

Protecting the Compromised Worker: A Challenge for Employment Discrimination Law

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Only the very best workers are completely satisfactory, and they are not likely to be discriminated against—the cost of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative.¹

INTRODUCTION

It is a truth universally acknowledged that employment discrimination plaintiffs do not do well.² Win rates at trial are very low, the lowest of any category of disputes with the exception of prisoner complaints. Although the data on settlement outcomes are much sparser, it is almost

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1. *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987) (opinion by Judge Posner).

2. Throughout this Article, I focus on plaintiffs in federal district courts pursuing antidiscrimination claims under Title VII, § 1981, the ADA, and the ADEA, but especially the first two of these.

impossible to believe that outcomes in settled cases are much more favorable to plaintiffs than litigation is, and many cases are dropped without any payment from the defendant at all.³ So it is very unlikely that plaintiffs are doing well in the cases whose outcomes we cannot observe.

Lawyers and social scientists have offered a variety of explanations for the poor performance of employment discrimination plaintiffs; indeed, the question of why plaintiffs do so badly (and what we can do about it) sometimes seems to be *the* dominant issue in employment discrimination scholarship. Some observers focus on the problems inherent in proving intentional discrimination, especially in the presence of unconscious discriminatory animus or pre-cognitive stereotypes.⁴ Others stress the apparent bias of judges and juries (especially in race discrimination cases), or their inability/unwillingness to take discrimination claims seriously.⁵ Still others complain of an epidemic of illegitimate lawsuits, suggesting that the reason plaintiffs do so badly is simply because they bring such weak

3. *But see* Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 144 (2007) (finding, based on confidential settlement records, that employment discrimination claimants obtained an average of \$54,651 in cases that settled between 1999 and 2005).

4. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

5. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 456 (2004) (suggesting that “[o]ne can easily see that [employment discrimination] plaintiffs do not do well in the lower courts, but it is difficult to say why.”); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CALIF. L. REV. 1251, 1328 (1998) (“Discrimination adjudications . . . may be even more vulnerable to . . . intergroup bias than the [underlying employment] decision tasks which give rise to them.”). But on appeal, judges appear to have a double standard, harshly scrutinizing employees’ victories while gazing benignly at employers’ victories. *See, e.g.*, Michael Selmi, *Why are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) (writing that “[w]hen it comes to race cases . . . courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way,” although suggesting the reverse is more often the case).

cases.⁶ Scott Moss has recently argued that a significant piece of the problem is the endemically poor performance of plaintiffs' lawyers.⁷

All of these stories have at least some plausibility. Intentional discrimination *is* difficult to prove, especially without smoking-gun evidence that employers are usually smart enough not to reveal. In the absence of such evidence, judges sometimes seem reluctant to attribute illicit motivation to events that can be framed in other ways. Some lawsuits probably are without merit (although it is hard to see how there could be sufficient numbers of such cases to drive aggregate win rates down to the low levels we now observe), and not all are strong.⁸

But all these stories miss an important aspect of the employment discrimination landscape, a key structural

6. See WALTER OLSON, *THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE* 62 (1997) (“[B]eing fired is still by far the most common reason . . . to sue, and protected-group status . . . has increasingly served such workers as ‘something to hang their hat on’ to get into court There is no need to speculate about whether the law gets used in this fashion: lawyers’ own literature confirms that it routinely does [One lawyer advises that protected class workers] . . . should ‘call a lawyer immediately’ . . . [w]hether or not a firing is in fact discriminatory, members of [these] groups will have increased leverage in a severance negotiation.’ ”) (emphasis in original).

7. Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs’ Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 *EMORY L.J.* 59, 62-63 (2013) (demonstrating that plaintiffs’ briefs in employment discrimination cases are frequently marred by serious substantive and strategic errors, as well as bad writing).

8. All explanations (including mine) for the low win rate must confront a serious problem: why do plaintiffs and their (contingent-fee) lawyers persist in bringing cases they are so likely to lose? Regardless of whether cases are weak, the rules are unfair, or fact-finders are biased, one would expect that plaintiffs, and the bar, would stop bringing claims that have such low odds of success. See, e.g., George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. LEGAL STUD.* 1, 4-5 (1984) (predicting plaintiffs will win fifty percent of litigated cases if the two parties’ stakes are equal). Steven Shavell argues for a more general model that allows for asymmetric information between plaintiffs and defendants. Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 *J. LEGAL STUD.* 493, 493-94 (1996). Perhaps the answer is that stakes are higher for employers than workers. Or maybe the information structure of employment discrimination disputes favors employers.

feature of modern employment discrimination law in action. A substantial fraction of all cases are brought by “compromised” workers, by which I mean employees whose own failings *could* plausibly explain the adverse treatment they are complaining about, although discriminatory animus could also explain such treatment. I suggest that this fact explains a great deal about the shape of legal doctrines and the dilemmas the law faces in combating employment discrimination. Nobody is perfect, but in employment discrimination litigation, the perfect is the enemy of the good.

From a broad policy perspective, the key question is whether the law is doing a good job punishing the guilty and compensating victims, while rejecting claims that lack merit.⁹ To answer that question requires an *a priori* assessment of how much discrimination is “out there,” since the amount of discrimination constitutes the baseline against which the performance of the legal system should be judged. If discrimination is common and plaintiffs rarely win, the system is not performing well. (The same would be true if

9. Things are even more complicated than this: since most of employment discrimination litigation alleges discriminatory discharge, the legal system might still have adverse consequences even if it perfectly sorted good from bad defendants. By penalizing firing while leaving discriminatory failures to hire largely unsanctioned, the law could actually encourage discriminatory employers to *hire* fewer protected class members in the first instance, so as to avoid potential liability for future (discriminatory) firings. The significance and welfare consequences of these dynamic labor demand effects are well beyond the scope of this Article, although John Donohue and I suggested that such effects are probably fairly small in the Title VII context. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 997 (1991). For a recent survey of empirical effects of employment protection legislation (“EPL”), see generally TITO BOERI & JAN VAN OURS, *THE ECONOMICS OF IMPERFECT LABOR MARKETS* (2008) (concluding that EPL may not bear significant responsibility for the high unemployment rates characteristic of many European labor markets). On the other hand, most empirical studies of EPL use very crude proxies for the stringency of these laws and rely on weak data on labor market performance. As James Heckman and Carmen Pagés point out, these measurement problems impart a downward bias to estimates of the laws’ effects. See generally James Heckman & Carmen Pagés, *Law and Employment: Lessons From Latin America and the Caribbean* (Nat’l Bureau of Econ. Res., Working Paper No. 10129 2003), <http://www.nber.org/papers/w10129>. According to Heckman and Pagés, better data leads to much larger estimates of the (negative) effects of firing protection on hiring and employment. *Id.* at 6.

discrimination is rare and plaintiffs frequently won.) That inquiry is beyond the scope of this Article, however. What can be said is that from an “internal” perspective, the law of employment discrimination faces inherent difficulties dealing with the problems posed by compromised plaintiffs; unless we are prepared to undertake a much more searching scrutiny of employment practices than we now do, it will be very difficult to improve the way the law works. Such heightened scrutiny may well be desirable, but it will also entail some significant costs.

This Article proceeds in four parts. Part I defines what constitutes a “compromised plaintiff.” Part II shows the quantitative importance of such plaintiffs among all Title VII cases using an original data set. Part III offers some explanations for why compromised plaintiffs are so prevalent based on a variety of structural features of the law of employment discrimination. Finally, Part IV explains how we might change legal rules to take better account of this phenomenon. Compromised plaintiffs pose many significant problems for employment discrimination law,¹⁰ but my focus here is on questions of evidence: why is it so difficult for a compromised plaintiff to prove discrimination, and what, if anything, we can do about these difficulties.

I. COMPROMISED WORKERS: DEFINITION, EXAMPLES, CLARIFICATION

A. *Example, Definition*

For a vivid but not especially unusual example of a compromised worker, consider the case of Tisa Crawford.¹¹ Ms. Crawford was a conductor/trainman at the Indiana Harbor Belt Railroad’s switching yard, where her duties were to switch trains between tracks, couple and uncouple train

10. Compromised plaintiffs pose special problems for several doctrines in employment discrimination law, including disparate impact (liability based on effect rather than intent). For an analysis of compromised plaintiffs in this context, see generally Peter Siegelman, *Contributory Disparate Impact in Employment Discrimination Law*, 49 WM. & MARY L. REV. 515 (2007).

11. *Crawford v. Ind. Harbor Belt R.R.*, No. 04 C 2977, 2005 U.S. Dist. LEXIS 10553, at *1 (N.D. Ill. May 23, 2005), *aff’d*, 461 F.3d 844 (7th Cir. 2006).

cars, and watch for potentially dangerous situations in the yard. She was fired after receiving eight reprimands during her first year of work. These included four for unexcused absences, two for improperly stabilizing a boxcar (one of these led to a partial derailment), one for not wearing safety glasses, and one for unsafe riding on a train.¹²

Ms. Crawford did not contradict the accuracy of her employer's records; she seems to have conceded that she did (or failed to do) everything she was accused of. Rather, her argument was that white males (she is African-American) who committed the same (kinds of) offenses were treated more leniently than she was, which suggests that her treatment was influenced by her race or sex.¹³ Whether similarly-situated white males actually received more favorable treatment than Ms. Crawford is obviously an important factual question, one that is at the heart of her claim to be a victim of discrimination.¹⁴ But even if she had been treated worse than comparable white males, it remains true that she violated workplace norms and rules in a way that significantly compromised her claim to being a good employee. To put it bluntly, she almost certainly deserved to be fired, even if it also turns out that others who *also* deserved to be fired avoided that fate because of their race.¹⁵

We can take Ms. Crawford to represent a prototypical case of a compromised worker: someone whose own conduct,

12. *Id.* at *2.

13. *Id.* at *15.

14. The standards for assessing who constitutes a comparable worker are set by law, so the ultimate question involves both factual and legal issues. In this case, both the district court and Seventh Circuit concluded that there was little or no evidence that others who were similarly situated had received more favorable treatment than Ms. Crawford for similar incidents. *Id.* Whether or not that was true is irrelevant for present purposes.

15. That statement would need to be abandoned, of course, if Ms. Crawford had been denied access to training, or if her bosses had given her more difficult assignments (to set her up to fail). *See id.* at *1 (stating Crawford was properly trained). Context always matters, and what at first seems to be the plaintiff's fault may turn out to be endogenous misbehavior that is ultimately attributable to employer animus, neglect, or prejudice. *Id.* at *8. But Ms. Crawford apparently made no such allegations, so it seems unlikely that these were significant issues of this kind in her case. *See id.*

taken in isolation, plausibly justifies the adverse treatment she received. A substantial fraction of all employment discrimination litigation is brought by plaintiffs like Ms. Crawford, people who could plausibly have deserved to be fired for their misbehavior.¹⁶ This seems to have been especially true for claims of race discrimination.

Despite the importance of “compromised plaintiffs” in Title VII litigation, the term is not a cognizable legal category. Since the concept is not yet a term of art, Table 1 presents a series of vignettes that illustrate the kinds of cases it is meant to cover. To reiterate, the key fact is that in each of these cases, the plaintiff has done something that might plausibly justify the adverse treatment he or she is complaining about, although discrimination could also be an explanation. There are literally thousands more that could have been included. Table 1 suggests two important generalizations, which I will demonstrate in more detail below.

Description	Outcome
Officer v. Sedgwick Cty., 226 F. App'x 783 (10th Cir. 2007). Black probation officer fired for several instances of dereliction of duty: failure to investigate parolees who made absurd claims, failure to keep proper records, etc. She asserts white male coworker was demoted rather than fired for identical misconduct.	Pl. lost on summary judgment.
Macy v. Hopkins Cty Bd. of Educ., 429 F. Supp. 2d 888 (W.D. Ky. 2006). Gym teacher who suffered from post-concussive syndrome after head injury fired after threatening to kill a group of students and making inappropriate remarks about their families and sexual activities. She claims disability discrimination. Her involvement in thirty-one previous incidents led to her	Pl. lost on summary judgment.

16. The background rule governing the employment relationship in most non-unionized contexts is “employment at-will.” See generally Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967). This means that an employer can in theory terminate an employee without cause, for any reason, or no reason at all, subject to some relatively modest exceptions. A compromised worker cannot therefore be defined merely as someone their employer is legally entitled to fire (or discipline, etc.). Rather, “compromised” means someone the employer is *justified* in firing, based on the seriousness of the employee’s misconduct.

conviction on nine counts of terroristic threatening. She asserts that another teacher, speaking to a teacher's aide, said that she would "kill" a student if the aide did not remove the student from the room, but the other teacher was not fired.	
Torlowei v. Target, No. 02-933 (MJD/JGL), 2004 U.S. Dist. LEXIS 1475, at *1 (D. Minn. Feb. 3, 2004). Nigerian collections worker was mistakenly assigned delinquent customer who had already worked out payment plan with another collector. Pl. deliberately re-entered data into the system to make it appear that she, rather than earlier collector, deserved credit for arrangement with customer. She was fired, but alleges race discrimination and suggests several others, "all whites," were not fired after similar behavior.	Pl. lost on summary judgment.
Scott v. Genuine Parts Co., No. IP00-866 C-T/K, 2002 U.S. Dist. LEXIS 1698, at *1 (S.D. Ind. Feb. 1, 2002). During interview for driver position, Pl. disclosed her criminal record (including three felony convictions many years previously, for selling drugs) and explained she had been terminated from most recent job for failing drug test. When Def. did not offer her a job, she claimed sex discrimination, based on the assertion that Def. had previously hired a male with felony record.	Pl. lost on summary judgment.
Baker v. Dep't of Children & Family Servs., No. 97 C 7075, 2001 U.S. Dist. LEXIS 988, at *1 (N.D. Ill Jan. 25, 2001). Black caseworker with long record of poor performance evaluations (including failure to meet twenty of thirty-six objectives set for him) was fired after he put an abused and disabled child in the home of a neighbor of hers, without required background checks; made no effort to ensure safety of the child post-placement; and possibly forged supervisor's signature on write up of the case. He asserts race and sex discrimination and claims that two white women did similar things and were not fired.	Pl. lost on summary judgment.
Madden v. Chattanooga City Wide Serv. Dep't, No. 1:06-CV-213, 2007 U.S. Dist. LEXIS 94175, at *1 (E.D. Tenn. Dec. 20, 2007). Black worker was discharged by public works department after admitting he set off firecrackers while on the job. Credible witnesses testified that white employees used firecrackers, sometimes with supervisors or managers present, without being reported or disciplined.	Pl. won in bench trial; verdict sustained on appeal.

Table 1: Examples of Compromised Workers

First, all of the plaintiffs performed badly, violating workplace norms or rules in ways that were typically quite significant.

Second, most of the cases involve an allegation that the plaintiffs were treated less-favorably than others who performed equally badly.¹⁷ The *comparative* misfeasance element is not part of my definition of a compromised worker, however, because it is possible to make a claim of discrimination without this kind of comparative evidence. X may assert she was the victim of discrimination without comparing herself to someone who was treated more favorably, relying instead on “direct evidence” such as racist or sexist remarks made by the employer, rather than comparative evidence. Nevertheless, compromised plaintiffs often do rely on comparative evidence, and as we will see, this has important implications for how courts treat their claims.

B. Clarifications, Caveats

1. Non-Compromised Workers Also Experience Discrimination

Although my focus is on compromised workers, there is abundant social science evidence suggesting that even exemplary workers face discrimination in pay, hiring, harassment, and other aspects of employment.¹⁸ I do not

17. See Donohue & Siegelman, *supra* note 9, at 1012 (noticing this issue, but failing to analyze it in depth); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 735 (2011) (offering a more theoretical take on comparator liability); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 192-94 (2009) (laying out the doctrines governing the use of comparators, stressing the judicial hostility to that mode of proof). The issue of comparator liability is discussed *infra* p. 595.

18. See, e.g., MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 991 (2004). *But see* James J. Heckman & Peter Siegelman, *The Urban Institute Audit Studies: Their Methods and Findings*, in CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA 187-227 (Michael Fix & Raymond J. Struyk eds., 1993) (cautioning against some

mean to deny the existence of this kind of discrimination; but I do want to suggest that at least in some areas of the law, it is less important as a source of litigation than most people believe. Regardless of the quantitative importance of discrimination against the “exemplary,” the legal rules designed to detect and redress their problems are often ill-suited to protect the compromised. That makes it important to study the special problems posed by efforts to protect the compromised.

2. Compromised Workers Can Be Victims of Discrimination

It is also important to emphasize that workers such as Ms. Crawford can be legitimate victims of discrimination, despite their compromised status. The law has long recognized that compromised workers are victims of discrimination if they are treated worse than other (similarly compromised) workers because of their race, sex, age, or other protected class status. In *McDonald v. Santa Fe Trail Transportation*,¹⁹ the Supreme Court made it clear that Title VII liability extended to the compromised. The plaintiff in McDonald was a white man who was fired for stealing sixty one-gallon cans of antifreeze from his employer.²⁰ McDonald did not deny that he had stolen the antifreeze, but he did assert that black co-thieves were not similarly disciplined. One of the employer’s arguments in response was that the

inferences from audit data). An archetypal example of discrimination against the exemplary was the 1939 refusal of the Daughters of the American Revolution to allow Marian Anderson to sing at Constitution Hall. Conductor Arturo Toscanini said Anderson had a voice that “comes around once in a hundred years.” But she was denied access to the venue solely because she was black. Instead, Anderson sang on the steps of the Lincoln Memorial at the invitation of Eleanor Roosevelt. See Susan Stamberg, *Denied A Stage, She Sang For A Nation*, NPR (Apr. 9, 2014), www.npr.org/2014/04/09/298760473/denied-a-stage-she-sang-for-a-nation. To view Anderson’s moving rendition of “My Country ‘Tis of Thee” at the Lincoln Memorial, see Lincoln Memorial and My Country ‘Tis of Thee, YOUTUBE, https://www.youtube.com/watch?v=jpYg_8pU_cQ (last viewed Feb. 29, 2016).

19. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976).

20. *Id.* at 276.

anti-discrimination law does not protect those guilty of theft. Writing for the Court, Justice Marshall concluded:

We cannot accept . . . [the] argument that the principles of [Title VII] are inapplicable where the discharge was based . . . on participation in serious misconduct or crime directed against the employer. [Title VII] prohibits *all* racial discrimination in employment, without exception for any group of particular employees, and while crime or other misconduct may be a legitimate basis for discharge, it is hardly one for racial discrimination [An act may justify firing,] but this does not diminish the illogic in retaining guilty employees of one color while discharging those of another²¹

Of course, some claims of discrimination made by compromised workers (and others) may be “illegitimate” or without merit. But “unmeritorious” and “compromised” are logically distinct categories. “Compromised” means that the *plaintiff* did something wrong; “illegitimate” (in the sense of someone who is bringing baseless litigation, perhaps to extract a settlement from their employer, without actually being a victim of discrimination) means that the *employer* did nothing wrong.

In sum, if white boxcar-derailers are rarely disciplined, while Ms. Crawford or other African-American boxcar-derailers are fired, the black workers are clearly victims of discrimination who are, and should be, entitled to the protection of our employment discrimination laws.²² It is unequal and unfair treatment based on race or sex for an employer to fire Ms. Crawford while allowing equally bad white male miscreants to remain on the job. It is also obviously illegal. But, as I argue below, the formal ban on discrimination against the compromised conceals several key problems entailed by the enforcement of the law in this area. Here are two: compromised plaintiffs often seem less sympathetic than the “perfect” worker who is a victim of discrimination despite having done nothing wrong. And

21. *Id.* at 283-84 (emphasis in original).

22. See, e.g., *Madden v. Chattanooga City Wide Serv. Dep't*, No. 1:06-CV-213, 2007 U.S. Dist. LEXIS 94175, at *1 (E.D. Tenn. Dec. 20, 2007) (alleging a black worker discharged after setting off firecrackers on the job was the subject of discrimination because white employees who also “used firecrackers, sometimes with supervisors or managers present, [were not] reported or disciplined . . .”).

sorting out an employer's motive for the adverse treatment the plaintiff is complaining about requires careful factual inquiry that courts seem reluctant to undertake.

Before turning to those problems, however, I first demonstrate the numerical importance of compromised plaintiffs in the overall employment discrimination caseload, and suggest why they are so common.

II. ASSESSING THE SIGNIFICANCE OF COMPROMISED PLAINTIFFS

A. *A Priori*

Compromised plaintiffs almost *have* to be important sources of employment discrimination litigation because so much litigation is about firing, and so many of the fired are compromised.

1. Most Discrimination Plaintiffs Allege Discriminatory Firing

Data on the composition of claims reveal that since the early 1970s, a majority of complaints have alleged firing discrimination. In our survey of employment discrimination complaints filed in federal district courts in seven cities around the country over the years 1970 through 1989, John Donohue and I found that roughly 60% of filed complaints alleged discriminatory discharge as one of their bases of discrimination.²³ Recent replication and extension of this work by Laura Beth Nielson and Robert L. Nelson, based on data through 2006, concludes that firings continue to generate roughly 60% of all employment discrimination complaints filed in federal district courts.²⁴

Virtually all federal employment discrimination plaintiffs must file a charge of discrimination with the EEOC

23. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1015 (1991).

24. See LAURA BETH NIELSEN ET AL., *CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION, 1987-2006*, at 17 (2008).

before being allowed to proceed to a hearing in federal court. Over the period from 2001-2007, slightly over 50% of all charges alleged discharge as an issue.²⁵ Discharge cases constituted roughly the same ratio, 48% of district court employment discrimination cases in my random sample of 363 federal district court opinions (published and unpublished).²⁶

2. Employers Rarely Fire for No Reason

True, the at-will employment rule gives employers in many states the right to fire someone for almost any reason, or no reason at all. But while people are sometimes fired to prevent their pension from vesting,²⁷ or to make room for the boss' brother,²⁸ or because they complained about being harassed, most firings seem to have at least a plausible link to deficiencies of the employee him- or herself.²⁹ Since firing cases are so numerous among employment discrimination claims, it follows that a very substantial fraction of claims will inevitably be brought by compromised workers. The data described below support this intuition.

25. See 42 U.S.C. § 2000e-5 (2009) (describing the required procedures). Since the EEOC keeps better records than the federal courts do, EEOC data can shed light on the types of discrimination plaintiffs are complaining about. Sadly, EEOC annual reports no longer give breakdowns of charges filed by "issue." However, an email from EEOC Staffer Barbara Robinson confirms that between FY 2001 and FY 2007, there were 560,395 charges, of which 282,601 (50.4%) alleged discharge as an issue. See E-mail from Barbara Robinson, Staffer, Equal Emp't Opportunity Comm'n (on file with author).

26. For a description of the survey, see *infra* app. pp. 606-07.

27. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 604 (1993) (arguing the worker was fired to avoid pension vesting).

28. *Miller v. Indep. Sch. Dist. No. 196*, No. 07-CV-1368(JMR/FLN), 2008 U.S. Dist. LEXIS 26390, at *4-5 (D. Minn. Mar. 31, 2008) (arguing the plaintiff was fired and replaced by her boss' brother, although her own poor performance was also an issue).

29. In unionized contexts, union activism represents another obvious motivation for discharge.

3. Immutable Characteristics and Changes in Employment Status

Moreover, race and sex are largely immutable characteristics, so they are typically incapable of explaining firing by themselves.³⁰ Simply put, firing constitutes a change in status (from employed to no longer employed). One can only explain a change in status with an explanatory variable that, itself, has changed. Since race and sex rarely change, they cannot, on their own, suffice to explain why a plaintiff changed from employed to fired. Of course, that does not mean that race and gender cannot be causes of firing, only that they must almost always be causes in combination with something else. That something else typically consists of the employee's compromised status; that is, of their having done something that might plausibly get them fired.

B. *Direct Evidence*

1. Limitations

Since the term "compromised plaintiff" is not (yet) a cognizable legal category, there is no simple way to determine the prevalence or importance of such plaintiffs among all potential employment discrimination grievances.

30. There are rare counter-examples in which a firing is motivated by a perceived "change" in race or sex. For instance, there are a few cases in which a plaintiff's race is initially unclear, the employer hires her believing she is white, and then fires her upon discovering she is actually black. *See, e.g., Mitchell v. Champs Sports*, 42 F. Supp. 2d 642, 646 (E.D. Tex. 1998) (alleging that employer fired plaintiff upon discovering that she was African-American instead of Caucasian). Plaintiffs sometimes allege that they were disciplined after they married someone of another race. *See, e.g., Pope v. Hickory*, 541 F. Supp. 872, 878 (W.D.N.C. 1981) (concerning an African-American alleging he was discharged because of his marriage to a white woman). In *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), the plaintiff was male when hired, underwent a sex change operation, and then alleged she was fired because she was a woman (or because she had changed sex). *Id.* at 1082-83. Even when race or national origin remains constant over time, their valence can nevertheless change dramatically. For example, in *Hasan v. Foley & Lardner LLP*, 552 F.3d 520 (7th Cir. 2008), the plaintiff had apparently received strong performance reviews, but was terminated after publicly defending Muslims and Islam in the wake of the 9/11 attacks. *Id.* at 523-25. However, these kinds of fact patterns are highly unusual.

Ideally, one might like to have independent measures at each level of the socio-legal “dispute pyramid,” which traces the evolution of a potential dispute from its earliest stage until it matriculates to a case filed in federal court. Abundant socio-legal research has established that there is a massive winnowing of disputes at each stage of the pyramid.³¹ Thus, cases with published district court opinions, at the top of the pyramid, are only a tiny and not necessarily representative sample of the universe of employment discrimination grievances at the bottom.³²

Unfortunately, we lack good data on what happens at the lower levels of the pyramid. The scant survey data on the prevalence of employment discrimination are based on inherently unreliable self-reports, and provide little, if any, context for what people actually perceive to be acts of discrimination. The EEOC does collect minimal data on the charges of discrimination it receives,³³ but without access to its confidential charge files, there is insufficient factual detail to make a plausible assessment of whether a charging party was “compromised” under my definition. A recent American Bar Foundation project coded more than 1000 filed employment discrimination cases, but also failed to provide enough detail to assess the plaintiff’s status.³⁴

31. See William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631, 631-36, 649-51 (1980-81); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 680-82. *But see* Sachin S. Pandya & Peter Siegelman, *Underclaiming and Overclaiming*, 38 L. & SOC. INQUIRY 836, 843-44 (2013) (suggesting some weaknesses in the Dispute Pyramid model).

32. Peter Siegelman & John J. Donohue III, *Studying the Iceberg From Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 L. & SOC’Y REV. 1133, 1133-35 (1990) (arguing cases with published opinions are unrepresentative of the filed cases).

33. Essentially all employment discrimination claims must proceed through the EEOC in order to obtain a right to sue letter that is a prerequisite for successful suit (the major exception is cases filed exclusively under section 1981 of the 1866 Civil Rights Act, which covers race discrimination, but which is seldom used on its own).

34. See NIELSEN ET AL., *supra* note 24, at 29.

Hence, there is little choice but to use judicial opinions to study the prevalence of compromised plaintiffs; these opinions are the only source that provides the rich factual background needed to make the determination of who is actually compromised. Moreover, on the available evidence, there is not much reason to think that the cases with published opinions are substantially different from filed cases or charges of discrimination filed with the EEOC. For example, the composition of disputes by basis of discrimination (race, sex, etc.) or by type of discrimination (hiring, firing, etc.) at these levels of the pyramid are actually quite similar.³⁵ Accordingly, I proceed on the assumption that judicial opinions reflect the run of cases filed for the purposes of this study.

Lexis or Westlaw searches cannot be designed to shed much light on the problem directly because “compromised plaintiff” is a “factual,” rather than a legal category, and cannot be reduced to a simple search protocol. Hence, I rely on my own survey of judicial opinions (as well as two other published studies). It is important to be cautious here, because published opinions offer a distorted window through which to view the underlying factual realities. Like any other narrator, judges invariably select which facts to present and how they are framed. It is certainly possible that losing plaintiffs are portrayed as more “compromised” (and hence, less attractive) than they might appear under some alternative narrative. This is true even when the judge is dismissing a case on a defendant’s motion for summary judgment and is obliged to consider the record as a whole in the light most favorable to, and draw all reasonable inferences that favor, the non-moving party.³⁶ I try to take account of this problem in the analysis that follows by being especially careful in the coding of what constitutes a compromised plaintiff (see Appendix), but I acknowledge that

35. See Donohue & Siegelman, *supra* note 9.

36. In deciding a motion for summary judgment, the court must read all facts in the light most favorable to the non-moving party. *Terrell v. Childers*, 920 F. Supp. 854, 858 (N.D. Ill. 1996) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)).

poses an obstacle to obtaining a clear picture of what is going on.

2. District Court Opinions Study

To ascertain the prevalence of compromised plaintiffs, I conducted my own random sample of opinions in 641 federal district court Title VII employment discrimination cases.³⁷ Table 2 presents a basic overview of the frequency of compromised plaintiffs in this data set.

Status	Number	Percentage of Total
Compromised	124	34.2
Possibly Compromised	131	36.1
Not Compromised	108	29.7
Total	363	100.0

**Table 2: Distribution of Title VII Opinions by Compromised Status
(for opinions with usable information)**

Note: Starting from a sample universe of 641 opinions, excludes 237 opinions that were not employment discrimination cases or for which no information about the plaintiff's status was available (e.g., a purely procedural opinion). Also excludes 43 opinions with more than 1 plaintiff.

The key point that emerges from Table 2 is simply that compromised plaintiffs constitute a substantial fraction of all employment discrimination cases. Just under one-third of all opinions involved a plaintiff who was clearly compromised; roughly one-third of involved plaintiffs who were possibly compromised, meaning cases in which the plaintiff may have done something wrong, but facts were in dispute.³⁸ Another one-third of plaintiffs were clearly not compromised. Put another way, roughly two-thirds of the useable opinions

37. Details (including coding of "compromised" status) are available in the Appendix. The sample included published and unpublished opinions for the period from 1965 through 2007. See *infra* app. pp. 606-07.

38. I tried to be as conservative as possible in coding this variable.

involved plaintiffs who had clearly or possibly done something wrong enough to justify the adverse treatment they received.

Table 3 further breaks down the opinions by type of discrimination being alleged, focusing on firing. Firing claims are by far the most common, constituting just under one-half of the “useable” opinions (that is, those that provided enough information about the underlying employment discrimination dispute, as opposed to procedural issues, legal fees, etc.). What emerges from Table 3 is that allegations of firing discrimination almost always entail compromised or possibly-compromised plaintiffs: only 10 out of 175 (5.7%) firing opinions involved non-compromised (“exemplary”) plaintiffs.³⁹ By contrast, more than half of the non-firing cases involved exemplary plaintiffs.⁴⁰ A substantial share of the cases in my sample thus involve compromised plaintiffs.

	Compromised	Possibly Compromised	Non-Compromised	Total
Firing	89	76	10	175
Column %	71.8%	58.0%	9.3%	48.2%
Row %	50.9%	43.4%	5.7%	100%
Non-firing	35	55	98	188
Column %	28.2%	42.0%	90.7%	51.8%
Row %	18.6%	29.3%	52.1%	100%
Total	124	131	108	363
Column %	100%	100%	100%	100%
Row %	34.2%	36.1%	29.8%	100%

χ^2 (2, N = 363) = 98.2, p < 0.01

Table 3: Number and Distribution of Title VII Opinions by Compromised Status and Type of Discrimination

Source: Author’s survey of employment discrimination opinions, detailed in Appendix.

Note: χ^2 test for independence of compromised status and type of discrimination across all 3 columns and both rows, 2 d.f.; alternative specifications (omitting the “possibly compromised” column altogether, or combining the “compromised” and “possibly-compromised”) with 1 d.f. yield essentially identical results.

39. These were cases where, for example, the plaintiff was fired to prevent his receiving a bonus, or because the plaintiff (a white woman) had married a black man.

40. Of the non-firing cases, harassment was by far the next most common type of discrimination, with 67 cases. Of these, fully 75% were brought by were “exemplary” plaintiffs.

Table 4 looks at compromised status by basis of discrimination (race, etc.), rather than by type of discrimination. Just over half of all cases allege race discrimination, and of these, roughly three-fourths are compromised or possibly compromised.

	Compromised	Possibly Compromised	Non-Compromised	Total
Race	75	71	48	194
Column %	60.5%	54.2%	44.4%	53.4%
Row %	38.7%	36.6%	24.7%	100%
Non-Race	49	60	60	169
Column %	39.5%	45.8%	55.6%	46.6%
Row %	29.0%	35.5%	35.5%	100%
Total	124	131	108	363
Column %	100%	100%	100%	100%
Row %	34.2%	36.1%	29.8%	100%

$\chi^2(2, N = 363) = 6.0, p < 0.01$

Table 4: Number and Distribution of Opinions by Compromised Status and Basis of Discrimination

Source: Author's survey of employment discrimination opinions, detailed in Appendix.

Note: χ^2 test for independence of compromised status and race across all 3 columns and both rows, 2 d.f. Alternative specifications (omitting the "possibly compromised" column altogether, or combining the "compromised" and "possibly-compromised") with 1 d.f. yield essentially identical results.

3. Other Evidence

My claim about the prevalence of employment discrimination cases brought by compromised workers is supported by the work of labor market sociologists. Craig Zwerling and Hillary Silver followed roughly 2000 probationary employees of the U.S. Postal Service in a single city between 1986 and 1989 in an effort to understand who would be fired.⁴¹ Their careful review of the personnel files revealed that there were apparently "no cases of

41. Craig Zwerling & Hilary Silver, *Race and Job Dismissals in a Federal Bureaucracy*, 57 AM. SOC. REV. 651, 653-54 (1992).

inappropriate firings,” for either black or white workers.⁴² This implies that any plaintiffs who might have materialized from this group of fired employees would had to have been “compromised” under my definition.⁴³

More recently, Vincent Roscigno surveyed roughly 60,000 employment discrimination claims filed with the Ohio Civil Rights Commission, restricting his sample to cases where either the Commission determined there was probable cause to believe that discrimination had occurred or the parties had reached a settlement (payment to the charging party).⁴⁴ His study led him to conclude that “sanctions for supposedly poor work performance are rampant throughout the body of case materials.”⁴⁵ This is precisely the compromised worker phenomenon.

4. Evidence from Other Areas of Civil Rights

A similar pattern of “at fault” or “non-exemplary” victims emerges in other equal protection contexts. For example,

42. *Id.* at 658. Importantly, they also found that blacks were more than twice as likely to be fired as whites, controlling for the information the employer apparently used in making firing decisions. *Id.* at 651.

43. We do not know if any of those who were fired actually sued, however. The authors suggested, but could not prove, that although all of those who were fired deserved to be, “there may [have been] white employees who were *not* fired for similar reasons.” *Id.* at 658 (emphasis added). Of course, this is precisely the plaintiff’s argument in a substantial fraction of discrimination-based cases. Zwerling and Silver could not reject unobserved heterogeneity by race as a possible source of differential outcomes, however. Thus, the data were not dispositive on the question of discrimination, although the detailed personnel records and the two-to-one firing ratio do seem suggestive.

44. VINCENT J. ROSCIGNO, *THE FACE OF DISCRIMINATION: HOW RACE AND GENDER IMPACT WORK AND HOME LIVES* 15 (2007).

45. *Id.* at 30. Roscigno goes on to state that “such termination is problematic and discriminatory when the rationale and justifications are differentially applied.” *Id.* Roscigno also confirms the importance of firing discrimination claims, concluding that “expulsion” (discriminatory discharge) was at issue in approximately two-thirds of all charges of discrimination filed against private employers in Ohio. *Id.* at 27, fig. 1.3. Civil service employees have much greater job security than most workers in the private sector. Hence, gross firing rates, and opportunities for discriminatory discharge, are typically much lower for public employees, consistent with Roscigno’s finding that firing is not an important source of discrimination complaints for public sector workers. *Id.*

consider claims of selective prosecution, in which a criminal defendant seeks to establish that “similarly situated individuals of a different race were not prosecuted.”⁴⁶ Just as a compromised employment discrimination plaintiff has done something wrong, but was treated worse than others who behaved equally badly, a victim of selective prosecution asserts that they are the victim of discrimination by virtue of the prosecutor’s failure to treat others as harshly as they were treated. Such claims are difficult to prove (especially given criminal defendants’ limited power to obtain information about prosecutorial motives), and are thus made relatively rarely. Moreover, the actors involved—criminal defendants/government prosecutors—are obviously quite different from the employment context. But while the existence of selective prosecution cases is obviously not proof of the importance of compromised plaintiffs in employment discrimination cases, there is a structural analogy that suggests the problem is not unique to employment.

Sadly, what seems to be true of firing (once dubbed “the industrial equivalent of capital punishment”⁴⁷) is also true of actual capital punishment itself. For example, a thorough statistical investigation of the death penalty in Connecticut recently revealed that while those few defendants who were sentenced to death were probably guilty of horrible murders, many whites (and fewer blacks) who were also guilty of such murders escaped with lesser sentences.⁴⁸

Compromised plaintiffs also cropped up frequently in an earlier study of public accommodations race discrimination

46. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (involving plaintiffs charged with selling crack cocaine who did not deny their guilt, but asserted that they were selected for prosecution because they were black).

47. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 421 (1981) (quoting M. Jay Whitman, *Wildcat Strikes: The Union’s Narrowing Path to Rectitude?*, 50 *IND. L.J.* 472, 481 (1975)).

48. See Rick Green, *Study Shows Scales Of Justice Askew When It Comes to Death Penalty: The Worst Killers Very Frequently Do Not Get It*, *HARTFORD COURANT* (Jan. 12, 2012) http://articles.courant.com/2012-01-12/news/hc-green-death-penalty-0113-20120112_1_capital-felony-death-eligible-killers-of-white-victims; see also John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?* 11 *J. EMPIRICAL LEGAL STUD.* 637, 637, 640 (2014).

cases.⁴⁹ Roughly one-third of these cases did not allege an outright refusal to serve, although such refusals were also common. Instead, a typical fact pattern often began with a dispute that occurred in the course of an ordinary transaction; this then precipitated the adverse race-based treatment being complained about. For a substantial fraction of these cases, in other words, race seemed to be combining with some less-than-exemplary behavior to produce the unfavorable outcome, although it is frequently difficult to know whether the non-exemplary conduct was actually endogenous to the situation.⁵⁰

C. Conclusion

Compromised or non-exemplary plaintiffs bring a substantial share of all employment discrimination cases. Most firing cases—as many as 70%—involve compromised workers, and such workers also figure in disputes over promotion, retaliation, and even hiring, albeit less frequently. Some types of discrimination—notably harassment claims—are much less likely to involve compromised workers. Compromised workers are most common in race discrimination claims.

III. WHY ARE THERE SO MANY COMPROMISED PLAINTIFFS?

Why is so much of employment discrimination litigation brought by compromised plaintiffs and why has the phenomenon virtually escaped the notice of legal academics and judges? There are two types of explanations: “structural” and “psychological.” Although this distinction is somewhat artificial, it helps illuminate the failure in the law.

49. See generally Peter Siegelman, *Racial Discrimination in “Everyday” Commercial Transactions: What Do We Know, What Do We Need to Know, and How Can We Find Out?*, in A NATIONAL REPORT CARD ON DISCRIMINATION IN AMERICA: THE ROLE OF TESTING 69 (Michael Fix & Margery Austin Turner eds., 1998).

50. See, e.g., *Alexis v. McDonald’s Rests. of Mass., Inc.*, 67 F.3d 341, 345-46 (1st Cir. 1995) (involving a black patron forcibly ejected from restaurant because of earlier dispute with cashier); *Perkins v. Marriott Int’l, Inc.*, 945 F. Supp. 282, 283-84 (D.D.C. 1996) (involving a dispute over whether room rate included breakfast which led to confrontation between plaintiffs and hotel staff).

A. *Structural Reasons*

The asymmetric power relationships that are endemic in most employment situations explain some of the prevalence of compromised plaintiffs in employment discrimination cases.

1. Employer Power

All the major employment discrimination statutes prohibit retaliation against workers who complain about illegal conduct by their employers or participate in investigations of such conduct.⁵¹ But employers have countless ways of making life difficult for employees they do not like, many of which will slip under the protection afforded by anti-retaliation laws. It follows that employment discrimination law offers relatively little protection against mistreatment that occurs while a worker is on the job: the potential for retaliation is simply too large to make it worthwhile for most plaintiffs to litigate against their current employers. And indeed, based on our survey of filed complaints, John Donohue and I concluded that “only 10 percent of suits by non-government employees are brought by plaintiffs who were working for the defendant at the time the suit was filed.”⁵² If currently-employed workers do not usually sue, then those who are no longer working for the defendant/employer will be the primary sources of litigation.

51. *See, e.g.*, *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). The anti-retaliation provisions of Title VII are found in § 704, which defines retaliation as an entirely separate basis for liability, apart from the validity of the underlying claim of discrimination. A successful retaliation claim requires the plaintiff to show that the employer was engaging in practices that the plaintiff reasonably believed were unlawful under Title VII, that the plaintiff complained about these practices or participated in opposition to them, and that there was a causal nexus between his or her behavior and some adverse employment action taken by the employer against the plaintiff. *See id.*; *see also* *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008) (holding that § 1981, although containing no explicit anti-retaliation provision, nevertheless encompasses claims of retaliation stemming from an underlying complaint based on race).

52. Donohue & Siegelman, *supra* note 9, at 1031. We found that public employees, who have substantially greater job protection, are considerably more likely to remain on the job while suing their employer.

Some of those will be workers who have quit, but many will have been fired, and many of those will be compromised, for reasons discussed earlier.

2. Economics

One reason why compromised workers bring such a large share of all employment discrimination suits is that they are probably more likely to experience discrimination than their non-compromised counterparts. The epigraph from Judge Posner gives an economic rationale for why this should be so: the best workers are less likely to be discriminated against because the opportunity costs of firing (or failing to hire) them are higher.⁵³ Moreover, exemplary workers will probably find it easier to obtain alternative post-discrimination employment, reducing their incentive to initiate litigation relative to compromised workers.⁵⁴

B. *Psychological Reasons*

1. “Aversive Racism”—Discrimination Against the Non-Exemplary

Evidence from social psychology supports a somewhat different explanation for the importance of compromised workers among all employment discrimination plaintiffs. According to the infelicitously-named theory of “aversive

53. This theory also seems to suggest that the *worst* workers are unlikely to be discriminated against for much the same reason. Consider a compromised minority worker X, who is fired. Firing X is presumably low-cost to the employer, precisely because X's productivity was low. But in order for the firing to be discriminatory, it would need to be the case that X's white counterpart, Y, was retained, despite being compromised in the same way X was, since it is only the retention of Y *while firing X* that makes the firing discriminatory. But retaining Y is decidedly *not* costless to the employer: failing to fire a bad employee will often be even more costly than failing to hire a good one.

54. See generally John J. Donohue III & Peter Siegelman, *Law and Macroeconomics: Employment Discrimination Litigation Over the Business Cycle*, 66 S. CAL. L. REV. 709 (1993) (showing that the volume of employment discrimination lawsuits responds to the business cycle because backpay damages are larger during recessions, giving fired workers a greater incentive to sue when the unemployment rate is high).

racism,”⁵⁵ many whites, even those who are in fact prejudiced, are actually reluctant to be labeled as racists, or to think of themselves as such. To maintain this self-image, despite unconscious beliefs to the contrary, aversive racists are willing to treat “exemplary” members of minority groups as their equals. After all, an open display of hostility towards all African-Americans would be incompatible with an unbiased attitude, clearly marking one as a racist. But racial hostility towards “non-exemplary” blacks can be disguised (both to one’s self and others) as justified hostility for the non-exemplary, rather than unjustified discriminatory animus. In simplified terms, an aversive racist employer might treat an exemplary African-American as though he were white, but would be much harsher on a compromised African-American employee than on a similarly compromised white worker. As the two leading aversive racism scholars put it:

[D]iscrimination will occur when an aversive racist can justify or rationalize a negative response on the basis of some factor other than race. Under these circumstances, aversive racists may engage in behaviors that ultimately harm blacks but in ways that allow whites to maintain their self-image as non-prejudiced and that insulate them from recognizing that their behavior is not color blind.⁵⁶

Gaertner and Dovidio’s experimental results suggest that this pattern is quite common.⁵⁷ And the behavior strongly resonates with at least some of the cases: when

55. See Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION AND RACISM: THEORY AND RESEARCH 61-89 (John F. Dovidio & Samuel L. Gaertner, eds., 1986). There is by now a fairly substantial body of experimental evidence supporting this theory. See, e.g., John F. Dovidio & Samuel L. Gaertner, *Aversive Racism*, in 36 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1-43 (Mark P. Zanna ed., 2004).

56. Dovidio & Gaertner, *supra* note 55, at 8.

57. There are dozens of experiments testing the theory. For a relatively recent survey, see *id.* Here is one example: college students were given the task of hiring someone for a peer counseling job. The applicants’ qualifications were manipulated to be either strong, intermediate, or very weak. When candidates’ credentials were either strong or very weak, subjects showed no preference for white over black applicants. “However, when candidates’ qualifications for the position were less obvious . . . white participants recommended the black candidate significantly less often than the white candidate with exactly the same credentials.” *Id.* at 16.

white workers set off firecrackers on the job in defiance of employer rules, their conduct gets excused as the result of stress, or of high spirits. But similar behavior by a black employee is treated more harshly: “a rule’s a rule,” “we can’t let people get away with that kind of thing,” and so on.⁵⁸ Discrimination against the compromised thus seems both psychologically plausible and consistent with familiar cultural stories.⁵⁹

2. Cognitive Dissonance/Self-Serving Bias

Even if the non-exemplary are actually more likely to experience discrimination, there are also non-discriminatory explanations for why the compromised are likely to sue.⁶⁰ One is self-serving bias, which has been well-described and documented by psychologists. It refers to a tendency to see things in a light most favorable to one’s self.⁶¹ Compromised workers may often feel that they really performed no worse

58. Employers often use such excuses to justify their actions. *See, e.g.*, *Madden v. Chattanooga City Wide Serv. Dep’t*, No. 1:06-CV-213, 2007 U.S. Dist. LEXIS 94175 (E.D. Tenn. Dec. 20, 2007).

59. It also may help explain why this kind of litigation is often so bitter: whether correct or not, plaintiffs compare themselves to their comparator and see evidence of discrimination. Conversely, employers compare plaintiffs to an absolute standard (“She derailed boxcars, so of course we fired her”) and see none.

60. Ward Farnsworth suggests that “[w]hat we know about self-serving biases . . . suggests that laws forbidding employment discrimination are likely to generate unusually high numbers of spurious claims *and defenses*, and that it will be relatively difficult to find a view of the matter on which the parties can agree. Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 594 (2003) (emphasis added). Farnsworth goes on to suggest that “interpos[ing] a measure of independent judgment between the plaintiff and the courts” can help reduce self-serving bias, and cites the EEOC as an example of this phenomenon, designed, perhaps, to “take away from the employee the power to decide whether his own perception that he was fired for bad reasons should be turned into legal costs for the employer.” *Id.* at 594-95. Don Moore and Deborah Small point out some subtleties in self-serving comparisons, and suggest that familiarity with the task increases the size of the self-serving bias effect: presumably most people are quite familiar with their own jobs. Don A. Moore & Deborah A. Small, *Error and Bias in Comparative Judgment: On Being Both Better and Worse Than We Think We Are*, 92 J. PERSONALITY & SOC. PSYCHOL. 972 *passim* (2007); *see* Dale T. Miller & Michael Ross, *Self-Serving Biases in the Attribution of Causality: Fact or Fiction?*, 82 PSYCHOL. BULL. 213 (1975).

61. Miller & Ross, *supra* note 60, at 213.

than their comparators, even when an objective third party would conclude otherwise. An (unconscious) attribution of discriminatory motive is a way to reconcile one's beliefs about one's relative performance with the employer's less-favorable evaluation of that performance.

Of course, employers are also likely to suffer from self-serving bias, and especially so when the employee has done something wrong. So, the bottom line here is not that plaintiffs are bringing a lot of unjustified employment discrimination claims; it is simply that self-serving bias offers a possible explanation for some of the claims that are brought.

C. Conclusion

Given that discrimination against the compromised is clearly illegal, one might be tempted to ask what difference any of this makes. Employment discrimination law *already* forbids the disparate treatment of black and white boxcar-derailers, as indeed it must. Compromised plaintiffs are clearly protected by law on the same basis as those who are entirely virtuous,⁶² so don't existing legal rules already handle the problems posed by compromised workers? Formally, the answer is "yes," and in that sense the category is of no legal relevance: compromised workers are entitled to the same protections as the non-compromised. But in practice, the answer looks very different.

IV. HOW COMPROMISED PLAINTIFFS SHAPE WHAT THE LAW CAN DO, AND VICE-VERSA

Compromised plaintiffs have a difficult time proving that they are victims of discrimination because—by definition—their employer will *always* have a plausible story about why they received the adverse treatment they are complaining about: "they deserved it." Put another way, among the compromised, distinguishing between actual victims of discrimination and non-victims is extraordinarily difficult because there is a good reason to fire the compromised plaintiff. Plaintiffs cannot win more often unless courts are

62. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281-85 (1976).

prepared to give much more intense and intrusive scrutiny to employment practices and particular circumstances than they now do. Such scrutiny would entail tradeoffs of a kind that employment discrimination law has not yet explicitly confronted.

A. *What Constitutes Evidence of Discrimination Against the Compromised?*

In order to prove that they were victims of discrimination, compromised plaintiffs potentially have available to them one or more of the following types of evidence.⁶³

1. Direct evidence of discriminatory motive (verbal remarks such as sexist/racist language or physical behavior that tend to indicate a discriminatory frame of mind);

2. Comparison evidence (the fact that employees of the other race/sex were treated more favorably for identical/similar misdeeds); and

3. "Offense severity" or "proportionality" evidence (linking the *degree* of misbehavior and the severity of the sanction imposed).

A schematic representation is provided by Figure 1. Each axis is drawn so that the plaintiff's case gets stronger as we move further from the origin; there is presumably a three-dimensional surface in this space beyond which plaintiffs should have enough evidence to convince a trier of fact that they were victims of discrimination.

63. Claims of discrimination are established through a framework first articulated by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which governs the order of proof in employment discrimination cases. The details are fortunately irrelevant for the present analysis.

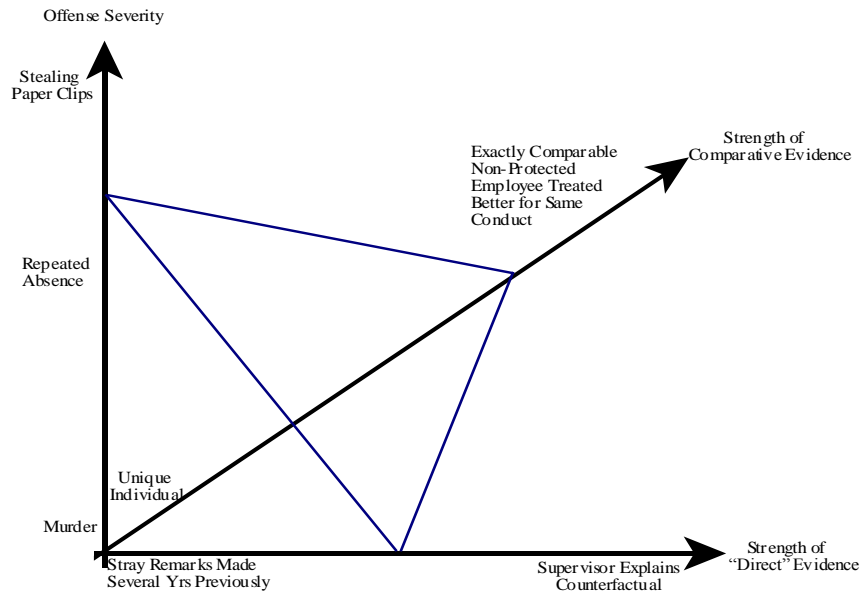


Figure 1: Types of Evidence in Employment Discrimination Cases

1. Direct Evidence

Consider “direct” evidence first. Such evidence usually takes the form of verbal remarks that suggest a racial or sex-based motive for an adverse employment action. For example, an employer might say, “I’m going to fire your black ass,” in the context of a workplace dispute.⁶⁴ Slurs and epithets—unfortunately, often much worse than this example—are not uncommon in employment discrimination litigation. Injurious by themselves, they also suggest the presence of discriminatory animus on the part of the employer. Of course, evidence can sometimes be even more “direct” than this comment. Consider this (unusual) remark in a hiring case, in which the defendant admitted that the

64. *Parker v. Rockford Park Dist.*, No. 99 C 50073, 2001 U.S. Dist. LEXIS 1192, at *5 (N.D. Ill. Feb. 2, 2001) (noting that upon discovering the plaintiff’s misconduct, the supervisor said, “I ought to fire your black ass,” after which the plaintiff was ultimately fired).

plaintiff's protected-class status was a but-for cause of his rejection:

[Plaintiff] asked [his interviewer] if age was a factor in the decision not to hire him [He] responded that "it didn't help you any" and [that] "I would understand—if you were 20 years younger, I would understand your nervousness and I would have selected you, yet a man your age, with your experience, I couldn't understand you being nervous."⁶⁵

Compromised plaintiffs typically have a difficult time prevailing based on direct evidence, especially because, by definition, they have done something wrong enough to plausibly warrant the adverse employment action they are complaining about.⁶⁶ That is, judges will often conclude that the plaintiffs' direct evidence is insufficient to outweigh the employers' "legitimate" reasons for the adverse treatment—typically, firing—being complained of. Not surprisingly, therefore, only about a quarter of all the plaintiffs in my survey used any direct evidence at all, as shown in Table 5. This number falls to about 20% among compromised plaintiffs (25% for the possibly-compromised). Because compromised plaintiffs rarely seem to use direct evidence, even if courts were to give such evidence significantly more weight than they now do, it would probably not make much of an overall difference in the way cases are resolved.⁶⁷

65. *Rossiter v. Potter*, No. 02-12192-MBB, 2005 U.S. Dist. LEXIS 10422, at *8 (D. Mass. May 23, 2005).

66. The combination of "direct" evidence of illicit intent and legitimate reasons for firing is sometimes handled doctrinally through the framework of "mixed motives" analysis, under which the employer may have both permissible and impermissible motivations for its actions. Again, the details are not relevant for our purposes.

67. I assume that there would be no "supply side" response to a change in the importance of direct evidence, since plaintiffs already use all of the direct evidence they have—they would be foolish not to.

	Compromised	Possibly Compromised	Non-Compromised	Total
Direct Evidence	18	23	49	90
Column %	14.5%	17.6%	45.4%	24.8%
Row %	20.0%	25.6%	54.4%	100.0%
No Direct Evidence	106	108	59	273
Column %	85.5%	82.4%	54.6%	75.2%
Row %	38.8%	39.6%	21.6%	100.0%
Total	124	131	108	363
Column %	100%	100%	100%	100%
Row %	34.2%	36.1%	29.7%	100.0%

$\chi^2(2, N = 363) = 35.2, p < 0.01$

Table 5: Number and Distribution of Title VII Opinions, by Compromised Status and Use of Direct Evidence

Source: Author's survey of employment discrimination opinions, detailed in Appendix.

Note: χ^2 test for independence of compromised status and type of evidence across all 3 columns and both rows, 2 d.f. Alternative specifications (omitting the "possibly compromised" column altogether, or combining the "compromised" and "possibly-compromised") with 1 d.f. yield essentially identical results.

2. Comparison Evidence

The most common way for compromised plaintiffs to make a case of discrimination—especially in race discrimination cases—is through comparison evidence. This evidence is designed to show that a similar worker from another group who committed similar misdeeds was treated more favorably than the plaintiff. Logically, the argument is compelling. If A and B are identical (except for race), both are guilty of identical misdeeds, and A was fired while B was not, an inference of race-based treatment would be warranted.⁶⁸

Table 6 demonstrates that 57% of race discrimination plaintiffs (96 of 168) rely on comparison evidence. The tendency to use comparison evidence is somewhat stronger for compromised plaintiffs (39 of 64, 61%) than for non-compromised plaintiffs (20 of 38, 53%).

68. Presumably, the employer might argue that he acted randomly—flipped a coin—to decide which of the two otherwise identical workers should be fired for their misdeeds. Or he could claim that he used factors such as Zodiac signs. But neither explanation would likely be credible, and I know of no cases in which such explanations are actually advanced.

	Compromised	Possibly Compromised	Non-Compromised	Total
Comparison Evidence	39	37	20	96
Column %	60.9%	56.1%	52.6%	57.1%
Row %	40.6%	38.5%	20.8%	100%
No Comparison Evidence	25	29	18	72
Column %	39.1%	43.9%	47.4%	42.9%
Row %	34.7%	40.3%	25.0%	100%
Total	64	66	38	168
Column %	100%	100%	100%	100%
Row %	38.1%	39.3%	22.6%	100%

$\chi^2(2, N = 363) = 0.7, p = 0.7$

Table 6: Number and Distribution Title VII Race Discrimination Opinions, by Compromised Plaintiff Status and Presence of Comparison Evidence

Source: Author's survey of employment discrimination opinions, detailed in Appendix.

Note: χ^2 test for independence of compromised status and type of evidence across all 3 columns and both rows, 2 d.f. Alternative specifications (omitting the "possibly compromised" column altogether, or combining the "compromised" and "possibly-compromised") with 1 d.f. yield essentially identical results.

In practice, however, no one is ever completely identical to anyone else, so actual comparators can never provide perfect evidence of discrimination. The key question then becomes how close of a comparison is required before the inference of discrimination can be sustained. In fact, the standards for who counts as a comparator and what counts as a similar misdeed are quite stringent. Although the rules vary slightly by circuit, most courts require comparators to be virtually identical to the plaintiff in every significant respect. The requirement that "[t]he comparator must be nearly identical to the plaintiff" is designed "to prevent courts from second-guessing a reasonable decision by the employer."⁶⁹

69. *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004). A typical formulation of the standard for comparison is that "to establish disparate treatment a plaintiff must show that the employer 'gave preferential treatment to [another] employee under nearly identical circumstances'; that is, that the misconduct for which [the plaintiff] was discharged was nearly identical to that

Courts could of course broaden the scope of permissible comparisons between plaintiffs and similarly compromised comparators, although it is not completely clear how one might precisely formulate a laxer standard. Judge Posner articulated a somewhat looser standard of comparison in the *Crawford* case cited earlier, suggesting that “[t]he cases that say that the members of the comparison group must be comparable to the plaintiff in all *material* respects get this right.”⁷⁰ But the difference between “nearly identical” and “comparable in all material respects” is in practice likely to be quite small.

Of course, compromised workers would find a looser standard of comparison to be helpful, since the formal reason they lose—the doctrinal sticking-point—is that their chosen comparators are insufficiently similar to them.⁷¹

A relaxation of the comparability requirement would entail some costs, however. One obvious cost is the increased likelihood of mistaken pro-plaintiff verdicts (type II errors). Of course, trading-off the frequency (and costs) of type I versus type II errors is inherently subjective in this context. But in a way, that is precisely the point: the fact that a substantial proportion of plaintiffs are compromised means that outside observers will have a hard time agreeing on which plaintiffs *should* prevail. In turn, this means that it will be hard to achieve consensus on the relative frequency of the two kinds of errors, let alone the fraught issue of the relative costs of such mistakes.

A second potential problem, alluded to above, is that relaxing the rules for who constitutes a legitimate comparator requires courts to scrutinize personnel policies

engaged in by . . . [other] employees.” *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001) (internal quotations and citations omitted).

70. *Crawford v. Ind. Harbor Belt R.R.*, 461 F.3d 844, 846 (7th Cir. 2006).

71. For example, in *Burke-Fowler v. Orange County*, the plaintiff was an African-American corrections officer who was fired after having an affair with a prisoner. She pointed to two whites who had had relationships with prisoners but were not similarly disciplined. 390 F. Supp. 2d 1208, 1209-10, 1213 (M.D. Fla. 2005). But her comparators had maintained “existing relationships with people who were later convicted” while she *began* her relationship with someone while he was a prisoner, and that difference was enough to invalidate the comparison according to the court. *Id.* at 1213.

with much more care than they now do. Under a laxer standard, courts would have to take seriously such questions as whether a (white, male) prison guard who escaped firing for illicitly fraternizing with a prisoner he had known *prior* to her incarceration is really “the same” as a (black, female) guard who was fired for fraternizing with a prisoner she had met for the first time after he was *already* in jail. Such comparisons are understandably unappealing to judges who are reluctant to intrude into the relationship between employer and employee.

Two leading employment discrimination scholars have produced lengthy and cogent critiques of the doctrines and practices governing plaintiffs’ use of comparator evidence.⁷² Both recognize that the strict standard of comparison required by courts is highly disadvantageous to plaintiffs. Professor Charles Sullivan suggests that the problem arises from judges’ unwillingness to take seriously the baseline prevalence of discrimination in the workplace. He offers a thoughtful doctrinal solution: courts should rely on expert testimony to define who is close enough to count as a valid comparator for proving discrimination.⁷³ Rather than listing “differences between plaintiff and proffered comparators and then apodictically declar[ing] them too great to be sufficient to infer discrimination,” as is current practice, “the better view is to ask whether *the differences are such that a reasonable employer is likely to look to them in making the decision in question.*”⁷⁴ Proof of whether someone is reasonably comparable to the plaintiff would be established through the testimony of a human relations department or an employment expert witness. But of course, Sullivan’s solution to the comparator problem would inevitably come at the expense of employers’ complete discretion to fire at will.

Professor Suzanne Goldberg focuses more broadly on how courts have come to require (or nearly so) a valid comparator to sustain a claim of discrimination, even when plaintiffs’ underlying theory of liability is not amenable to

72. See generally Goldberg, *supra* note 17; Sullivan, *supra* note 17.

73. Sullivan, *supra* note 17, at 192, 197.

74. *Id.* at 229 (emphasis in original).

comparison evidence.⁷⁵ In the garden-variety Title VII firing case, there is often a plausible reason for the plaintiff's discharge, so the best way to demonstrate that the employer was acting on the basis of an illegitimate, rather than a legitimate, motive will often be some kind of comparison evidence. In these run-of-the-mill cases, the kinds of difficulties adduced by Goldberg do not usually apply.

Some scholars argue that it is appropriate to use Title VII as a vehicle for revamping employment practices generally.⁷⁶ Others would presumably decry such a development.⁷⁷ Whatever one's policy preferences, my point is simply that there cannot be much of an increase in the win rates of compromised plaintiffs without a substantial ratcheting-up of judicial supervision of employment practices. Among compromised plaintiffs, it is just inherently difficult to tell who has been discriminated against and who has not. Detecting this kind of discrimination requires careful scrutiny of whether worker A is *really* "the same as" worker B, and this kind of exercise in applied ontology is never simple.

3. Offense Severity Evidence and the "Just Cause Problem"

Courts are routinely asked to consider whether a compromised plaintiff's behavior was not sufficiently serious to justify the adverse treatment about which he or she is

75. Goldberg, *supra* note 17, at 742. Intersectional claims of discrimination based on more than one protected category (for example, race and gender) make it difficult to find appropriate comparators. *Id.* at 736. Comparators are also problematic, Goldberg notes, in the opposite circumstance: when an employer discriminates against a subset of protected class members (for example, Latinos with accented English, or African-Americans who wear their hair in dreadlocks). *Id.* at 737. Finally, claims based on "structural" impediments to equal workplace participation make it difficult or impossible to locate relevant comparators. *Id.* at 737-38.

76. See, e.g., Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659 (2003).

77. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 76-77 (1992); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 *CONN. L. REV.* 979 (2008).

complaining. And equally routinely—indeed, almost universally—courts decline to pass judgment on this issue. The reason (sometimes explicitly stated, but often lurking in the background) is that to do so would be to intrude unduly on an employer’s freedom to make firing decisions.⁷⁸ Language such as this is typical:

Evidence that the employer should not have made the termination decision—for example, that the employer was mistaken or used poor business judgment—is not sufficient to show that the employer’s explanation is unworthy of credibility. “The relevant inquiry is not whether the employer’s proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith upon those beliefs.”⁷⁹

Indeed, courts have a particular phrase they use to signal that they will not take such evidence seriously. We are not, courts frequently assert, “a super personnel department” sitting in judgment of the wisdom of the defendant’s business practices.⁸⁰

Taking offense-severity evidence more seriously is conceptually the easiest technique courts could adopt to

78. Among others, Richard Michael Fischl has written insightfully about how “[e]mployees who have discharge claims that are compelling as a matter of fairness, but which do not meet the requirements of proof under discrimination law, frequently attempt to squeeze their ‘square peg’ of a case into the ‘round hole’ of the applicable legal category.” Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 181 (2007). The employment at-will doctrine thus casts a substantial shadow over employment discrimination cases involving discharged workers, as so many cases do.

79. *Swackhammer v. Sprint/United Mgmt. Co.*, 493 F.3d 1160, 1169-70 (10th Cir. 2007) (internal citations and quotations omitted).

80. *Verniero v. Air Force Acad. Sch. Dist.*, 705 F.2d 388, 390 (10th Cir. 1983). *Verniero*, apparently the first opinion to use the phrase, provides a clear illustration:

We agree with the district court that “[i]t is not the duty of a court nor is it within the expertise of the courts to attempt to decide whether the business judgment of the employer was right or wrong. The court is not a super personnel department. All that a court does is to exercise a very limited review of the employment practices of an employer to see if the practices are shown to be lawful”

Id. (internal citation omitted). The phrase “super personnel department” has been used in 2924 federal district court opinions as of February 19, 2016.

expand the rights of compromised workers. Even a court that is unwilling to “second guess” an employer’s firing decisions should appreciate that the less “wise, fair or correct” an employer’s proffered reasons are for its decision, the more likely it is that the real reason for the decision was discriminatory.⁸¹ Put the other way around, the less-serious the infraction the compromised employee was fired for, the more credible it is that the employer had an illicit motivation for the firing. Nevertheless, courts are deeply reluctant to consider whether the compromised worker’s failures—often quite real ones—are “sufficient” to cast doubt on the decision to fire him or her.

A good example of this problem is *Smith v. Monsanto*,⁸² in which the plaintiff, an African-American, was terminated for his unauthorized removal of three rag towels from his job site, apparently to dry his car in the building’s parking lot. The employer offered evidence that the plaintiff had no better-treated comparators, demonstrating to the court’s satisfaction that over the past thirty years, all thieves with less than five years of seniority (as had plaintiff) had been fired.⁸³ But no evidence was ever introduced concerning what kinds of incidents counted as thefts, and it seems entirely plausible that whites might have gotten away with minor infractions of the kind for which Smith was fired. Even in the absence of strong comparison evidence, the triviality of Smith’s offense casts doubt on the employer’s motivation for firing him.

There is a difference between someone caught stealing \$100 from the cash register and someone removing three rag towels (market value \$1) under the mistaken but reasonable belief that this was permissible.⁸⁴ Firing someone for a minor

81. See, e.g., *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) (disbelief of employer’s explanation, together with plaintiff’s prima facie case, may suffice to establish discrimination).

82. *Smith v. Monsanto Chem. Co.*, 770 F.2d 719 (8th Cir. 1985).

83. *Id.* at 721-24.

84. The plaintiff in *Smith v. Monsanto* testified that others had taken towels to dry their cars, and that he thought doing so was permissible. *Id.* at 721. The defendant asserted that it had not known about the practice and would not have condoned it. *Id.* at 724. Even if this were true at the level of official policy,

infraction is more likely to be discriminatory than firing someone for, say, assaulting a supervisor, precisely because it is plausible that other towel-stealers were treated better than the plaintiff (and implausible that other assaulters were treated more favorably).⁸⁵ Taking three rag towels, or setting off firecrackers on the job,⁸⁶ is precisely the kind of behavior that a white worker might be allowed to get away with, but that a black employee might not. Low-severity misbehavior that could easily be covered up by a friendly supervisor is particularly likely to be subject to unequal discipline on the basis of membership in a protected class. Thus, from the perspective of employment discrimination law, it would make sense for courts to acknowledge such “severity” evidence as a compliment to the other kinds of evidence (direct and comparative) that can be used to draw inferences of discrimination. But this rarely happens in practice.

It is important to acknowledge the tensions that arise when, as here, the imperatives of employment discrimination run up against the principles of employment law. By definition, taking account of offense severity evidence requires courts to assess “the seriousness” of what the plaintiff did wrong. Ineluctably, that means at least some erosion of the background rule of employment at-will, which is typically understood to give employers virtually unfettered discretion in deciding who is fired and why. If an employer can fire anyone at any time for any reason, then all firings are always legally “justified,” and asking whether a particular employee’s misbehavior is “sufficient” to “justify” her or his firing verges on an oxymoron.

Ultimately, the only way to expand the protection of anti-discrimination law to compromised workers may be to

however, it is easy to imagine low-level supervisors turning a blind eye to towel-removing (at least when the removers were white), so that management would never learn of such behavior.

85. *See, e.g., Barry v. Noble Metal Processing, Inc.*, 276 F. App’x 477, 478-79 (6th Cir. 2008) (assault on supervisor).

86. *Madden v. Chattanooga City Wide Serv. Dep’t*, No. 1:06-CV-213, 2007 U.S. Dist. LEXIS 94175, at *2-3 (E.D. Tenn. Dec. 20, 2007).

significantly curtail the employment at-will doctrine.⁸⁷ But some compromise short of full just cause protection might be possible. Firing has been dubbed “the industrial equivalent of capital punishment,” reserved—at least in principle—only for the most serious offenses.⁸⁸ Even if employers are *entitled* to fire for “no reason,” that does not mean that they will frequently choose to do so. It should, therefore, be possible for a court to consider whether employers *typically* fire people for the kinds of things the compromised plaintiff did, without thereby inevitably moving to a just cause firing regime. Put another way, even if an employer is *legally* entitled to fire for any reason, it is still possible to ask whether, *in fact*, employers *do* (or *this* employer *did*) fire for the kind of behavior that gave rise to a particular employment discrimination claim.

In *Smith v. Monsanto*, for example, a court could ask whether other employees had been fired for offenses as minor as removing three rag towels, even if the other offenses were not identical to what Smith actually did. This question would require assessing the relative severity of different kinds of misbehavior (taking home three pens versus removing three rag towels), and that comparison is admittedly not straightforward. But neither would such a relatively modest inquiry require the abandonment of at-will employment.

B. *Nepotism or Favoritism*

Employment discrimination law is a response to a particular set of problems. As implicitly defined by the 1964

87. Long ago, Alfred Blumrosen proposed that employment discrimination law had essentially swallowed-up employment law in this respect. Alfred W. Blumrosen, *Strangers No More: All Workers Are Entitled to “Just Cause” Protection Under Title VII*, 2 INDUS. REL. L.J. 519, 519-20 (1978), Blumrosen’s syllogism ran as follows: (i) *McDonald v. Santa Fe Trail Transportation Company* applied anti-discrimination law to all workers, regardless of race; (ii) anti-discrimination law requires an employer to give a legitimate non-discriminatory reason for a challenged action; (iii) thus, any fired worker can allege race discrimination and force the employer to provide a “legitimate” reason for his or her firing. *Id.* at 524-27.

88. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 421 (1981) (quoting M. Jay Whitman, *Wildcat Strikes: The Unions’ Narrowing Path to Rectitude?*, 50 IND. L.J. 472, 481 (1975)).

Civil Rights Act and related statutes, the problem of unjustified unequal treatment in employment has been identified as “discrimination”: negative treatment of persons because of their membership in one or more socially-disfavored groups. But consider the case of black worker X, who is fired after shooting off firecrackers at work or derauling boxcars, while white worker Y, who also did these things, was punished less severely. What is anomalous may not actually be the firing of X, but the more favorable treatment accorded to Y.

Framed this way, some compromised plaintiff cases start to look more like cronyism or nepotism (favorable treatment of whites or males) than discrimination. The question implicitly posed in these cases is which frame one chooses, favoritism toward one group or hostility toward another.

The framing matters for two reasons. First, courts have occasionally struggled with this issue, and seem mostly to have taken the view that, at least in this context, the intentional discrimination forbidden by federal statutes must be based on animus.⁸⁹ In consequence, decisions based on favoritism are usually held to lie outside the purview of the antidiscrimination regime.⁹⁰ It is hard to see why this follows

89. Of course, there is also effects-based disparate impact liability available under some employment discrimination statutes. *See, e.g.*, 42 U.S.C. § 2000e-2(k) (2009) (authorizing disparate impact liability under the 1964 Civil Rights Act).

90. *See, e.g.*, *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 583 (1978) (hiring by word-of-mouth through current employees is not disparate treatment because the employer had legitimate reasons for its practice); *Neal v. Roche*, 349 F.3d 1246, 1252 (10th Cir. 2003) (“[E]mployer’s decision to save a white employee from an impending layoff by giving that employee preference over an African-American employee who did not face a layoff does not give rise to an inference of discrimination” given plausibility of cronyism as motivation); *Brandt v. Shop ‘n Save Warehouse Foods, Inc.*, 108 F.3d 935, 938 (8th Cir. 1997) (“[I]t is not intentional sex discrimination . . . to hire an unemployed old friend who happens to be male, without considering an applicant who is neither unemployed nor an old friend and happens to be female.”); *Foster v. Dalton*, 71 F.3d 52, 54, 56 (1st Cir. 1995) (white supervisor designed job description to fit his white male “fishing buddy,” but such cronyism was not discrimination against black female applicant who was denied the position); *Howard v. BP Oil Co.*, 32 F.3d 520, 527 (11th Cir. 1994) (awarding gas station franchises to relatives of current dealers constitutes “[n]epotism [but] does not violate Title VII per se [although] it may be evidence of intentional discrimination when it works to the detriment of a protected class.”); *Holder v. City of Raleigh*, 867 F.2d 823, 826 (4th Cir. 1989) (“[N]epotism’ by itself

inevitably from the text of Title VII or the other antidiscrimination statutes, and courts rarely articulate compelling justifications for this conclusion.

Second, decisions based on racial favoritism may actually lead to different long-run outcomes from those based on racial animus. In the economist's standard model of employer animus-based discrimination, competitive forces should lead to the disappearance of racial wage differences in the long run.⁹¹ But when employers base decisions on favoritism toward white workers, rather than animus against black workers, both "nepotistic" and neutral firms can survive indefinitely, and racial differences in wages need not be eliminated, even in long run competitive equilibrium.⁹²

Virtually all of the favoritism cited above arose in the context of hiring while most compromised plaintiffs allege discriminatory firing. Nevertheless, there would seem to be some room to expand the protection afforded compromised workers through a more robust conception of favoritism or cronyism in employment discrimination law.

CONCLUSION

In an age when many plaintiffs are "compromised," effective employment discrimination law will require courts to lose their fear of acting like a "super personnel department": compromised plaintiffs cannot be protected

is not actionable under a disparate treatment analysis. A racially discriminatory motive cannot, as a matter of law, be invariably inferred from favoritism shown on the basis of some family relationship."). *But see* *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 587 (1st Cir. 1999) (distinguishing *Foster* and noting that a district court must not "accept uncritically an employer's articulation of cronyism as an explanation for its actions. Rather, the court must . . . determine . . . whether [that] proffered explanation is the real reason for the employer's decision or, conversely, a pretext for discrimination."); *Gibson v. Local 40, Supercargoes & Checkers of Int'l Longshoremen's & Warehousemen's Union*, 543 F.2d 1259, 1268 (9th Cir. 1976) ("Since the relatives being preferred were disproportionately white, the nepotism discriminated against blacks whether or not appellees acted with a discriminatory purpose.").

91. See GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 159 (2d ed. 1971).

92. Matthew S. Goldberg, *Discrimination, Nepotism, and Long-Run Wage Differentials*, 97 Q.J. ECON. 307, 308 (1982).

unless courts are willing to scrutinize employment decisions more carefully than they now do. Ferreting out whatever illegitimate motives might be in play when a compromised worker is subject to an adverse employment action is next to impossible with anything less than a careful and detailed assessment of how serious the compromised employee's misbehavior actually was. Gone are the days when discrimination entailed the outright rejection of exemplary applicants or the firing of those with spotless records. Such discrimination is easy to spot: if Smith has a perfect record and is nevertheless fired, it is pretty easy to imagine that his race played a major role in his discharge. But when Jones is fired after doing something wrong, it is hard to know whether he would have been retained had he been of a different race.

But if closer scrutiny of employers is required for effective antidiscrimination law, it may be forbidden by the at-will employment doctrine that essentially bars any inquiry into the reasons why someone was discharged. There is no tradeoff here, however, if one favors both tighter enforcement of antidiscrimination laws and less deference to employers in making discharge decisions.

APPENDIX: SEARCH CRITERIA & SAMPLE DEFINITION

Westlaw contains too many employment discrimination cases to be searched or retrieved in one fell swoop. To give a sense of the population size, I searched for (HE(TITLE-VII) or HE(42 +1 U.S.C. U.S.C.A. +2 2000E)) & date(YYYY), where YYYY was each year since 1966. In all, this search located 42,765 opinions.⁹³ I therefore randomly sampled 21 weeks—1% of the total—from the 2153 weeks between Jan. 1, 1966 and Dec. 30, 2006, and coded all cases located using Key Cite searches⁹⁴ for each of the 21 sampled weeks. This yielded a total of 641 opinions. Some non-discrimination cases were picked up, since Westlaw's headnotes are less than perfect, and even those opinions that did pertain to an

93. As of April 20, 2007. Westlaw's ALLFEDS database was used.

94. All Topics>Employment Law>Discrimination>Title VII. This search had to be run twice, once on the population of cases with headnotes and once without, since the two databases cannot be combined.

underlying employment discrimination case sometimes lacked any factual detail, often because they were about some purely procedural matter. I was thus left with 406 opinions in which there was enough evidence to make a judgment about whether the plaintiff had done something wrong or not. (Thirty-three opinions involving more than one plaintiff were also eliminated.)

The plaintiff's status was coded using a three-way classification.

Some cases unambiguously involved compromised plaintiffs. In some of these, the plaintiff admitted that he had done or failed to do whatever the defendant asserted was the basis for his adverse treatment. In others, there was a finding of fact about what the plaintiff had done or failed to do, or the plaintiff never denied the defendant's description of his behavior. A minimal severity constraint was also applied, so that someone fired for stealing a paper clip would not count as compromised, even if they admitted that they had in fact stolen the paperclip.

The "possibly compromised" cases consisted of those in which the plaintiff disputed the defendant's description of his behavior or the description was sufficiently ambiguous to suggest doubts about what actually happened. For example, a "possibly compromised" case might be one in which the defendant claimed that the plaintiff was fired for sleeping on the job while the plaintiff denied that he was sleeping. Similarly, if the defendant's reason for taking adverse action against the plaintiff was substantially unconvincing ("I fired him because he stole a paperclip"), this was coded as "possibly compromised."