopted the Civil Rights Act in 1964. Following the adoption of the Civil Rights Act, studies attempted to measure the effect of Title VII and its provisions on employment outcomes of minorities. Most of these studies were time-series studies that analyzed the changes that occurred after the law was passed in 1964 and controlled for other time trends (Brown 1982). These studies found mixed results, likely because of two competing consequences of the Title VII requirements: Title VII increased the cost of employing a member of a protected class, by increasing the likelihood of liability, which could decrease employment, but it also increased the penalty for discrimination, which could increase employment (Hersch and Shinall 2015).

Additional studies have specifically linked Title VII litigation to employment benefits for employees of protected classes and to other labor market outcomes. Leonard (1984) analyzed the effect of class action litigation filed under Title VII in a state and industry on the number of minority employees in certain occupations. Leonard (1984) found that litigation regarding race discrimination increased the number of black employees, specifically black women, in certain occupations during 1960s and 1970s. Hersch (1991) analyzed how publicized employment

litigation between 1964 and 1986, including litigation brought by the EEOC, negatively affected firm profitability, finding that such litigation did decrease stock values in the short run. More recently, Skaggs (2008) indirectly analyzed the impact of Title VII by analyzing the effect of high-profile employment discrimination litigation on labor market outcomes (women in supermarkets). Skaggs (2008) found that litigation filed during 1983–1998 against specific supermarket corporations did reduce the presence of male/female occupational segregation in the supermarket industry in general, suggesting that such litigation does not only affect the firm involved in the case.

The Deterrent Effect of Other Agencies

While not directly related to employment discrimination, several scholars have analyzed the effect of other federal administrative agencies tasked to improve certain outcomes. Much like the EEOC, these agencies often investigate potential violations, and these investigations or findings of a violation have been found to deter negative actions in firms within the industry or state where the agency was active. In particular, the Occupational Safety and Health Administration (“OSHA”) monitors working conditions such that injuries and fatalities on the job decrease. OSHA frequently investigates firms and fines those that violate any regulations and do not properly report injury statistics. Several early studies found that firm-specific or industry-specific OSHA inspections statistically significantly decreased injuries in that firm or industry during the late 1970s and early 1980s by upwards of 20% (Viscusi 1986; Gray and Scholtz 1993). However, Gray and Mendeloff (2005) found that the effect fell to 11% in the late 1980s and was

no longer present in the 1990s. These studies also found that inspections where penalties are levied had a greater effect than those without.

Scholars have also studied the deterrent effect of the Environmental Protection Agency (“EPA”), which is tasked with improving environmental conditions, partially by decreasing the amount of pollution emitted by firms. These studies also analyzed the impact of investigations and fines. While many of these studies looked at the impact of an inspection on a specific firm’s or plant’s pollution rates (Gray and Shadbegian 2008), others looked at the effect more broadly. For example, Shimshack and Ward (2005) found that a fine or an inspection on any firm in a jurisdiction led to statistically significant decreases in emissions from other firms in that jurisdiction. While the EEOC cannot directly fine a firm for employment discrimination, its investigations can lead to costly outcomes, including damages awarded following litigation. As a result, scholars have also examined the effect of the EEOC on employment outcomes for minorities.

The Effect of the EEOC on Employment Outcomes

The first study to empirically analyze the impact of the EEOC was Freeman (1973), finding a decrease in the white/black wage gap of 15% for males and 27% for females when the total of EEOC expenditure per black worker (or a larger EEOC budget) increased. However, this study was soon contradicted by Butler and Heckman (1977) who attributed this increase to an increase in real benefits with the adoption of programs such as the Aid to Families with Dependent Children (“AFDC”). Butler and Heckman found no effect of EEOC expenditure on the wages of black employees once they controlled for this increase.

Beller (1978) was the first study to directly analyze EEOC action through measuring the EEOC’s presence by the rate of the total number of discrimination charges filed with the EEOC to the total number of employees within a state during 1966–1970. Beller used EEO-1 records to

match EEOC action in a state to covered firms.⁸⁵ Beller also did not find a positive effect of the EEOC on black employment outcomes, including wages, during the late 1960s and early 1970s. Two recent studies have updated this earlier analysis with more recent data and slightly different techniques. Hirsh (2009) matched EEOC discrimination charge data to EEO-1 records to see whether firms with high levels of charges responded to the charges by improving workplace sex and race occupational segregation.⁸⁶ Hirsh found that EEOC enforcement, measured by the dollar amount of an EEOC settlement for any Title VII charges filed between 1991 and 2002, did not have a direct effect by reducing the firm's sex segregation, but that instead, the industry-level enforcement had an indirect effect on other firms in the industry. Hirsh found no improvements in race segregation.

The analysis performed in this chapter closely resembles the analysis found in Wilhem (2002). Wilhem (2002) analyzed individual wage equations for the time period, 1988–1996 and found that black women in industries with more EEOC charges alleging sex discrimination had higher wages than those in industries with lower charges. Wilhem did not find an effect for race charges and did not analyze the wages of men. In this chapter, I expand and alter this analysis in several ways. Firstly, this chapter examines data from 2002–2008 and focuses on race discrimination, including the wage gap between white and black males. In addition, Wilhem analyzed the total number of race charges filed against an industry, whereas, I analyze the rate of race charges per 100,000 employees in an industry and state to isolate a measure of the risk of incurring the costs associated with responding to an EEOC charge. In addition, this is the first study to analyze EEOC action by industry and state with the assumption that firms may be more

⁸⁵ Each employer with more than 100 employees must file EEO-1 records with the EEOC each year. These forms are meant to provide information about the employment of individuals protected under the nondiscrimination laws.

⁸⁶ Hirsh (2009) analyzed a 1% random sample of the firms that filed EEO-1 forms.

aware of these charges than charges filed nationally in their industry or charges filed in their state against any industry. An additional benefit of my analysis is that due to the construction of the wage equations, which are not limited to black employees, I can examine the effect of EEOC action on the white/black wage gap. This is also the first analysis of the effect of litigation filed by the EEOC and the first to analyze the effect of certain types of charges filed, including those that the EEOC views as meritless and those that the charging party files in federal court before the EEOC completes its administrative process. In the following section, I discuss these different types of charges, the EEOC's ability to litigate a claim, and why these charges may or may not be expected to deter potentially discriminatory actions, such as a difference in pay by minority status.

THE EEOC AND THE ENFORCEMENT OF TITLE VII

Under Section 706 of Title VII of the Civil Rights Act, any individual with a claim of employment discrimination must first file the claim with the EEOC, and then the EEOC must investigate each charge of employment discrimination before it can be filed in federal court. Approximately 100,000 charges are filed with the EEOC each year, and as reported in Table 1, almost 30,000 of these include a charge of race discrimination. Two characteristics of these charges make it likely that they not only directly deter potentially discriminatory acts of the responding employer, but also indirectly deter acts of other employers in the industry and state: the charges are costly, with the potential to result in litigation and reputational harm, and the charges are frequently publicized.

Although, it is generally understood that a number of meritless charges are filed with the EEOC, and according to the EEOC statistics that are publically available, only 20% of such charges result in some kind of conciliation, mediation, or litigation, any potentially offending employer is required to respond to every charge (no matter the merit of the charge) filed against

them with the EEOC. These costs include completing a position statement in response to every charge filed, hiring an attorney to complete the EEOC's required mediation process, and complying with investigations, which include detailed discovery requests. It is possible that these costs alone are enough to explain a potential deterrent effect of EEOC charges. However, as the merit of the charge increases, these charges can also result in costly settlements and litigation.

Charges that result in settlement during the EEOC process are often quite costly. Generally, if the opposing parties settle a charge during the EEOC process, the monetary benefits average around \$19,000 (Hirsh 2009), however, those publicized are almost always much larger, approaching hundreds of thousands of dollars. For example, on the EEOC recently publicized a \$95,000 settlement against a Memphis, TN company for racial harassment.⁸⁷ These settlements can also include injunctions and enjoinders, often requiring the employer to develop a certain policy or reinstate the employment of a charging party who was fired due to discriminatory reasons. The EEOC also releases quarterly statements of major settlements, which are publicized on their website.

Approximately one-fifth of the charges filed with the EEOC are subsequently filed in federal court (Selmi 2001). Of course, charges that are filed in court have the potential to generate large costs. Under Title VII of the Civil Rights Act, an employee alleging discrimination (either disparate impact or disparate treatment) under Title VII can always recover equitable relief such as back pay and attorney's fees, and the court can also issue injunctions and can force the employer to correct the discriminatory act.⁸⁸ In addition, following the Civil Rights Act of 1991, if the charging party alleges intentional discrimination, the charging party can also recovery compensatory damages of a limited amount for pain and suffering and emotional loss, and if the

⁸⁷ This article on Skanska USA is available at <http://www.eeoc.gov/eeoc/newsroom/release/1-29-15.cfm>.

⁸⁸ 42 U.S.C. 2000e.

charging party shows “malice” or “reckless indifference,” the charging party can also recover a limited amount of punitive damages (Johnson 1994). As reported in Van der Veer (2005), employment discrimination litigation, even for a single plaintiff, has resulted in awards of tens of millions of dollars, and class action litigation, has the potential to result in awards of hundreds of millions.

Under the Civil Rights Act of 1991, after investigating a charge and attempting to conciliate a charge that the EEOC believes has merit, the EEOC “may bring a civil action against any respondent not a government.”⁸⁹ While the EEOC only represents at most 400 charging parties per year in litigation, these cases are generally highly publicized and they have the ability to result in large damages and in injunctions and enjoinders. EEOC settlement and award amounts published on the EEOC’s “Newsroom” website since October 2009 range from several thousand dollars to 240 million dollars. These injunctions and enjoinders can directly affect employment discrimination, and damages can indirectly affect employment discrimination by deterring such actions not only in the one firm, but also, in other firms that become aware of the action.

One way that other firms can become aware of EEOC action is through the publicity of this action. Stories such as the \$95,000 settlement reported on the EEOC’s website are often reported by local and national news sources. In fact, even when charges do not result in settlement, but the EEOC finds cause, these charges can be publicized. For example, a local Chicago news source recently reported that the EEOC found cause in race discrimination charges brought against Sara Lee.⁹⁰ Charges that are filed in court are certainly not confidential and often publicized, and it has been shown that such litigation can have an indirect and direct impact on employment

⁸⁹ 42 U.S.C. 2000e-5(f).

⁹⁰ This article is available at <http://chicago.cbslocal.com/2015/02/10/feds-side-with-sara-lee-workers-subjected-to-racist-taunts/>.

outcomes: Skaggs (2008) found that prominently publicized employment litigation did have an impact on women in the supermarket industry, including those not involved in the litigation. In addition, Leonard (1984) found that litigation decreased race occupational segregation.

Even before a case has been resolved, the EEOC often publicizes its litigation. For example, the EEOC recently publicized a lawsuit against Ruby Tuesday for sex discrimination.⁹¹ In addition, these cases are often represented in the national media, for example, in October 2014, the New York Times published an article about the EEOC's lawsuit against FedEx for disability discrimination (New York Times Oct. 10, 2014). The data collected in Hersch (1991) showed that EEOC litigation is very public, as 45 of the 123 suits written about in the Wall Street Journal during 1964–1986 were charges brought by the EEOC.⁹² The common publicity of each of these types of action can act as an information source for other firms in an industry and state not currently involved in EEOC action, making them aware of the potentially large consequences and willing to change the equity in their office to avoid future action. However, this publicity can also create reputation costs, which further deters potential discriminatory action.

Many scholars have analyzed the costs associated with adverse publicity. While largely unexplored, such publicity could include public accusations that a firm discriminates in its employment practices. As noted in James and Wooten (2006), generally, the literature on reputation costs has focused on the costs associated with organizational crises, such as tort liability and recalls following the malfunctioning of a product, liability or fines for pollution and other environmental mishaps, and findings of securities fraud, and on the importance of maintaining a positive corporate image during these crises. The major costs associated with these crises include

⁹¹ This article is available at <http://www.eeoc.gov/eeoc/newsroom/release/1-22-15.cfm>.

⁹² Today with the presence of online media and social media, the presence of such negative publicity from an EEOC lawsuit is likely greater.

costs to shareholders because it is a signal of effectiveness to a market, which affects investments and consumer perceptions (Riordan et al. 1997). However, these costs also include deterring good employees from applying for jobs, affecting the performance and attitude of current employees, and changing the reaction of employees to certain actions of leadership, including turnover rates (Riordan et al. 1997). James and Wooten (2006) recognized that these costs could all be associated with employment discrimination. As noted previously, Hersch (1991) showed that the publicity of employment litigation also has the potential to negatively affect a firm's profits. In addition, these costs have also been assumed to have deterrent effects on the firms involved in the litigation. In fact, with anecdotal and theoretical evidence, James and Wooten (2006) suggested that firms are most likely to improve employment equal opportunity policies in the wake of demonstrations, boycotts, and negative publicity.

Ultimately, every charge will certainly result in administrative costs, and has the potential to result in settlement costs, litigation costs and damages, and often negative publicity. In addition, employers can learn of the threat of these costs due to this publicity and through other channels. These employers could become aware of the action by discussing practices with other employers in their state and industry, and through the actions of their employees as they discuss recent actions with employees of the other firms. After becoming aware of such threats, employers may respond in a variety of ways to avoid being the target of any such charges or litigation and liability. Employers could introduce grievance policies as suggested by Edelman (1992), they could reduce any potentially discriminatory practices in occupation sorting or hiring or wages, and they could improve working conditions to avoid deter an employee's desire to sue.

Because of the costs and publicity of EEOC action discussed above, I hypothesize that firms in an area with a higher rate of EEOC action in the past will respond by improving wages at

the current time; this will equate to a positive relationship between past EEOC action and current wages for black employees.⁹³ While previous studies have found some effect within a state or within an industry (Wilhem 2002; Hirsh 2009), I believe that action within an industry *and* state will be most salient and have the strongest potential to affect actions of other firms. I also hypothesize that this deterrent effect will be stronger for EEOC action such as EEOC litigation and charges that the employer files in court because these actions are also more salient and have greater potential for reputation costs and high damages; however, because these actions are very low risk, as the EEOC only litigates 400 charges a year (0.4% of the total amount of charges) and a charge only results in litigation 20% of the time, this hypothesis is likely weak.

Many employers have Employment Practices Liability Insurance policies that cover most instances of liability for employment discrimination. While some may argue that these policies make it less likely that employers react to EEOC action, these policies show that employers fear these costs. In addition, these policies do not cover intentional discrimination; as a result, they would not cover punitive damages. These policies also cannot prevent costs associated with a negative reputation. As noted in Van der Veer (2005), insurance companies are also active in risk management, making it such that they encourage employers to protect against actions that could be considered discriminatory. Insurance companies also provide another mechanism for dissemination about EEOC action, as they could encourage employers to become better actors when another client is involved in EEOC action.

In this chapter, I analyze whether there is a relationship between the rate of EEOC action involving race discrimination for firms in a certain industry and state and the wages of black

⁹³ I lag the action variable by two years because I believe it gives the employer ample time to respond to the action and because it lessens endogeneity concerns. In addition, because the year of the charge is the year when the charge was filed, two years gives the EEOC ample time to actually make other determinations on the charge. However, my results are the same if the variable is lagged by one year instead of two.

employees in that industry and state. I analyze the effect of the total rate of charges filed in that industry and state and the specific effect of charges that the charging party filed in federal court before the EEOC completed its investigation. To determine whether the likelihood that a charge is meritorious matters, I also analyze the effect of charges that the EEOC believed lacked merit. Specifically, I analyze whether higher rates of charges that the EEOC labels as “likely to be dismissed” when the charge is first processed also have the ability to deter employers. In 1996, the EEOC adopted a policy through which it labels a charge based on its potential merit when it is first processed. These labels include, A, B, and C labels, where a C label is considered “likely to be dismissed.” Finally, I also analyze the relationship between EEOC litigation and the white/black wage gap.

EMPIRICAL ANALYSIS

Data

Limited data exists to analyze the number of claims alleging race discrimination that are actually filed in federal court. In fact, the only data available aside from collecting individual court filings from other sources, is the Federal Court Cases: Integrated Database, which does not include information on the specific type of claim filed, but only on the statute that the claim was filed under. This data also does not include information on the industry of the responding employer. In this chapter I overcome this difficulty by analyzing EEOC data that I includes the universe of charges filed with the EEOC and very detailed information about each charge, including the specific bases of the charge and the industry of the responding employer. Matching this EEOC data to wage and employment information provides one of the most comprehensive ways to specifically analyze the relationship between any type of employment discrimination action under

Title VII and employment outcomes for minorities. In addition, this process allows be to test the deterrent effect of charges that might never be filed in court.

The basis of my empirical analysis is the standard hedonic wage equation, and I introduce the rate of EEOC action (either charges or litigation) to this equation. Generally, to construct the rates of EEOC action, I match the number of charges and cases against an industry and state from the EEOC data to the number of employees in an industry and state as recorded in the 2000–2008 Current Population Survey (“CPS”). The CPS data is comprised of responses to government issued monthly surveys of a nationally representative subset of Americans, and it provides a large amount of employment and demographic information. The EEOC charge data is the result of a Freedom of Information Act (“FOIA”) request that I recently completed. I created rates of EEOC action using this data and matched these variables through the industry variable provided in the CPS. The EEOC charge data provides three digit North American Industry Classification System (“NAICS”) codes, which I use to match to the 51 two-digit industry codes provided in the CPS with a crosswalk provided by the National Bureau of Economic Research (“NBER”).

When the EEOC receives a charge of employment discrimination, it first conducts an intake interview and records information including demographic information about the charging party, characteristics of the employer, and the basis or bases of the charge. The EEOC then follows each charge through its investigation and administration of the charge, and then records the final outcome of each investigation and administration. The data includes the majority of the non-confidential charge information recorded by the EEOC since 1985. For the purposes of this analysis, the following variables are relevant: the bases of the charge, such as whether the charging party claimed race, or sex discrimination; the state of the responding employer; the industry of the employer; the outcome of the charge, including whether it was settled, whether the EEOC litigated

the charge, and whether the EEOC found cause; and the processing label that the EEOC first gives a charge following its intake interview, including whether it labeled a charge “C” or “likely to be dismissed.”

Based on this information provided in the EEOC data for years 2000–2006 and employment and industry information provided in the CPS for the same years, I create variables measuring the rate of EEOC action by state, industry, and year per 100,000 employees. The numerator of these rates comes from the EEOC data and the denominator is constructed from employment information reported in the CPS. These yearly rate variables include *RateCharges*, which is equal to the number of race charges filed against the industry in the relevant state divided by the number of employees in the industry and the state as reported in the CPS data (per 100,000 employees). I also include analyses of the effect of the rate of race charges in which a party preemptively filed the claim in court (*RateCPCharges*) and the effect of the rate of race charges that the EEOC labeled “likely to be dismissed” (*RateDismissCharges*), where the denominator is the same as *RateCharges* and the numerator is the number of the type of charge filed in the industry and state. In addition, I analyze the effect of EEOC litigation using the following variable: *RateEEOCCases*, which is equal to the ratio of the number of cases brought by the EEOC against firms in the industry and the state that include a charge of race discrimination to the number of employees in the industry in the state per 100,000 employees.⁹⁴

While industry is missing for approximately 23% of the charges within the time period analyzed in the EEOC data, when analyzing the effect of the rate of sexual harassment in the workplace on wages, Hersch (2011) showed that observable characteristics that are expected to affect the wage of an individual do not strongly predict whether industry is missing. Similarly,

⁹⁴ The construction of this variable is modeled after the construction of the rate of injuries and fatalities in Viscusi and Hersch (2008) and the rate of sexual harassment charges in Hersch (2011).

through my own analysis, I discovered that whether industry is missing also has very little predictive power on whether the EEOC litigated a charge or any other charge outcome. Though the frequency of missing variables means that the rate of EEOC action is underestimated, these factors show that this information is most likely missing at random. As a result, this construction should not affect the analysis in anyway except for introducing classical measurement error.⁹⁵ Because the number of missing industry labels increased in 2006 to approximately 48%, I limit my analysis to charges filed between 2000 and 2006.⁹⁶

Table 1 provides the number of race cases brought by the EEOC and the number of race charges filed with the EEOC during this sample. As illustrated, the EEOC litigates less than 1% of the total amount of race charges filed each year.⁹⁷ The EEOC was most active in litigation in 2003, bringing 278 cases charges of race discrimination. In 2002, the highest number of race charges were filed with the EEOC: 29,089 race charges. Table 2 provides the average rates of EEOC action by industry, state, and year per 100,000 employees for the entire sample. The means of these rates are separately reported by black and white men and black and white women. The average rate of yearly EEOC race charges ranges from 20.87 to 31.64 per 100,000 employees in an industry and state, with black men working in the industries and states with the highest average rates of race charges and white women working in the industries and states with the lowest rates of race charges. The average yearly rate of EEOC race litigation ranges from 0.07 to 0.10 per 100,000 employees, with white and black men working in industries and states with the highest rates of race litigation (0.10).

⁹⁵ Measurement error will bias the results of this analysis downwards.

⁹⁶ While industry is missing more often for smaller firms than larger firms, I expect that the construction of EEOC action as a ratio to the total number of employees should limit any concern.

⁹⁷ Approximately 70% of the charges the EEOC chooses to litigate are Title VII cases. As noted in the table notes in Table 1, the litigation statistics may be slightly skewed because the construction of the year comes from the date the charge was filed with the EEOC.

The average rates of EEOC charges and litigation are reported by industry in Table 3 and by state in Table 4. While these are reported separately by industry and state, the reported rates are each constructed by industry, state, and year per 100,000 employees. There is interesting variation in both breakdowns. During the years 2000–2006, the highest rate of EEOC action by industry and state per 100,000 employees was in the Internet Service Providers and Data Processing Services industry, with over 127.71 race charges per 100,000 workers being brought on average by state and year. Other industries with very high rates of race charges included Beverage and Tobacco Products Manufacturing, which had an average rate of 84.52 race charges per 100,000 employees by state and year, Rental and Leasing Services, and Telecommunications. These are the only industries where the average yearly rate of race charges exceeded 60 per 100,000 employees. The highest average rate of EEOC litigation occurred in the Beverage and Tobacco Products industry, and the second highest average rate occurred both in Internet Service Providers and Data Processing Services and Mining. The average rate of race cases per state, industry, and year (per 100,000 employees) never exceeded 0.50.

Table 4 provides the variation in the average rates of EEOC action by state. Again, these rates are constructed by state, industry, and year per 100,000 employees. While the rate of EEOC race charges never exceeded 100 charges per 100,000 employees, the average rate of EEOC race charges per 100,000 employees was 87.38 in Alabama, 69.57 in Arkansas, 72.94 in Mississippi, 65.88 in Georgia, 74.09 in Mississippi, 58.93 in Tennessee, 56.32 in Louisiana, and 52.89 in the District of Columbia. Not surprisingly, these highest rates of race charges are all concentrated in the Southern United States. These were the only states that had an average rate over 50 charges per 100,000 employees per year. Interestingly, the highest rates of EEOC litigation were not always found in the states with the highest rates of EEOC charges. However, the highest rate of

EEOC race litigation did occur in Tennessee (0.34 per 100,000 employees). The average rates of EEOC litigation were lower when broken down by state as compared to by industry, suggesting there is greater variation by state than industry.

The CPS provides much of the relevant information necessary to analyze individual wage equations for a representative sample of the US population. This information includes the respondent's age, educational attainment, race, national origin, sex, state of residence, occupation, working hours, hourly wage or weekly earnings, and industry. If hourly wage was not provided, I constructed hourly wage by dividing the self-reported usual weekly wage by the number of hours worked. Table 5 provides the mean hourly wage of each of these subgroups, ranging from 15.39 for black women to 21.36 for white men. All wages are in 2008 dollars, and the sample is limited to all employed individuals ages 16–64 that were not self-employed. Self-employed individuals are not covered under Title VII and do not have an employer to sue. What is not reported in any of these descriptive statistics tables is the relationship between these rates and the wages of minority employees. Because many things contribute to an individual's wage, other than state and industry, I do not report average wages by state and industry. Instead, I use regression analyses to analyze the relationship between EEOC action and the white/black wage gap.

Empirical Specification

I analyze the specific relationship between certain EEOC action and the wages of black employees through individual level wage equations. These equations follow the form:

$$(1) \text{Ln (Wage)}_{i,t} = \beta_0 + \beta_1 \text{Black}_{i,t} + \beta_2 \text{EEOCAction}_{y,s,t-2} + \beta_3 \text{EEOCAction}_{y,s,t-2} \times \text{Black}_{i,t} + \mathbf{X}_{i,t}'\beta_4 + \mathbf{Z}_t'\beta_5 + \mathbf{R}_s'\beta_6 + \varepsilon$$

In Equation (1), the dependent variable is the natural log of the individual's wage at time, t , where t is in years. In this equation, i indexes the individual, y indexes the industry, and s indexes state. *EEOCAction* is the rate of EEOC action by industry and state per 100,000 employees at time,

t-2. *EEOCAction* is constructed in the ways discussed above. *Black* is a dummy variable equal to one if the individual reports that their race is black or if the individual reports multiple races and one of those races is black. The coefficients on *EEOCAction* and the interaction, *EEOCAction x Black* are of interest. If EEOC action has a positive relationship with the wages of black employees beyond any association that it has with the wages of white employees, the coefficient on the interaction term, β_3 , should be positive and statistically significant. This result would suggest that firms that are in industries and states in which the EEOC acted more often in the previous two years are associated with an improvement in wages that white employees in that industry did not experience and that black employees in industries and states with lower EEOC action did not experience. Because the *EEOCAction* rates are constructed per 100,000 employees any effect is separate from the size of the industry.⁹⁸

To isolate the effect of *EEOCAction*, I also control for a vector of individual demographics (*X*) expected to influence an individual's wage. *X* includes the following variables: the individual's potential work experience, constructed by subtracting the individual's highest level of education from his or her age minus five years (*Potential Experience*) and the square of this variable (*Potential Experience*²), the individual's highest year of school completed (*Years of Education*), the individual's marital status (*Married*), the sex of the individual (*Female*), whether the individual worked full time, defined as working more than 35 hours a week (*Full Time*), whether the individual worked in the government (*Government Employee*),⁹⁹ whether the individual was covered by a union (*Union Covered Employee*), whether the individual worked in a metro area

⁹⁸ Because of the construction of the sample, this analysis is limited to employees who work in firms and states where at least one EEOC charge (of any type) has been filed in the past three years.

⁹⁹ While the federal government has its own procedures for handling Title VII charges, the EEOC still administers this process. In fact, approximately 12% of the charges filed in the EEOC data were filed by federal or state employees. This percentage is very similar to the percentage of government employees in the CPS data. However, excluding government employees from this analysis does not change the results.

(*Metropolitan Location*), and controls for 22 occupations. Each specification also includes year fixed effects (*Z*) and region fixed effects (*R*). *R* includes individual controls for the 15 EEOC district offices, with the assumption that these offices each have their own policies and procedures that could affect wages and the strength of EEOC action.¹⁰⁰ *R* also includes industry by year fixed effects to control for any trends in each district. Because wages and *EEOCAction* could be affected by state law, *R* also includes a variable that is equal to one if the employee worked in one of the three states that do not have state laws governing employment discrimination and do not have a Fair Employment Practices Agency (*No FEPA State*).¹⁰¹

As discussed above, *EEOCAction* is constructed in several different ways to test the effect of specific types of *EEOCAction*. Generally, it is the ratio of EEOC action in the industry in the state at time, *t*-2, to the number of employees in the industry in the state at time *t*-2 (per 100,000 employees). Again, the specific variables analyzed include the following: *RateCharges*, *RateCPCharges*, *RateDismissCharges*, and *RateEEOCCases*. Each of these variables measures the action two years before to lower concerns of endogeneity and to give the employer ample time to respond to the action.¹⁰² I estimate the effect of each of these actions in separate regressions for

¹⁰⁰ In fact, when analyzing the outcome of charges filed under the ADA within the EEOC, Moss et al. (2001) found that the outcomes greatly varied based on the office that the charge was filed in. For example, the authors found that 34% of the variation in whether a claim was settled during the EEOC could be explained by where a charge was filed. While the authors acknowledge that this difference could be a systematic difference in the merit of cases filed with each office, they attribute at least part of this difference to differences in leadership and the culture of an office. If a certain office is known to encourage settlement and to investigate charges more thoroughly than another, it is likely that charges filed in that office are more likely to deter employers in a certain industry. The EEOC currently has 38 local offices and 15 district offices. In addition, the EEOC often works in conjunction with state Fair Employment Practices agencies (“FEPA”) and Tribal Employment Rights offices (“TERO”). Each of these offices has their own practices and policies. In particular, each EEOC district follows a local enforcement plan, specifically tailored to unique needs of the region, and these plans change over time (Igasaki 2001). EEOC district office controls were created using the state variable. Generally, such offices cover several states in their entirety. However, four offices cover half of a state. For simplicity, and due to data limitations, the controls for these offices include each observation from the entire state.

¹⁰¹ I do not control for individual state fixed effects because *EEOCAction* is created by industry and state. Instead, I control for district offices and *No FEPA*.

¹⁰² If the variable is constructed at time, *t*, then it is likely that the EEOC is acting against the industry in the state because they are known discriminators. This endogeneity would likely bias the coefficient of interest downwards. In addition, the time period begins when the charge is filed, as such, the EEOC may not have decided to litigate a charge

male and female employees using Ordinary Least Squares (“OLS”) regressions. These regressions include the earnings weight provided in the CPS, and because the EEOC rates are created by industry and state, the residuals between industry and state may be correlated. As a result, I cluster the standard errors by industry and state.¹⁰³ In addition, I limit the regressions to black and white individuals, as these charges or cases could also positively affect other racial minorities. In fact, black employees may not benefit any more from these charges than other racial minorities. Results from the estimations of this analysis follow below.

Results

Results from OLS regressions estimating versions of Equation (1) are presented in Tables 6–8. As seen in Table 6, the rate of EEOC race charges did not have a statistically significant effect on the wages of the entire sample of black employees or on black women two years following the action. The coefficient on *RateCharges x Black* (the interaction) is only significant in specifications limited to male employees, suggesting a positive relationship between the rate of EEOC race charges per industry and state at time t-2 on the wages of black men at time t that only black men (and not white men) experience.¹⁰⁴ The effect of increasing the rate of race charges from zero risk to the mean rate for black men (31.64) on the log wages of a black male is 0.012, or 1.2%. This suggests a small, though statistically significant, increase of 21 cents in the hourly wages of black male employees. The coefficient on black suggests a 12.35% gap in the wages between black men and white men. As a result, this 21 cent per hour decrease suggests a 9.72% decrease in the white/black wage gap for men.

or fully investigated the charge until t-2. While t-1 might be sufficient time for the employer to respond, I also wanted to test whether this effect was lasting. Results for variables lagged by one year are similar in size, significance, and direction.

¹⁰³ The standard errors are also robust.

¹⁰⁴ Interestingly, when the rate is constructed at time t, there is no significant effect for race charges or litigation as well. In addition, these rates only had an effect when constructed by industry and state and not industry or state alone.

Interestingly, the coefficients in column 3 suggest that while on average, higher rates of race charges are positively associated with black female wages, black females benefit less than white females. The coefficient on *RateCharges* is positive and statistically significant, however, the coefficient on *RateCharges x Black* is negative and statistically significant. Adding the two coefficients together, suggests a 0.9% effect for going from zero risk to the average rate of race charges for black women (30.55). However, because white females benefit much more than white females, this result does not signify a decrease in the white/black wage gap for female workers. In fact, the results suggest that this action is associated with a larger wage gap worse.¹⁰⁵ The results did not show a positive relationship between the number of EEOC race charges in an industry and state and the wages of black females, this is not surprising as the wage gap between black women and white women is very low, if present at all (Chandra 2000).¹⁰⁶

Knowing that a higher rate of race charges at time t-2 is associated with a significant increase in black male wages, in Table 7, I present results showing that even if the rate of charges that are likely to dismiss is higher, charges have a positive relationship with black male wages. The coefficients in Column 1 show that controlling for the number of race charges brought, the number of race charges that the charging party files in court have a positive impact on black male earnings. Going from zero risk to the mean rate of dismiss charges (5.23) increases black wages (and not white wages) by 1.3%, or 22 cents. This effect suggests that employers are deterred by the costs associated with all charges, and that the effect of all charges is not driven by those with merit or those that are eventually filed in court.¹⁰⁷

¹⁰⁵ Interestingly, limiting the specification to black females and not including the interaction would suggest a positive effect of the rate of EEOC charges on black females. This suggests that such analyses may be flawed.

¹⁰⁶ While some argue that the estimated female wage gaps are too small (Neal 2004), most scholars agree that it is smaller than the male white / black wage gap. The coefficient on black in the female specification presented in this chapter suggests a six percent gap as compared to a twelve percent gap for the male sample.

¹⁰⁷ This result holds when I control for the total number of race charges in addition to these charges and when I do not.

Column 1 in Table 7 and Columns 1–3 in Table 8 show that contrary to my hypothesis, when the rate of EEOC litigation or charging party litigation did not have a statistically significant impact on the wages of black men or black women. The coefficient on *RateCPCharges x Black* and *RateEEOCCases x Black* were insignificant in all equations. As noted before, the probability that a firm experiences either of these types of actions is very low. The average rate of CP Charges was 0.10 per 100,000 employees for black males and 0.07 per 100,000 employees for black females. Overall, these results suggest that the rate of EEOC charges related to race discrimination in total can have a significant impact on black male wages. However, likely due to the small probability of experiencing one of the events, litigation rates do not positively affect black wages.

CONCLUSIONS AND IMPLICATIONS

Scholars have criticized the EEOC since its inception, and many have suggested that its purpose could be achieved through the federal court system alone. However, the EEOC's ability to litigate charges of importance and its ability to act as a gatekeeper, such that more charges of employment discrimination are filed with the EEOC as compared to the federal courts, have been suggested as important characteristics of the agency. These two characteristics, respectively, have the ability to change the law such that it is more likely to deter discrimination and to allow plaintiffs unlikely to file a claim due to the costs of litigation an opportunity to have recourse. These two characteristics also have the potential to indirectly deter future discrimination in the responding firm and in other related firms due to the potential high costs of response and frequent publicity associated with these actions. However, empirical evidence suggests mixed results as to whether this deterrent effect is actually present. The evidence presented in this chapter suggests that higher rates of charges filed with the EEOC, including charges that are not likely to have merit, can

decrease the gap in wages between white and black men. However, litigation associated with the EEOC is not likely to have an effect.

In this analysis, the rate of race charges filed with the EEOC in an industry and state had a positive impact on the wages of black men in that industry and state two years following that action. The results suggest that this effect decreased the gap between white and black wages for men in the industry and state combination where the EEOC acted by 9.7%. While this is a positive result and shows that EEOC action can improve working conditions for black male employees, it does not necessarily show that the EEOC is more beneficial than the federal court system without the EEOC. Interestingly, the results showed that the sheer rate of charges was driving the effect and not the potential merit of the charge, and it is possible that the average yearly rate would decrease if the EEOC did not administer each charge.

What does not suggest EEOC success is the fact that EEOC litigation does not have the deterrent effect that I expected it to due to its highly publicized nature and potential for large damages. This result is likely because the EEOC litigates a very small percentage of charges, and as a result, these firms may not view it as a real threat. Perhaps this result would be different if the EEOC litigated cases more frequently, and some scholars (see Engstrom 2013) are proponents of this change, which would of course require a change in the structure of the EEOC and expanded resources. Future research could inform the general deterrent effect of all Title VII lawsuits filed in federal court on the industries in which they were filed against and in the state in which they were filed as compared to the EEOC effect presented in this chapter and earlier research.

Surprisingly, only approximately 10% of the race discrimination charges in the EEOC charge data that I analyze in this chapter claim discrimination in wages. As a result, it may be surprising that I find an effect on EEOC action on minority wages. However, wages are correlated

with other factors associated with potentially discriminatory actions, including promotion and hiring behavior. In addition, if an employer responds to such a risk by improving working conditions, they likely attract better employees worth compensating with higher wages or other employment benefits. It is likely that these results also suggests that EEOC action may have a positive impact on other employment outcomes as well. The analysis that I present in this chapter is also the first empirical evidence since Freeman (1973) that shows that EEOC action may be positively associated with improvements for black males.¹⁰⁸ Overall, I presented some evidence that the EEOC has helped decrease the white/black pay gap for men through the number of charges filed against the agency, and perhaps, this evidence suggests that the EEOC has not been “ineffective since its inception.”

¹⁰⁸ Many of the studies cited in this chapter did not analyze the effect of EEOC action on outcomes for male employees. In addition, none of the studies discussed in this chapter analyzed the effect on an industry and state level, and it might be that the deterrent effect is only present on such a level.

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Table 1. EEOC Race Charges and Cases Per Year

Year	Number of Race Charges	Number of Race Cases
2000	28,377	91
2001	28,276	87
2002	29,089	102
2003	27,675	160
2004	26,879	123
2005	25,990	145
2006	26,418	163

Source: 2000–2006 EEOC Charge Data.
Notes: The total number of cases, while always less than the total number of cases reported on the EEOC website, is often quite close to the total. This is likely because many of these cases include both a race and sex bases. In addition, these numbers are based on when the charge was filed, not when the actually case was filed in court, and, as a result, the years may be measured with error.

Table 2. Average EEOC Race Charge and Case Rates Reported by Race and Sex

Variable	Black Men	White Men	Black Women	White Women
RateCharges	31.64	21.14	30.55	20.87
RateEEOCCases	0.10	0.10	0.07	0.07
RateCPCharges	0.04	0.02	0.03	0.02
RateDismissCharges	5.23	3.62	5.52	3.65
Number of Observations	49,337	413,692	64,284	407,946

Source: EEOC Charge Data, 2000-2006
Notes: The rates are constructed by state, industry, and year, per 100,000 employees.

Table 3. EEOC Race Charge and Case Rates Reported by Industry

Industry	Rate Charges	Rate Cases
Agriculture	22.18	0.01
Forestry, Logging, Hunting, Fishing, and Trapping	42.45	0.00
Mining	28.97	0.43
Construction	7.48	0.09
Nonmetallic Mineral Products	22.24	0.19
Primary Metals and Fabricated Metal Products	26.01	0.23
Machinery Manufacturing	16.79	0.30
Computer and Electronic Products	13.44	0.05
Electrical Equipment, and Electronic Manufacturing	34.62	0.17
Transportation Equipment Manufacturing	19.56	0.05
Wood Products Manufacturing	24.78	0.07
Furniture and Fixtures Manufacturing	20.27	0.15
Miscellaneous and Non Specified Manufacturing	36.47	0.02
Food Manufacturing	31.31	0.18
Beverage and Tobacco Products	84.52	0.47
Textile, Apparel, and Leather Manufacturing	23.89	0.03
Paper and Printing	16.81	0.08
Petroleum and Coal Products	42.00	0.00
Chemical Manufacturing	26.90	0.11
Plastic and Rubber Products	17.17	0.08
Wholesale Trade	0.70	0.00
Retail Trade	14.29	0.09
Transportation and Warehousing	26.37	0.19
Utilities	23.34	0.10
Publishing Industries (except internet)	22.07	0.10
Motion Picture and Sound Recording Industries	10.95	0.04
Broadcasting (except internet)	12.54	0.09
Internet Publishing and Broadcasting	0.00	0.00
Telecommunications	63.09	0.08
Internet Service Providers and Data Processing Services	127.71	0.43
Other Information Services	8.37	0.00
Finance	20.59	0.05
Insurance	9.93	0.01
Real Estate	10.73	0.02
Rental and Leasing Services	65.24	0.50
Professional and Technical Services	22.47	0.07
Management of Companies and Enterprises	19.53	0.00
Administrative and Support Services	24.56	0.07
Waste Management and Remediation Services	24.20	0.05
Educational Services	9.89	0.01
Hospitals	16.05	0.03

Health Care Services, Except Hospitals	17.71	0.06
Social Assistance	12.94	0.02
Arts, Entertainment, and Recreation	11.04	0.01
Accommodation	44.01	0.11
Food Services and Drinking Places	11.74	0.06
Repair and Maintenance	14.54	0.04
Personal and Laundry Services	20.58	0.08
Membership Associations and Organizations	21.18	0.04
Private Households	2.75	0.00
Public Administration	32.02	0.02
Source: EEOC Charge Data 2000–2006, CPS Data 2000–2006.		
Notes: The rates are constructed by state, industry, and year, per 100,000 employees for each industry represented in the EEOC charges data.		

Table 4. EEOC Race Charge and Case Rates Reported by State

State	Rate Charges	Rate Cases
Alabama	87.39	0.03
Alaska	4.89	0.12
Arizona	20.96	0.13
Arkansas	69.57	0.10
California	7.95	0.03
Colorado	13.53	0.05
Connecticut	2.13	0.00
Delaware	11.99	0.16
District of Columbia	52.89	0.00
Florida	17.21	0.06
Georgia	65.88	0.07
Hawaii	10.33	0.10
Idaho	0.88	0.00
Illinois	32.24	0.27
Indiana	23.76	0.03
Iowa	1.98	0.05
Kansas	13.29	0.01
Kentucky	23.56	0.02
Louisiana	56.32	0.12
Maine	0.58	0.00
Maryland	12.56	0.09
Massachusetts	1.57	0.02
Michigan	14.20	0.08
Minnesota	10.54	0.12
Mississippi	72.94	0.12
Missouri	19.57	0.08
Montana	1.73	0.00
Nebraska	2.94	0.00
Nevada	5.67	0.10
New Hampshire	0.48	0.00
New Jersey	12.55	0.09
New Mexico	31.75	0.07
New York	8.28	0.08
North Carolina	39.71	0.09
North Dakota	1.21	0.00
Ohio	14.83	0.04
Oklahoma	33.93	0.04
Oregon	1.78	0.00
Pennsylvania	11.66	0.12
Rhode Island	1.65	0.00
South Carolina	16.19	0.03
South Dakota	1.51	0.00

Tennessee	58.93	0.34
Texas	27.61	0.12
Utah	1.38	0.00
Vermont	1.52	0.00
Virginia	18.19	0.04
Washington	7.14	0.03
West Virginia	4.03	0.00
Wisconsin	11.86	0.02
Wyoming	1.18	0.00
Source: EEOC Charge Data, 2000–2006; CPS Data 2000–2006. Notes: Rates are constructed by state, industry, and year per 100,000 employees for each industry represented in the EEOC charge data.		

Table 5. Descriptive Statistics for CPS Sample, Means and Percentages

Variable	Black Men	White Men	Black Women	White Women
Hourly Wage	17.41	21.36	15.39	17.63
Log of Hourly Wage	2.72	2.88	2.59	2.70
Potential Experience	19.49	20.27	20.13	20.55
Government Employer	16.48	13.51	24.24	18.34
Union Covered Employee	17.40	15.27	15.51	12.29
Years of Education	13.14	13.33	13.45	13.78
Married	49.42	59.19	34.98	55.16
Metropolitan Location	89.72	84.22	90.14	83.07
Full Time	87.15	91.32	85.05	77.43
Number of observations	49,336	435,771	65,278	430,518
Source: CPS, 2002-2008 Notes: All values are weighted by the CPS earnings weight. The sample is comprised of employed workers ages 16–64, with hourly wages between \$1.00 and \$100, and that are not self-employed. Wages are in 2008 dollars.				

Table 6. Regression Results for Rate of Race Charges
Dependent Variable Log of Hourly Wages

Variables	Full Sample (1)	Men (2)	Women (3)
RateCharges x Black	0.007 (0.015)	0.039** (0.018)	-0.029* (0.017)
RateCharges	0.021 (0.013)	-0.012 (0.014)	0.059*** (0.016)
Black	-8.549*** (1.237)	-11.653*** (1.844)	-6.048*** (0.582)
Female	-15.326*** (0.426)		
Potential Experience	2.864*** (0.079)	3.399*** (0.158)	2.357*** (0.054)
Potential Experience ² /100	-4.634*** (0.172)	-5.685*** (0.341)	-3.676*** (0.113)
Full Time	16.364*** (1.720)	18.003*** (4.150)	14.635*** (0.526)
Government Employee	0.673 (0.768)	-0.623 (0.954)	2.208*** (0.794)
No FEPA State	-6.584*** (2.233)	-6.241*** (2.378)	-6.802** (2.728)
Union Covered Employee	11.445*** (0.589)	12.032*** (0.710)	10.516*** (0.669)
Metropolitan Location	10.240*** (0.436)	9.260*** (0.509)	10.770*** (0.520)
Years of Education	7.003*** (0.141)	6.517*** (0.176)	7.210*** (0.125)
Married	7.888*** (0.602)	12.092*** (1.012)	3.383*** (0.296)
Constant	166.235*** (2.713)	165.001*** (2.964)	155.524*** (2.771)
Number of Observations	854,345	414,686	439,659
R-Squared	0.483	0.471	0.478

Robust standard errors clustered by two-digit industry and state are reported in parentheses. All coefficients and standard errors have been multiplied by 100. The sample is the CPS years 2002–2008: individuals that are employed, between ages 16 and 64, with hourly wages between \$1.00 and \$100. Regressions are limited to black and white individuals. All values are weighted by the CPS earnings weight. Each regression also includes occupation fixed effects, district office fixed effects, and year fixed effects. Wages are in 2008 dollars. *** indicates significance at the 1 percent level; ** indicates significance at the 5 percent level; and * indicates significance at the 10 percent level.

**Table 7. Regression Results for Rate of Race Charges, Male Sample
Dependent Variable: Log of Hourly Wages**

Variables	CP Charges (1)	Dismiss Charges (2)
RateCPCharges x Black	1.826 (1.248)	
RateCPCharges	0.235 (0.210)	
RateDismissCharges x Black		0.240** (0.100)
RateDismissCharges		-0.021 (0.044)
RateCharges	-0.007 (0.013)	-0.008 (0.016)
Black	-10.560*** (2.012)	-11.697*** (1.651)
Constant	164.818*** (2.958)	165.009*** (2.971)
Number of Observations	414,686	414,686
R-Squared	0.471	0.471

Robust standard errors clustered by two-digit industry and state are reported in parentheses. All coefficients and standard errors have been multiplied by 100. The sample is the CPS years 2002–2008: individuals that are employed, between ages 16 and 64, with hourly wages between \$1.00 and \$100. Regressions are limited to black and white males. All values are weighted by the CPS earnings weight. Each regression also includes occupation fixed effects, district office fixed effects, and year fixed effects. Wages are in 2008 dollars. *** indicates significance at the 1 percent level; ** indicates significance at the 5 percent level; and * indicates significance at the 10 percent level.

Table 8. Regression Results for Rate of EEOC Race Cases
Dependent Variable: Log of Hourly Wages

Variables	Full Sample: Rates by Industry & State (1)	Men: Rates by Industry & State (2)	Women: Rates by Industry & State (3)
EEOCRateCases x Black	-0.052 (0.435)	-0.128 (0.443)	0.928 (0.715)
EEOCRateCases	-0.052 (0.199)	0.143 (0.176)	-0.571 (0.387)
EEOCRateCharges	0.023* (0.012)	-0.006 (0.012)	0.053*** (0.015)
Black	-8.322*** (1.366)	-10.478*** (2.066)	-6.960*** (0.557)
Female	-15.324*** (0.426)		
Constant	166.197*** (2.715)	164.805*** (2.959)	155.736*** (2.772)
Number of Observations	854,345	414,686	439,659
R Squared	0.483	0.471	0.478

Robust standard errors clustered by two-digit industry and state are reported in parentheses. All coefficients and standard errors have been multiplied by 100. The sample is the CPS years 2000–2008: individuals that are employed, between ages 16 and 64, with hourly wages between \$1.00 and \$100. All values are weighted by the CPS earnings weight. Each regression also includes occupation fixed effects, district office fixed effects, and year fixed effects. Wages are in 2008 dollars. *** indicates significance at the 1 percent level; ** indicates significance at the 5 percent level; and * indicates significance at the 10 percent level.