Chapter 5

Gender and Employment Discrimination and Harassment

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I. Summary

In 1989, there were certainly laws on the books that barred discrimination in employment. Today, there are even more federal and state laws on the books, and they bar even more forms of discrimination in employment – for example, federal law now explicitly bars discrimination on the basis of sexual orientation in employment. But the problems of discrimination and harassment in employment remain. They can invade all kinds of workplaces and effect all groups. Our research, however, shows that certain populations are subject to disproportionately high rates of discrimination and harassment in the workplace: females who are Black, Indigenous, and people of color;[1] those with disabilities; LGBTQ+ workers; female workers in service and hospitality work; female farmworkers; and female domestic workers.

The evidence reviewed in this section suggests that despite widespread legal protections, patterns of racial discrimination in hiring have remained steady over the decades; that Black, Indigenous, and other women of color are underrepresented in management positions across industries; and that in general, women as a group, especially Black, Indigenous, and women of color, earn significantly less than white men. A national survey in 2020 reported that 45% of Black women said they had experienced racism while applying for a job and 44% said they had experienced racism during decisions about promotion and pay. But this discrimination affects more than employment opportunities, conditions, and wages. It can also cause deep emotional harm and produce long-term health impacts.

And although there are strong federal and state antidiscrimination laws to protect against discrimination and sexual harassment in the workplace, the evidence suggests that they are not fully effective. While there is no statewide data from Washington on the number of workplace discrimination cases filed each year, the available evidence suggests that very few workers pursue cases in court and even fewer prevail. Some possible explanations include the fact that

[1] The 2021 Gender Justice Study uses the race and ethnicity terms used in the underlying sources when citing data in order to ensure we are presenting the data accurately and in alignment with the how the individuals self-identified. When talking more broadly about the body of literature we strive to use the most respectful terms. See Section V of the full report ("2021 Gender Justice Study Terminology, Methods, and Limitations") for a more detailed explanation of terminology used throughout the report.

workers face barriers to reporting and to finding legal representation, and evidence suggests unequal outcomes by gender, race, and ethnicity.

While there is insufficient Washington State data to analyze outcomes by gender and race, in federal employment court cases, Black, Latinx, and Asian American plaintiffs are more likely to have their cases dismissed than white plaintiffs. There is some evidence that plaintiffs bringing claims based on multiple marginalized identities fare worse in court—meaning, for example, a Black woman alleging both race and sex discrimination may be less likely to win her case than a white woman alleging only sex discrimination, or a Black man alleging only race discrimination.

We therefore conclude by recommending improvements to data collection as a first step towards figuring out the best way to improve our workplaces, our laws, and our fellow Washington workers' access to legal remedies. We need accurate data on the landscape of discrimination claims in courts in Washington; on the effectiveness of measures to reduce discrimination and harassment; and on the ability of workers to take advantage of those measures in court.

II. Legal Summary

A. Federal law

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to fail to hire or to fire an individual, or to otherwise discriminate against any individual, with respect to the terms, conditions, or privileges of employment "because of" the individual's sex, race, color, religion, or national origin.[2] An employer may not "limit, segregate, or classify" employees or applicants for employment because of sex, race, color, religion, or national origin.[3] In June 2020, the U.S. Supreme Court held for the first time that Title VII's bar on making employment decisions "because of … sex" includes lesbian, gay, and transgender individuals.[4] In other words, discrimination on the basis of sexual orientation or gender identity violates Title VII. Title VII's

[2] 42 U.S.C. § 2000e-2(a)(1).
[3] 42 U.S.C. § 2000e-2(a)(2).
[4] *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).

protections also bar discrimination against one who is not a member of a protected class, but who is associated with a member of a protected class.[5]

Before filing a lawsuit for Title VII violations, however, employees must first file a charge with the U.S. Equal Employment Opportunity Commission (EEOC) within 300 days of the discriminatory act (or the last discriminatory act if there is a continuing violation).[6] If the employee fails to meet that deadline, then they may not bring a Title VII claim in court. In addition, workers whose claims are covered by both federal and state law can file with their state agency (in Washington, the Washington State Human Rights Commission or WSHRC), instead.

Under Title VII there are two ways to demonstrate discrimination: disparate treatment and disparate impact. Under the disparate treatment theory, a plaintiff must prove that their employer acted with a discriminatory motive.[7] Under the disparate impact theory, it's not necessary to prove discriminatory intent. Instead, using that theory, the plaintiff can prevail by

[5] *See, e.g.*, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 n.5, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (noting "[i]t is clear, and respondent seemingly concedes, that its refusal to serve petitioner was a violation of s 201 of the 1964 Act, 42 U.S.C. s 2000a," even though she was a white woman – because she entered the store to eat at the lunch counter with six black friends).

[6] 29 U.S.C. § 626(d).

[7] Employees may make a prima facie case of discrimination through direct or circumstantial evidence. Direct evidence is "evidence, which, if believed, proves the [discriminatory intent] without inference or presumption." *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1038 (9th Cir. 2005) (quoting *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998)). For those without direct evidence, plaintiffs may make a prima facie case under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Using that framework, a plaintiff must show (1) they belong to a protected class, (2) they applied for and was qualified for the position, (3) they were rejected despite their qualifications, and (4) the employer filled the position with someone not of plaintiff's protected class, or considered other applicants whose qualifications were comparable to plaintiff's after rejected plaintiff. *Dominguez-Curry*, 424 F.3d at 1037. Once established, the prima facie case creates a rebuttable presumption of unlawful discrimination. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The burden then shifts to the defendant to produce evidence that if believed would show the adverse employment action was taken "for a legitimate, nondiscriminatory reason." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The plaintiff must then show the employer's reasons were a pretextual cover for discrimination. *Dominguez-Curry*, 424 F.3d at 1037. Pretext can be demonstrated by either showing the unlawful discrimination more likely motivated the employer or by showing the employer's explanation is not trustworthy because it is inconsistent or not believable. *Id.* Under Title VII, the plaintiff must prove either that (1) the discriminatory animus is the sole cause for the challenged employment action, or that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, and the discriminatory reason was "a motivating factor" in the challenged action. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856-57 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003). A motivating factor is a factor that "played a part in the employment decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (plurality opinion).

proving that an objectively neutral employment practice had a discriminatory consequence.[8] The vast majority of employment discrimination cases filed in federal courts allege disparate treatment.[9] State courts also have jurisdiction over such Title VII claims.[10]

Title VII offers a variety of remedies to employees who experience discrimination. They include injunctive relief, such as reinstatement or hiring of the employee, along with front pay, backpay for up to two years from the date the charge is filed with the EEOC (less any amounts earned by the plaintiff through other employment), plus other equitable relief as appropriate.[11] Title VII also authorizes the recovery of compensatory and punitive damages.[12] Compensatory damages are designed to compensate employees who experience wrongful conduct and include loss of future earnings and compensation for a range of negative emotional effects.[13] Punitive damages are designed to deter the employer from engaging in further discriminatory conduct. An employee can recover punitive damages against certain employers if the plaintiff proves the employer engaged in discriminatory practice(s) "with malice or with reckless indifference" to the rights of the individual.[14] Federal law caps the combined value of compensatory and punitive damages recoverable under Title VII, depending on the size of the employer.[15] The damages caps

[8] Disparate impact refers to employment practices that are facially neutral but "discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971). 42 U.S.C. § 2000e-2(k) governs disparate impact cases. A disparate impact claim can be supported only if (1) the plaintiff demonstrates an employment practice disparately impacts a protected class of people and the employer "fails to demonstrate the practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff shows there is an alternative employment practice that did not have a disparate impact and the employer refused to adopt it. 42 U.S.C. § 2000e-2(k)(1)(A). Disparate impact claims employ a similar burden-shifting scheme. To prevail, a plaintiff needs to show a facially-neutral employment practice disproportionately impacted a protected class. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). The burden then shifts to the employer to show the employment practice has a "manifest relationship" to the position in question. *Griggs*, 401 U.S. at 432. If the employer is successful, the burden shifts back to the plaintiff to show other less discriminatory alternatives that equally serve the legitimate business interests. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975).

[9] ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017). From an examination of a random sample of 1,788 employment discrimination cases filed in federal court between 1988-2003, 98% of cases alleged disparate treatment.

[10] *Yellow Freight Sys., Inc. v. Donnelly,* 494 U.S. 820, 110 S.Ct. 1566, 108 L. Ed. 2d 834 (1990).

[11] 42 U.S.C § 2000e-5(g)(1).

[12] 42 U.S.C. § 2000e-5(e)(3)(B); 42 U.S.C. § 1981a.

[13] "Future pecuniary loss, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981a(b)(2), (3).

[14] 42 U.S.C. § 1981a(b)(1).

[15] 42 U.S.C. § 1981a(b)(3).

were set in 1991 and have not been adjusted for inflation.[16] Plaintiffs can also recover reasonable attorney fees and costs if they win.[17]

In addition to Title VII, the Equal Pay Act of 1963 prohibits wage discrimination on the basis of sex. The law does not require that jobs be identical, but they must be substantially equal. The Equal Pay Act covers all forms of pay, including salary, bonuses, and stock options. An employee with an Equal Pact Act claim may also have a claim under Title VII, because, as discussed above, it prohibits discrimination on the basis of pay. However, damages under the Equal Pay Act are limited to wages the employee was underpaid (in addition to reasonable attorneys' fees and costs) and do not include emotional distress damages. However, unlike Title VII, employees are not required to file with the EEOC before filing claims in court.

B. Washington State law

The Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, predates Title VII and in many ways provides more protections. The WLAD prohibits discrimination "because of race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service animal by a person with a disability."[18] The Washington State Legislature explicitly barred discrimination on the basis of sexual orientation – that prohibition was not explicit in federal law until a recent Supreme Court decision.[19]

In enacting the WLAD, the Washington State Legislature found discrimination in Washington State "threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state."[20] The Legislature also declared that the

[16] Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INTEREST L. REV. 237 (2019). Damages limits range from $50,000 for employers with 15-100 employees, to $300,000 for employers with more than 500 employees. *Remedies for Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/remedies-employment-discrimination.
[17] 42 U.S.C. § 2000e-5(k).
[18] RCW 49.60.010.
[19] *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020).
[20] RCW 49.60.010.

right to be free from discrimination constitutes a civil right.[21] To that end, the Legislature directed courts to interpret any ambiguity in the language of the statute generously to accomplish the goal of eliminating and preventing discrimination in Washington.[22] There is no similar direction in Title VII.[23]

The civil right provided by WLAD is broad. It includes (but is not limited to) the right to be free from discrimination in the following situations:

- To obtain and hold employment;
- To full enjoyment of any accommodations, advantages, facilities, or privileges of any place of public accommodation, resort, assemblage, or amusement;
- To engage in real estate transactions;
- To engage in credit transactions;
- To engage in insurance transactions;
- To engage in commerce; and
- To breastfeed a child in public.[24]

Unlike Title VII, the WLAD does not require claimants to file a claim with the EEOC before going to court. Washington lawyers familiar with this area of law note that the 300-day time limit to file with EEOC can pose a barrier to claimants (more on filing with the EEOC below). The WLAD's more streamlined procedure and longer filing period likely promotes better access to judicial remedies.

The WLAD gives people who have experienced illegal discrimination the right to sue in court to stop that behavior, to recover monetary damages, or both.[25] The WLAD is a broad remedial statute, meaning the law was enacted to provide remedy to individuals wronged by discrimination. Accordingly, the law allows for a variety of remedies to allow employees to be

[21] RCW 49.60.030(1).
[22] RCW 49.60.020.
[23] *Martini v. Boeing Co.*, 137 Wn.2d 357, 373, 971 P.2d 45 (1999).
[24] RCW 49.60.030(1).
[25] RCW 49.60.030(2).

made whole, including injunctive relief (such as stopping further violations or reinstatement if wrongly terminated), recovery of economic damages (such as back pay, front pay, loss of benefits, decreased retirement benefits, and lost earning capacity if denied promotions), general damages (for pain and suffering, anxiety, emotional distress, embarrassment, loss of enjoyment of life), and costs and reasonable attorneys' fees.[26]

The WLAD applies to employers with eight or more employees, including any governmental entity, municipality, or agency.[27] It does not apply to employers with fewer than eight employees. The definition of employer also excludes "any religious or sectarian organization" that is not a for-profit company,[28] and the Washington Supreme Court has upheld that exclusion as applied to those employees who are "ministers."[29] The WLAD prohibits discrimination and retaliation by both employers and prospective employers.[30] It applies to employment agencies and protects any prospective, current, or former customer or recruit.[31] Additionally, the WLAD applies to "any labor union or labor organization."[32] The Washington Supreme Court has interpreted the WLAD to provide protection for independent contractors,[33] unlike Title VII. This is an important protection for Washington contract workers: they make up around 10-20% of the workforce and they often lack job stability, benefits or other legal protections.[34] Additionally, the Washington Court of Appeals in *LaRose v. King County* held that an employer may be liable for a non-employee's harassment of an employee if the employer knew or had reason to know about that harassment and failed to stop it;[35] the Washington State Supreme Court in *Floeting v. Group Health Cooperative* ruled that the Washington State Legislature made employers "directly liable" for their own employees' sexual harassment of customers.[36]

[26] *Id.*
[27] RCW 49.60.040(11), (19).
[28] RCW 49.60.040(11).
[29] *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 481 P.3d 1060 (2021).
[30] RCW 49.60.200, .210.
[31] RCW 49.60.190, .210; *see also* RCW 49.60.190(3).
[32] RCW 49.60.190.
[33] *Marquis v. City of Spokane*, 130 Wn.2d 97, 108, 922 P.2d 43 (1996).
[34] JENNY R. YANG ET AL., REIMAGINING WORKPLACE PROTECTIONS (2020), https://www.urban.org/sites/default/files/publication/103331/reimagining-workplace-protections_0_0.pdf.
[35] 8 Wn. App. 2d 90, 437 P.3d 701 (2019).
[36] 192 Wn.2d 848, 852, 434 P.3d 39 (2019).

If the WLAD applies only to employers with eight or more employees, then what happens to people who suffer discrimination from smaller employers? In *Roberts v. Dudley*,[37] the Washington Supreme Court held that, although the employer was exempt from WLAD requirements because it employed fewer than eight people, it still did not have free reign to discriminate. The Court explained that the WLAD expresses a strong public policy that all inhabitants of the state should be free from discrimination. Therefore, the employee plaintiff had a common law cause of action for wrongful firing in violation of the public policy prohibiting sex discrimination found in such statutes as RCW 49.12.200 and RCW 49.60.010.[38]

The WLAD also provides a broader range of remedies than Title VII – in fact, the Washington Supreme Court has called those state law remedies "radically different."[39] Any person who successfully sues under the WLAD may recover "actual damages," an injunction against further violations, and/or reasonable attorney fees, as well as any other appropriate remedy authorized by the Civil Rights Act of 1964.[40] Unlike with Title VII, a plaintiff suing under the WLAD can recover any damages caused by the actions of the defendant, without limitation.[41] This can also include back pay and front pay.[42] In addition, Washington does not cap damages; state court juries can therefore award damages much higher than those available under Title VII.[43]

Washington has a state equivalent to the federal Equal Pay Act: The Equal Pay and Opportunities Act (EPOA).[44] First enacted in 1943, the EPOA similarly prohibits wage discrimination on the basis of sex. An employee may file a claim for civil damages in court without exhausting administrative remedies. The Washington State Legislature made sweeping improvements to the EPOA in 2019

[37] 140 Wn.2d 58, 77, 993 P.2d 901 (2000).
[38] *Roberts*, 140 Wn.2d at 77.
[39] *Martini v. Boeing Co.*, 137 Wn.2d 357, 375, 971 P.2d 45 (1999).
[40] RCW 49.60.030(2).
[41] *Martini*, 137 Wn.2d at 368.
[42] *See* 6A WASHINGTON PRAC.: WASH. PATTERN JURY INSTRUCTIONS: CIVIL, WPI 330.81 (7th ed).
[43] Some recent examples include: $1.75 million for emotional distress in a disability discrimination case, *Jury Orders FedEx Freight to Pay $6.85 Million for Disability Discrimination*, Bloomlaw (Nov. 16, 2020), https://www.bloomlawpllc.com/jury-orders-fedex-freight-to-pay-6-85-million-for-disability-discrimination; $600,000 in emotional distress for sexual harassment retaliation, J. Jury Verdict Against State of Washington, Sept. 28, 2020, http://sheridanlawfirm.com/wp/wp-content/uploads/2020/09/Click-here-to-see-judgment-and-jury-verdict.pdf; and $750,000 in emotional distress for gender discrimination retaliation, *Johnson v. Albertsons LLC*, 2:18-01678-RAJ, 2020 WL 3604107 (W.D. Wash. July 2, 2020).
[44] ch. 49.58 RCW.

to address the continuing wage gap between women and men; those improvements included prohibiting employers from seeking wage history from applicants, requiring employers to provide a wage scale or salary range for promotions/transfers, and promoting greater transparency about wage and salary information.[45]

C. Sexual harassment

Both state and federal courts have recognized that sexual harassment is a form of sex discrimination. In 1985, in *Glasgow v. Georgia-Pacific Corp.*,[46] the Washington Supreme Court broke new ground and held that a hostile work environment caused by a co-worker's sexual harassment constituted illegal sex discrimination under Washington's Law Against Discrimination.[47] A year later, in 1986, a unanimous United States Supreme Court recognized sexual harassment as a viable claim under Title VII in *Meritor Sav. Bank v. Vinson*.[48] Sexual harassment includes "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[49] The U.S. Supreme Court has also held that if "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,'" that also violates Title VII.[50] To prevail, the plaintiff must show that their work environment was both subjectively hostile to them and objectively hostile to a reasonable person.[51]

Under Title VII, an employer "is subject to vicarious liability"—meaning legally responsible for the actions of others—for a hostile work environment created by a supervisor.[52] An employer is held vicariously liable, with no defense, for sexual harassment by a supervisor that results in a

[45] *Id.*
[46] 103 Wn.2d 401, 693 P.2d 708 (1985).
[47] RCW 49.60.
[48] 477 U.S. 57, 66, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).
[49] *Id.* at 65.
[50] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).
[51] *Dominguez-Curry v. Nevada Transp. Dep't*, 424 F.3d 1027, 1034 (9th Cir. 2005); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994).
[52] *Burling Industries, Inc. v. Ellerth*, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

"tangible employment action, such as discharge, demotion, or undesirable reassignment" for the target of the harassment.[53]

Washington law recognizes two kinds of sexual harassment claims—"quid pro quo" and hostile work environment.[54] "Quid pro quo" harassment exists where a supervisor (1) requires an employee to submit to unwelcome sexual conduct as a condition of receiving job benefits, or (2) takes a negative employment action against the employee for refusing the advances.[55] Hostile work environment claims exist where the behavior of co-workers or a supervisor toward an employee because of the employee's sex creates an intimidating, hostile, or offensive working environment.[56] Under the WLAD, the employer is held responsible for harassment by a company owner, manager, partner, or corporate officer.[57] For the harassment of co-workers or supervisors, the plaintiff must show the authorized employer knew, or should have known, about the harassment and failed to take reasonably prompt and adequate corrective action.[58]

III. Background on workplace discrimination and sexual harassment

A. Prevalence

As discussed above, there are strong laws on the books to combat workplace discrimination and sexual harassment in Washington. But we lack comprehensive data on the prevalence of workplace discrimination and sexual harassment in Washington State and, consequently, on the impact of those laws.

The recent survey of sexual harassment in the Washington courts conducted by the Gender and Justice Commission in collaboration with the Washington State Center for Court Research is a notable exception. This survey provides statewide data on workplace harassment and bullying among court employees, Superior Court Clerks' Office employees, and judicial branch employees.

[53] *Id.*
[54] *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004).
[55] *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985).
[56] *Id.*
[57] *Id.* at 407.
[58] *Id.*

The Washington survey found high rates of harassment in these workplaces: 57% of respondents experienced at least one form of workplace harassment in the 18 months prior to the survey.[59] You can find the full survey technical report in Appendix C of this report. To supplement this Washington-specific data, we also reviewed national data where there are no comparable sources in Washington:[60]

- A review of data from the General Social Survey from 2002-2018 found that of all respondents, 5.31% reported race discrimination; 6.34% reported gender discrimination, and 3.18% reported experiencing sexual harassment in the 12 months before the survey; these data were not disaggregated by race, gender, or other demographics, and the dataset was limited to full-time workers.[61]

While the size of the General Social Survey dataset and the sampling methodology used make it a valuable source of national data, the results differ significantly from those found in research using less rigorous sampling methods:

- A Gallup poll from 2020 found that 18% of surveyed workers reported experiencing discrimination at work in the past year.[62]

[59] ARINA GERTSEVA. WORKPLACE HARASSMENT SURVEY: WASHINGTON STATE COURTS, SUPERIOR COURT CLERKS' OFFICES, AND JUDICIAL BRANCH AGENCIES - SUMMARY FINDINGS REPORT 1. WASHINGTON STATE CENTER FOR COURT RESEARCH (2021).

[60] Note that it is often not possible to make direct comparisons between studies, as wording of questions varies, and can influence responses. For example, respondents may report experiencing behavior that they themselves do not recognize as harassment, and so surveys that ask about behaviors experienced in the workplace often get higher rates of reported discrimination and harassment compared to surveys that use the terms "harassment" and "discrimination."

[61] Vincent J. Roscigno, *Discrimination, Sexual Harassment, and the Impact of Workplace Power*, 5 SOCIUS 1 (2019). The General Social Survey is a nationally representative sample of English-speaking and Spanish-speaking adults, and for this analysis authors used data from over 6,000 respondents over a series of five yearly waves of data collection.

[62] Camille Lloyd, *One in Four Black Workers Report Discrimination at Work*, GALLUP (Jan. 12, 2021), https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx (describing results from a web-based survey of over 8,000 respondents, conducted in English).

- And in a 2016 review of the social science literature, the EEOC reported that anywhere from 25% to 85% of female workers report having experienced sexual harassment in the workplace.[63]

B. Disparities

Existing evidence from national studies suggests that there are disparities in who commonly experiences discrimination and harassment at work. For example, the 2020 Gallup poll found that 24% of Black and Hispanic employees reported experiencing discrimination at work in the past year, compared to 15% of white employees (these data were not disaggregated by gender, sexual orientation, disability, or other factors).[64] Moreover, Black, Indigenous, and women of color; LGBTQ+ individuals; and other people with multiple marginalized identities may experience higher rates of workplace discrimination and sexual harassment. The recent Washington judicial branch survey mentioned above found, "[t]he highest rates of any workplace harassment were reported by employees who identified as Indigenous, (82%), bisexual (84%), gay or lesbian (73%), multiracial (66%), court clerks (65%), and women (62%), relative to all respondents (57%).[65]

1. Gender/sex and sexual orientation discrimination

Gender discrimination against female workers is pervasive, as is discrimination based on sexual orientation or transgender identity:

- In a nationally representative Pew survey in 2017, 42% of female respondents reported having experienced gender discrimination at work, compared to 22% of men.[66]
- A nationally representative survey conducted by Harvard University in 2017 found similar results to the Pew study regarding gender discrimination, and further reported that one

[63] CHAI FELDBLUM & VICTORIA LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC (2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace. Cisgender or transgender status was not reported, and estimates for males were not reported.

[64] Lloyd, *supra* note 62.

[65] ARINA GERTSEVA, *supra* note 59, at 2. See Appendix C for the full survey report.

[66] Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today foWorking Women* (Dec. 14, 2017), https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/. Cisgender or transgender status was not reported.

fifth of LGBTQ respondents reported having experienced workplace discrimination based on their LGBTQ identity.[67]

- Workers who identify as bisexual report being less likely to disclose their sexual orientation at work compared to their gay and lesbian counterparts; and they report facing discrimination and harassment when they do disclose—even from their gay and lesbian coworkers.[68]
- Women who are perceived to be lesbian, bisexual, or queer may be less likely to be hired than women who are perceived to be heterosexual.[69]
- In the 2015 U.S. Transgender Survey, 30% of those who had been employed in the previous year reported they had been fired, denied a promotion, or experienced other forms of discrimination, harassment, and mistreatment in the workplace because of their transgender identity; and 15% had been verbally harassed, physically attacked, and/or sexually assaulted at work.[70]

Women who are Black, Indigenous, and people of color may experience higher rates of gender discrimination:

[67] HARV. OP. RSCH. PROGRAM, DISCRIMINATION IN AMERICA: FINAL SUMMARY (2018), https://www.hsph.harvard.edu/horp/discrimination-in-america/. 31% of women reported having been discriminated against when applying for jobs and 41% when being paid equally or considered for promotions; 20 % of LGBTQ+ people reported having been discriminated against when applying for jobs and 22% when being paid equally or considered for promotions; compared to 18% of men in both situations. Race/ethnic data, gender data, and LGBTQ+ data were not disaggregated by the other demographic categories. *Id.*

[68] David F. Arena & Kristen P. Jones, *To id F. ANot to "B": Assessing the Disclosure Dilemma of Bisexual Individuals at Work*, 103 J. VOCATIONAL BEHAV. 86 (2017) (using data from online surveys conducted with over 800 gay, lesbian, and bisexual identified workers).

[69] Emma Mishel, *Discrimination Against Queer Women in the U.S. Workforce: A R:"a2fvirstc30","p*, 2 SOCIUS 1 (2016). The author sent pairs of resumes with typically female names to over 800 administrative jobs in four U.S. states (not including Washington State); while the resumes had equivalent experience and skills, one of the resumes included a history of leadership in a LGBTQ+ student organization, and the other did not. *Id.* The resumes with the LGBTQ+ experience received 30% fewer callbacks. *Id.*

[70] NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2017), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. Mistreatment included breaches of confidentiality, negative job reviews, being forced to resign, not being allowed to use the bathroom that aligned with their gender, being told to present as the wrong gender at work, and more. The survey did not disaggregate between male, female, or gender-nonconforming respondents.

- Among older adults in a longitudinal cohort study, 25% of Black women reported any kind of discrimination in the workplace (compared to 11% of white men); more Black women (11%) than white women (8%) reported sex discrimination.[71]
- In a 2010 survey, 42.8% of LGBTQ+ Black, Indigenous, and respondents of color reported employment discrimination, compared to 37.7% of white LGBTQ+ survey respondents.[72]
- According to the U.S. Transgender survey, transgender respondents of color, especially American Indian, Black, and multiracial respondents, reported higher rates of discrimination, harassment, and mistreatment on the basis of their transgender identity, compared to their white peers.[73]

2. Race discrimination

While some white workers do file race discrimination claims, the evidence shows that Black, Indigenous, and people of color experience rates of racial discrimination in the workplace much more frequently:

- In the 2020 Gallup poll noted above, 18% of Black workers surveyed and 15% of Hispanic workers surveyed reported having experienced race-based discrimination in the past year, compared to 6% of white workers.
- In the Harvard study mentioned above, more than half of Black respondents noted having experienced discrimination in the workplace on the basis of race.[74]

The evidence suggests that Black women may experience higher rates of workplace race discrimination than Black men:

[71] Desta Fekedulegn et al., *Prevalence of Workplace Discrimination and Mistreatment in a National Sample of Older U.S. Workers: The REGARDS Cohort Study*, 8 SSM - POPULATION HEALTH 1 (2019) (reporting from a sample of nearly 5,000 adults pulled from a nation-wide cohort of non-Hispanic Black and white adults).
[72] Darren L. Whitfield et al., *Queer Is the New Black? Not So Much: Racial Disparities in Anti-LGBTQ Discrimination*, 26 J. GAY & LESBIAN SOC. SERVS. 426 (2014) (relying on data from a 2010 survey of adult LGBTQ individuals in Colorado (n=3,854)).
[73] NAT'L CTR. FOR TRANSGENDER EQUALITY, *supra* note 70.
[74] *Id.*

- In the longitudinal study noted above, more Black women reported racial discrimination in the workplace (17%) than Black men (12%), compared to two percent each of white women and white men.[75]
- An Essence survey in 2020 reported that 45% of Black women said they had experienced racism while applying to a job, and 44% said they had experienced racism "while being considered for a promotion or for equal pay."[76]

3. Discrimination on the basis of disability

The experiences of workplace discrimination among people with disabilities vary widely, as some disabilities are more readily apparent than others, which may affect how people are treated.[77] However, the evidence suggests that in general, people with disabilities are discriminated against in hiring, compensation, and treatment in the workplace:

- A field experiment that sent job applications to over 6,000 accounting positions in the U.S. found that applications that disclosed a physical or developmental disability received 26% fewer callbacks compared to applications that did not—even though all had the same qualifications.[78]
- In a nationally representative telephone survey of U.S. adults with self-reported disabilities, 36% of those who were actively seeking work reported that employers "incorrectly assumed that they could not do the job because of their disability."[79] Over 16% of those currently working reported receiving lower pay than peers in similar positions.[80]

[75] Desta Fekedulegn et al., *supra* note 71.
[76] ESSENCE, *More Than Three-Quarters Of Black Mothers Worry Their Children Will Be Victims Of Police Brutality, ESSENCE Survey Finds* (June 15, 2020), https://www.essence.com/feature/essence-insights-black-mothers-police-brutality/. The Essence online survey includes responses from 749 U.S. adult Black women.
[77] SARAH PARKER HARRIS & ROB GOULD, EXPERIENCE OF DISCRIMINATION AND THE ADA 9 (2019), https://adata.org/sites/adata.org/files/files/ADA percent20Research percent20Brief_Discrimination percent20and percent20the percent20ADA_FINAL.pdf.
[78] Mason Ameri et al., *The Disability Employment Puzzle: A Field Experiment on Employer Hiring Behavior*, 71 INDUS. & LAB. RELS. REV. 329 (2018).
[79] KESSLER FOUND., THE KESSLER FOUNDATION 2015 NATIONAL EMPLOYMENT AND DISABILITY SURVEY: REPORT OF MAIN FINDINGS 20 (2015), https://kesslerfoundation.org/sites/default/files/filepicker/5/KFSurvey15_Results-secured.pdf. This nationally representative telephonic survey reached over 3,000 U.S. adults with disabilities by phone.
[80] *Id.*

Experiences of disability discrimination have also been shown to vary by social identity, as individuals belonging to other marginalized groups experience more pervasive and severe discrimination:

- Female workers with disabilities file Americans with Disabilities Act (ADA) charges with the EEOC at a rate 42% higher than their male counterparts.[81]

4. Sexual harassment

The federal government's Merit Systems Protection Board collects and publishes what is probably the most comprehensive and long-lasting survey of sexual harassment in the workplace, surveying federal employees regularly since 1981.[82] In 2016, roughly one in seven federal employees reported having experienced sexual harassment during the two years before the survey (20.9% of female employees and 8.7% of male employees). Note that these results should not be generalized to the wider population (in fact, they are significantly lower than those found in a recent national survey);[83] as discussed below, sexual harassment prevalence varies greatly by workplace. However, they are helpful to understand historical trends. Rates of sexual harassment had decreased slightly since the previous survey in 1994.[84] Employee understanding of sexual harassment had changed significantly, with more employees overall recognizing specific actions as harassment, and showing a higher rate of agreement between male and female employees on which actions qualify as harassment. The most common reaction reported by victims of workplace sexual harassment was avoidance of the harasser (61%), followed by asking the harasser to stop (59%). Note that respondents could select multiple options. Only 11% filed

[81] Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 61 (2017) (from an examination of EEOC charges from 2000-2009).
[82] U.S. MERIT SYS. PROTECTION BD., OFF. OF POL'Y & EVALUATION, UPDATE ON SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE 10 (2018), https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1500639&version=1506232&application=ACROBAT.
[83] HOLLY KEARL, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT (2018), https://ncvc.dspacedirect.org/handle/20.500.11990/789. This nationally representative survey of over 2,000 adults found that 38% of women and 13% of men reported ever having experienced sexual harassment at work. Note, however, that this survey asked about lifetime experiences, while the Merit Systems Protection Board only asks about experiences in the previous two years.
[84] However, rates cannot be compared exactly because the methodology changed: the 2016 survey asked about 12 different harassment behaviors, while the 1994 survey asked about eight behaviors.

a formal complaint. Concerningly, 12% of respondents reported changing jobs or locations to avoid the harassment.[85] This data was not disaggregated by race, LGBTQ+ identity, pay grade, or other factors.

C. Variations in workplace sexual harassment and discrimination by industry

1. Service and hospitality

The sectors most represented in EEOC sexual harassment filings are accommodation and food services, retail trade and healthcare, and social assistance.[86] Workers in hotels and accommodations may be vulnerable because much of their work is done in isolation. More than half of hotel housekeepers in Seattle surveyed in 2016 reported sexual harassment or assault on the job.[87] Restaurant workers experience sexual harassment from supervisors, co-workers, and customers. In a nation-wide survey of female fast-food industry workers, 40% reported having experienced "unwanted sexual behaviors," with Black and Latina women reporting higher rates.[88] Prior to the COVID-19 pandemic, the restaurant industry was the fastest-growing sector of the U.S. economy, and it is marked by extreme gender and racial segregation in roles and wages: female, Black, and Hispanic workers in the industry are more likely to be living in poverty than their male and white counterparts, and are more highly concentrated in low-wage positions and tipped positions.[89] In many parts of the country, tipped positions are subject to a much lower federal minimum wage (referred to as the "tipped minimum wage"), on the assumption that tips from customers will make up the difference.[90]

[85] U.S. MERIT SYS. PROTECTION BD., *supra* note 82.
[86] AMANDA ROSSIE, JASMINE TUCKER & KAYLA PATRICK, NAT'L WOMEN'S L. CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN (2018), https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf (from an analysis of filings from women in the private sector, 2012-2016).
[87] PUGET SOUND SAGE, SURVEY OF DOWNTOWN SEATTLE HOTEL HOUSEKEEPERS REVEALS FREQUENT SEXUAL HARASSMENT AND PAIN (2016), https://pugetsoundsage.org/wp-content/uploads/2016/12/PSS_HotelWorkerSurvey_Sept2016.pdf
[88] HART RSCH. ASSOCS., KEY FINDINGS FROM A SURVEY OF WOMEN FAST FOOD WORKERS (2016), https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf.
[89] HEIDI SHIERHOLZ, LOW WAGES AND FEW BENEFITS MEAN MANY RESTAURANT WORKERS CAN'T MAKE ENDS MEET (2014), https://files.epi.org/2014/restaurant-workers-final.pdf.
[90] *Id.*

There appears to be an inverse relationship between rates of sexual harassment and the tipped minimum wage—industry experts note that financial dependence on customer tips leads to "an environment in which a majority female workforce must please and curry favor with customers to earn a living."[91] This supports the theory that minimum wage policy can affect not just workplace wages, but also workplace safety: restaurant workers in tipped positions report higher rates of sexual harassment; and restaurant workers in states with a "tipped minimum wage" report higher rates of sexual harassment than those in states with a single minimum wage, like Washington State. In all scenarios, female restaurant workers report higher rates of sexual harassment than their male counterparts.[92]

2. Domestic workers

While there are less data on domestic workers, it is important to note that they are often excluded from civil rights and discrimination protections by design[93] and because their employers may not meet the minimum requirement of number of employees, but they report high rates of mistreatment: in a national survey of nannies, caregivers and housecleaners, 36% reported experiencing verbal harassment in the past year.[94] Domestic workers are almost exclusively female (91.5%), and most are Black, Indigenous, and women of color (52.4%).[95] A higher proportion of domestic workers are foreign-born compared to the general population, and they earn lower wages as a group than other workers and are more likely to be living in poverty. They are also much less likely than other workers to receive employer-provided retirement or health insurance.[96] Given their high rates of poverty and lack of benefits, domestic workers are likely to

[91] THE RESTAURANT OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 1 (2014).
[92] *Id.*
[93] *See* RCW 49.60.040(10) (excluding from the definition of "employee" individuals employed "in the domestic service of any person"); 42 U.S.C. §§ 2000e(b) (exclusion for businesses with fewer than fifteen workers). *See also* Richard Carlson, *The Small Firm Exception and the Single Employer Doctrine in Employment Discrimination*, 80 ST. JOHN'S L. REV. 1197, 1199 (2006) ("The exemption may be one reason why small firms are much less likely than larger firms to hire a representative number of black employees"). The domestic worker exclusion in WLAD dates back to the original 1949 enactment of the law. *See* LAWS OF 1949, ch. 183, § 3(b).
[94] LINDA BURNHAM & NIK THEODORE, HOME ECONOMICS: THE INVISIBLE AND UNREGULATED WORLD OF DOMESTIC WORK (2012), https://idwfed.org/en/resources/home-economics-the-invisible-and-unregulated-world-of-domestic-work/@@display-file/attachment_1.
[95] JULIA WOLFE ET AL., DOMESTIC WORKERS CHARTBOOK (2020), https://files.epi.org/pdf/194214.pdf.
[96] *Id.*

be extremely vulnerable to any retaliatory actions taken by an employer in the event that an employee complains about or reports discrimination or harassment. Etelbina Hauser, a 56-year-old domestic worker born in Honduras and living in Washington State, recounted the experience of going from job to job, fleeing sexual harassment: "Hunger will make you put up with a lot of things… You realize that you have to find a way to survive, even with your dignity crushed."[97]

3. Farmworkers

Human Rights Watch reports that farmworkers may be particularly vulnerable to sexual harassment in the workplace.[98] Working alone in remote or low-visibility areas; a high proportion of male supervisors to female employees; and financial vulnerability are some of the factors that may influence high rates of sexual harassment for female farmworkers.[99] Experts in Washington note that in the agricultural industry, male supervisors can have a huge amount of control over their employees, including the power to reassign, hire, and fire with very little oversight, making female employees extremely vulnerable. While no comprehensive national data exists, available data suggests that rates of sexual harassment are extremely high among female farmworkers.[100] Sexual harassment in these workplaces can include unwanted touching, verbal abuse and exhibitionism, but sometimes also sexual assault or sexual coercion.[101]

Given that farmworkers are majority Hispanic/Latinx, and females are more likely to experience sexual harassment than males, Latina farmworkers likely face a disproportionate impact of workplace sexual harassment.[102] Farmworkers may depend on their employers not only for

[97] Alexia Fernandez Campbell, *Housekeepers and Nannies Have No Protection from Sexual Harassment Under Federal Law*, VOX (Apr. 26, 2018), https://www.vox.com/2018/4/26/17275708/housekeepers-nannies-sexual-harassment-laws.

[98] GRACE MENG, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012). The authors interviewed 160 individuals, including farmworkers, attorneys, industry members, and experts in 11 states (including Washington).

[99] Irma Morales Waugh, *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237 (2010).

[100] MENG, *supra* note 98. Human Rights Watch reports that in a series of interview conducted in 2012, nearly all workers interviewed had experienced sexual violence or harassment on the job or had witnessed or heard about it happening to someone else. *See also* Morales Waugh, *supra* note 99 (from interviews with 150 Mexican and Mexican-American farmworker women in California, 80% reported having experienced some form of sexual harassment, and 24% of those reported experiencing sexual coercion on the job).

[101] *Id.*

[102] TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (2018),

scarce work opportunities, but in some cases also for housing, transportation, and language access support in navigating U.S. systems (nearly one-third of workers report that they cannot speak English).[103]

Sexual harassment and gender discrimination behaviors can continue for months or years in some cases, such as for the plaintiff named in an EEOC lawsuit against National Food Corporation headquartered in Everett, Washington.[104] A female laborer who worked in isolated conditions was pressured for sex on a weekly basis over the course of seven years. Co-workers tried to complain on her behalf and were fired in retaliation. The EEOC's general counsel commented, "This lawsuit is another in an unfortunate pattern of employers taking advantage of female agricultural workers who often work in isolation and are unaware of their rights."[105] Similarly, a 2021 consent decree ordered Great Columbia Berry Farms LLC, located near Walla Walla, Washington, to pay damages to several women who were raped or sexually assaulted by a supervisor, who used his position to threaten and fire workers when they complained.[106] The company must also create systems to protect workers in the future, including anti-discrimination and anti-retaliation policies; secure and anonymous complaint proceedings; annual employee trainings; and investigative procedures to respond to complaints. "Companies that know or should know that powerful managers are harassing and assaulting their employees, but do nothing to stop it, bear responsibility," said Washington State Attorney General Bob Ferguson. "Agricultural workers deserve to be heard — and they deserve a safe work environment free from abuse."[107] Besides civil remedies and civil accountability, sexual assault and coerced sex in the workplace may require criminal justice response. Since data on the prevalence on gender-based coercion, assaults, and related criminal and civil injuries occurring in the farm labor and

https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf. The 2018 U.S. National Agricultural Workers Survey found that 89% of U.S. farmworkers are Hispanic.

[103] *Id.*

[104] *Egg Giant National Food to Pay $650,000 to Settle EEOC Sexual Harassment Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 16, 2013), https://www.eeoc.gov/newsroom/egg-giant-national-food-pay-650000-settle-eeoc-sexual-harassment-lawsuit.

[105] *Id.*

[106] *AG FERGUSON: WALLA WALLA COUNTY BERRY FARM MUST PAY $350,000 OVER SEXUAL ASSAULT, HARASSMENT OF FARM WORKERS*, WASH. STATE OFF. OF THE ATT'Y GEN. (2021), https://www.atg.wa.gov/news/news-releases/ag-ferguson-walla-walla-county-berry-farm-must-pay-350000-over-sexual-assault.

[107] *Id.*

service industries is limited, Washington should strive to collect such data statewide. This would allow stakeholders to monitor the efficacy of laws and regulations in combating gender-based violence, identify gaps in protection for these vulnerable populations, and collaborate on providing better access to criminal and civil justice.

4. Other workplaces

There is some evidence that female workers in historically male-dominated workplaces face more gender-based harassment, based on studies of women working in academia, the courts, and the military.[108] "Chapter 4: The Impact of Gender and Race in the Courtroom and in the Legal Community" looks in depth at one such sector – the legal profession. While a full review of discrimination and sexual harassment in these specific sectors is beyond the scope of this review, it is worth noting that male workers in these sectors, especially Black, Indigenous, and men of color, also experience gender-based harassment: for example, Black men in the military experience higher rates of sexual harassment than their white counterparts.[109]

5. Religious employers

The exemption for religious organizations under WLAD leaves some workers vulnerable to discrimination. In 2013, the vice-principal of Eastside Catholic school in Sammamish resigned from his position, reportedly under pressure by the archdiocese, when it became known that he had married his same-gender partner.[110] And in 2020, two teachers left Kennedy Catholic school in Burien after each disclosed to school administrators that they had plans to marry their same-gender partners and were told by the archdiocese that their employment contracts would not be renewed for the following school year.[111] Though religious and sectarian non-profits are expressly exempted by the WLAD, other non-profit or for-profit employers are not exempted,

[108] Dana Kabat-Farr & Lilia M. Cortina, *Sex-Based Harassment in Employment: New Insights Into Gender and Context*, 38 LAW & HUMAN BEHAV. 58 (2014).
[109] Isis H. Settles, NiCole T. Buchanan & Brian K. Colar, *The Impact of Race and Rank on the Sexual Harassment of Black and White Men in the U.S. Military*, 13 PSYCH. MEN & MASCULINITY 256 (2012).
[110] Kristen Millares Young, *Seattle Catholic School ITFiring of Gay Teacher Pits State Law Against Religion*, GUARDIAN (Dec. 21, 2013), https://www.theguardian.com/world/2013/dec/21/seattle-catholic-schools-firing-gay-vice-principal.
[111] Dahlia Bazzaz, *Seattle Archbishop Puts Kennedy Catholic School President on Leave of Absence Until the End of the School Year*, SEATTLE TIMES (Feb. 25, 2020), https://www.seattletimes.com/seattle-news/education/seattle-archbishop-puts-kennedy-catholic-school-president-on-leave-of-absence-until-the-end-of-school-year/.

even if they hold the same beliefs. Further, there are likely some constitutional limits to the reach of the exemption under the Washington Constitution. In March 2021, the Washington Supreme Court held that the religious exemption in the WLAD is not unconstitutional as applied to "ministerial functions," or those positions that involve matters of "faith and doctrine."[112] The court, however, suggested that the exemption for religious organizations could violate the state constitution as applied to employees with non-ministerial functions.[113]

6. Parenting and discrimination

Finally, female workers who are married, pregnant, or parenting face discrimination in the workplace that has been well-documented in U.S. data. Empirical studies with lay audiences have found significant biases against female job applicants or workers who are married or who have children, a bias referred to by some researchers as the "motherhood penalty."[114] A review of cases alleging discrimination on family responsibilities found that 25% of workers alleging mistreatment were in the service sector, and 28% worked in manufacturing, office administration and sales.[115] The authors note that low-wage jobs are less likely to provide paid sick time or flexible time off for caregiving, and more than half of workers who make below 200% of the federal poverty level aren't covered by federal family leave laws, because their position or employer is exempt. Workers in low-wage jobs report being fired immediately or shortly after disclosing their pregnancy at work; being banned from holding certain positions; being denied accommodations while pregnant; harassment and mistreatment; and denial of legal rights. There is evidence that Black and Latina workers are treated more harshly than white workers when

[112] *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 252, 481 P.3d 1060 (2021).
[113] *Id.* (finding the exemption does not facially violate article I, section 12 of the Washington constitution, but recognizing it "may still be unconstitutional as applied to" the plaintiff).
[114] Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616 (2010). Benard and Correll tested the how the attitudes of 252 undergraduate students towards male and female job applicants changed with the information that applicants were parents. *See also* Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCH. 474 (2012). Jordan and Zitek conducted a series of experiments with a total of 288 undergraduate students to assess how participants' ratings of male and female employment would change with the information that workers were married. The term "motherhood penalty" was first used in Correll et al. in 2007; they also found that male parents faced either no penalty, or the opposite: what they termed the "fatherhood bonus." Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM J. OF SOCIO. 1297 (2007).
[115] STEPHANIE BORNSTEIN, POOR, PREGNANT AND FIRED: CAREGIVER DISCRIMINATION AGAINST LOW-WAGE WORKERS (2011), https://worklifelaw.org/publications/PoorPregnantAndFired.pdf.

pregnant or parenting.[116] While much of the social science literature focuses on female workers, in certain fields male workers who engage in caregiving at home may also face gender-based harassment.[117] There is a gap in the literature regarding workplace treatment of LGBTQ+ workers who are pregnant and parenting, both nationally and in Washington State.

7. The impact of COVID-19

There is evidence to suggest that the COVID-19 crisis has shifted the landscape of workplace discrimination. With schools in many areas limiting or shutting down in-person learning, parents have had to find childcare alternatives—including working from home while caring for children. Workers may need to take time off from work to quarantine after potential exposures, or to care for sick family members. Front-line and essential workers need to be provided with personal protective equipment and other safety measures to lessen their risk of exposure. And Asian Americans are more likely than any other racial or ethnic group to report experiencing racial discrimination during the pandemic.[118] Many of these situations are likely to have a disproportionate gender impact. The Seattle Times notes that the majority of single parent households are headed by women, and social distancing guidelines may cut families off from family members who otherwise might be able to provide support with childcare.[119] In heterosexual two-parent households where both parents work full-time, mothers generally shoulder a greater part of household and childcare tasks.[120] See "Chapter 4: The Impact of Gender and Race in the Courtroom and in the Legal Community" for a more in-depth discussion of division of domestic and childcare duties by gender, and the impacts of COVID-19 on childcare

[116] *Id.*
[117] Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving: Workplace Mistreatment*, 69 J. SOC. ISSUES 341 (2013) (conducted studies in two populations, union workers in a female-dominated field, and public service workers in a male-dominated field, finding that caregiving fathers received more mistreatment than their female counterparts); BORNSTEIN, *supra* note 115 (from a survey of family responsibility discrimination cases).
[118] Neil Ruiz, Juliana Menasce Horowitz & Christine Tamir, *Many Black and Asian Americans Say They Have Experienced Discrimination Amid the COVID-19 Outbreak*, PEW RSCH. CTR. (July 1, 2020), https://www.pewresearch.org/social-trends/2020/07/01/many-black-and-asian-americans-say-they-have-experienced-discrimination-amid-the-covid-19-outbreak/.
[119] Megan Burbank, *COVID-19 Pits Full-Time Parenting Against Full-Time Work, and Women Are the Hardest Hit*, SEATTLE TIMES (Aug. 15, 2020), https://www.seattletimes.com/life/covid-19-pits-full-time-parenting-against-full-time-work-and-women-are-the-hardest-hit/.
[120] Titan Alon et al., *The Impact of COVID-19 on Gender Equality*, 4 COVID ECON. 62 (2020).

duties. Employment discrimination cases are already being brought during the pandemic claiming that employees have been denied family leave, fired in retaliation for raising concerns about safety protocols, denied opportunities to work remotely, and more.[121] Claims of workplace sexual harassment appear to have decreased during COVID-19. It's possible that sexual harassment is less common on virtual platforms; but experts warn that declines in claims may also signal that victims are less likely to report incidents for fear of retaliation with unemployment rates so high.[122] More research is needed to assess how the state of employment discrimination litigation in Washington has changed since the onset of the COVID-19 pandemic.

D. Retaliation

Both Title VII and the WLAD prohibit retaliation against employees who provide support for a charge of discrimination.[123] To prove retaliation under Title VII, the employee must show they suffered a materially adverse action that could "dissuade a reasonable worker from making or supporting a charge of discrimination."[124] The retaliatory action does not need to be related to the terms and conditions of employment.[125] It can be something harmful completely outside the workplace.

Under the WLAD, to establish a prima facie case of retaliation, an employee must show: (1) the employee took an action protected by law (such as filing a discrimination case in court), (2) the employee suffered an adverse employment action, and (3) the employee's protected activity caused the adverse employment action.[126] This requires proving the employer's knowledge of the protected activity.[127] For the third prong, the employee has to show that "retaliation was a substantial factor motivating the adverse employment decision."[128] If the plaintiff is successful, the burden shifts to the employer to show it had a legitimate reason for the adverse employment

[121] Tom Spiggle, *The Coronavirus is Causing More Employment Lawsuits*, FORBES (Sept. 22, 2020), https://www.forbes.com/sites/tomspiggle/2020/09/22/the-coronavirus-is-causing-more-employment-lawsuits/?sh=5c2d5d9634c7.
[122] *Id.*
[123] 42 U.S.C. § 2000e-3(a); RCW 49.60.210(1).
[124] *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006).
[125] *Id.* at 61, 64.
[126] *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411, 430 P.3d 229 (2019).
[127] *Allison v. City of Seattle*, 118 Wn.2d 79, 89 n.3, 821 P.2d 34 (1991).
[128] *Cornwell*, 192 Wn.2d at 412.

action.[129] The employee must then show the legitimate reason is merely pretext.[130] Anecdotally, Washington attorneys familiar with this area of law note that retaliation can be difficult to prove, as employers are often able to present other reasons for the alleged retaliatory action, and it is challenging for employees to prove that these reasons are pretexts.

The risks of retaliation may be much higher for farmworkers, the majority of whom are Hispanic/Latinx and immigrants and nearly half of whom do not have legal authorization to work in the U.S., than for workers in other industries.[131] For those who live in company housing, losing their job can also mean losing the roof over their heads. Retaliation on the job may target not only the worker in question, but also their families, who frequently work on the same farm. And due to the seasonal nature of the work, retaliation can be hard to prove, as a worker may simply not be re-hired at the beginning of the next work season with no reason given.[132] While the barriers to reporting are high, the few cases that have been filed with the EEOC show that threats of retaliation against workers may include threats of physical harm to the worker and their friends and family, firing, and even deportation.[133] Experts in Washington note anecdotally that employers engaged in harassing their female employees do use immigration and documentation status to discourage employees from reporting harassment or as a tool to coerce women into receiving unwanted sexual advances.

Of all sexual harassment charges filed with the EEOC in 2016-2017, over 70% of the charges included claims of retaliation.[134] These data are not disaggregated by identity of the complainant. It's not possible to know whether retaliation is this common in practice, or whether workers are more likely to file charges with the EEOC after experiencing retaliation for internal reporting of

[129] *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002).
[130] *Id.* at 619.
[131] TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf.
[132] *Id.*
[133] WILLIAM R. TAMAYO, RETALIATION IN SEXUAL HARASSMENT CASES, THREATS TO DETER REPORTING AND THE IMPACT ON IMMIGRANT WORKERS (2013), http://employeerightsadvocacy.org/wp-content/uploads/2017/02/S0305_RetaliationInSexualHarassmentCases_TamayoW.pdf.
[134] Jocelyn Frye, *Not Just the Rich and Famous: The Pervasiveness of Sexual Harassment Across Industries Affects All Workers*, CTR FOR AM. PROGRESS (2017), https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/.

harassment. Nearly one-third of 2018 claims to the Washington State Human Rights Commission (WSHRC) included a claim of retaliation.

E. Consequences of workplace discrimination and harassment

Discrimination in the workplace causes deep emotional harm to those who experience and witness it; long-term individual health and economic impacts. This discrimination also contributes to persistent population-level inequities. Workers may experience disruptions to their work, including time and productivity loss due to mental anguish, reduction in hours and wages, reduced opportunities for professional development and advancement, and unemployment, leading to short- and long-term financial strain.[135] Female workers, transgender workers, and Black, Indigenous, and workers of color who experience discrimination and harassment on the basis of sex, gender identity, and race have reported short- and long-term mental health outcomes, from stress, anxiety, and depression.[136] Chronic stress from experiences of discrimination can spill over into negative impacts on physical health including chronic disease, accelerated aging, and poor health outcomes.[137] Importantly, there is some evidence that observing discrimination against others can be just as impactful, if not more so, than direct

[135] Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOCIETY 333 (2017); ELYSE SHAW, ARIANE HEGEWISCH & CYNTHIA HESS, SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS (2018).

[136] Ivy K. Ho et al., *Sexual Harassment and Posttraumatic Stress Symptoms Among Asian and White Women*, 21 J. AGGRESSION, MALTREATMENT & TRAUMA 95 (2012) (showing that self-reported sexual harassment frequency is associated with Post-Traumatic Stress symptom severity in a sample of 214 white and Asian female college students); Franco Dispenza et al., *Experience of Career-Related Discrimination for Female-to-Male Transgender Persons: A Qualitative Study*, 60 CAREER DEVELOPMENT Q. (2012) (from interviews with nine transgender participants, reporting negative emotional outcomes like stress, anxiety and depression from workplace discrimination); Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC. & MENTAL HEALTH 89 (2011) (using longitudinal data from the Youth Development Study and interviews with 33 female participants); SHAW, HEGEWISCH & HESS, *supra* note 135 (reporting results from a review of the literature); Marting results from a review of the literaturet Study and in*Perceived Workplace Racial Discrimination and its Correlates: A Meta-Analysis: PERCEIVED RACIAL DISCRIMINATION*, 36 J. ORGANIZ. BEHAV. 491rganiz. Beh (using a meta-analysis of studies on the relationship between racial discrimination and employee outcomes); Victor E. Sojo, Robert E. Wood & Anna E. Genat, *Harmful Workplace Experiences and Women E. Genat, ip between racial discrimination*, 40 PSYCH. WOMEN Q. 10 (2016) (from a meta-analysis of 88 studies with over 73,000 working women).

[137] Ronald L. Simons et al., *Racial Discrimination, Inflammation, and Chronic Illness Among African American Women at Midlife: Support for the Weathering Perspective*, J. RACIAL & ETHNIC HEALTH DISPARITIES (2020).

experiences of discrimination,[138] suggesting that legal interventions that deter future discrimination can have a positive impact on both those being targeted by the discrimination and those who observe it. There is some emerging evidence to suggest that experiences of discrimination and harassment for individuals with multiple marginalized identities (e.g., experiences of discrimination on the basis of gender and race or ethnicity, disability, sexual orientation, or more) can create a compounded effect; however, this field of study is still relatively new, and more research is needed.[139]

On a broader scale, discrimination in workplace practices may contribute to maintaining deep inequities in workplace advancement, wages, and earnings. A meta-analysis of field experiments studying hiring discrimination in the U.S. from 1974-2015 found that patterns of racial discrimination in hiring between white, Black, and Latino applicants have remained steady across the decades.[140] Data from the Bureau of Labor Statistics shows that management positions have an overrepresentation of white men and underrepresentation of every other gender/race group, and that professional jobs have an underrepresentation of Black men and women.[141] And the race and gender wage gap severely disadvantages Black, Indigenous, and women of color: nationally, for every dollar employers pay white men, they pay Asian women $0.90, white women $0.79, Black women $0.62, American Indian/Alaska Native women $0.57, and Hispanic or Latina women $0.54.[142] It is important to note that these board race and ethnicity categories mask wage inequities for subpopulations. See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more granular information on pay and wage disparities.

[138] Lindsay Y. Dhanani, Jeremy M. Beus & Dana L. Joseph, *Workplace Discrimination: A Meta-Analytic Extension, Critique, and Future Research Agenda*, 71 PERSONNEL PSYCH. 147 (2018).
[139] David R. Williams et al., *Understanding How Discrimination Can Affect Health*, 54 HEALTH SERVS. RSCH. 1374 (2019).
[140] Lincoln Qillian & Ole Hexel, Trends and Patterns in Racial Discrimination in Hiring in America, 1974-2015 (2016) (paper presented at the Meetings of the Population Association of America, Washington, D.C.).
[141] BERREY, NELSON & NIELSEN, *supra* note 9.
[142] ROBIN BLEIWEIS, QUICK FACTS ABOUT THE GENDER WAGE GAP (2020), https://cdn.americanprogress.org/content/uploads/2020/03/23133916/Gender-Wage-Gap-.pdf. Data from the U.S. Census Bureau 2018. Note that not aggregating all Asian Americans, for example, may hide further disparities.

IV. Disparities in civil litigation

A. Barriers to reporting

The social science literature suggests that very few workers who experience discrimination or harassment in the workplace file formal complaints or charges. Nationwide, between 6% and 13% of those who experience sexual harassment file a formal complaint,[143] and it is estimated that fewer than one percent of workers who suffer discrimination file a charge with the EEOC.[144] These estimates are not broken out by race, ethnicity, gender, sexual orientation, disability, or other protected status.

There are barriers to reporting claims with the EEOC or local agencies. In their review of the literature on sexual harassment, the EEOC reported that barriers to reporting include a fear of negative reactions and disbelief; concern that reporting will not lead to action; fear of being blamed; fear of social retaliation; and a fear of professional retaliation.[145] The Washington State workplace harassments survey found: "Approximately 44% of employees who experienced harassment in the past 18 months did not seek help. Of those who tried to get help, 65% were able to obtain some resolution of their problem(s), including 9% who obtained a complete resolution of their problem(s). The most commonly cited reasons for not searching help were fear of repercussions (60%), the status of the perpetrator (57%), lack of confidence in reporting practices (54%), and the belief that incident would be perceived as acceptable by the organization (50%)."[146]

The social penalties for reporting have been empirically demonstrated: in a survey of nearly 1,000 U.S. adults, participants were less willing to promote a female employee who self-reported sexual harassment, compared to a female employee whose harassment was reported by a coworker.[147] While there is no empirical evidence to show that these barriers have a disproportionate impact

[143] FELDBLUM & LIPNIC, *supra* note 63.

[144] BERREY, NELSON & NIELSEN, *supra* note 9. The authors use data from a 2002 Rutgers University study using nationally representative survey data on workplace discrimination; and compare rates of racial discrimination in Black respondents to EEOC charge data.

[145] FELDBLUM & LIPNIC, *supra* note 63.

[146] ARINA GERTSEVA, *supra* note 59, at 1. See Appendix C for the full survey report.

[147] Chloe Grace Hart, *The Penalties For Self-Reporting Sexual Harassment*, 33 GENDER & SOCIETY 534 (2019).

on historically marginalized groups, multiple experts in Washington State agree that the anticipation of economic impacts of job loss due to retaliation can reasonably be expected to form a greater barrier for individuals with lower socioeconomic position. In rural areas, where wages tend to be lower and rates of poverty are higher, these barriers could be particularly challenging, according to experts in Washington. And the consequences of retaliation are potentially more severe for workers who are undocumented or on work-related visas.[148]

There are time limits for complainants to file charges: with the EEOC, workers have up to 300 days of the last discriminatory act;[149] and with the WSHRC, workers have six months to file most discrimination charges (and one year to file pregnancy discrimination charges).[150]

The EEOC has an online portal through which complainants can file a charge; or they can file in person, by mail, or directly with the state or local fair employment agency (such as WSHRC).[151] In Washington, the EEOC's only field office is located in Seattle and is open during business hours, potentially limiting accessibility for workers unable to take time off or those in other regions of the state. The EEOC does have a phone line for questions, but claims cannot be filed over the phone. The EEOC website, when visited in January 2021, was easy to access, with plain-language explanations and options to translate the page to Spanish (which appeared to be a formal translation, rather than machine). For workers unable to access the internet, these options may be too limited to allow them to access the administrative process. Experts in Washington note that immigrant workers find it difficult to file charges with the EEOC without legal aid.

Meanwhile, the WSHRC has a webpage, but no online portal to file charges. Complainants may file in person, or by printing the intake questionnaire, filling it out, and returning it by mail (which requires access to both the internet and a printer). There is a phone line for questions and claimants can request accommodations by phone. The WSHRC has offices in Olympia, Spokane,

[148] Arthi Prasad & Charlotte Alexander, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069 (2014); Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 LAW & SOC. INQUIRY 561 (2010).
[149] *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/how-file-charge-employment-discrimination.
[150] *Employment: Washington Law Against Discrimination*, WASH. STATE HUM. RTS. COMM'N (2018), https://www.hum.wa.gov/employment.
[151] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 149.

Yakima, and Wenatchee, making it more accessible to workers in Central and Eastern Washington; however, physical offices were closed during the COVID-19 pandemic. The WSHRC website has many language options but they appear to be machine translation, which are not always reliable. The employment complaint form is available in English and Spanish.[152] For workers with limited English proficiency, workers in rural areas, or workers lacking access to computers and printers, these reporting guidelines could be a barrier.

1. Claims filed with WSHRC

WLAD does not require claimants to file with WSHRC or EEOC before filing a case in federal court, so WSHRC data likely do not represent the entirety of workplace discrimination claims in Washington State. The WSHRC does not publish statistical analyses or reports on filings; WSHRC employees note that their data compiler position has been unfilled for several years due to lack of funding.[153] This is a significant impediment to understanding experiences of discrimination and harassment in Washington State, and to assessing levels of access to legal relief. However, unpublished data of WSHRC cases gives a small glimpse into the nature and resolution of employee discrimination cases filed there. In 2018, WSHRC opened an investigation into 510 cases, and 485 (95%) were closed. The majority of logged cases (91%) were filed simultaneously with the EEOC (complainants can bring charges in both forums if their claims also are covered under Title VII). Claimants can bring one or more discrimination charges in the same complaint. The most common claims were on the basis of disability (36%), sex (28%), age (17%), and race (15%). Seven cases (one percent) claimed sexual harassment. Nineteen (four percent) claimed discrimination on the basis of sexual orientation or gender. Nearly one-third (30%) of cases alleged retaliation. Of cases claiming sex or gender discrimination that had gender data included, 64% claimed discrimination based on female gender, 22% on male gender, and 14% on pregnancy. More than two-thirds (65%) of claimants brought just one claim, while 28% brought two simultaneous claims, six percent brought three, and one percent brought four.[154] Experts in

[152] WASH. STATE HUM. RTS. COMM'N, *supra* note 150.
[153] Personal communication with Laura Lindstrand (Jan. 19, 2021).
[154] Analysis of unpublished data from WSHRC, accessed January 2021. From personal communication with Debbie Thompson, WSHRC.

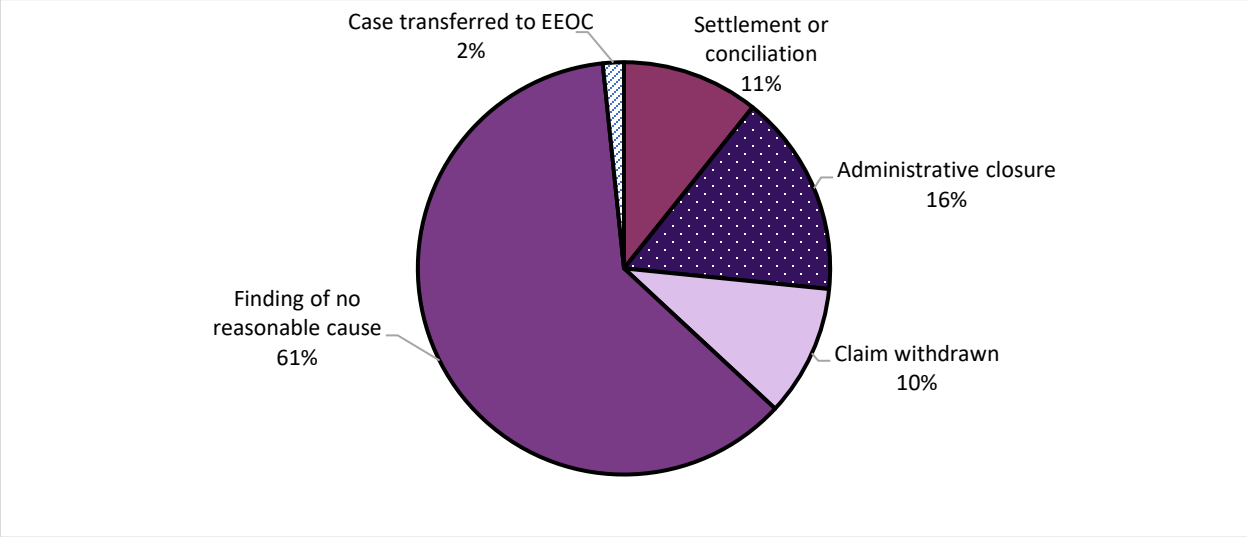
Washington State note that these numbers are very likely underestimates, due to barriers to reporting.

The majority of cases closed in 2018 (61%) had a finding of "no reasonable cause." Sixteen percent were closed for administrative reasons.[155] In 11% of cases, the employee and their employer reached a settlement before the WSHRC concluded its investigation. In 10% of cases, the claimant withdrew their claim for unknown reasons; and in a few cases (two percent), the case was transferred to the EEOC.[156] Claimants whose cases are closed with "no reasonable cause" can go on to file in court, but it is unknown how many do so, as there is a lack of consistent data on state court filings in Washington State. It is also unknown how many employees file WLAD cases in state court without first filing a claim with WSHRC. As noted above, employees have only six months to file a case with WSHRC, but they have three years to file in court.

Like the EEOC, the WSHRC's administrative process can provide resolution to workers without an attorney. However, the remedies available to workers in the administrative process are limited. While there is no limitation on damages when pursuing a claim in court, emotional distress damages are capped to $20,000 in the WSHRC's administrative hearing process.[157] According to practitioners and investigators, this limitation can hamper attempts to resolve cases in conciliation. Further, the agency has very few resources to enforce conciliation agreements to which they are a party. As a result, the agency has often demanded minimal injunctive relief in the form of reporting, training, and policy changes. According to practitioners, the injunctive relief is sometimes limited to one instance of employee training.

[155] Includes cases where the issue was resolved separately, or taken up through private litigation, or where WSHRC declined jurisdiction.
[156] Analysis of unpublished data from WSHRC, accessed January 2021. From personal communication with Debbie Thompson, WSHRC.
[157] *See* WAC 162-08-298(4).

Figure 1. Resolution of Washington State Employment Discrimination Claims Filed with the Washington State Human Rights Commission and Closed in 2018 (n=485)



Source: Analysis of unpublished data from WSHRC, accessed January 2021. From personal communication with Debbie Thompson, WSHRC.

It appears that WSHRC may not have sufficient investigators to address the volume of claims it receives. Its website notes, "The Washington State Human Rights Commission currently has a several month backlog of cases waiting to be assigned to an investigator. We apologize for this inconvenience." Of the 637 investigations opened in 2019, nearly a third had not yet been resolved as of January 2021.

2. Claims filed with EEOC

In 2020, there were 1,004 charges filed with the EEOC in Washington State. Nearly a third alleged race discrimination and nearly a third alleged sex discrimination (31.3% and 31.7%, respectively), and 40.4% alleged disability discrimination (note that individual filings can list multiple charges).[158] Sexual harassment charges are not broken out from discrimination charges here;

[158] *FY 2009 - 2020 EEOC Charge Receipts for WA*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/enforcement/charges-by-state/WA.

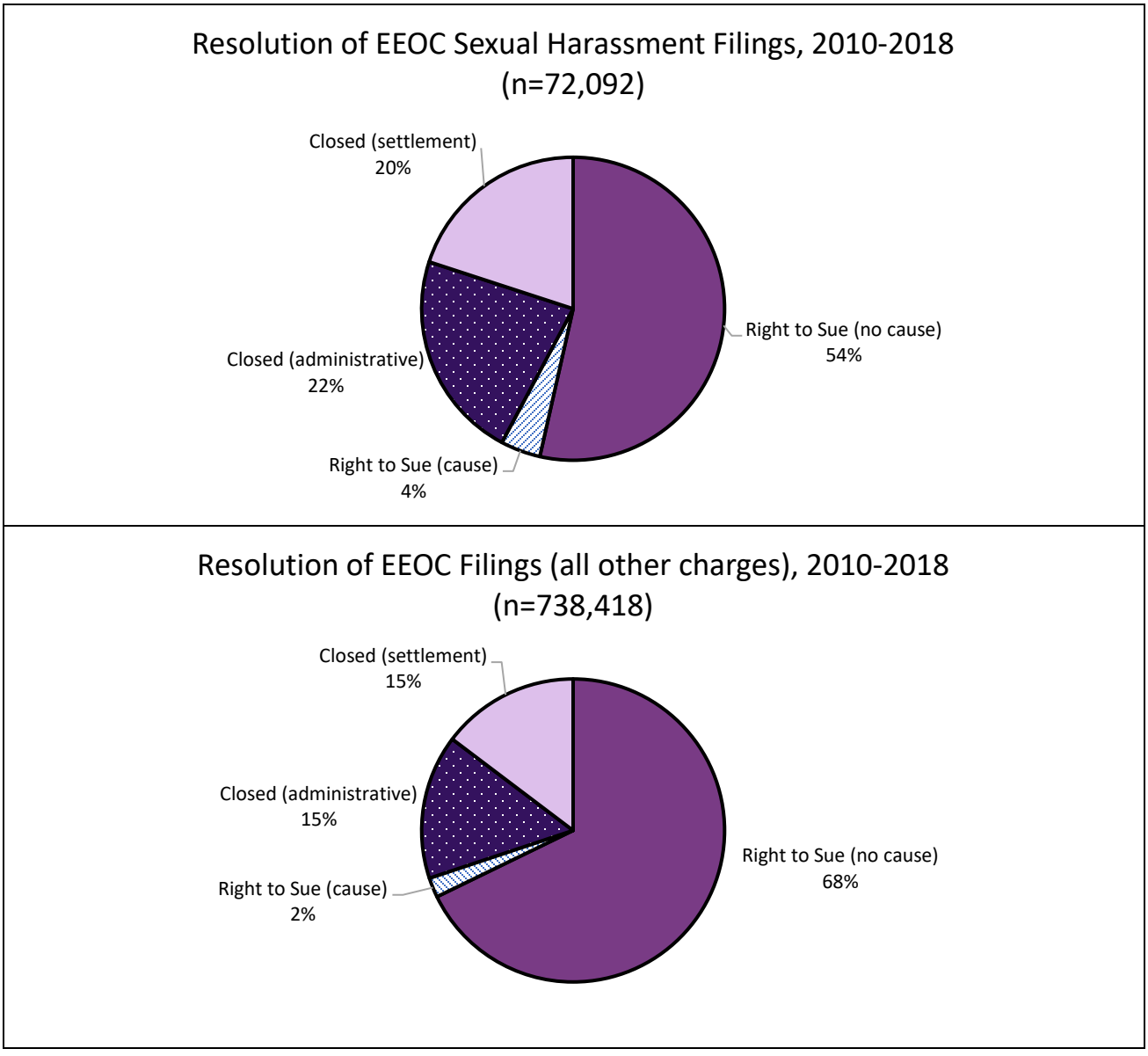
however, elsewhere EEOC reports that a total of 133 charges of sexual harassment were filed with both WSHRC and EEOC in 2019, 80% of which were brought by females.[159]

Given the public availability of EEOC reports and the centralized nature of federal courts, there is much more information and evidence available regarding the experiences of claimants bringing suits at the federal level. While not all the evidence here is broken out by the state of residence of the claimant, this may provide some context on how claimants fair when pursuing relief in the courts.

Most complainants will not find relief with the EEOC. An examination of national EEOC filings from 2010-2018 found that only 20% of sexual harassment filings and 15% of all other employment discrimination filings were resolved with a settlement negotiated by the EEOC. Meanwhile, the majority of claimants in both categories are given a "right to sue (no cause)," meaning the EEOC ends its investigation, and the claimant must file their own case in federal or state court to seek relief.[160]

[159] *EEOC & FEPA Charges Filed Alleging Sexual Harassment, by State & Gender FY 1997 - FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/eeoc-fepa-charges-filed-alleging-sexual-harassment-state-gender-fy-1997-fy-2020.
[160] Charlotte Alexander, *#MeToo and the Litigation Funnel*, 23 EMP. RTS. & EMP. POL'Y J. 17 (2019).

Figure 2. Resolution of National Sexual Harassment and Other Employment Discrimination Complaints Filed with the U.S. Equal Employment Opportunity Commission (EEOC), 2010-2018



Footnotes for Figure 2.

Source: adapted from Equal Employment Opportunity Commission resolution data, available from Charlotte Alexander, #MeToo and the Litigation Funnel, 23 EMP. RTS. & EMP. POL'Y J. 17 (2019).

Anecdotally, lawyers familiar with employment discrimination cases in Washington note that one of the benefits of filing with EEOC is that the agency may help the employee and their employer reach an agreement by providing a mediator, and in very extreme cases, may litigate the matter itself or refer the case to the Department of Justice[161] to initiate a case against the employer, where the charging party can intervene.[162] However, there are downsides to the process as well, including the 300-day window to file.

The EEOC's budget has remained functionally the same over the past four decades, and the number of investigators has decreased, while the size of the U.S. workforce has grown.[163] EEOC staff widely report not having the resources they need to do their jobs.[164]

The available data suggest that a relatively small proportion of employees who file Title VII claims with EEOC go on to file federal court cases. An analysis that compared nationwide EEOC filing data to federal court filings for workplace race discrimination claims in 2014 noted that while 31,043 charges were filed with the EEOC, 26,847 potential disputes were not resolved but remained viable for federal court charges; in the same time period, only 4,841 lawsuits were filed in federal court, or 18.0%.[165] In other words, fewer than 1 in 5 claimants who received a "right to sue" letter from the EEOC likely went on to file a case in federal court. These estimates were not disaggregated by gender.

B. Barriers to representation in court

There are demonstrated disparities in legal representation for workplace discrimination plaintiffs in federal courts. Black plaintiffs are 2.5 times more likely to be pro se (self-represented) than white plaintiffs, and Asian and Latinx plaintiffs are 1.9 times more likely to be pro se than white plaintiffs.[166] These data were only presented for white and Black race and are not disaggregated

[161] EEOC litigates cases against private entities, Department of Justice against public entities.
[162] The charging party has a right to intervene, but it's not automatic.
[163] Maryam Jameel, *More and More Workplace Discrimination Cases Are Closed Before They're Even Investigated*, THE CTR. FOR PUB. INTEGRITY (2019), https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/more-and-more-workplace-discrimination-cases-being-closed-before-theyre-even-investigated/.
[164] *Id.*
[165] BERREY, NELSON & NIELSEN, *supra* note 9. They note that these 4,841 court cases are 0.13% of the estimated Black individuals who experience racial discrimination in the workplace in a given year.
[166] *Id.*

by gender. An examination of nationwide EEOC cases from 1988-2003 shows that 1 in 5 plaintiffs were pro se throughout the duration of their case.[167] In the 2015 U.S. Transgender Survey, 15% of those who reported being fired for their gender identity or expression noted that they had contacted a lawyer; but a third of them were unable to get legal representation.[168] The survey did not note reasons why the respondents were unable to get representation.

In general, experts note that there are a number of reasons why a complainant may be unable to find legal representation for their case. They may lack information about and connections to lawyers.[169] Experts in Washington State note that individuals from low-income communities and those with limited English language proficiency may be less likely to know how to access legal help in any context, including workplace discrimination. Additionally, immigrant workers without legal authorization to work in the U.S. may fear their documentation status becoming public during a court case.[170]

Additionally, even when complainants do contact a lawyer, that lawyer may choose not to take the complainant's case. Attorneys with experience in employment law in Washington note anecdotally some reasons why attorneys may not take cases: they may feel the complainant isn't credible or has other character issues that might influence the chances of a successful case, or that the complainant doesn't have sufficient or compelling evidence on their side. Of course, it is also possible that lawyers are influenced by implicit biases that impact their assessment of a client's truthfulness. Many lawyers make very quick decisions about whether they are interested in a case or not, so as not to waste too much time (because every minute spent on a case not taken is a minute not spent on an existing case), and these quick decisions could lead lawyers to rely more heavily on implicit biases. There is some limited evidence to suggest that attorneys are more responsive to requests for representation from potential white clients facing criminal

[167] *Id.*

[168] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2017), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[169] BERREY, NELSON & NIELSEN, *supra* note 9.

[170] *See State of Washington et al. v. Horning Brothers, LLC et al.*, 2018 WL 2208215 (E.D. Wash. 2018) (granting protective order and denying discovery into U visa immigration information for plaintiff because of the chilling effect of such inquiry). *But cf. E.E.O.C. v. Evans Fruit Co.*, 2011 WL 2471749, at *1 (E.D. Wash. June 21, 2011) (bifurcating trial because found immigration status was relevant to damages).

charges compared to potential Black clients;[171] however, not enough is known about if biases regarding race, ethnicity, gender, and other factors may influence attorney decision-making when evaluating employment discrimination cases.

Finally, complainants may face economic barriers to representation. While Title VII and WLAD contain provisions that allow successful plaintiffs to recover attorney's fees from their employer, employment attorneys don't necessarily get paid from the plaintiff's recovery. Some attorneys may choose to work on mixed fee agreements, guaranteeing payment from fee recovery and a percentage of damages won. For low-wage workers in small or informal employment agreements, their employer may not be insured or may not have substantial assets, meaning that even if damages are awarded, that money may never be collected. Overall, there is a greater financial incentive for attorneys to take cases with high potential for damages and a high probability of success.

While the federal court data on pro se plaintiffs cited above was not disaggregated by gender, it is reasonable to believe that the barriers to representation disproportionately impact female plaintiffs, especially female Black, Indigenous, and plaintiffs of color, due to the wage gap between female workers and their white male counterparts.[172] Female farmworkers in particular may face high barriers to representation due to the above factors as well as language access barriers.[173] Given that complainants only have 90 days from receiving a "right to sue" letter to

[171] Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53 (2020). In this audit study, the author sent emails purporting to be from potential clients with names indicating Black or white race to 96 lawyers in California, inquiring about representation for a criminal misdemeanor DUI case. *Id.* at 99. The study found that white potential clients got twice as many responses as Black potential clients. *Id.* A replication study in Florida with 899 lawyers inquiring about representation in criminal, divorce, and personal injury cases found no significant race effect; the author theorizes that the relatively greater competition among lawyers in Florida may have reduced the influence of bias as it incentivized lawyers to respond positively to requests. *Id.* at 94-98.

[172] WOMEN'S POL'Y RSCH., THE ECONOMIC STATUS OF WOMEN IN WASHINGTON (2018), https://statusofwomendata.org/wp-content/themes/witsfull/factsheets/economics/factsheet-washington.pdf. For every dollar employers pay to white men in Washington State, they pay white women $0.75, Hispanic women $0.47, Black women $0.62, Asian women $0.77, and American Indian/Alaska Native women $0.63. *American Community Survey: 2016*, U.S. CENSUS BUREAU, https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2016/. Note that when Asian race, for examples, is not disaggregated, it may mask disparities.

[173] TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS (2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf (finding that over 70% of all farmworkers reported speaking and reading/writing English less than "well").

file their case in federal court, the above barriers may not be possible for workers to overcome in such a short time period.[174] Lack of access to representation in court has serious implications for plaintiffs, as will be shown below. There is a lack of evidence regarding rates and disparities in self-representation in Washington State courts. See "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more information on disparities in access to legal representation.

C. Biases and disparities in court outcomes

While there is no data on outcomes in Washington's courts, the national data paint a bleak picture for employment discrimination plaintiffs in the federal courts. A comprehensive analysis of employment discrimination outcomes in federal courts found that only two percent of cases ended with a plaintiff win at trial; the majority settle, and most settlements result in much lower awards than cases that end in trial.[175]

Legal representation has a measurable effect on court outcomes. An examination of all employment litigation cases filed in the northern district of Georgia from 2010-2017 found that pro se plaintiffs were more likely than represented plaintiffs to have their cases dismissed. They were also less likely to receive a settlement.[176] From an examination of federal employment litigation court cases 1988-2003, pro se plaintiffs were three times more likely than their represented counterparts to have their case dismissed and were twice as likely to lose on summary judgment.[177] As noted above, Black, Asian American, and Latinx plaintiffs are more likely to represent themselves than white plaintiffs in employment litigation cases. It is difficult to parse out in the literature the causal pathway here. Being unrepresented may lead to worse

[174] Heydemann & Tejani, *supra* note 16.
[175] BERREY, NELSON & NIELSEN, *supra* note 9. An examination of a random sample of cases filed in federal courts from 1988-2003 found that only two percent of federal court cases ended in a plaintiff win at trial; and almost 40% of plaintiffs won nothing, either having their case dismissed outright or losing at summary judgment. The majority of cases ended in settlement (50% of all cases in early settlement, and an additional eight percent in late settlement), but many settlements included confidentiality agreements, limiting the ability to analyze outcomes for plaintiffs. For those that did include information from this dataset, the average settlement was $30,000. Plaintiffs who continued to jury trial generally received much higher awards than those who settle—the average award at trial was $110,000. See more details on the quantitative analysis of this dataset on pages 54-73.
[176] Alexander, *supra* note 160; see "Chapter 1: Gender and Financial Barriers to Accessing the Courts" for more research on the correlation between legal representation and outcomes in court.
[177] BERREY, NELSON & NIELSEN, *supra* note 9.

outcomes, but attorneys with experience in employment law in Washington also note attorneys may be less likely to take cases they feel are difficult or unlikely to win.

Plaintiff race, particularly when intersecting with gender, appears to have an impact on court outcomes. In federal employment court cases, Black, Latinx, and Asian American plaintiffs are more likely to have their cases dismissed than white plaintiffs.[178] There is some evidence that plaintiffs bringing intersectional claims, or cases with claims based on multiple marginalized identities, fare worse in court—meaning, for example, a Black woman alleging both race and sex discrimination may be less likely to win her case than a white woman alleging only sex discrimination, or a Black man alleging race discrimination.[179] In the past, some courts explicitly refused to recognize that Black women may experience a form of discrimination that is unique to the intersection of their racial and gender identity.[180] While some intersectional claims do prevail today, their poorer success rate suggests that legal protections against discrimination are weaker for people who experience discrimination on the basis of multiple facets of their identity.

Additionally, there is evidence that may suggest that judges' gender and race influence rulings in discrimination and harassment cases, sometimes interacting with plaintiff gender and race. Female judges may be more favorable than male judges to female plaintiffs in sexual harassment

[178] *Id.*

[179] Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation: Multiple Disadvantages*, 45 LAW & SOCDISADV. 991 (2011). In a representative sample of over 1,000 judicial opinions between 1965-1999 circuit and district courts found that while intersectional claims have increased steadily over the decades, plaintiffs with multiple claims are less likely to win their cases than plaintiffs with single claims. *Id. See also* Emma Reece Denny, *Moma Reece Denny, sample of over 1,000 judicial opinlaimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339 (2012). In an examination of 162 employment discrimination cases from the Eighth Circuit Court from 2008-2010, over a third (32.7%) of cases were based on multiple claims; those cases were more likely to appear pro se, and less likely to make it past summary judgment. *Id.* Only one case survived summary judgment on all claims. *Id.*

[180] Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). Dr. Crenshaw discusses three important Title VII cases and their relationship to intersectionality theory in the law: *DeGraffenreid v. General Motors*, *Moore v. Hughes Helicopter*, and *Payne v. Travenol*.

cases,[181] and to transgender plaintiffs in discrimination cases,[182] while judges of color may be more likely than white judges to find in favor of plaintiffs of color in racial discrimination cases.[183] However, the majority of federal judges are still white men.[184] Washington State court judges are slightly more diverse: as of 2014, 58% of state court judges were white men.[185] See "Chapter 4: The Impact of Gender on Courtroom Participation and Legal Community Acceptance" for more information on the current and historical demographics of the judiciary.

These disparities in court outcomes may be due at least in part to implicit bias functioning in the courtroom. Researchers note ample evidence suggesting that participants in courtroom proceedings can be influenced by unconscious biases that sway their feelings about people with marginalized identities, usually having a negative effect.[186] Based on studies done with the lay

[181] Pat K. Chew, *Judges CGender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions*, 14 J. GENDER, RACE & JUST. 359 (2011). The author conducted a macro review of 14 studies on the effect of judge gender on employment discrimination cases in state and federal appeals court, and found evidence that female judges are more likely to support the plaintiff in sex discrimination cases – but not race discrimination cases. *See also* Matthew Knepper, *When the Shadow Is the Substance: Judge Gender and the Outcomes of Workplace Sex Discrimination Cases*, 36 J. LABOR ECON. 623 (2018) (describing that in a study of approximately 1,000 employment sex discrimination cases in federal district court between 1997-2006, female plaintiffs were found to be more likely to settle and more likely to win their case when female judges were assigned to their case).

[182] AndrIN ZOTERO_Ie & Rusty Juban, *Is There Transgender Bias in the Courtroom?*, 42 EMP. RELS. 1531 (2020). The authors examine cases from 12 regional circuit courts alleging workplace discrimination against transgender plaintiffs, a total of 97 cases from 1975-2018. During motions for summary judgment, female judges ruled in favor of plaintiffs more than male judges. Most of the transgender plaintiffs identified as female.

[183] Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and JudgesndRace*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 91 (2012). The authors examined the outcomes of motions for summary judgment for all 473 racial discrimination cases in six federal district circuits from 2002-2008 and found that Hispanic plaintiffs were 2.32 times more likely to be successful than plaintiffs of other races or ethnicities. White judges heard over 80% of all cases and were less likely to find in favor of the plaintiff. Black judges were 2.9 times as likely as judges of other races and ethnicities to find in favor of the plaintiff. And pairings of judges and plaintiffs of the same race or ethnicity increased the odds of plaintiff success 2.83 times. However, note that Dunham and Leupold did not find a relationship between gender or race of judge during the initial pleading stage in a sample of 160 federal cases alleging gender discrimination brought by female plaintiffs between 2010-2018. Catherine Ross Dunham & Christopher Leupold, *Third Generation Discrimination: An Empirical Analysis of Judicial Decision Making in Gender Discrimination Litigation*, 13 DEPAUL J. SOC. JUST. 1 (2019).

[184] DANIELLE ROOT, JAKE FALESCHINI & GRACE OYENUBI, BUILDING A MORE INCLUSIVE FEDERAL JUDICIARY 6 (2019), https://cdn.americanprogress.org/content/uploads/2019/10/02142759/JudicialDiversity-report-3.pdf ("As of August 2019, 80 percent of all the sitting judges on the federal bench were white (sic) and 73 percent were male. Together, white (sic) males comprise nearly 60 percent of all judges currently sitting on the federal bench.").

[185] TRACEY GEORGE & ALBERT YOON, AM. CONST. SOC'Y FOR L. & POL'Y, THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS? (2014), https://www.acslaw.org/wp-content/uploads/2018/02/gavel-gap-report.pdf.

[186] Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55 (2017); Jerry Kang, Judge Mark Bennett & Devon Carbado, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

population, judges and juries may also be subject to biases rooted in misperceptions of the nature and causes of sexual harassment and discrimination. Jury makeup matters (for the few cases that get to a jury trial), as studies have shown that the gender and race of lay people influences which behaviors they identify as harassment and discrimination.[187] A recent analysis of jury pool summons in Washington State notes that Black, Indigenous, and women of color are underrepresented on Washington juries, and LGBTQ+ people are underrepresented in King County juries.[188] The lack of representation on juries could have negative repercussions for plaintiffs bringing claims of discrimination on the basis of marginalized identities. See "Chapter 3: Gender and Barriers to Jury Service" for more information on the barriers to jury service, how they impact jury diversity, and how jury diversity impacts outcomes in court.

Class actions, collective legal action from multiple people with similar claims, are rare in employment discrimination litigation—less than 10% of cases—but when they do happen, they are more likely to achieve success for plaintiffs involved.[189] Class actions are an important tool to enable access to justice for low-income groups who face financial barriers to individual justice. However, changes in federal statute and Supreme Court decisions have narrowed the possibilities

[187] Sheila T. Brassel, Isis H. Settles & NiCole T. Buchanan, *Lay (Mis)Perceptions of Sexual Harassment Toward Transgender, Lesbian, and Gay Employees*, 80 SEX ROLES 76 (2019). A study with students at a large U.S. midwestern university found that when students perceived harassment as rooted in sexual attraction, they saw it as more acceptable than harassment perceived as rooted in power and prejudice. Acceptability was related to suggested remedies – participants were more likely to recommend the target report the behavior when it was seen as being rooted in power and prejudice. There was evidence that sexual harassment of transgender individuals may be seen as less acceptable than harassment of gay and lesbian cisgendered individuals, because participants perceived it as more likely to be rooted in power and prejudice. *See also* Elaine Howard Ecklund, Anne E. Lincoln & Cassandra Tansey, *Gender Segregation in Elite Academic Science*, 26 GENDER & SOC. 693 (2012) (from surveys and interviews with scientists at 30 American universities, women were more likely than men to say that discrimination is a main reason for underrepresentation of women in science); Katie R. Eyer, *Thatr, Reys and interviews with scientists at 30 American universities, women were mo*, 96 MINN. L. REV. 1275 (2012) (in a review of empirical studies on lay people, the authors note that the public are often unable or unwilling to recognize discrimination when it happens; and that persons with more power in society are more likely to believe that discrimination is rare, when compared to people with marginalized identities). Jin X. Goh et al., *Narrow Prototypes and Neglected Victims: Understanding Perceptions of Sexual Harassment.*, J. PERSONALITY & SOC. PSYCH. 1 (2021). In a series of experiments with over 4,000 U.S. adult participants, study authors found that participants were less likely to identify ambiguous harassing behavior as harassment, or were less likely to rate it as credible or harmful, when it targeted women seen as less protoypically feminine; See "Chapter 3: Gender and Barriers to Jury Service" for more research on how diversity of jury pools and seated juries impacts court outcomes.

[188] Peter A. Collins & Brooke Miller Gialopsos, *Answering the Call: An Analysis of Jury Pool Representation in Washington State*, 22 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 24 (2021).

[189] BERREY, NELSON & NIELSEN, *supra* note 9.

for class action litigation, and more and more employment contracts include clauses that require workers to waive their right to collective legal action.[190] To be enforced, however, class action waivers in employment agreements must meet the requirements of substantive and procedural fairness under state law. Employment agreements, like any other contract, may be invalidated if they are unconscionable.[191] For example, mandatory arbitration clauses in contracts are unenforceable if they are either (1) procedurally unconscionable—which applies during the formation of the contract and occurs where the individual lacked a meaningful choice in entering into the arbitration agreement;[192] or (2) substantively unconscionable—where a clause or term in the contract is one-sided or overly harsh.[193]

Some courts reportedly have recognized anti-discrimination and anti-harassment workplace policies as evidence against a plaintiff's claim.[194] This practice appears to have become increasingly common over the decades,[195] and evidence suggests that the practice of deferring to organizational policy is detrimental to plaintiff claims.[196] The fact that an organization has a written anti-discrimination policy does not necessarily mean that the policy is followed by all workers:

> Troublingly, organizations can win cases when they have antidiscrimination policies that exist on the books but are not followed in practice, when they have diversity training programs that do not result in greater diversity or better treatment of minorities and women, when they have grievance procedures that

[190] Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531 (2016).
[191] *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 47, 470 P.3d 486 (2020).
[192] *Zuver v. Airtouch Commc'ns*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004).
[193] *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396, 191 P.3d 845 (2008).
[194] Linda Hamilton Krieger, Rachel Kahn Best & Lauren B. Edelman, *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 LAW & SOC. INQUIRY 843 (2015).
[195] Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOCIO. 888 (2011). The authors examined over 1,000 written judicial opinions from federal district and circuit court civil rights cases from 1965 to 1999.
[196] Krieger, Best & Edelman, *supra* note 194. The authors examined a random sample of 1,024 federal civil rights opinions from federal district and circuit courts from 1965-1999.

> employees are afraid to use, and when they have formalized personnel policies that are used post hoc to justify discriminatory decisions.[197]

There is also concern that neither the "disparate treatment" theory nor the "disparate impact" theory is adequate to address the modern psychological understanding of how implicit bias functions in discrimination. On the one hand, disparate treatment theory "assumes that discriminatory employment decisions result from discriminatory motives," rather than unconscious biases.[198] Disparate impact, on the other hand, requires that plaintiffs demonstrate that a similar group of employees (in the same protected class) were similarly negatively impacted by an employment practice.[199] However, this definition doesn't recognize how individual experiences of discrimination differ between members of the same group—such as in the case of individuals with multiple marginalized identities.[200] A group of Black employees may experience racial discrimination differently depending on their gender identity, sexual orientation, disability status, age, and more. This disconnect between the legal standard and lived experience may be part of why intersectional claims fare so poorly in court, as noted above.

Workplace sexual harassment claims must show "severe and pervasive" behavior to meet the standard for harassment under WLAD and Title VII.[201] A 2019 review of sexual harassment cases in the federal courts argues that since the standard was set, cases alleging more and more extreme behavior have been found not to meet that standard, with the result of setting the standard so high that "employers must only legally maintain a workplace where there is neither a severe nor a pervasive level of sexual harassment."[202] Again, it's relevant to note that almost three-quarters of the judges evaluating this standard in federal and state courtrooms are male.[203]

[197] *Id.* at 861.
[198] Kya Rose Coletta, *Women and (In)Justice: The Effects of Employer Implicit Bias and Judicial Discretion on Title VII Plaintiffs*, 16 HASTINGS BUS. L.J. 175, 195 (2020).
[199] *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).
[200] C. Elizabeth Hirsh, *Beyond Treatment and Impact: A Context-Oriented Approach to Employment Discrimination*, 58 AM. BEHAV. SCIENTIST 256 (2013).
[201] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986).
[202] Heydemann & Tejani, *supra* note 16.
[203] ROOT, FALESCHINI & OYENUBI, *supra* note 184.

D. Damages and monetary awards

In Washington employment discrimination cases, jurors are told they can award "the reasonable value of lost past earnings and fringe benefits, from the date of the wrongful conduct to the date of the trial" and the "reasonable value of lost future earnings and fringe benefits."[204] There are no other standards given to jurors to make the determination, and they must base their decision on the evidence and testimony admitted at trial. Given the steep gap in wages that women, especially Black, Indigenous, and women of color, experience compared to men, female litigants who successfully argue discrimination cases in court may then experience the impact of discrimination again when damage awards are set based on prior wages.

Under Washington law, jurors may award general damages for the emotional harm caused by the employer's wrongful conduct.[205] Emotional harm can include emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. The Washington pattern jury instruction specifically tells the jury there is no one way to evaluate these kinds of general damages:

> The law has not furnished us with any fixed standards by which to measure emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish. With reference to these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.[206]

Washington courts have recognized the vague nature of general damages, noting that general damages like pain and suffering are "not readily susceptible to valuation in dollars."[207] Lawyers in Washington report anecdotal evidence that women's reactions to misconduct are sometimes downplayed, either because the woman is just "overreacting" or is being "too emotional," or if she wanted to work in a "man's job" she should be able to handle the environment. The same thing anecdotally occurs when the value of her worth to the household or her friendships or

[204] 6A WASH. PRAC.: WASH. PATTERN JURY INSTRUCTION—CIVIL, WPI 330.81 (7th ed. July 2019)
[205] *Id.*
[206] *Id.*
[207] *Bingaman v. Grays Harbor Cmty. Hosp*., 37 Wn. App. 825, 831, 685 P.2d 1090 (1984).

relationships is at issue. One lawyer in Washington reports being on an arbitration panel where the other two arbitrators—both men—minimized a grandmother's general damages because they said a grandmother's losses were worth less than a man supporting his family. There is a lack of evidence to understand how gender, race, ethnicity, and other protected statuses may influence damages for harassment and discrimination claims based on wages or on emotional injury for litigants in Washington State. See "Chapter 6: Gender Impacts in Civil Proceedings as They Relate to Economic Consequences Including Fee Awards and Wrongful Death" for more information on how these demographic factors can impact wrongful death and loss of consortium awards generally.

E. Mandatory arbitration

The use of mandatory arbitration in workplaces has been increasing with a series of U.S. Supreme Court decisions allowing, and later affirming, the use of mandatory arbitration as an appropriate venue for discrimination claims.[208] It has been estimated that more than 60 million American workers are subject to a mandatory arbitration clause, or more than half of workers.[209] As noted above, many of these clauses also prohibit class action lawsuits. Mandatory arbitration is more common in workplaces with low-wage jobs, and in industries with a higher proportion of female, Black, and Hispanic workers.[210]

Arbitration may have benefits for some workers—for example, for employees who are unable to access the court system or find legal representation.[211] However, the use of mandatory arbitration in employment clauses has been particularly criticized in the context of the #metoo movement, in 2017 and on, during a time when stories of sexual harassment were shared openly on social media, complaints to the EEOC increased markedly, and journalists, legal scholars, and workers discussed the structural factors that had enabled workplace sexual harassment to

[208] *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010).
[209] Alexander JS Colvin, *The Growing Use of Mandatory Arbitration*, 7 ECON. POL'Y INST. 1 (2018). Colvin estimates that 56.2% of nonunion, private-sector workers are subject to mandatory arbitration clauses.
[210] *Id.*
[211] Kathleen McCullough, *Mandatory Arbitration and Sexual Harassment Claims: #MeToo- and Time's Up Inspired Action Against the Federal Arbitration Act*, 87 FORDHAM L. REV. 40 (2019).

continue unchecked for so long.[212] Gretchen Carlson, when discussing the arbitration of her sexual harassment allegations against Roger Ailes and employer Fox News, argued, "Arbitration is a sexual harasser's best friend: It keeps proceedings silent, findings sealed, and victims silent." This is because many employment arbitration clauses also include nondisclosure agreements, and so the results of arbitration can be kept confidential.[213] Nondisclosure agreements limit public information as to the patterns and practices of discrimination by employers, shielding them from the public accountability that a public court case would bring.[214] Additionally, when claims of sexual harassment are made publicly, it often encourages other victims to step forward.[215]

It is difficult to compare outcomes in court cases with outcomes in arbitration, because there may be differences between employees subject to mandatory arbitration and those able to bring cases in court. However, the available social science literature does suggest that employees may face worse outcomes in arbitration compared to litigation, with lower win rates and lower award amounts.[216] This is particularly the case when employers use the same arbitrator across multiple cases. Researchers call this the "repeat player" effect, whereby employers and arbitrators benefit from a cumulative advantage in the process over multiple arbitration events.[217] In this dynamic, privately hired arbitrators may have an economic motivation to work towards outcomes that are favorable to the employer in the hopes of being hired again; and large employers can afford to pay for experienced arbitrators. Meanwhile, individual employees often have little or no experience in arbitration.[218]

[212] *Id.*
[213] Lisa Nagele-Piazza, *Unaffordable Justice: The High Cost of Mandatory Employment Arbitration for the Average Worker*, 23 U. MIAMI BUS. L. REV. 39 (2014).
[214] Kaci Dupree, *#METOO, DUE PROCESS, AND MANDATORY ARBITRATION: THE PERFECT STORM FOR FUNCTIONAL STATE LEVEL ARBITRATION REFORM*, 11 ARB. L. REV. 5 (2019).
[215] *Id.*
[216] Pat K. Chew, *Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO STATE J. ON DISP. RESOL. 195 (2017). The author examined 121 arbitration sex discrimination and sexual harassment cases from 2010-2014 and found that employee plaintiffs experienced a positive outcome in 14% of cases, compared to the 27% success rate previously reported in litigation.; Alexander J. S. Colvin & Mark D. Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR REV. 1019 (2015).
[217] Colvin & Gough, *supra* note 215.
[218] *Id.*

As discussed above, the U.S. Supreme Court has held that arbitration clauses are unenforceable if they are procedurally or substantively unconscionable. Washington courts have therefore invalidated some egregious mandatory arbitration clauses, such as those prohibiting class action lawsuits, or those mandating arbitration under oppressive conditions. For example, in *Scott v. Cingular Wireless*, Cingular Wireless imposed a mandatory arbitration clause in its contracts with its wireless users.[219] That clause also contained a prohibition on class actions. When the plaintiffs filed a class action lawsuit against Cingular alleging violations of Washington Consumer Protection Act, Cingular moved to compel arbitration. The Washington Supreme Court held that the prohibition against class actions was substantively unconscionable because it "drastically forestalls attempts to vindicate consumer rights."[220] The court noted that without class actions, "many meritorious claims would never be brought."[221] In these types of cases, damages to each consumer may be nominal, making individual lawsuits not financially feasible.[222] But spread out over hundreds or thousands of people, consumers were losing a significant amount of money. The court held the class action prohibition violated the state's public policy to "protect the public and foster fair and honest competition because it drastically forestalls attempts to vindicate consumer rights."[223]

More recently, the Washington Supreme Court held a mandatory arbitration clause in an employment agreement was unconscionable because it imposed a one-sided mandatory pre-lawsuit procedure on an employee, which if not followed would cause the employee to lose the right to raise the claim.[224] The court held these mandatory policies provided an unfair advantage to the employer and thus were unconscionable.[225]

Three years ago, the Washington State Legislature enacted a law aimed at invalidating any provision in an agreement that requires the confidential resolution of discrimination claims

[219] 160 Wn.2d 843, 161 P.3d 1000 (2007).
[220] *Id.* at 854.
[221] *Id.* at 853.
[222] *Id.* at 853-54.
[223] *Id.* at 854.
[224] *Burnett v. Pagliacci Pizza, Inc.*, No. 97429-2, slip op. at 18 (Wash. Aug. 20, 2020).
[225] *Id.* at 19.

outside of court.[226] While the issue has not yet been litigated, there is some question about how the statute interacts with the Federal Arbitration Act, 9 U.S.C. § 2, which expressly states that all written agreements to arbitrate are "valid, irrevocable, and enforceable," except under very narrow circumstances.

V. Conclusion

Black, Indigenous, and women of color, female workers with disabilities, female immigrant workers, and LGBTQ+ workers experience disproportionately high rates of discrimination and harassment in the workplace. So do females working in several low-paying sectors of the economy such as farmworkers, service workers, and hotel and restaurant workers. They experience negative short- and long-term outcomes to their financial status and to their physical and mental health. They face barriers to reporting these experiences, and they face barriers to legal relief in court.

Washington State's anti-discrimination laws provide broad protections for workers against discrimination or harassment in the workplace. These protections often go beyond the protections provided in Title VII. In Washington State, the WLAD applies to employers with eight or more employees, though the Washington Supreme Court has found smaller employers to be subject to wrongful discharge in violation of public policy.[227] This leaves a large chunk of the workforce without legal remedies for other kinds of discrimination and harassment. According to census data, approximately 11% of Washington's workforce work in firms with ten or fewer employees, which account for 77% of the total number of firms in Washington.[228] Currently, 15 states and Washington DC ensure workplace civil rights protections covering employers with one

[226] RCW 49.44.085.
[227] *Roberts v. Dudley*, 140 Wn.2d 58, 77, 993 P.2d 901 (2000).
[228] Based on calculations from the U.S. Census Bureau's Statistics of U.S. Businesses 2016 data.

or more employee.[229] It is unknown what impact extending civil rights protections to all employers might have on workers' experiences.

There is a lack of information regarding the experiences of individuals in Washington State bringing cases to WSHRC, and whether they face barriers in accessing information or filing claims. However, given the filing procedures, it seems likely that workers without access to internet or a computer, those with limited English proficiency, and those in rural areas face particularly high barriers to accessing this service. Additionally, WSHRC currently states that it has a backlog of several months of cases. WSHRC does not publish data on workplace discrimination complaints filed. This data would also help researchers understand which industries and populations are using that system—and, just as importantly, which workers and industries known to be vulnerable to discrimination and harassment are underrepresented in claims and therefore may be having difficulty using the system.

A lack of centralized data across Washington State makes it impossible to know the demographics of individuals bringing complaints under WLAD in the state. Case information cover sheets do not currently have a field to specify if a case brought is an employment discrimination case. For example, in the King County Superior Court case information cover sheet, the closest category provided is "Tort, Other."[230] A review of the Pierce County Superior Court, Clark County Superior Court, and Spokane County Superior Court websites shows that none include a specific category to track employment discrimination lawsuits. The lack of this data severely restricts the ability of researchers and the public to evaluate employment discrimination litigation in the state of Washington.

Non-disclosure clauses applicable to workplace discrimination claims, confidential settlement agreements, and confidential arbitration proceedings also obscure the public's knowledge of the prevalence and outcomes of workplace harassment complaints and litigation. Likewise lack of public access to workplace demographics for large companies (such as gender, race, ethnicity,

[229] MAYA RAGHU & JOANNA SURIANI, NAT'L WOMEN'S L. CTR. #MEETOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY (2017), https://nnedv.org/mdocs-posts/metoowhatnext-strengthening-workplace-sexual-harassment-protections-and-accountability/.
[230] King County Superior Court Case Assignment Area Designation and Case Information Cover Sheet (CICS), King County Superior Court, accessed August 2020.

wage, and salary data) makes it difficult to determine whether those companies have patterns of discriminatory behavior.[231]

Some researchers argue that, "...in applying standard rules for litigation and taking a position as a neutral arbiter of rights claims, they (the federal courts) ignored the asymmetry of power between plaintiffs and employers in the workplace and litigation," and that in practice, court decisions do little to fundamentally disrupt the operation of biases and discrimination in the workplace, even when plaintiffs win.[232] More research is needed to understand how Washington State courts treat employment discrimination litigants, and how effective civil litigation is in addressing past discrimination and harassment as well as deterring future acts.

Ordering employers to provide workplace sexual harassment training is not an uncommon outcome of litigation by the EEOC.[233] In Washington State, SB5258 passed in 2019 and requires employers in certain industries (including hotels and motels, retail, security, and others with employees working in isolated conditions) to provide mandatory workplace sexual harassment and discrimination training.[234] State government employees must complete sexual harassment training at minimum every five years.[235] However, the social science evidence regarding the effectiveness of sexual harassment training in preventing sexual harassment is mixed. A review of 60 published, empirical studies on sexual harassment training reported consistent findings that training increases knowledge of sexual harassment behaviors and increases internal reporting—but only mixed evidence supporting a reduction in prevalence of sexual harassment behaviors. The authors note a need for more research:

> …although the reviewed studies, considered in light of theory and research from the broader training and [sexual harassment] SH literatures, support the conclusion that training alone is very unlikely to significantly reduce SH in the

[231] BERREY, NELSON & NIELSEN, *supra* note 9.
[232] *Id.*
[233] See, for example, the settlement between EEOC and Marelli Tennessee USA in August 2020, *Marelli Pays $335,000 to Settle EEOC Sexual Harassment Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Sept. 14, 2020), https://www.eeoc.gov/newsroom/marelli-pays-335000-settle-eeoc-sexual-harassment-lawsuit ("Marelli also agreed to provide annual sexual harassment training and to conduct employee exit interviews.").
[234] ENGROSSED SUBSTITUTE S.B. 5258,66th Leg., Reg. Sess. (Wash. 2019).
[235] WAC 357-34-100.

> workplace, they also support the conclusion that training can play an important role in contributing to the prevention or reduction of SH if (a) it is conducted in accordance with science-based training principles and (b) the organizational context is supportive of the SH training efforts.[236]

The EEOC, in its comprehensive report on sexual harassment in the workplace, concluded that workplace training can be most effective when it takes place in an environment that also emphasizes accountability at all levels of management, when it is tailored to the specific workplace, and when it is accompanied by changes to workplace culture.[237]

A similar question occurs regarding anti-bias trainings. In Washington, all state agencies and institutes of higher education must provide training on implicit bias to all recruitment staff.[238] Jurors in federal courts are shown implicit bias trainings,[239] and the Washington Pattern Jury Instructions Committee is creating a video in implicit bias for jurors in state courts. Some groups, like the American Bar Association, advocate for implicit bias trainings for judges;[240] states such as Florida and New York provide anti-bias training for judges.[241] However, evidence supporting the effectiveness of anti-bias training is mixed.[242] Without better evidence supporting the effectiveness of trainings, these requirements will likely have limited effect in reducing discrimination and harassment in the workplace, or in the courtroom.

[236] Mark V. Roehling & Jason Huang, *Sexual Harassment Training Effectiveness: An Interdisciplinary Review and Call for Research*, 39 J. ORGANIZATIONAL BEHAV. 134, 146 (2018).
[237] FELDBLUM & LIPNIC, *supra* note 63.
[238] WASHINGTON STATE OFF. OF FIN. MGMT., STATE HUMAN RESOURCES HR DIRECTIVE 20-02 (2020), https://www.ofm.wa.gov/sites/default/files/public/shr/Directives/WorkforceDiversityDirective.pdf.
[239] *Unconscious Bias Juror Video*, U.S. DIST. CT., W. DIST. OF WASH., https://www.wawd.uscourts.gov/jury/unconscious-bias.
[240] Lee Rawles, *Judges Should Receive Anti-Bias Training, ABA House Says*, ABA JOURNAL (Aug. 15, 2017), https://www.abajournal.com/news/article/judges_should_receive_anti-bias_training_aba_house_says.
[241] *Judges Recieve Anti-Bias Training*, THE FLA. BAR (Feb. 15, 2016), https://www.floridabar.org/the-florida-bar-news/judges-receive-anti-bias-training/; JEH CHARLES JOHNSON, REPORT FROM THE SPECIAL ADVISER ON EQUAL JUSTICE IN THE NEW YORK STATE COURTS (2020), http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf.
[242] Chloe FitzGerald, Angela Martin, Delphine Berner, Samia Hurst, *Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review*, 7 BMC PSYCH. 1 (2019). This systematic review of 30 studies published 2005-2015 concluded that "currently the evidence does not indicate a clear path to follow in bias reduction." *Id*. at 9.

VI. Questions and Gaps in the Data

There are gaps in the data that prevent a better understanding of legal outcomes for civil litigants in employment discrimination cases. Data in state court outcomes are not tracked systematically in Washington State, which is why most of the studies cited here focus on federal court outcomes. Additionally, confidentiality in court and arbitration settlements complicates a full analysis of outcomes in these cases. The following questions remain:

- What is the state of employment discrimination cases filed in Washington State courts?
    - What is the demographic breakdown of plaintiffs bringing employment cases?
    - What kinds of discrimination are alleged in employment civils rights cases?
    - In what proportion of discrimination cases brought in Washington State courts does the plaintiff achieve a favorable outcome, either through settlement or jury trial?
    - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or by the combination of these statuses?
    - In what proportion of sexual harassment cases brought in Washington State courts does the plaintiff achieve a favorable outcome, either through settlement or jury trial?
    - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or by the combination of these statuses?
- What is the state of employment cases filed with the Washington State Human Rights Commission?
    - What is the demographic breakdown of plaintiffs bringing employment cases?
    - What kinds of discrimination are alleged in employment civil rights cases?
    - In what proportion does the WSHRC find merit?

- Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or by the combination of these statuses?

- What is the state of self-represented employment discrimination cases in Washington State?
  - How many employment discrimination cases in Washington State courts are brought by pro se plaintiffs?
  - What proportion of pro se plaintiffs achieve favorable outcomes in court?
  - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status, or combination of statuses?
- What is the state of damages and monetary awards in Washington employment discrimination cases?
  - Do damages and monetary awards in Washington employment cases show disparities by gender, race, ethnicity, sexual orientation, or other protected statuses or combination of statuses (including lost earning and damages for emotional and other harms)?
- What is the state of mandatory arbitration for employment discrimination cases in Washington State?
  - How many workers in Washington State are subject to mandatory arbitration?
  - How many are subject to anti-class action clauses?
  - What proportion of plaintiffs win in mandatory arbitration compared to litigation?
  - Are there disparities by gender, race, ethnicity, sexual orientation, or other protected status?

VII. Recommendations

- Stakeholders should convene a workgroup – in consultation with AOC data management professionals – to outline ways to collect the court data that is needed to identify trends in harassment and discrimination case filings and resolutions by race, ethnicity, gender, and other demographic factors.
- Stakeholders should convene a workgroup to identify resources needed to ensure that the Washington State Human Rights Commission has capacity to: 1) investigate all claims in a complete and timely manner, 2) analyze barriers to reporting and any disproportionate impact barriers have on marginalized groups, and 3) regularly analyze and report on the demographics of workplace harassment and discrimination.
- To improve the effectiveness of measures, such as anti-bias training, to reduce bias towards litigants in court, the Gender and Justice Commission should authorize the creation of a list of trainings for judges, court staff, and potential jurors, which have proven to be effective at reducing bias in the judiciary and among jurors.
- Justice system partners should consider analyzing the number and demographics of employees and employers who are not covered by the Washington Law Against Discrimination (WLAD) because of its employer-size exemption (*see* RCW 49.60.040(11)). The analysis should address: 1) whether this exemption has a disparate impact on the groups whom the law intends to protect (*see* RCW 49.60.010), and 2) the demographics of WLAD-exempt business owners to better understand how these exemptions impact women and minority owned businesses.
- Adopt the recommendation described in "Chapter 8, Consequences of Gender Based Violence," to collect statewide data, including data on the prevalence and impact of coercion for sex and sexual assault in the workplace – especially for farm laborers and service workers.