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## DIGNITY AND DISCRIMINATION: EMPLOYMENT CIVIL RIGHTS IN THE WORKPLACE AND IN COURTS

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### I. INTRODUCTION<sup>1</sup>

Gerry Handley (plaintiff): They would like always bring up these racial conversations and make these racial jokes . . . I'd just ignore them. I wouldn't laugh or I wouldn't listen in . . . They started talking about incest, and they started talking about blacks from slavery time, you know, they bred them and sold them, and they inbred them down in the south. And I'm from down south . . . they told me a lot of the blacks had sex with their daughters and stuff like that, way back from the Caribbeans [sic]. And I would just sit there listening like, "Oh my God, I know they're not saying this." And the guy asked me, he said, 'did I ever have sex with my daughter.' And so—

Laura Beth Nielsen: He asked you if you had sex with your daughter?

Handley: Yeah.

Nielsen: And this is your boss or your manager?

Handley: He was like my lead.<sup>2</sup>

When ordinary employees, like Gerry Handley ("P14") quoted here, face what they perceive to be discrimination in the workplace, state and federal law may provide redress and restitution.<sup>3</sup> As the remedy for em-

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1. This article revisits data from our book. *See generally* ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* (2017). In that book, we use a different theoretical framework but the concept of employment civil rights as a dignity taking was too interesting to pass up. *Id.*

2. *Rights on Trial Audio Recordings (selections): Chapter 1, Gerry Handley's Story*, ELLEN BERREY, SOCIOLOGIST, <https://www.ellenberrey.com/audio> [<https://perma.cc/D238-LJJT>] [hereinafter *Gerry Handley's Story*].

3. All names of research participants are pseudonyms.

ployment discrimination suggests (past and future earnings), discrimination is a material deprivation of wages. When one experiences discrimination and one's work is devalued or terminated, there are material consequences. By definition, it is an illegitimate deprivation of property. Discrimination in the workplace, as well as in the process of pursuing claims in regulatory agencies and federal courts, routinely involves the re-inscription of mistreatment and stereotypes that are, in effect, infantilizing and dehumanizing, such as the assertion by Mr. Hanley's supervisor that Mr. Handley and other African-American descendants of slaves are hypersexualized predators.

The invitation of this conference is to examine employment civil rights in a "dignity takings" theoretic framework. In some respects, the process of using the Equal Employment Opportunity Commission ("EEOC") and the federal courts to enforce an employment civil rights claim is easy to conceive as a dignity taking, but in other respects it is more difficult. Here, we use the existing scholarship on dignity takings to introduce how the concept could work as an analytic framework; in the next section, we use our qualitative data to see if we can meet these required elements.

The most fulsome exploration of dignity takings comes from the scholar who coined the term and identified the phenomenon. In *We Want What's Ours: Learning from South Africa's Land Restitution Program*,<sup>4</sup> Bernadette Atuahene established the dual harm of a dignity taking where individuals (1) experience the confiscation of property by the state through a deprivation that is (2) done in a way that resulted in the dehumanization or infantilization of the dispossessed. In cases of dignity takings, the restoration of property is not enough, according to Atuahene. Instead, the remedy must include material compensation *and* a process that reaffirms the harmed parties' agency and humanity.

This Article proceeds in five sections. Section II provides background about the nature and scope of the employment civil rights litigation system, as well as an exposition about what constitutes a dignity taking and why employment civil rights are ripe for a dignity takings analysis. Section III presents our methods and data used to conduct the analysis. In Section IV, we use our qualitative data to posit three questions. First, does employment

4. See generally BERNADETTE ATUAHENE, *WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM* (2014); Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating A New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 *LAW & SOC. INQUIRY* 796 (2016); Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 *ANN. REV. L. & SOC. SCI.* 171, 178 (2016).

discrimination and the subsequent process of pursuing a legal claim amount to a property loss for the individual? Second, does the discrimination itself and the subsequent legal process infantilize the party claiming discrimination? Third, do aggrieved parties seek some recognition of the dehumanization? And finally, does the litigation process provide such a process? Section V is the conclusion.

## II. BACKGROUND

### A. Discrimination

Our nation's sixty-year history of battling employment civil rights violations represents a significant period of incredible progress on a variety of fronts including improvements in race and gender wage equality and significant changes in attitudes about workplace discrimination. And yet, for every dollar earned by full- and part-time white male wage workers in the United States in 2015, white women earned eighty-two cents; African-American men earned seventy-three cents, Hispanic men earned sixty-nine cents, African-American Women earned sixty-five cents, and Hispanic women, fifty-eight cents.<sup>5</sup>

Of course, some of this differential is attributable to education, experience, industry, and occupation. When these factors are taken into account, however, only about 8% of the gender wage gap can be explained,<sup>6</sup> and nearly 51% of the race gap is explained.<sup>7</sup> Of the unexplained wage gap, some part is attributable to discrimination.

But wages are not the only way in which employees may be disadvantaged based on their race, sex, age, disability, or other statuses that puts them in a class protected by anti-discrimination law. Discrimination in hiring, promotion, and termination follow these general trends. Additionally, individuals' experience and perceptions of discrimination vary widely based on their racial identity. When asked, "Were you personally treated unfairly in hiring, pay or promotion in the past year because of your race or

5. Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RESEARCH CTR.: FACT TANK (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/> [https://perma.cc/UE5S-9LBH] (referring to median hourly earnings).

6. Francine D. Blau & Lawrence M. Kahn, *Gender Differences in Pay*, J. ECON. PERSP., Fall 2000, at 75, 80.

7. Roland G. Fryer et al., *Racial Disparities in Job Finding and Offered Wages*, 56 J.L. & ECON. 633 (2013); Eric Grodsky & Devah Pager, *The Structure of Disadvantage: Individual and Occupational Determinants of the Black-White Wage Gap*, 66 AM. SOC. REV. 542. It is important to note that quantitative measures such as industry, occupation, and length of workforce participation are themselves produced by unequal education and discrimination.

ethnicity?”, 21% of African-Americans said yes, whereas 16% of Hispanics and 4% of whites answered yes.<sup>8</sup>

*B. The Legal Process for Combatting Workplace Discrimination*

The number of discrimination cases filed in federal district court grew from 336 in 1970, to some 9000 in 1983, and then declined to 7613 in 1989.<sup>9</sup> The early 1990s saw a marked increase in the number of filings, more than doubling from under 10,000 in 1991 to 23,735 in 1998. 1998 was the high water mark for filings, and led to doomsday predictions about the growth in employment civil rights claims, similar to the alarms sounded about the growth in the total number of civil filings in the early 1980s.<sup>10</sup> But the doomsday predictions proved wrong. From 1998 to 2004, filings declined by 15% to about 20,000 and went on to dip significantly between 2004 and 2008 before recovering somewhat to 17,000 in 2011. In 2014, the most recent year for which data are available, 13,831 lawsuits were filed.

These data reveal a notable trend in the rise of retaliation charges over time. They rose from 15.3% of charges in 1992 to 42.8% by 2014. The growth in retaliation charges may reflect the rising proportion of charges that involve dismissal, a finding documented by Donohue and Siegelman for the 1965–1987 period and in our data for the 1988–2003 period.<sup>11</sup> It may also reflect an increasing tendency for plaintiffs (and their lawyers) to add retaliation as a claim in discrimination disputes. It may reflect more retaliatory behavior by employers. Without in-depth analysis of claims over time and the employment contexts that produce them, we are left to speculate about the reasons for this shift.

When employees believe they have suffered a violation of their employment civil rights and they have no further remedies for appeal in the workplace organization itself, those workers who want to pursue a claim must make a charge with the EEOC and/or a Fair Employment Practices Agency (FEPA) at the state or local level. Some charging parties receive relief through the EEOC or state FEPA conciliation process, making a law-

8. See Patten, *supra* note 5.

9. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 (1991).

10. See BERREY, NELSON & NIELSEN, *supra* note 1, at 41.

11. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC. REV. 1133, 1167 (1990); see BERREY, NELSON & NIELSEN, *supra* note 1, at 41.

suit unnecessary, but most EEOC complaints do not receive definitive resolution and the agency later provides a right to sue letter.<sup>12</sup>

The proportion of employees who believe they have been targets of discrimination and file claims against their employer is slim. For example, in 2016, there were 14,870,000 full-time, year-round African-American workers in the United States.<sup>13</sup> Using the Pew rate of perceived discrimination (21% for African Americans), we expect that some 3,122,700 African-American workers thought they were treated unfairly on the basis of their race or ethnicity in that year. And yet, there were only 32,309 race discrimination charges made at the EEOC.<sup>14</sup> Assuming an equal number were reported to state Fair Employment Practice Agencies (FEPAs), that means roughly 64,618 of the 3.1 million workers reported the unfair treatment outside the company. In other words, about 2% of African-American workers who think they were treated unfairly on the basis of their racial status made a complaint to any agency designed to protect against this. To be sure, this includes unfair treatment that does not rise to the legal definition of discrimination, but it also excludes part-time, African-American workers, workers of all other racial groups, assumes that those treated unfairly were only treated unfairly once, and it does not include unperceived discrimination. With these caveats, this exercise provides a dramatic demonstration of how few complaints enter formal dispute resolution processes and while the absolute number of complaints may seem large (in Figure 1), this exercise puts those “huge” numbers in perspective vis-à-vis perceived discrimination in the workplace.

The ratio of lawsuits to charges (sometimes referred to as the conversion rate) fluctuates between 15% and 30% for most years in this series. Beginning in 1994, there were steady increases in the percentage of charges leading to lawsuits—from 15% in 1993 to 18% in 1994, and almost 30% in the years 1996 through 1999, and then receding to an average of roughly 17% between 2007 and 2014.

12. Michael A. Szkodinski, *An Analysis of the EEOC's Issuance of Early Right-to-Sue Letters: Does it Promote Judicial Efficiency or Encourage Administrative Incompetence?*, 150 U. PA. L. REV. 689, 690 (2001).

13. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, <https://www.bls.gov/cps/cpsaat08.htm> [<https://perma.cc/2KWL-6MAW>] (last modified Feb. 8, 2017).

14. *Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2016*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/J4FH-SNG6>].

Table 1



On the one hand, employment civil rights litigation consumes a large part of the federal docket. On the other hand, we see that—of perceived discrimination—this caseload represents a tiny fraction of people who believe they have been targets of discrimination. And yet, in the arena of employment discrimination, this is the process to which aggrieved individuals must appeal, and it is the process that does (or does not) function as the “cost” to employers for engaging in or permitting discrimination. We expect individuals to file these suits to continue to fight workplace discrimination in society. But, when plaintiffs take on the monumental task of enforcing rights, what happens to them? Here we argue that what they experience may be conceived as a dignity taking.

### *C. Dignity Takings*

It is easy to make the case that racist, sexist, homophobic, and discriminatory practices in the workplace are affronts to dignity. Nobody wants to be called a “black bitch,”<sup>15</sup> to be accused of incest,<sup>16</sup> or simply to

15. Robert L. Nelson et al., *Rights on Trial: Race and Representation in Employment Civil Rights Litigation* (Sept. 13, 2011) (unpublished manuscript),

be told they are lazy or not good at their job. Human dignity, pride of work, and basic humanity all are implicated in cases of discrimination that involve these kinds of epithets and insinuations. Workplace discrimination, as a legal subject, is ripe for an analysis of dignity taking. In the following section, we describe the data we collected and analyzed as part of a larger project to answer this question.

### III. DATA

The research reported here is part of a large-scale, multi-year, mixed-method research project about employment civil rights which occurred in three phases, and which was designed to reveal the distinct perspectives of multiple parties engaged in litigation.<sup>17</sup> First, we collected and analyzed a national random sample of 1788 employment civil rights cases filed in federal court in seven districts between 1988 and 2003, coding for hundreds of factors about the cases. We then analyzed these data quantitatively to explore litigations trends and outcomes.<sup>18</sup> The quantitative portion of our research is an expanded replication of Donohue and Siegelman's well-known study of employment civil rights litigation between 1972 and 1987.<sup>19</sup>

Using the quantitative findings of the most common types of employment discrimination (race, sex, age, disability) and the most theoretically meaningful case resolutions (dismissal, early settlement, late settlement, trial), we created a sixteen-cell grid to capture the possible combinations. From each cell, we drew a random subsample of cases from two of the districts for in-depth study. By sampling for range,<sup>20</sup> we increased the likelihood of capturing relevant dynamics in the cases.

We interviewed 100 individuals across these cells: forty-one plaintiffs; twenty plaintiffs' attorneys; twenty defense attorneys representing employers; and nineteen lawyers serving as outside counsel to employers and hu-

[http://www.americanbarfoundation.org/uploads/cms/documents/nelson\\_racerepresentation\\_sept\\_13\\_2011.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/nelson_racerepresentation_sept_13_2011.pdf).

16. *Gerry Handley's Story*, *supra* note 2.

17. For the most fulsome statement of our research, see BERREY, NELSON & NIELSEN, *supra* note 1.

18. See generally Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010).

19. See generally Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 165 (1990).

20. See, e.g., Mario L. Small, *How Many Cases Do I Need?: On Science and the Logic of Case Selection in Field-Based Research*, 10 ETHNOGRAPHY 5 (2009).



man resource directors (“defendant-representatives”). We first interviewed plaintiffs; when feasible, we interviewed defendant-representatives and lawyers in the same case. When this was not feasible, we selected defendant-representatives and lawyers from other cases in the random subsample. This Article focuses only on plaintiffs,<sup>21</sup> (although we report the findings of defendant-representatives and attorneys on both sides elsewhere) but the analysis is enhanced through interviews with plaintiff and defense lawyers. Defendant-representatives were employed by a company, non-profit organization, or government entity as human resource professionals or in-house counsels with responsibility for employment law (see Table 1).<sup>22</sup> Plaintiff-employees filed cases against the private companies, non-profit organizations, or government entities that employed them—although, at the time of our interviews, only one plaintiff still worked for the employer.

Our interview protocols consisted of open-ended, semi-structured questions about closed legal cases involving the interviewee. The plaintiffs’ interviews covered their personal experiences of job discrimination, workplace dispute resolution, legal authorities, and case resolution. Defendant-representatives, plaintiffs’ attorneys, and outside defense counsel discussed a specific closed case and their organization’s general strategy for managing discrimination complaints and lawsuits. Each interview lasted about one hour, and ended with force-choice demographic and attitudinal questions. Interview transcripts and notes were coded with NVivo qualitative analysis software. The coding scheme was developed inductively—with codes identified through data analysis—and deductively—with several codes based on secondary literature.<sup>23</sup>

Following standard practices for qualitative research, the analysis uses rich, textured data to identify social mechanisms and general processes.<sup>24</sup> Because interviewees were asked to “tell us their story,” the resulting data can be viewed as *narrative*. Our data provide a personal account, a “plot,”<sup>25</sup> which—with a beginning, middle, and end—resonates as persuasive with many readers. To temper the individualistic tendency common in narrative

21. Ellen Berrey et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC’Y REV. 1 (2012).

22. Title VII exempts employers with fewer than fifteen employees. 42 U.S.C. § 2000e(b) (2012) (The term “employer” signifies those with “fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”).

23. See generally MATTHEW B. MILE & MICHAEL A. HUBERMAN, QUALITATIVE DATA ANALYSIS: AN EXPANDED SOURCEBOOK (3d ed. 1994).

24. For an example of this practice, see JOHN LOFLAND & LYN H. LOFLAND, ANALYZING SOCIAL SETTINGS: A GUIDE TO QUALITATIVE RESEARCH AND ANALYSIS (3d ed. 1995).

25. See, e.g., FRANCESCA POLLETTA, IT WAS LIKE A FEVER: STORYTELLING IN PROTEST AND POLITICS (2006).

studies,<sup>26</sup> we follow socio-legal research that ties narrative accounts to social structure, the life course, social situations, and membership in identity groups.<sup>27</sup> Our study combines the persuasive richness of narrative interviews with rigorous qualitative analysis of our respondents' stories.

Our interviewees' "plots" are necessarily retrospective, particularly for the plaintiffs, as very few were still involved in litigation when interviewed. Nonetheless, interviewees' reconstructions of their cases are as important, arguably more important, than their in situ experience. It is through memories of salient events that legal actors continually reconstruct their faith, or lack thereof, in the fairness and legitimacy of the law. Our unique inclusion of defendant-representatives and plaintiffs, along with our data on parties' interpretations of real lawsuits, reveals the subjective and relational experiences that matter for both sides' assessments of fairness.

#### IV. ANALYSIS

This section of the article uses our original empirical data to analyze the four questions alluded to in the introduction and explained in the prior section of this paper. This analysis proceeds by answering four questions in turn:

- A. Does employment discrimination and the process of pursuing the legal claim amount to a deprivation of property for the individual?
- B. Does the discrimination itself and the subsequent legal process infantilize the party claiming discrimination?
- C. Do aggrieved parties seek some recognition of the loss of this humanity?
- D. Does the litigation process provide such a process?

We argue that the answer to each of the four questions is yes or arguably yes; therefore, the dignity taking theoretic framework is an appropriate

26. See, e.g., Ellen Berrey & Laura Beth Nielsen, *Rights of Inclusion: Integrating Identity at the Bottom of the Dispute Pyramid*, 32 LAW & SOC. INQUIRY 233 (2007); BENJAMIN D. FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY (2004); Laura Beth Nielsen, *The Work of Rights and the Work Rights Do: A Critical Empirical Approach*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 63 (Austin Sarat ed., 2004)

27. See, e.g., DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES (2003); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 LAW & SOC'Y REV. 1055 (2000); PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

way to understand employment civil rights. One story presented here is worth telling in its entirety before we move to each of the elements.

Kristen Baker (“P34”), was a thirty-three-year-old, white woman who worked as an assistant buyer for GCo, a small, family owned company manufacturer. According to her account and records we reviewed, she was a hard worker, taking classes to earn certificates in areas of expertise relevant to her job. After five years of service, Daniel Miller, a male employee who had not taken the courses and who had only six more months of service, was promoted to salesman. Ms. Baker approached the vice president to ask about the decision. He told her “Daniel is a guy and he’s got three kids and a wife, and you are a girl and you married a doctor, so you obviously don’t need the income.” Although she thought this was not fair, she made the best decision for her and her family, which was to continue working at the manufacturing plant.

As time went on—according to Ms. Baker—the workplace became increasingly professionalized when GCo was sold to a larger company. Ironically, the more formalized HR practices coincided with an increase in unprofessional behavior. The norms that were carefully policed when the company was family-run were harder to enforce in the new bureaucratic structure. Soon, the salesmen—and Mr. Miller in particular—were swearing more. And it was not just about venting frustration; what once could be explained away as rude or bawdy became obscene. Ms. Baker came to believe that the sexualized teasing was ruining her credibility with her vendors and clients.

Mr. Miller began bringing pornographic magazines and movies to the workplace, charging a dollar for admission to the conference room at lunch where he would show the movies. He showed Ms. Baker pictures of pornography depicting bestiality. She utilized the new HR policies and complained to her manager, documenting multiple complaints. There were other women in the department, but the ethic was one of gendered toughness and, while they would express frustration privately to Ms. Baker, they did not make formal complaints. Finally, she told us:

There were two final straws. One of them was when he [had] a pornographic picture of a woman who had a watermelon shoved into her vagina. And [the woman in the photograph] was on a bed and had stiletto heels on . . . Daniel took it in front of a group of my peers and said, “Oh, look Kristen, we would recognize you anywhere with those heels on.” I was humiliated, just humiliated and then reported it.

Shortly thereafter, in front of a client:

Daniel went in a room and pulled out this tray of chocolate dildos and took out one, a big one, and stuck it in my face, in my mouth, and said,

“Here I know you like to suck on these. Suck on this.” And I just [said], “I can’t do this anymore.”

Ms. Baker took all of the appropriate steps to stop the discrimination, making repeated reports to the appropriate workplace representatives, but nothing happened. After the chocolate dildo incident, she told us that she told her boss:

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

When she eventually spoke to an attorney at the urging of a friend, her attorney told her (and later, us) “you know, I don’t normally take non-corporate clients . . . [but] I have to take this case, because you really were treated inhumanely.”

Ms. Baker said her attorney informed her “that it wasn’t a million dollar case.” This was not important to her, she told us: “It was never about money, so we [demanded] a simple [settlement] of just \$100,000 . . . and then an apology.” And she wanted to keep her job because it provided her family’s health insurance (her husband had a chronic illness that required ongoing medical attention).

As the case proceeded, Mr. Miller eventually was forced to give a deposition in which he denied the most outrageous accusations and sugar-coated others. Shortly after his deposition, the company’s owner asked a respected former employee, Tim Fligstein, what he saw when he worked with Mr. Miller and Ms. Baker. With nothing to lose now that he worked for another company, Mr. Fligstein answered honestly. In Ms. Baker’s words, he told the owner what happened “word for word.” Ms. Baker cried as she told us, “[t]hat is when they decided to drop the suit because they knew that they were wrong.” After the owner heard the truth from someone he apparently valued (a man), GCo decided to settle the lawsuit.

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

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

Ms. Baker dropped the lawsuit, keeping her job and benefits in exchange for the following concessions: apologies from Mr. Miller, as well as from the past and current presidents of GCo in front of all of GCo's executive management; one dollar (that was not recorded in any settlement documents); a stipulation that the case would neither be characterized as a "loss" for Ms. Baker nor could GCo's owner ever claim that he "always won lawsuits"; that Mr. Miller could never advance in management; and that the company start a sexual harassment program that month. Ms. Baker enjoyed a seventeen- year career at GCo after the lawsuit. Mr. Miller eventually was fired or quit (no one we interviewed was exactly sure which).

In what follows of this section, we analyze each element of a dignity taking in turn, returning to Ms. Baker, Mr. Handley (from the beginning of the Article), and other plaintiffs we interviewed to illustrate how employment discrimination and the litigation system itself constitute a case of dignity taking.

*A. Does Employment Discrimination and the Process of Pursuing the Legal Claim Amount to a Deprivation of Property for the Individual?*

For an individual to suffer a dignity "taking," that individual must suffer some kind of material loss. Atuahene uses the loss of real property in South Africa. And yet, the material loss can also function as anticipated, earned future material goods, such as in this case with wages or salary. Consider Kristin Baker, above. She makes the case clearly when she told us that that the sexualized teasing was ruining her credibility with her vendors and clients. In a commission-driven industry, this has a direct impact on her compensation alongside the psychic toll of being harassed daily. Moreover, her husband's chronic medical condition, and her family's reliance on healthcare provided by GCo meant she was in a somewhat quid-pro-quo harassment arrangement. In exchange for continued employment (and the health insurance that came along with it), she was required to tolerate sexual harassment.

In some ways, this element of the dignity takings test is the easiest to show in the case of employment discrimination. The material loss here is obvious because a devalued worker also will be underpaid and under-promoted. When an employee is terminated (a very common outcome in

cases like this), the loss is absolute—the loss of all income, health insurance (where applicable), other benefits, et cetera.

And yet, this element is also complicated because the taking has to be done by the state. For those employees working for local, state, and federal employers (some 15% of the workforce in 2016), discrimination itself meets this condition. But how do we understand employees in private organizations that are discriminated against? Can it be said that the state is involved in the taking when MegaCorp engages in or permits discrimination on the basis of race, sex, age, or disability?

We think so. The endowment of a statutory right to a discrimination-free workplace imbues employers with state-sanctioned power and responsibility. Although, for private employers, it may not be the state itself acting to dehumanize (though that certainly happens in the regulatory and litigation processes), the state is legitimizing behavior of private actors. And then lawyers and judges, as officers of the legal system, dehumanize these individuals through the cases.

*B. Does the Discrimination Itself and the Subsequent Legal Process Infantilize or Dehumanize the Party Claiming Discrimination?*

Matthew Brown's employment civil rights dispute in the workplace began after a promotion. An African-American retail account manager in his forties, Mr. Brown ("P9") faced increased hostility from his new supervisors, all of whom were white men. The position normally required an undergraduate degree, but Mr. Brown was given the job before he finished his degree, which he was completing at night. Rumors began to circulate that Mr. Brown had been promoted on the basis of his racial status, rather than his qualifications, and he began to have frequent conflicts with his new manager, who aggressively criticized his work. When Mr. Brown would seek a second opinion to confirm that he was in fact performing his duties and producing good work, the manager would respond with insults and, in one instance, by throwing things.

These tantrums stopped after Mr. Brown took the issue to the HR office; the manager resigned shortly thereafter. After a second manager quit, coworkers began to accuse Mr. Brown of pushing talented people out of the company and of being insulated from disciplinary action or termination. These employees felt that the threat of a race discrimination lawsuit was "forcing" the company to allow Mr. Brown's continued employment. Although he saw the increasingly "racialized" nature of these accusations, Mr. Brown felt reluctant to, in his words, "play the race card," since the mes-

sages being sent to him were, “How dare you?! You’re African American. You’ve been given an opportunity. You should play ball.”

Consider Matthew Brown’s workplace situation along with Gerry Handley’s from the beginning of this Article. Both were the only African-American worker in their immediate department, and both were subject to racial stereotypes about African Americans: in Mr. Brown’s case, that he only received and kept his job as part of illegitimate affirmative action programs designed to promote unqualified African-American employees; in Mr. Handley’s case, that African-American men are lascivious, over-sexed perpetrators of incest. The stereotypes that confronted Mr. Brown clearly demonstrate how some workers are devalued on the basis of skin color. Mr. Handley’s are an example of the worst kind of dehumanization: physical violence; in addition to the disregard for his work, Mr. Brown’s manager threw things at him!

*C. Do Aggrieved Parties Seek Some Recognition of the Loss of This Humanity?*

Annie Daley (“P18”), a forty-year-old African-American supervisor, filed a race discrimination claim against her employer, a telecommunications firm. Her director, a white woman, had accused Ms. Daley of hiring too many African Americans. Then, the employees under Ms. Daley’s charge began performing at a subpar level and expressed open racial hostility. Ms. Daley told us “there was one particular supervisor who, who made it very clear that she was not going to report to a black woman . . . She even called me a black ‘B’ [bitch].”

Soon after Ms. Daley looked to her own supervisor and the HR department for assistance in disciplining these white employees, she was fired. While Ms. Daley’s attorney, Ellis Barry, a white man, praised her character and noted “a pattern of somebody who clearly was not in favor, not in management’s favor or never had been,” her employer’s attorney, a white woman, Mary Hill, described Ms. Daley exactly as Ms. Daley anticipated. Ms. Hill told us “she came across as not terribly sharp and really kind of cold . . . Not someone you would warm up to and feel sympathy for. She came across as rigid and sort of bitchy.”

Ms. Daley refused a last-minute settlement offer of \$100,000, and the case went to trial. The jury, which was comprised largely of white people, and included several older white males, decided in favor of the telecommunications company—neglecting the problematic characterization of her as bitchy.

Ms. Daley's story is certainly one of dehumanization by stereotype. The pervasive stereotype that African-American women are bitchy or overbearing matriarchs originate in African-American slavery. Stereotypes of the feminine as delicate, good, and modest were limited to white women, while black womanhood signified masculinized strength and hard labor in combination with attributes of promiscuity.<sup>28</sup> In modern America, the matriarchy stereotype also roots itself in the reality of high unemployment among African-American men and the imperative that African-American women fulfill the breadwinner role (in turn, this economic reality clearly contributes to the stereotype of male laziness).<sup>29</sup> The stereotype of the "angry African American woman" caricatures African-American women as possessive, nagging, and always irate. The stereotype has structural origins in the "shortage" of available African-American men through incarceration, homicide, and unemployment throughout the United States.

In retrospect, Ms. Daley assessed her case in terms of the difficulty of achieving justice and the challenges of confronting racism at work: "You can try to prevent people from, you know, from mistreating people . . . But you can't make them not be racist." The legal system reasserted the dignitary harm she suffered in the workplace. Despite her attempt to wrest it back through litigation, Ms. Daley lost. Kristin Baker, on the other hand, experienced her \$1 and her apology as a dignity restoration.

*D. Does the Litigation Process Provide a Process for Dignity Restoration?*

As the adversarial process comes to an end, the asymmetry of power between parties becomes clear. Plaintiffs often get little or nothing of material value as a result of litigation.<sup>30</sup> They routinely experience grave non-material costs, such as depression. Defendant employers, while not happy with paying a settlement or carrying litigation costs, very seldom have to acknowledge that they committed discrimination. In the vast majority of cases, law re-inscribes ascriptive hierarchies by leaving untouched both those hierarchies, as well as the alleged injustices that give rise to employment civil rights litigation in the first place. Indeed, in many cases, the

28. See generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* (2011).

29. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20 (2010).

30. See BERREY, NELSON & NIELSEN, *supra* note 1, ch. 8.



power of law is deployed to “seal” the outcome of a case, in that employees sign agreements not to disclose the terms of settlement.

Other plaintiffs accepted offers simply to end the unpleasantness of various aspects of litigation and the pressure from attorneys and judges. Catherine Harris, a middle aged white woman (“P12”), told us when her employer, a city government, made a “final” settlement offer, she saw it as a bluff, but her own attorney thought she should accept it. By her account, her attorney told her “‘Well, if you’re going to blow off your attorney, maybe you should go see another attorney.’ I said, ‘Wow!’ You know. I wanted a tough attorney to go after them, not me!”

Eventually, however, Ms. Harris justified her decision as one where the employing city government “learned their lesson,” and one in which she prevented her coworkers from being destroyed in the litigation process. She told us:

I didn’t want to tear people up like that, and I knew they’d try to tear me up. It was so unpleasant, it was just so unpleasant, and I think that’s in the end why I did take the settlement. [My] attorney really wanted me to take it. He put a lot of pressure on me to take it.

Gerry Handley, whose story opened this Article, told us that his lawyer advised him to accept a \$50,000 settlement, recalled: “I told him no. I told him no, I didn’t want to do that, but my home had went into foreclosure and I was behind in my bills and stuff . . . I really got the bitter end. I won, but sometimes you win, you lose.” Mr. Handley did not think the settlement was fair, but he needed the money. And yet, plaintiffs work very hard to find a way to tell a story that “vindicates” their efforts.

Shelly Simmons (“P31”), a forty-five-year-old African-American female lab technician, felt affirmed when the judge in her case sympathized with her:

The trial vindicated me. Well, the process from where I started representing myself to the end of the trial vindicated me, as far as I was concerned. [The judge] made an open apology of what happened [earlier in the case] . . . And believe you me, [when] I see her today, I hug her. She saved my life, because that really picked me up out of the dumps. It really did. It gave me motivation and courage. Interestingly, Ms. Simmons lost at trial and on appeal. In recounting how she rejected a significant settlement offer, she spoke of refusing to be silenced. “You are not going to shut me up for \$100,000.” Despite her loss in court, the opportunity to express her claim at trial gave her significant satisfaction. Other plaintiffs derived a sense of exoneration during the depositions, when they told their version of the story, unencumbered, in front of their former employer.

For Ms. Harris, justice had not truly been achieved in her case: the organization had not changed. She described her \$160,000 early settlement as

a “victory” but recounted many reasons for disappointment in the outcome. One of the most salient was that the individual bad actor was not terminated from his job. She viewed this as an affront to the principle of public service, and to her identity as a city employee and resident:

As someone who is very proud of a public service career, I did not feel comfortable with this individual being in a leadership role in a city that, in any city, but one that I was proud of and one that I was associated with and my city that I lived in. Basically, I think he was a golfing buddy of the city manager, and until the city manager was going to leave, he wasn’t going to probably leave, and all that stuff was well out of my control.

In contrast, Ms. Baker manages to create pride in her \$1 settlement and apology. In that sense, her workplace experience was a dignity taking but by using the power of law for leverage, she was able to achieve a dignity restoration.

The case of Rick Nolls (“P3”), a white warehouse manager in his sixties, is another example of abuse in workplace, but ultimate vindication through the law. In Mr. Nolls’ case, “vindication” took a long time and came in the form of an appellate court decision. Nolls was stereotyped as abnormal at work and, initially, in court. A sixty-four-year-old white warehouse manager who suffered from a chemical imbalance, Mr. Nolls filed a disability and age discrimination suit against the large food corporation for which he worked. He had to take a leave associated with his illness, and while he was absent, someone at work started a rumor that he was on medical leave for psychological evaluation. As he recalled, coworkers said he was “in the nuthouse” and branded him as “crazy.”

Mr. Nolls recalled that, when he was fired, he was “escorted out of the plant like a nut, you know, considered criminal.” This is not unusual. Employers discriminate against people with disabilities by deploying this stereotype of abnormality; our other interviewees described managers who spread rumors, intentionally misinterpreted disability-related behaviors, and preyed on other employees’ misunderstandings of disabilities.<sup>31</sup>

In Mr. Nolls’ case, the employer manipulated peoples’ misunderstanding of his chemical imbalance to frame him as a problem employee and as mentally ill, unstable, unpredictable, and possibly drug addicted. His case was one in which the employer turned the disability into a psychological stigma—thus fueling other people’s feelings of discomfort, disgust, or fear regarding individuals with disabilities.

31. See Berrey & Nielsen, *supra* note 26.

For Mr. Nolls, “disableism” was re-inscribed in other ways at work. The rumors that he was mentally unstable and acting inappropriately further undermined his authority as a supervisor. When he was fired, his employer claimed that he was no longer a credible supervisor capable of managing his employees. Mr. Nolls wanted to file a suit against his employer for defamation of character. He got signatures from twelve employees who affirmed that their employer had told them that Mr. Nolls was on leave for psychiatric reasons, when, in fact, he was on leave to better manage his chemical imbalance.

As this section demonstrates, litigation can sometimes provide a mechanism for restoration of dignity in employment civil rights cases. More often, however, plaintiffs leave the system feeling as though they lost. Where they are able to construct a win, it is often by redefining “trying at all” as winning, because the real “loss” would be to let the company get away with treatment like they suffered.

#### V. CONCLUSION

Dignity is at stake for everyone in the workplace. By providing employers the duty to enforce a discrimination-free workplace, the state is implicated in the workplace. Employment discrimination and the legal processes for litigating it often furthers the destruction of workers’ dignity. And while the process has some mechanisms for dignity restoration, they are relatively weak.