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# Misclassification and Antidiscrimination: An Empirical Analysis

Charlotte S. Alexander

**Article**

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## INTRODUCTION

"Misclassification" refers to employers' practice of classifying workers as independent contractors whom the law would categorize as employees.[1] These workers are controlled by and economically dependent on a single employer, and lack the flexibility, entrepreneurial opportunity, and autonomy of true independent contractors.[2] By virtue of their contractor status,

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1. Workers may also be misclassified as interns, trainees, volunteers, partners, shareholders, and/or member-owners of limited liability companies. *See* Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440 (2003) (discussing shareholders as employees); *Paul Johnson Drywall Inc. Agrees To Pay $600,000 in Back Wages, Damages and Penalties Following U.S. Labor Dep't Investigation*, U.S. DEP'T OF LABOR (May 19, 2014), https://www.dol.gov/opa/media/press/whd/WHD20140827 (discussing LLC members as employees); *infra* note 61 (discussing cases concerning interns, trainees, and volunteers).

2. Part III.B.1 discusses the legal tests that courts use to determine a worker's true employment status, including considering employer control and economic dependence. In the legal literature, the archetypal example of a true independent contractor is the self-employed plumber. *See, e.g.*, Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought To Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 340 (2001) ("A plumber, for example, might be a contractor if installing good plumbing is a

misclassified workers have few workplace rights, as nearly all federal labor and employment statutes apply exclusively to employees and not to independent contractors.[3] This means that, in most circumstances, employers are free to reject workers for jobs, fire them, and otherwise discriminate on the basis of sex, religion, or disability, for example, and to be absolutely explicit about their reasons for doing so, as long as those workers are classified as independent contractors.

Courts, however, are meant to act as a check on employers' classification power. Despite their status, misclassified workers may file suit alleging violations of their workplace rights and seek reclassification for purposes of the litigation.[4] High profile

discrete end the parties seek to achieve, and where the owner or general contractor wishes to have no involvement in the details of the plumbing."). A vivid example of misclassified workers, on the other hand, may be found in *Heath v. Perdue Farms, Inc.*, where workers who were previously classified as employees arrived at their jobs only to find that they had been summarily reclassified as independent contractors, with little to no change in their job duties, pay structure, or any other term or condition of work. 87 F. Supp. 2d 452, 460–61 (2000) ("Prior to January 1, 1991, Perdue readily acknowledged that its crew leaders and chicken catchers were employees. In 1991, Perdue made an attempt to create a new system under which the crew leaders could be deemed independent contractors. In reality, however, nothing of substance changed in the manner in which Perdue related to its live haul crews except the manner in which they were paid.").

3. 42 U.S.C. § 1981 requires all people to receive the same treatment as white citizens in contracting, and so has been used by some contracted workers to pursue race and national origin discrimination claims. 42 U.S.C. § 1981(a) (2012); *see also* Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 YALE L.J. 170, 184–85 (2006) (explaining § 1981's coverage of contracted workers). Otherwise, independent contractors are barred from bringing claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012), the Americans with Disabilities Act, 42 U.S.C. § 12111 (2012), the Equal Pay Act of 1963, 29 U.S.C. § 203 (2012), and the Age Discrimination in Employment Act, 29 U.S.C. § 630 (2012). Contractors also fall outside the coverage of other federal statutes that provide rights on the job: the National Labor Relations Act, 29 U.S.C. § 152 (2012) (protecting workers' rights to organize, bargain collectively, and engage in concerted activity), the Occupational Safety and Health Act, 29 U.S.C. § 652 (2012) (protecting workers' rights to a safe workplace), the Fair Labor Standards Act, 29 U.S.C. § 203 (2012) (guaranteeing the minimum wage and overtime pay), and the Family and Medical Leave Act, 29 U.S.C. § 2611 (2012) (providing workers with leave time for self-care and care of others). *See generally* Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws To Include Independent Contractors*, 38 B.C. L. REV. 239, 239–40 (1997) (describing the exclusion of independent contractors from coverage of federal antidiscrimination laws, with the single exception of 42 U.S.C. § 1981).

4. Notably, the misclassification question is a threshold inquiry in the

class actions against FedEx, Uber, and Amazon, for example, have asserted overtime and other pay claims in connection with those companies' use of independent contractors.[5] This litigation has received significant public and academic attention, focused primarily on misclassification's implications for wage and hour law in the new "gig," "sharing," or "on-demand" economy.[6]

Less attention has been paid to the connections between misclassification and antidiscrimination.[7] Reams have been written about the weakening and narrowing of Title VII of the Civil Rights Act of 1964 (Title VII)—the central federal antidiscrimination law—as courts have erected procedural and substantive barriers to plaintiff success.[8] Yet an antidiscrimination

underlying substantive labor or employment law case, not a cause of action in and of itself. The act of misclassification does not constitute a violation of federal employment law, at least as currently interpreted by the U.S. Department of Labor. However, some scholars disagree. *See, e.g.*, Catherine K. Ruckelshaus, *Labor's Wage War*, 35 FORDHAM URB. L.J. 373, 378 (2008) ("[T]he current [Wage and Hour Division] administrator has stated on several occasions that it is not a violation of any of the laws enforced by the WHD to misclassify workers as independent contractors. This is false, as the [Department of Labor] can and should investigate any complaints by workers claiming unpaid wages, whether or not they are called independent contractors."). However, the act of misclassification in and of itself does violate some state laws. *See* Christopher Buscaglia, *Crafting a Legislative Solution to the Economic Harm of Employee Misclassification*, 9 U.C. DAVIS BUS. L.J. 111, 120–28 (2009) (discussing state laws that penalize the act of misclassification).

5. *See* Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981 (9th Cir. 2014); Second Amended Class Action Complaint and Jury Demand, O'Connor v. Uber Techs., Inc., No. 13-cv-3826-EMC, 2014 WL 7912596 (N.D. Cal. Aug. 16, 2013); *see also* Greg Bensinger, *Amazon Faces Lawsuit over Whether Delivery Workers Are Employees*, WALL ST. J. (Oct. 27, 2015), http://www.wsj.com/articles/amazon-faces-lawsuit-over-whether-delivery-workers-are-employees-1445989623.

6. *See, e.g.*, Elizabeth Tippett, *Using Contract Terms To Detect Underlying Litigation Risk: An Initial Proof of Concept*, 20 LEWIS & CLARK L. REV. 549 (2016) (discussing implications of misclassification litigation for the "sharing economy"); Julia Tomassetti, *From Hierarchies to Markets: FedEx Drivers and the Work Contract as Institutional Marker*, 19 LEWIS & CLARK L. REV. 1083 (2015) (analyzing FedEx litigation in depth and investigating its implications for labor and wage-and-hour law); Kevin Roose, *Does Silicon Valley Have a Contract-Worker Problem?*, N.Y. MAG (Sept. 18, 2014), http://nymag.com/daily/intelligencer/2014/09/silicon-valleys-contract-worker-problem.html (investigating misclassification of workers by "on-demand" companies such as Homejoy and Uber).

7. The only scholarly article that addresses the connections between misclassification and discrimination directly is decades old. *See* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75 (1984) (arguing that courts should cease using the common law test for employee status in Title VII cases).

8. *See, e.g.*, Sandra F. Sperino & Suja A. Thomas, *Fakers and Floodgates*,

law's effectiveness depends not only on the strength of the doctrine, but also on its ability to reach the workers whom the law is intended to protect. In this view, the misclassification question is key to the antidiscrimination project, as employers may use their classification power to write workers out of the law, and workers who cannot win a misclassification challenge in court cannot gain access to Title VII rights. However, little is known about the extent to which misclassification affects groups of workers who are also at high risk for employment discrimination. Nor do we have data on the outcomes of misclassification challenges in Title VII cases. In other words, we do not know the extent to which misclassification is pulling workers out of Title VII's coverage, and the extent to which the courts are pulling them back in.

Accordingly, this Article investigates misclassification and antidiscrimination. The Article makes two novel empirical contributions. First, the Article combines previous research in labor economics with data from the U.S. Bureau of Labor Statistics to investigate misclassification's occupational and demographic distribution. This analysis finds that women and/or people of color are overrepresented in seven of the eight occupations at highest risk for misclassification, suggesting that misclassification may be removing Title VII protection from workers who most need antidiscrimination rights.

Second, the Article presents the results of an original empirical study of all federal court decisions available on Westlaw from 2005 to 2014 in which workers made misclassification arguments in Title VII cases. The Article examines which workers made misclassification challenges, which won, and why. Here, the Article concludes that courts may not be adequately

10 STAN. C.R. & C.L. 223, 247–49 (2014) (summarizing barriers to Title VII plaintiffs). There is also an extensive body of empirical literature on the poor chances of Title VII plaintiffs in federal courts. *See* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 132 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991); John J. Donohue III & Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 261 (Laura Beth Nielsen & Robert L. Nelson eds., 2005); Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175 (2010).

performing their backstopping function in misclassification cases, both because the workers who are most at risk for misclassification and discrimination do not appear to be filing suit, and because courts' processing of misclassification challenges can be deeply flawed.

The Article proceeds as follows. Part I describes misclassification's history and scope and presents data on the characteristics of misclassified workers and their coverage by Title VII. Part II describes the methodology used in coding courts' Title VII misclassification decisions and provides descriptive statistics summarizing the coding results. Part III sketches out three theories—legal formalism, contractual formalism, and critical realism—that might predict the outcome of plaintiffs' misclassification challenges, and then presents regression results that identify the variables associated with plaintiffs' misclassification wins. Part IV discusses the implications of these results. Part V concludes.

## I. MISCLASSIFICATION AND TITLE VII

### A. MISCLASSIFICATION'S HISTORY AND SCOPE

David Weil, Administrator of the U.S. Department of Labor's Wage and Hour Division, describes misclassification as the outgrowth—and perversion—of companies' attempts to shed employees whose work falls outside the core competency of the business.[9] As Weil explains it, since the late 1970s, pressure from "investors, lenders, and capital markets" has pushed companies "to focus their attention on those activities that added greatest value (such as product design, product innovation, cost or quality efficiencies, or other unique strengths) while farming out work to other organizations not central to their core mission."[10] Advances in technology and communication then enable lead companies to direct, monitor, and oversee the work they have shed through the contracting process.[11] Over time, companies' labor outsourcing has only increased, and "independent contracting [has] popped up in places that previously would have been regarded as traditional employment situa-

9. DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT 10–11 (2014).

10. *Id.* at 11.

11. *Id.* at 44 ("[T]echnological changes created new ways of designing and monitoring the work of other parties, inside or outside the corporation.").

tions."[12] Many of these newly minted independent contractors are misclassified, bearing little resemblance to the "business entities in their own right" that would properly be exempt from antidiscrimination and other employment laws.[13] Nevertheless, misclassification has proven a profitable and relatively low-risk strategy for companies in an environment of vague legal standards and lax enforcement.[14]

Today, much of the research on misclassification uses surveys and audits to estimate lost federal and state tax revenues when misclassified workers fail to pay the correct taxes on their income. If those workers had been properly classified as employees, the thinking goes, then their employers would have withheld taxes throughout the year, preventing underpayment by the workers themselves at tax time.[15] At least eleven states,[16] three federal agencies,[17] unions,[18] journalists,[19] and ad-

12. *Id.* at 24.

13. *Id.* at 21.

14. As the U.S. Supreme Court has put it, the task of distinguishing between employees and independent contractors "depends upon criteria often subtle and uncertain of application." Crowell v. Benson, 285 U.S. 22, 82 (1932); *see also* RICHARD J. REIBSTEIN ET AL., PEPPER HAMILTON LLP, THE 2015 WHITE PAPER ON INDEPENDENT CONTRACTOR MISCLASSIFICATION: HOW COMPANIES CAN MINIMIZE THE RISKS (2015), http://www.pepperlaw.com/publications/the-2015-white-paper-on-independent-contractor-misclassification-how-companies-can-minimize-the-risks-2015-04-27 ("The use and misuse of independent contractors has increased dramatically over the last two decades. This has been due, in large part, to the combination of two factors: (1) economic and other business advantages derived from the use of 1099ers and (2) lax regulatory enforcement—a classic risk/reward calculus.").

15. *See* Mandy Locke & Franco Ordoñez, *Why Is Worker Misclassification a Problem?*, STAR-TELEGRAM (Sept. 4, 2014), http://www.star-telegram.com/news/special-reports/article3871866.html ("The company acts as a tax collector of sorts. Before employees pick up their paychecks each week, the company siphons off the pieces of it that Uncle Sam demands in taxes. The practice works. The IRS says it collects 99 percent of what it's owed from employees on the payrolls of companies. Workers treated as contractors, on the other hand, often elude tax collection.").

16. MICHAEL P. KELSAY ET AL., DEP'T OF ECON. UNIV. OF MISSOURI-KANSAS CITY, THE ECONOMIC COSTS OF EMPLOYEE MISCLASSIFICATION IN THE STATE OF ILLINOIS 3 (2006), http://www.faircontracting.org/PDFs/prevailing_wages/Illinois_Misclassification_Study.pdf (summarizing results of studies conducted in eleven states).

17. LALITH DE SILVA ET AL., PLANMATICS, INC., INDEPENDENT CONTRACTORS: PREVALENCE AND IMPLICATIONS FOR UNEMPLOYMENT INSURANCE PROGRAMS (2000), https://wdr.doleta.gov/owsdrr/00-5/00-5.pdf (prepared for the U.S. Department of Labor Employment and Training Administration); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER EN-

vocacy groups[20] have conducted such studies, finding in New Jersey, for example, that "38 percent of employers were . . . misclassifying their workers and much, much higher rates of misclassification [were] found in certain industries," particularly in construction.[21] Another report found misclassification rates of between thirteen and twenty-three percent in industries across eleven states, producing tax losses in the tens and hundreds of millions per state.[22] Likewise, according to U.S. Government Accountability Office estimates, the last time the Internal Revenue Service conducted a comprehensive misclassification estimate, "the federal government lost out on $2.72 billion in Social Security, unemployment, and income taxes because of employee misclassification."[23]

SURE DETECTION AND PREVENTION (2009), http://www.gao.gov/assets/300/293679.pdf; U.S. DEP'T OF THE TREASURY, WHILE ACTIONS HAVE BEEN TAKEN TO ADDRESS WORKER MISCLASSIFICATION, AN AGENCY-WIDE EMPLOYMENT TAX PROGRAM AND BETTER DATA ARE NEEDED (2009), https://www.treasury.gov/tigta/auditreports/2009reports/200930035fr.pdf.

18. *See, e.g.*, DEP'T FOR PROF'L EMPS., MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS: FACT SHEET 2016, http://dpeaflcio.org/wp-content/uploads/Misclassification-of-employees-2016.pdf.

19. *See, e.g.*, Jones Fitzgerald, *Wage Theft: How Two States Are Fighting Against Companies That Categorize Employees as Independent Contractors*, PAC. STANDARD (Sept. 11, 2014), https://psmag.com/wage-theft-how-two-states-are-fighting-against-companies-that-categorize-employees-as-independent-abd474d362e7#.k87t06ilc; *Misclassified: Contract To Cheat*, MCCLATCHY DC, http://media.mcclatchydc.com/static/features/Contract-to-cheat.

20. *See, e.g.*, SARAH LEBERSTEIN, NAT'L EMP'T LAW PROJECT, INDEPENDENT CONTRACTOR MISCLASSIFICATION IMPOSES HUGE COSTS ON WORKERS AND FEDERAL AND STATE TREASURIES (2012), http://nelp.org/content/uploads/2015/03/IndependentContractorCosts1.pdf.

21. *The Misclassification of Workers as Independent Contractors: What Policies and Practices Best Protect Workers?: Hearing Before the Subcomm. on Health, Emp't, Labor & Pensions and the Subcomm. on Workforce Prots. of the H. Comm. on Educ. & Labor*, 110th Cong. 49–50 (2007) (statement of David Socolow, Comm'r, New Jersey Department of Labor and Workforce Development).

22. KELSAY ET AL., *supra* note 16; *see also Employee Misclassification*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/employee-misclassification-resources.aspx (last visited Nov. 27, 2016) (summarizing state studies' findings, including $125 million lost tax revenues in Illinois in the years 2001 to 2005 and $50 million in annual losses in Rhode Island).

23. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-656, EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION 2 (2006), http://www.gao.gov/new.items/d06656.pdf. These tax losses explain, in part, employers' motivation to misclassify: "It's estimated that a business can save 30 percent of their labor costs by using independent contractors rather than employees. . . . That provides a real incentive for busi-

Yet apart from these tax loss studies, as labor scholar Annette Bernhardt puts it, "we have very little data" on the characteristics of misclassified workers themselves, and no data at all on the connections between misclassification and Title VII.[24] The difficulty is that misclassification is a form of "disguised work," an employment arrangement that is hard for researchers to identify because the worker's true status is obscured.[25]

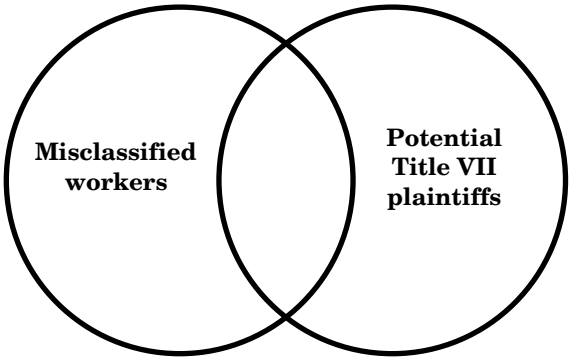
The Sections that follow begin to fill in those blanks, drawing on what little data there is to paint a portrait of the misclassified worker and his or her coverage by Title VII. As Figure 1 illustrates, the task is to identify those workers who are misclassified, those who are likely to bring Title VII claims, and then estimate the overlap between the two. In this way, we can make our best guess about the workers who are both at high risk for misclassification and for discrimination, thus needing, but lacking, Title VII coverage.

nesses to classify their workers as independent contractors, even if the workers are truly employees. While not always a deliberate attempt to flout the law, such savings allow a business to gain a competitive edge over other businesses." NAT'L CONF. OF ST. LEGISLATURES, *supra* note 22.

24. Annette Bernhardt, *Labor Standards and the Reorganization of Work: Gaps in Data and Research* 7 (Inst. for Research on Labor and Emp't, Working Paper No. 100-14, 2014), http://www.irle.berkeley.edu/workingpapers/100-14.pdf. In response to the paucity of data on misclassification, the U.S. Department of Labor has launched a huge data-gathering initiative described at http://www.dol.gov/whd/workers/misclassification. States have also launched their own misclassification initiatives. *See, e.g.*, LINDA H. DONAHUE ET AL., THE COST OF WORKER MISCLASSIFICATION IN NEW YORK STATE 5 (Cornell Univ. ILR Sch. ed. 2007), http://www.digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009&context=reports (describing New York's initiative).

25. Int'l Labour Org. [ILC], International Labour Conference, *The Scope of the Employment Relationship*, Report V, at 24–25 (2003), http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf ("A disguised employment relationship is one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form in which the worker enjoys less protection.").

**Figure 1: Overlap Between Misclassified Workers and Potential Title VII Plaintiffs**




## B. IDENTIFYING MISCLASSIFIED WORKERS

In a line of research that is little known in legal scholarship, labor economists have attempted to identify misclassified workers by exploiting inconsistencies between two sets of federal records: individual workers' self-reported wage and salary earnings from the U.S. Census Bureau's Current Population Survey (CPS), and employers' reports of those same workers' earnings from the Social Security Administration's Detailed Earnings Records (DER).[26] The CPS is a monthly survey of workers that collects a variety of labor force statistics, including earnings.[27] The DER assembles employers' records of workers' earnings and their tax classification as employees or independent contractors.[28] For a properly classified employee, the CPS and DER earnings figures should match: the worker reports his or her wage and salary income—earned as an employee—on the CPS, and the employer reports that same income—

26. MARC ROEMER, U.S. CENSUS BUREAU, TP-2002-22, USING ADMINISTRATIVE EARNINGS RECORDS TO ASSESS WAGE DATA QUALITY IN THE MARCH CURRENT POPULATION SURVEY AND THE SURVEY OF INCOME AND PROGRAM PARTICIPATION 1 (2002), http://www2.census.gov/ces/tp/tp-2002-22.pdf (describing data sets).

27. *About the Current Population Survey*, U.S. CENSUS BUREAU (Nov. 30, 2015), http://www.census.gov/programs-surveys/cps/about.html.

28. Christopher R. Bollinger et al., Trouble in the Tails? Earnings Nonresponse and Response Bias Across the Distribution 2 (Aug. 2015) (unpublished manuscript) (on file with author) ("Access to the DER is advantageous as it affords the opportunity to fill in missing earnings for nonrespondents [to other surveys], and to compare survey responses to administrative tax records for respondents.").

with the "employee" tax designation—in the DER. Mismatches, with the worker reporting dollars earned as an employee (or so the worker thought), and the employer reporting only independent contractor earnings, signal a possible misclassification.[29] Table 1 illustrates this mismatch.

**Table 1: CPS and DER Income Reporting and Implications for Employment Status**

| *"Employee" Income Reported: CPS* | *"Employee" Income Reported: DER* | *Implication For Employment Status* |
|---|---|---|
| Yes | Yes | Probably not misclassified |
| Yes | No | Possibly misclassified as an independent contractor |
| No | Yes | Possibly misclassified as an employee[30] |
| No | No | Probably not misclassified |

It is important to note that misclassification rates gleaned from CPS-DER mismatches are not the result of a third party's

29. *Id.* at 9 ("[W]orkers may report . . . that they received wage and salary earnings, while the company from which they received pay instead reports it to IRS as self-employment earnings. The employer for tax purposes treats them as non-employees . . . and reports earnings on a 1099-MISC in Box 7 ('Nonemployee compensation') rather than a W-2."). A CPS-DER mismatch may also be evidence that workers were paid "off-the-books," i.e., that they were considered employees by their employers but were paid in such a way as to avoid tax reporting requirements. *Id.* at 8. The CPS-DER comparison method does not distinguish between mismatches caused by misclassification and those caused by off-the-books payment arrangements. *Id.* at 14; *see also* Katharine G. Abraham et al., *Exploring Differences in Employment Between Household and Establishment Data*, 31 J. LABOR ECON. S129, S133 (2013) (discussing differences between off-the-books and misclassified workers). However, some scholars view off-the-books and misclassified workers as one and the same. *See, e.g.*, *Payroll Fraud: Targeting Bad Actors Hurting Workers and Businesses*: *Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions and the Subcomm. on Emp't & Workplace Safety*, 113th Cong. 3 (2013) [hereinafter *Payroll Fraud Hearing*] (statement of Catherine K. Ruckelshaus, National Employment Law Project) ("These [off-the-books] workers are *de facto* misclassified independent contractors, because the employers do not withhold and report taxes or comply with other basic workplace rules.").

30. This version of "misclassification" differs from the version that is the focus of this Article, as the worker views him or herself as an independent contractor and the employer views him or her as an employee. This circumstance might arise where an employer attempts to claim intellectual property created by a worker, for example. Thanks to Julia Tomassetti for this insight.

independent assessment of any given work arrangement, such as the analysis a court would perform at the threshold of a Title VII case.[31] What CPS-DER comparisons measure is a mismatch between the perceptions of the parties to the employment relationship: the worker's belief that her income derives from work performed as an employee versus the employer's belief that the same income derives from an independent contractor relationship. Indeed, CPS-DER mismatch findings might be over-inclusive, in that a worker who believes that she is an independent contractor—because she receives a 1099 non-employee earnings form at tax time, for example—might still report her earnings as "employee" income on the CPS, due to a misunderstanding of the CPS questions. Such a result would generate a "false positive" CPR-DER mismatch.

Mismatch findings from CPS-DER comparisons might also be under-inclusive, because they draw data only from workers with a Social Security number,[32] thereby omitting many undocumented workers who might be subject to misclassification. Given that undocumented workers tend to hold jobs at the low end of the labor market, the CPS-DER mismatch findings may therefore skew toward higher-paid, higher-skilled occupations and omit undocumented workers entirely.[33]

Nevertheless, despite the limitations of the data, CPS-DER mismatch findings begin to sketch a picture of the occupational distribution of misclassification. By mining CPS and DER mismatches, it is possible to identify both the occupations that appear to be most at risk for misclassification—i.e., the ones in which the largest percentages of workers are misclassified—and those that contribute the most misclassified workers to the workforce—i.e., those in which the largest absolute numbers of workers are misclassified. A 2002 U.S. Census Bureau technical paper by Marc Roemer provides the most recent available analysis of both measures of misclassification.[34]

31. For a discussion of courts' misclassification analyses, see *infra* Part III.B.1.

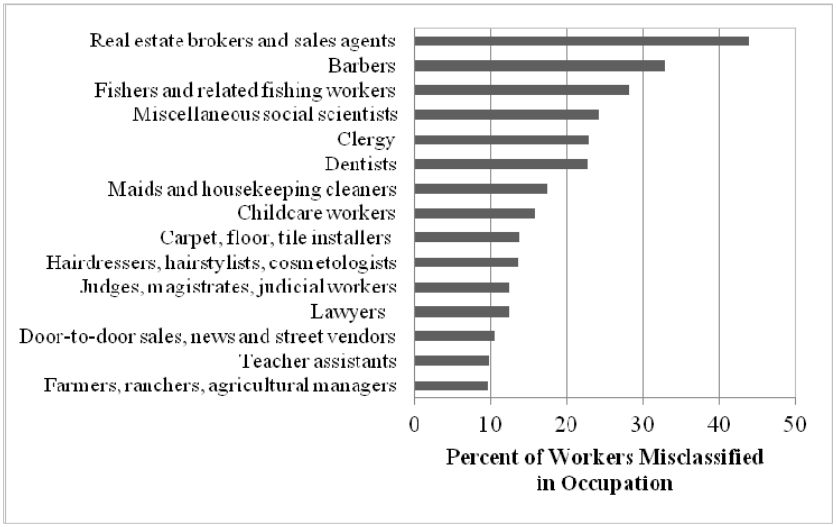
32. ROEMER, *supra* note 26, at 8.

33. *See generally* Madeline Zavodny, *Do Immigrants Work in Worse Jobs than U.S. Natives? Evidence from California*, 54 INDUS. REL. 276 (2015) (using California as a case study to show immigrant employment statistics).

34. ROEMER, *supra* note 26, at 8. In addition to the self-reporting issue identified above, the present application of the Roemer research is limited somewhat by its age, as it draws on mismatches gleaned from data from 1991, 1994, and 1997. Because many scholars believe that misclassification has spread to new occupations in recent years, *see, e.g.*, WEIL, *supra* note 9, at 24,

Roemer uses CPS-DER mismatches to generate a list, reproduced with some modifications in Table 5 in the Appendix, of the forty occupations in which mismatches occurred with a likelihood ratio of at least one percent.[35] Figures 2 and 3 below show, respectively, the fifteen occupations in which ten percent or more workers were misclassified, and the top fifteen occupations by absolute number of misclassified workers.[36]

**Figure 2: Occupations with Ten Percent or More Workers Misclassified**

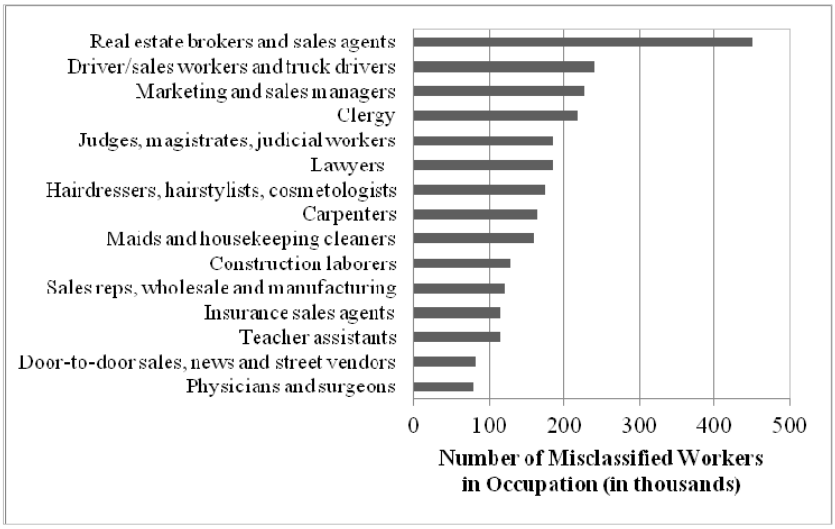



the Roemer list does not perfectly describe today's misclassified workforce. Nevertheless, it represents our best guess as to the occupation profiles of misclassified workers.

35. The original version of this table appears in ROEMER, *supra* note 26, app. A, tbl.10. The version in Table 5 in the appendix has been modified as follows. Instead of reporting likelihood ratios, which are difficult to reverse-engineer from Roemer's table without access to the underlying data, Table 5 reports percentages calculated from the figures reported in Roemer's table. Table 5 also converts the occupation names listed in Roemer to their closest equivalent among the standardized occupations used in U.S. Bureau of Labor Statistics data.

36. The ten percent cutoff is employed in order to produce a manageable subset of high-misclassification occupations, as is the display of the top fifteen occupations by absolute number of workers.

**Figure 3: Top Fifteen Occupations by Number of Misclassified Workers**[37]




As Figure 2 shows, those workers most at risk for misclassification were real estate brokers and sales agents, roughly forty-four percent of whom appear to be misclassified. Figure 3 also lists real estate brokers and sales agents as the top occupation in terms of the absolute number of misclassified workers. Seven other occupations also appeared on both lists: clergy; lawyers; judges, magistrates, and other judicial workers; hairdressers, hairstylists, and cosmetologists; maids and housekeeping cleaners; teacher assistants; and door-to-door sales workers, news and street vendors, and related workers. Taken together, these eight high misclassification occupations account for approximately 1.6 million workers, or just over one percent of employed persons sixteen years and older in the 2014 workforce.[38] They are the occupations that Roemer's work suggests are most at risk for misclassification and the greatest contribu-

37. ROEMER, *supra* note 26.

38. The total number of employed workers in 2014 was 146,305,000; the total number of misclassified workers in the eight occupations, per Roemer, was 1,569,000, or 1.07 percent of the employed population. *Labor Force Statistics from the Current Population Survey*, BUREAU LAB. STATS., http://www.bls.gov/web/empsit/cps_charts.pdf (last visited Nov. 27, 2016) [hereinafter *Labor Force Statistics*]; ROEMER, *supra* note 26, at app. A, tbl.10.

tors to the overall number of misclassified workers in the labor force.

A full explanation of why different occupations have particular misclassification rates is outside the scope of this Article, though Roemer does suggest reasons for some occupations' presence on his list:

> There may be accounting idiosyncrasies at work here. Commissions from real estate sales may follow peculiar accounting conventions, allowing workers to opt out of the Social Security system [thereby generating a CPS-DER mismatch]. Tax law can consider the clergy self-employed, although in the . . . CPS context they clearly work for wages because they have an employer and don't own a business.[39]

For purposes of this Article, the reason that a worker is misclassified is irrelevant. Whether misclassification is the result of innocent accounting idiosyncrasies or employer malfeasance, the impact on the worker's antidiscrimination rights is the same: Title VII does not apply, unless the worker can prove otherwise in court.[40]

Thus, the Roemer list begins to fill in the left-hand circle in the Venn diagram shown above in Figure 1. The next tasks, then, are to identify those workers who are most likely to become Title VII plaintiffs, and then to determine the extent to which the two categories overlap.

### C. IDENTIFYING POTENTIAL TITLE VII PLAINTIFFS

Potential Title VII plaintiffs must satisfy two threshold requirements: (1) they must be employed, as an employee, by a covered employer, defined as one that employs at least fifteen employees;[41] and (2) they must have experienced discrimination on the basis of their membership in one of the five protected classes: race, sex, religion, national origin, and color.[42] With respect to the first requirement, according to some estimates, approximately sixteen percent of employees work for firms small enough to escape the statute's coverage, leaving an estimated eighty-four percent of U.S. employees covered.[43]

39. ROEMER, *supra* note 26, at 14–15.

40. *See* 42 U.S.C. § 2000e-2(a) (1964) (prohibiting *employers'* discriminatory employment practices).

41. *Id.* § 2000e(b).

42. *Id.* § 2000e-2.

43. Brian Headd, *The Characteristics of Small-Business Employees*, MONTHLY LAB. REV., Apr. 2000, at 13–14, http://www.bls.gov/opub/mlr/2000/04/art3full.pdf.

With respect to the second requirement, there are no statistics that definitively identify the workers who face employment discrimination most frequently. However, statistics from the Equal Employment Opportunity Commission (EEOC) tell us which types of discrimination *charges* are filed most frequently, a rough proxy for the types of discrimination that actually occur.[44] From 1997 through 2014, the most frequently filed discrimination charge type was race, followed by sex.[45] And though the EEOC's publicly available data do not report the specific types of sex and race discrimination at issue, as Laura Beth Nielsen, Robert L. Nelson, and Ryon Lancaster have observed, "[w]hile anti-discrimination law protects everyone, it largely is employed by members of traditionally disadvantaged groups . . . ."[46] For example, in some surveys, "[a]lmost one-third of African Americans report that they experienced discriminatory treatment in the last year at least once, compared to a much smaller percentage of white workers."[47] Likewise, women report sex discrimination and harassment at a rate that is dramatically higher than men.[48]

Thus, in filling in the right-hand circle in the Venn diagram in Figure 1, as a technical matter, all employees employed by covered employers, regardless of their particular race, sex, national origin, color, or religion—approximately

44. All workers seeking to assert a claim under Title VII and other federal antidiscrimination statutes must first file a discrimination charge with the federal EEOC or its state equivalent. *Filing a Charge of Discrimination*, EEOC, https://www.eeoc.gov/employees/charge.cfm (last visited Nov. 27, 2016).

45. *Charge Statistics FY 1997 Through FY 2015*, EEOC, https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Nov. 27, 2016).

46. Nielsen et al., *supra* note 8, at 177.

47. *Id.* (citing K.A. DIXON ET AL., A WORKPLACE DIVIDED: HOW AMERICANS VIEW DISCRIMINATION AND RACE ON THE JOB 11 (John J. Heldrich Ctr. for Workforce Dev., Rutgers, State Univ. of N.J. eds., 2002), http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/A_Workplace_Divided.pdf). Moreover, field experiments testing the rate at which potential employers selected job applicants for further interviews have shown "highly consistent" results across cities, "with Whites receiving positive responses at roughly twice the rate of equally qualified Black applicants." Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 226 (2012).

48. *See, e.g.*, Joni Hersch, *Compensating Differentials for Sexual Harassment*, 101 AM. ECON. REV. 630, 632 (2011) ("Men's risk of sexual harassment is substantially below that of women at every age."); Joel T. Nadler & Margaret S. Stockdale, *Workplace Gender Bias: Not Just Between Strangers*, 14 N. AM. J. PSYCHOL. 281, 281–84 (2012) (summarizing social science research on employment discrimination faced by women versus men).

eighty-four percent of the workforce—could potentially experience job discrimination and bring a Title VII claim. However, as the research suggests, and as anyone with a passing familiarity with the United States' history of oppression and segregation would predict, the workers who occupy the right-hand circle are much more likely to be women and people of color.

### D. ESTIMATING THE OVERLAP

Combining Roemer's research with demographic data from the U.S. Bureau of Labor Statistics (BLS), then, we are able to estimate the overlap between workers who may be misclassified and those who are most likely to become Title VII plaintiffs, defined here as women and workers of color. The BLS provides data on the percent of each occupation held by women and by workers who are Black or African American, Asian, and Hispanic or Latino.[49] These categories are not mutually exclusive—a Black worker can also be counted as Latino, for example—and we do not have statistics on the interactions between the sex and race/ethnicity variables: the number of Black women in a particular occupation, for example.[50]

Figure 4 below shows BLS demographic data for the eight high misclassification occupations identified in Part I.B above, illustrating whether the workers in those eight occupations are also likely to be women and/or people of color. Some context is useful in interpreting Figure 4. Overall, in 2014, women represented 46.9 percent of employed persons aged sixteen and over.[51] Black or African American workers represented 11.4 percent; Asian workers represented 5.7 percent; and Hispanic or Latino workers represented 16.1 percent.[52] These percentages are marked on Figure 4 with dashed lines. When the percentage of women or workers of color in one of the eight high misclassification occupations exceeds their percentage in the overall population of employed persons, we can conclude that

49. *Labor Force Statistics*, *supra* note 38.

50. *Id.*

51. *Id.* The analysis presented here uses a snapshot of the labor market from 2014 as a rough proxy for the demographic profile of the workers who held the occupations identified in Roemer's work, and of the plaintiffs who are captured in the court decision data presented below. A more extensive research project would employ a time series approach, in which misclassification rates, worker demographics, and court decisions were all captured in the same set of successive years. Lack of access to the underlying CPS and DER data prevent this approach at present.

52. *Id.*

those workers are overrepresented in that occupation. Table 2 then identifies each instance of overrepresentation by occupation.

**Figure 4: Top Eight Occupations by Percentage and Number of Workers Misclassified, with Worker Demographics by Occupation and by All Employed Persons**

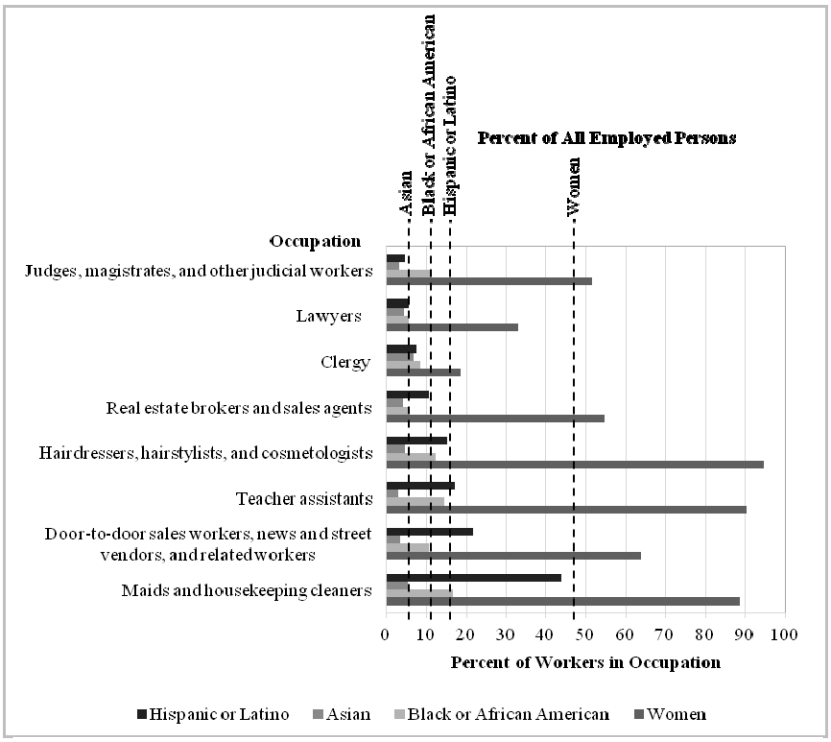


**Table 2: Top Eight Occupations by Percentage and Number of Workers Misclassified, with Overrepresentation of Women, Black or African American, Asian, and Hispanic or Latino Workers Noted**[53]

| *Occupation* | *Overrepresentation in Occupation* | | | |
|---|---|---|---|---|
| | *Women* | *Black or African American* | *Asian* | *Hispanic or Latino* |
| Judges, magistrates, and other judicial workers | x | | | |
| Lawyers | | | | |
| Clergy | | | x | |
| Real estate brokers and sales agents | x | | | |
| Hairdressers, hairstylists, and cosmetologists | x | x | | |
| Teacher assistants | x | x | | x |
| Door-to-door sales workers, news and street vendors, and related workers | x | | | x |
| Maids and housekeeping cleaners | x | x | | x |

Of the eight high misclassification occupations in Figure 4 and Table 2, women were overrepresented in six: real estate brokers and sales agents; judges, magistrates, and other judicial workers; hairdressers, hairstylists, and cosmetologists; maids and housekeeping cleaners; teacher assistants; and door-to-door sales workers, news and street vendors, and related workers.[54] In all six occupations, women held more than fifty percent of jobs; in three (hairdressers, maids/housekeepers, and teacher assistants), women represented close to or above ninety percent of all workers.[55]

With respect to workers of color, Black or African American workers were overrepresented in three of the eight high misclassification occupations: hairdressers, hairstylists, and cos-

53. ROEMER, *supra* note 26; *Labor Force Statistics*, *supra* note 38.

54. *Labor Force Statistics*, *supra* note 38.

55. Women held 94.6 percent of hairdressing jobs, 88.6 percent of maid/housekeeping jobs, and 90.3 percent of teacher assistant jobs. *Id.*

metologists; maids and housekeeping cleaners; and teacher assistants. Asians were overrepresented as clergy only; Hispanic or Latino workers were overrepresented as maids and housekeeping cleaners (representing almost forty-four percent of workers in that occupation); teacher assistants; and door-to-door sales workers, news and street vendors, and related workers.[56]

Thus, drawing on Figure 4 and Table 2, we can see that seven of the eight high misclassification occupations were held disproportionately by women and/or workers of color, leaving out only lawyers. Four of these occupations sit at the intersection of misclassification, race, and gender: hairdressers, maids and housekeepers, teacher assistants, and door-to-door sales workers and street vendors were all high misclassification occupations and held by outsize percentages of *both* women and workers of color. All of these workers occupy the overlap space in the Venn diagram in Figure 1; deprived of Title VII coverage if they experience job discrimination, unless they can bring and win a misclassification challenge in a Title VII lawsuit.[57]

Returning, then, to the original question: to what extent is misclassification being felt by women and people of color—groups of workers who have historically faced discrimination? In other words, is misclassification blocking Title VII from

56. Expanding beyond the eight occupations listed in Figure 4 and Table 2 to consider the other seven occupations in which at least ten percent of workers were misclassified, the BLS reports no demographic data for fishers and related fishing workers and miscellaneous social scientists and related workers, two of the seven remaining occupations. Of the rest, women were overrepresented (to the tune of 95.5 percent) among childcare workers. Black or African American workers were overrepresented as barbers and, again, childcare workers; Asian workers were overrepresented as dentists; Hispanic or Latino workers were overrepresented as barbers; carpet, floor, and tile installers and finishers; and, in its third appearance, childcare workers. Of the remaining seven occupations that ranked highest by number, rather than percent, of misclassified workers, Black or African American workers were overrepresented as driver/sales workers and truck drivers; Asian workers were overrepresented as marketing and sales managers and physicians and surgeons; Hispanics or Latinos were overrepresented as carpenters; construction laborers; and driver/sales workers and truck drivers. *Id.*

57. One might argue that women and workers of color who hold jobs in which they are overrepresented would be less, rather than more, likely to experience discrimination. However, the demographic statistics presented above say nothing about the gender or race of the workers' supervisors or managers; it is therefore possible that a Latina housekeeper could experience discrimination at the hands of a supervisor with a different demographic profile. Moreover, discrimination does not need to occur across groups in order to be actionable; in-group discrimination can and does occur.

reaching the workers it is intended to protect? The Roemer and BLS results suggest that misclassification is both gendered and raced, occurring in occupations in which women and/or people of color are overrepresented. Again, the causes of this distribution are beyond this Article's scope,[58] but its effects seem clear: to further weaken an already compromised antidiscrimination regime by removing workers from its reach.

## II. MISCLASSIFICATION CHALLENGES IN TITLE VII CASES

The dire conclusion of the previous Section need not be true, however, if misclassified workers who experience discrimination file suit under Title VII and argue successfully for reclassification as employees for purposes of the litigation. The remainder of this Article therefore looks to the courts. Returning again to the Venn diagram in Figure 1, one can imagine workers moving from the center overlap section into the circle on the right side, shedding their misclassified status and becoming eligible for Title VII coverage. Little is known, however, about whether the workers in the seven overlap occupations listed above—the real estate agents, hairdressers, maids, and others—actually make, and win, misclassification challenges in Title VII cases. The analysis presented in the following Parts seeks to describe those workers who make misclassification challenges in federal district court, as well as those who win, and to investigate why some plaintiffs are successful and some are not.

### A. DATA AND METHODOLOGY

The data set examined here consists of all Title VII cases filed in federal district courts over the ten years from 2005 to 2014, in which workers made misclassification arguments that resulted in a decision available on Westlaw. After first receiv-

58. This Article does not delve into the extensive literature on occupational segregation by sex, race, and ethnicity. *See generally* William T. Bielby & James N. Baron, *Men and Women at Work: Sex Segregation and Statistical Discrimination*, 91 AM. J. SOC. 759 (1986) (discussing occupational segregation by sex); Robert M. Blackburn, *The Measurement of Occupational Segregation and Its Component Dimensions*, 15 INT'L J. SOC. RES. METHODOLOGY 175 (2012) (summarizing approaches to occupational segregation by sex); William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. ECON. PERSP. 63 (1998) (discussing occupational segregation by race and sex).

ing training on coding protocols[59] and completing research and readings on the law of misclassification, two law student coders ran an initial Westlaw search for the terms "advanced: ("title vii" and "independent contractor") & DA(aft 12-31-2004 & bef 01-01-2015)" in Westlaw's federal district courts database.[60] The coders then reviewed each of the search results to determine whether it fit into the data set, i.e., whether the court engaged with the misclassification question directly or merely mentioned the search terms in passing. Coders considered all decisions available on Westlaw, not just those that were designated "published" with a Federal Reporter citation. Through this process, coders identified 154 cases that were properly in the data set, and then coded a variety of pieces of information from each case, discussed further in the Sections below.[61]

The law student coders worked as a pair, checking their conclusions with one another, and then reported their findings to the author during weekly meetings. In this sense, inter-coder reliability cannot be measured, as coding decisions were made by consensus. The author served as the arbiter of any differences of opinion, and also performed a final review and cleaning of the entire data set before analysis.[62]

59. *See, e.g.*, Lee Epstein & Andrew Martin, *Coding Variables*, *in* ENCYCLOPEDIA OF SOCIAL MEASUREMENT 321 (Kimberly Kempf-Leonard ed., 2004) (describing good coding protocols).

60. That search produced 659 results, from which coders identified 154 cases that were properly in the data set. As part of this process, the coders identified and removed thirty-three decisions that were duplicates, i.e., the underlying case generated more than one opinion responsive to the search terms that appeared among the original 659 search results. The goal of this project was to code the district court's final decision on misclassification; therefore, preliminary decisions that addressed misclassification but were then superseded by later decisions were struck from the data set.

61. Coders also identified cases in which courts addressed other reasons that a worker might not be classified as an employee, because the worker was a volunteer or an intern, for example. *See, e.g.*, Day v. Jeannette Baseball Ass'n, Civil Action No. 12-267, 2013 WL 5786457, at *3 (W.D. Pa. Oct. 28, 2013) (deciding whether "an unpaid volunteer baseball coach for a community baseball league is entitled to protection against racial discrimination under Title VII as an 'employee'"). While these cases raise similar issues to those cases in which a court decides between independent contractor and employee status, they are excluded from the data examined here because courts use different legal tests to distinguish between employees and interns or volunteers than between employees and independent contractors.

62. Other researchers have used similar methods in coding projects involving court decisions. *See, e.g.*, Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y L. 54, 63 (2011) (describing a consensus-based coding approach to court decisions

B. SELECTION EFFECTS

Though this data set is comprehensive as to all decisions available via Westlaw during the ten-year study period, the data are limited by selection effects, which constrain generalizability from the results.[63] In other words, the cases examined in the coding process are not the entire universe of all possible misclassification challenges brought by Title VII plaintiffs, nor were they randomly chosen from that universe. Indeed, workers who did not make a claim; whose claims were abandoned, settled privately, or resolved via the EEOC's conciliation process before any federal court filing; workers who filed suit in state court; and workers whose federal court decisions are not available via Westlaw are not included in the present analysis.[64]

Nevertheless, these data remain useful for three reasons. First, the subset of Title VII misclassification decisions that are available via Westlaw have important precedential value. Those that are published in a Federal Reporter are cited as authority by other federal and state courts in subsequent Title VII misclassification cases; even those that carry only a Westlaw

involving discrimination issues).

63. *See, e.g.*, PETER KENNEDY, A GUIDE TO ECONOMETRICS 265–67 (6th ed. 2008) (discussing selection effects).

64. These sets of missing cases were not included due to nonexistent data or data access difficulties. There are no records of employment discrimination disputes that a plaintiff has abandoned or settled privately without ever filing a lawsuit. Moreover, the EEOC does not track whether misclassification is an issue in a worker's charge, investigation, or conciliation. *See* Code Table for EEOC Integrated Mission System (on file with author). The results of the EEOC conciliation process are similarly inaccessible due to their confidentiality. *See What You Should Know: The EEOC, Conciliation, and Litigation*, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/conciliation_litigation.cfm (last visited Nov. 27, 2016) (describing the conciliation process as "an informal and confidential [settlement] process"). Some state trial court decisions are available via Westlaw, but very few. For example, a search of all state trial court decisions and orders on Westlaw using the same search terms and time period yielded only two in which the court considered a misclassification challenge in a Title VII context. The plaintiff's Title VII claims survived in one case and did not in the other. Taylor v. Vestuto, No. A543723, 2011 WL 2357449, at *9–10 (D. Nev. Mar. 8, 2011) (deeming plaintiff an employee for Title VII purposes); Cramer v. Cutner, Index No. 61443/2012 (N.Y. Sup. Ct. Nov. 29, 2012) (finding plaintiff to be an independent contractor for Title VII purposes). However, two is too small a pool of cases from which to draw any useful conclusions. Finally, while federal court decisions that are not available via Westlaw could theoretically be accessed by searching federal district courts' dockets directly using the PACER system, such a project would be prohibitively laborious and expensive.

citation are cited in legal briefs and court opinions.[65] The decisions in this data set also have a spillover effect on two other Title VII analyses that are closely related to the misclassification question: whether an employer has the appropriate number of "employees" (fifteen) for Title VII coverage purposes,[66] and whether a worker may sue more than one putative employer under Title VII.[67] Finally, the cases studied here serve as precedent for misclassification decisions in lawsuits under the Americans with Disabilities Act,[68] the Age Discrimination in Employment Act,[69] and many state law analogs,[70] all of which are analyzed *in pari materia* with Title VII.

Second, and similarly, the cases that resolve via private settlement or the EEOC's conciliation process, and so fall out of the data before reaching federal court, are likely influenced by the outcomes of the litigated cases in this data set. This is because settlement bargaining occurs, famously, in the shadow of the law.[71] In this conception, parties' attempts to resolve their

65. *See, e.g.*, Shah v. Deaconess Hosp., 355 F.3d 496, 499 (6th Cir. 2004) (citing Chadha v. Hardin Mem'l Hosp., No. 99-3166, 2000 WL 32023, at *2 (6th Cir. Jan. 6, 2000)).

66. *See, e.g.*, Williams v. Anchorage Marina, No. Civ. CCB-05-2855, 2006 WL 470603, at *1 (D. Md. Feb. 27, 2006) (deciding employment status of five workers who would count toward required fifteen minimum if deemed employees rather than independent contractors).

67. *See* Charlotte S. Alexander, *Direct and Indirect Employment Under Title VII*, *in* PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR: WHO IS AN EMPLOYEE, AND WHO IS THE EMPLOYER?, (Kati Griffith ed.) (forthcoming 2016) (on file with author) (manuscript at 5–9) (explaining courts' comingling of joint employment and misclassification analyses).

68. *See, e.g.*, Doud v. Yellow Cab of Reno, Inc., No. 3:13-cv-00664-WGC, 2015 WL 5533381, at *2 (D. Nev. Sept. 18, 2015) (citing Title VII cases in discussing employee-independent contractor distinction in ADA case).

69. *See, e.g.*, Vahid v. Farmers Ins. Exch., 985 F. Supp. 2d 1002, 1007–08 (S.D. Iowa 2013) (using the same analysis to determine whether a worker was an employee or independent contractor for purposes of Title VII and the ADEA).

70. *See*, *e.g.*, D'Annunzio v. Prudential Ins. Co. of Am., 891 A.2d 673, 677 (N.J. Super. Ct. App. Div. 2006) (using Title VII case law defining employee and independent contractor status to decide a dispute under the state Law Against Discrimination); Gover v. Royal Comm. Consultants, Inc., Index No. 118987/06 (N.Y. Sup. Ct. Aug. 21, 2007) (stating in case involving employee or independent contractor status under the New York State and City Human Rights Laws, "[t]hus, for all intents and purposes, cases construing Title VII can be relied upon by the court in construing the local statutes relied upon by the plaintiff").

71. *See generally* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982);

disputes outside of court are heavily influenced by their calculation of the odds of winning should they proceed to court. Federal courts' treatment of misclassification disputes in Title VII cases provides data with which parties estimate their odds of victory, which in turn influences the positions they take during negotiations. Again, understanding the way in which federal courts dispose of Title VII misclassification disputes is important not only for understanding those cases resolved via litigation, but likely also for those resolved out of court.

Third, we can learn something from making educated guesses about the magnitude and direction of the selection effects. That is to say, given what we know independently about the occupational distribution of misclassification (the data presented above in Part I), we can hypothesize about the direction and magnitude of the selection bias in the litigation data examined here. We can thus get a sense of which misclassified workers who experience discrimination take their claims to federal court, and which drop out of the data set. This is an important contribution in and of itself, speaking to how well workers are able to use the court system to redress workplace rights violations. These topics are discussed more fully in connection with the descriptive statistics presented in the next Section.

### C. DESCRIPTIVE STATISTICS AND SELECTION EFFECTS REVISITED

Tables 6.1 and 6.2 in the appendix report descriptive statistics for all variables collected by the coders. This Section discusses some key findings and returns to the subject of selection effects. With respect to the main variable of interest, misclassification outcomes, approximately sixty-six percent of plaintiffs lost, ending their Title VII claims completely.[72] Of the surviving

Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

72. Here, a misclassification "win" is defined as any case in which the plaintiff had the opportunity to proceed with his or her Title VII claim. This includes cases in which the court addressed the misclassification issue on summary judgment and affirmatively deemed the plaintiff an employee (granting a plaintiff's motion for summary judgment) or declared the question still in dispute (denying a defendant's motion for summary judgment). Plaintiff misclassification "wins" also include cases in which a court denied a defendant's motion to dismiss or granted a defendant's motion to dismiss without prejudice, both of which preserved the plaintiff's ability to continue with the litigation or amend his or her complaint to correct pleading deficiencies. A misclassification "loss," on the other hand, signifies a total loss, in which the court either granted a defendant's motion to dismiss with prejudice or found

fifty-three plaintiffs' Title VII claims, approximately sixty-four percent ultimately settled; twenty-three percent lost on later pretrial motions or at trial; and six percent—only three cases—ended in at least a partial plaintiff's win. (Four cases, or approximately eight percent, were still open at the time that coding was completed.) When Title VII outcomes are calculated for the whole data set of 154 cases, including both misclassification wins and losses, seventy-three percent of plaintiffs lost, twenty-two percent settled, two percent won, and three percent of cases were still open.[73]

These plaintiff success rates align generally with those found in other empirical studies of Title VII plaintiffs' fate in federal court, though they also reveal some interesting differences. For instance, in Nielsen and her co-authors' work, the authors found that forty percent of plaintiffs lost their Title VII claims, fifty-eight percent of cases settled, and two percent of plaintiffs ultimately won at trial.[74] In comparison, in this Article's data, seventy-three percent of all plaintiffs lost their Title VII claims, twenty-two percent of cases settled, and two percent of plaintiffs ultimately won. While these differences could be explained by differences in the two studies' data and methodology,[75] the lower overall plaintiff loss rates in Nielsen et al.'s work might suggest the rather obvious conclusion that Title VII plaintiffs who must overcome a misclassification challenge face a harder task than Title VII plaintiffs as a general matter. The misclassification inquiry thus appears to be acting as a substantial hurdle for Title VII plaintiffs.

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the plaintiff to be an independent contractor on summary judgment. In all instances, coders searched the underlying court docket for motions for reconsideration and appeals to ensure that they captured the court's final disposition of the misclassification question, even if the decision available on Westlaw did not represent the final disposition.

73. It is possible that the plaintiffs who lost on the misclassification question or on their underlying Title VII claims recovered under some other statute, such as a state antidiscrimination law or 42 U.S.C. § 1981 (1991), but the coding process did not capture those results.

74. Nielsen et al., *supra* note 8, at 186–87. In comparison, in their study of employment discrimination cases filed in federal courts between 1979 and 2006, Kevin Clermont and Stewart Schwab report an overall plaintiff win rate of fifteen percent. Clermont & Schwab, *supra* note 8, at 127.

75. Nielsen et al. examined case filing data rather than judicial decisions available via Westlaw. They assembled and coded a random sample of 1672 closed employment discrimination cases filed in seven U.S. district courts between 1998 and 2003. They also conducted interviews with plaintiffs, defendants, and lawyers and examined charge filing data from the EEOC. Nielsen et al., *supra* note 8, at 181 (describing data and methodology).

However, comparing the outcome statistics for the plaintiffs who *survived* a misclassification challenge in this Article's data set with the Nielsen et al. data also suggests some interesting implications. The surviving plaintiffs in the data set studied here went on to lose twenty-three percent of their Title VII claims, settle sixty-four percent, and win six percent. In comparison, the larger pool of all antidiscrimination plaintiffs in the Nielsen data suffered a higher loss rate of forty percent, a comparable settlement rate of fifty-eight percent, and a lower win rate of two percent.[76] It is not known how many of the Nielsen cases involved misclassification claims, so we are unable to make an apples-to-apples comparison. Yet the data do suggest that those plaintiffs who survive beyond a misclassification challenge ultimately do better with their underlying Title VII claims. This is slightly puzzling: there is no reason that strong *discrimination* evidence would necessarily co-occur with strong *misclassification* evidence, unless one assumes that some employers take the low road with respect to all of their employment practices. Therefore, there may be factors other than the merits at work here—attorney skill, perhaps, or chance.

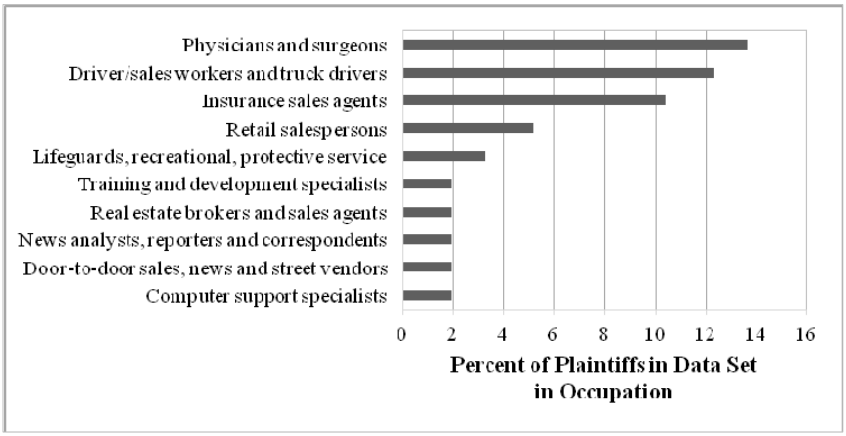
Descriptive statistics also give us a picture of the plaintiff characteristics in the data set, allowing us to explore and hypothesize about selection effects. If our data set did capture the full universe of misclassified Title VII plaintiffs, then we would expect the occupational profiles of the plaintiffs to resemble those in the overlap area in the Venn diagram above in Figure 1: the workers in the seven occupations held disproportionately by women and/or people of color who were also at high risk for misclassification and/or accounted for the largest numbers of misclassified workers. This is because, on the one hand, we would expect occupations with large *percentages* of misclassified workers who are women and/or people of color to generate misclassification challenges, because those plaintiffs are likely to have strong misclassification claims on the merits. On the other hand, we would also expect occupations that employ large *numbers* of misclassified workers to generate lawsuits involving misclassification challenges due to their numbers alone. Recall that these seven overlap occupations were real estate brokers and sales agents; clergy; judges, magistrates, and other judicial workers; hairdressers, hairstylists, and cosmetologists; maids and housekeeping cleaners; teacher assistants; and door-

76. *Id.* at 186–87.

to-door sales workers, news and street vendors, and related workers.[77]

Of these occupations, four appeared in the data set: real estate and door-to-door sales workers each brought three cases (1.95 percent of all cases in the data set); clergy and judges/judicial workers filed one case (0.65 percent) apiece. Hairdressers, maids and housekeepers, and teacher assistants—jobs in which both women and workers of color were overrepresented—did not appear in the data set at all. More generally, the data set was skewed toward white-collar occupations, with over two-thirds of plaintiffs holding white-collar jobs. Figure 5 shows the top ten occupations in the data set, all of which appeared in at least three cases.[78]

**Figure 5: Top Ten Occupations in Data Set by Percent Representation**




*Note*: *N*=154

77. *See supra* note 56 and accompanying text.

78. The presence of the "lifeguards, recreational, protective service" occupation may be slightly misleading, explained by a repeat plaintiff or plaintiffs. In four of the five cases in that occupational category, a group of plaintiffs who had worked as school sports referees sued the same two school districts for discrimination and argued for reclassification as employees rather than independent contractors. Lanier v. Clovis Unified Sch. Dist., No. 1:11-CV-01613-LJO-GSA, 2013 WL 1904822 (E.D. Cal. May 7, 2013); Quintero v. Fresno Unified Sch. Dist., No. 1:12-CV-00675-LJO-GSA, 2013 WL 268704 (E.D. Cal. Jan. 24, 2013); Earl v. Fresno Unified Sch. Dist. Bd. of Educ., No. F CV 11-1568-LJO-GSA, 2012 WL 2798806 (E.D. Cal. July 9, 2012); Quintero v. Clovis Unified Sch. Dist., No. 1:12-CV-00676-AWI-BAM, 2012 WL 2050736 (E.D. Cal. June 6, 2012).

Though it is difficult to draw concrete conclusions from these small numbers, we can hypothesize that some workers' presence in or absence from the data might be explained by workers' access to the money, time, and legal knowledge necessary to sue. The author's previous empirical work has suggested that the lower a worker is on the socio-economic scale, the less likely he or she is to resolve workplace problems via litigation.[79] The prevalence of white-collar workers in the data set—including the high-misclassification real estate, clergy, and judge/judicial worker occupations—is consistent with this observation, as is the absence of the lowest paid of the seven overlap occupations, maids and housekeepers.[80] Indeed, the most frequent of all occupations to appear in the data set, physicians and surgeons, is also one of the highest paid in the country.[81] Moreover, the weighted average of the national median hourly wages of all forty occupations on the Roemer list—those in which at least one percent of workers appeared to be misclassified—is $26.07, while that same figure for the occupations represented in the set of cases filed in court is the higher $32.28.[82]

79. Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1072–73 (2014) (finding, based on analysis of over 4300 worker interviews, that "legal knowledge . . . appears to decrease with a worker's relative power and stability, and many workers simply may not have the information necessary to become workplace law enforcers" and that forty-three percent of workers who had experienced a recent problem on the job decided not to make a claim against their employer, primarily due to fear of retaliation and doubts about the efficacy of the claiming process).

80. According to 2014 data available from the Bureau of Labor Statistics, the national hourly median wage for maids and housekeepers was $9.67. *May 2014 National Occupational Employment and Wage Estimates, United States*, U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, http://www.bls.gov/oes/2014/may/oes_nat.htm (last visited Nov. 27, 2016) [hereinafter *May 2014 Estimates*].

81. In a typical case brought by a physician or surgeon, the plaintiff alleged discrimination against a hospital at which he or she had privileges, and the hospital denied that the plaintiff was a hospital employee, as opposed to an independent contractor. *See, e.g.*, Brintley v. St. Mary Mercy Hosp., 904 F. Supp. 2d 699, 705 (E.D. Mich. 2012). Note that, due to physicians' and surgeons' high salaries, any recovery keyed to their earnings, such as backpay, would be quite high, making the costs of litigation in terms of time and investment worthwhile. Moreover, highly paid workers in this occupation could likely afford a specialist attorney, further signaling the high value and strong merits of the case to the court.

82. A weighted average takes into account the number of workers in each occupation as well as the wage earned. Wage figures are drawn from BLS statistics. *May 2014 Estimates*, *supra* note 80.

Thus, returning to the Venn diagram in Figure 1, we can conclude, albeit tentatively, that not all workers in the seven overlap occupations attempt a move rightward, toward Title VII coverage. On the whole, the plaintiffs who do seek reclassification and redress for discrimination are white-collar workers like physicians and surgeons, not the lower-paid maids and hairdressers who experience misclassification at higher rates. While these blue-collar workers could have fallen out of the data set because they settled or conciliated their cases prior to filing in federal court—or filed in state court instead—previous research suggests that these workers more likely stayed silent, or chose to leave their jobs, instead of exercising their Title VII rights in court.

## III. REGRESSION DESIGN, PREDICTIONS FROM THEORY, AND RESULTS

This Part turns from those workers who were absent from the data to those who were present, first describing the regression design and variables used in the analysis of misclassification outcomes, then discussing three theories that might predict or explain those outcomes, and, finally, presenting the regression results.

### A. VARIABLE CONSTRUCTION

The dependent variable in this analysis—the primary result that the coding project attempts to describe and explain—is the outcome of the plaintiffs' misclassification challenges. For each case in the data set, coders also recorded a set of independent variables describing characteristics of the litigants, the claims in the lawsuit and the misclassification decision itself, and the court and judge. These variables allow exploration of whether certain types of litigants, certain types of claims, and/or certain types of judges appear to influence the outcome of misclassification challenges.[83]

With respect to the plaintiff, we coded whether he or she was represented by an attorney and, if so, an attorney specializing in employment, labor, or civil rights law;[84] the plaintiff's

83. The choice and construction of these variables was guided by previous empirical work by Laura Beth Nielsen and her co-authors on the fate of Title VII cases in federal court. Nielsen et al., *supra* note 8, at app. (listing variables).

84. The specialist attorney designation was determined by looking at each

occupation, and whether it was blue or white-collar; the percent and number of misclassified workers in the plaintiff's occupation, per the Roemer data; and the percent of women, Black or African American, Asian, and Hispanic or Latino workers in the plaintiff's occupation, per the BLS data. Regarding the defendant, we coded the industry: trucking, construction, maintenance; retail; manufacturing, agriculture; package delivery; school, university; medical, health, social services; media, entertainment; government; and financial services, insurance, other professional services.[85] We also coded descriptors of the lawsuit and misclassification decision, noting the type(s) of discrimination asserted,[86] fact pattern(s) giving rise to the Title VII claim(s),[87] the legal test used by the court (no test, common law test, hybrid test),[88] whether the court referred to a written contract between the parties in its misclassification decision, and the year the misclassification decision was made. Finally, with respect to the judge and court issuing the misclassification decision, we coded the deciding judge's imputed political ideology and the circuit in which the deciding district court was located.[89]

plaintiff attorney's website. If the attorney or firm listed employment, labor, or civil rights law as one of its practice areas, it was designated a "specialist."

85. In order to minimize the number of independent variables due to the small number of observations in this data set, defendant industry variables were not used in the regression described below, but are reported in Table 6.1 in the Appendix of this Article. The plaintiff occupation variables that were included in the regression likely capture much of the same information contained in the defendant industry variable.

86. Claim types were race, sex, religion, national origin, color discrimination, and retaliation. Each case may have more than one claim type. Because of their small number of observations, claims for religious, national origin, and color discrimination are grouped into one "other discrimination" variable for purposes of this analysis.

87. Fact patterns were failure to hire, termination, and harassment or other discriminatory conditions of work. Each case may have more than one fact pattern.

88. *See infra* Part III.B.1 for explanations of these tests.

89. The presiding judge's political ideology is imputed from the political party of the judge's nominating President. This is a common technique in research on judges' decisions. *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 5–6 (2006) (using political party of a judge's nominating president as a proxy for a judge's own political ideology).

## B. PREDICTIONS FROM THEORY

This Section sets out predictions for the associations between the independent and dependent variables, drawing on three theories about the drivers of litigation outcomes in civil cases generally, and in cases involving discrimination allegations and/or contract disputes specifically. These theories are not mutually exclusive—the goal here is not to pick a "winner" among theories—but they do provide a useful set of lenses through which to view the results.

### 1. Legal Formalism

In their study of the outcomes of Title VII cases in federal court, Laura Beth Nielsen and her co-authors describe legal formalism in employment discrimination cases as:

> [H]old[ing] that legal outcomes should reflect the law on the books. The outcome of a case should be determined by how well a plaintiff meets the formal requirements for making and proving a claim of discrimination. Because different theories of discrimination require different elements of proof, ceteris paribus, a formal legal model suggests that there will be variation in plaintiff success across different legal claims.[90]

Richard Posner elaborates that formalism refers to:

> [T]he use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect.[91]

A legal formalist would thus predict that the law on the books matters to case outcomes, that different legal tests will produce different outcomes in a predictable way that aligns with some measure of the strength of the merits.

However, none of the independent variables coded in this project purports to measure the merits of a plaintiff's misclassification challenge as a way to pronounce misclassification outcomes "correct" or "incorrect" as a matter of legal formalism. Other researchers have used various proxies to assess a claim's merits, but constructing such a variable is extremely difficult.[92]

90. Nielsen et al., *supra* note 8, at 178.

91. Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986).

92. Nielsen et al. provide an insightful summary of the difficulties in attempting to code the quality of a case:

Some of the independent variables listed above may capture something about merits: the fact that a plaintiff is pro se may suggest that his or her case is particularly weak, and that no attorney would sign on; a specialist attorney's presence in a case might signal that the attorney judges the merits to be particularly strong.[93]

Likewise, misclassification claims by workers in occupations with high percentages of misclassified workers, per Roemer, might be predicted to have greater success, as they might be strong on the merits. However, even the occupation most at risk for misclassification on Roemer's list, real estate sales workers, had a misclassification rate of less than fifty percent, so there is no guarantee that any given real estate sales plaintiff in this data set fell into the fifty percent who were misclassified. Moreover, as discussed above, the Roemer list relies on self-reported classifications, which may or may not align with a court's assessment of a worker's true employment classification under Title VII law.

Nevertheless, if legal formalists are correct that the merits of a case can be ascertained and judged as an objective matter against a given set of legal requirements, then we may see increasing misclassification success rates in cases brought by attorneys and specialist attorneys, and perhaps also in cases brought by plaintiffs in occupations at great risk of misclassifi-

> It is important to note that we attempted in the coding of case files to construct valid measures of what can be conceived of as a latent or unmeasured variable of the "quality" of a case. Several of our measures might capture aspects of this variable, including the index of legal effort, the outcome of a case in the EEOC, and the EEOC priority code, but none is definitive. We attempted, without success, to have coders provide a subjective rating of the strength of a case, but we learned that there are inherent limitations to case files as a source of indicators about the "merits" of a case. Unlike some medical malpractice research in which medical records can be sent to medical professionals to assess, the merits of the case in employment discrimination depend on subjective assessments of job performance and the meaning of employer actions. Even where such records were included in the file, there is no standard for keeping employment records that would allow us to evaluate personnel files like a medical professional can do using agreed upon standards of care. We coded sets of documents constructed by the adversarial process of which they are a part. The relationship between those documents and a "good" or "bad" case are difficult to discern.

Nielsen et al., *supra* note 8, at 182.

93. *Id.* at 189 ("The powerful effect of legal representation might be explained as a selection effect. That is, obtaining legal representation reveals an otherwise unmeasured variable of quality of case.").

cation, though both variables are extremely rough merits proxies.[94]

In addition, if legal formalists are right that differing legal requirements should produce differing outcomes, then we would expect to see different misclassification win rates depending on the test a court uses to determine a worker's proper status. Courts use one of two multi-factored rubrics: the common law approach, which adopts the principles of agency law and focuses primarily on the employer's right to control the putative employee; or the hybrid common law-economic realities test, which considers both an employer's control and, more broadly, the relationship of economic dependence between worker and employer.[95] Because the common law test is generally perceived to be the more restrictive of the two, one would predict that misclassification challenges subject to that analysis would fail more frequently.[96]

However, some commentators, including the authors of the new Restatement (Third) of Employment Law, have concluded that there is actually little difference in practice between the tests for employee status.[97] If the Restatement is correct in its characterization of the law, any difference between the two tests may actually dissolve when applied, and we should see no

94. The critical realist, however, might interpret such results as evidence of the attorneys' signaling of plaintiff power and status, not of (or in addition to) the underlying merits of a case. *See infra* Part III.B.3.

95. *Compare* Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323–24 (1992) (discussing the common law test), *and* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) (discussing the same), *with* Oestman v. Nat'l Farmers Union Ins. Co., 958 F.2d 303, 305 (10th Cir. 1992) ("The hybrid test, which is most often applied to actions under Title VII, is a combination of the economic realities test and the common law right to control test."), *and* EEOC v. Zippo Mfg. Co., 713 F.2d 32, 38 (3d Cir. 1983) ("Consequently, the hybrid standard that combines the common law 'right to control' with the 'economic realities' as applied in Title VII cases is the correct standard . . . .").

96. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1069 (10th Cir. 1998) (contrasting the "stringent" common law approach with the more permissive economic reality factors that are incorporated into the hybrid test).

97. As the Restatement puts it, "Decisions interpreting the meaning of employee under the federal antidiscrimination laws illustrate the lack of any sharp distinction between the common-law test, at least as formulated in *Reid* and *Darden*, and a multifactor economic-realities test." RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. d–e (AM. LAW INST., Proposed Final Draft 2014) ("The antidiscrimination-law decisions thus highlight the broad common ground covered by the common-law test and the economic-realities test in determining whether or not to classify a service provider as an employee." (citing Murray v. Principal Fin. Group, Inc., 613 F.3d 943, 945 (9th Cir. 2010) ("[T]here is no functional difference between the . . . formulations.")).

difference in the outcomes of misclassification challenges subject to the two tests. If, however, there is a meaningful distinction between the two tests in practice, and if the legal formalists are correct, then the "test" independent variable may exert an influence on misclassification outcomes.

2. Contractual Formalism

A second theory that might hold predictive value in misclassification cases is contractual formalism. Contractual formalism holds that the words of a contract matter, and that judges should hew strictly to the text in matters of interpretation.[98] Viewing misclassification cases through this lens, one would expect courts to pay a great deal of attention to the details of the contract, if any, between the parties, to determine the true nature of their relationship. In fact, some courts' formulations of the common law test have developed to include a formalistic element. Courts in the Fourth Circuit consider the parties' "mutual intent to create an independent contractor relationship."[99] Courts in other circuits also commonly consider the parties' beliefs about their relationship, as evidenced by the existence of a written contract.[100]

98. Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1171 (1995) (describing formalism as historically holding up "the precise word . . . as the sovereign talisman" (quoting Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917))).

99. Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 262–63 (4th Cir. 1997).

100. *See, e.g.*, Vakharia v. Swedish Covenant Hosp., 190 F.3d 799, 805–06 (7th Cir. 1999) (finding the plaintiff's status as an independent contractor, and therefore not an employee, was "confirmed" by an agreement between the parties expressly referring to the plaintiff as an "independent contractor"); Lockyer v. AXA Advisors, L.L.C., No. 2:10-CV-00678, 2010 WL 4612040, at *3 (D. Utah Oct. 12, 2010) ("[T]he Agent Agreement establishes that plaintiff was an independent contractor with the AXA Network."); Kravis v. Karr Barth Assoc., Civil Action No. 09-485, 2010 WL 337646, at *3 (E.D. Pa. Jan. 26, 2010) ("In evaluating whether or not Kravis qualifies as an employee, the Court will first consider the intent of the parties, as evinced by the contract Kravis signed to become a Sales Agent with Defendants. Where parties have reduced their agreement to writing, courts may ascertain the parties' intent by examining the writing."); DeSouza v. EGL Eagle Global Logistics LP, 596 F. Supp. 2d 456, 464 (D. Conn. 2009) ("[T]he Court notes that contractual language 'fixing the relationship between [the plaintiff and the defendant], although not dispositive, provides strong evidence of the parties' intentions.'" (quoting Taracido v. United States, 93 Civ. 8266(LLS), 94 Civ. 3062(LLS), 1995 WL 217525, at *2 (S.D.N.Y. Apr. 12, 1995))); Taylor v. BP Express, Inc., No. CV 407-182, 2008 WL 5046071, at *5 (S.D. Ga. Nov. 24, 2008) ("[C]ontract provisions that refer to Plaintiff as a 'contractor' must be given great weight.").

However, the law of employee status has a conflicted relationship with contractual formalism. Though some courts view written contracts between the parties as evidence of a worker's true status, others are clear that the existence of a written contract is not dispositive of the nature of the employment relationship.[101] Indeed, courts in misclassification cases widely state the proposition that "an employer may not avoid Title VII by affixing a label to a person that does not capture the substance of the employment relationship."[102] The idea is that employers should not be permitted unilaterally to classify workers in such a way as to avoid antidiscrimination obligations; the fox should not, after all, guard the hen house. Courts are thus instructed to disregard labels and instead to consider the facts of the relationship between the hiring and hired parties. Courts that disregard the existence of written contracts in misclassification cases extend this rule rejecting unilateral labels to bilateral contracts as well. Courts that pay close attention to the existence of a written contract take the opposite position, adopting a contractual formalist stance.

The independent variable that captures whether a court referred to a written contract between the parties should therefore reveal interesting results about the extent to which courts rely on written contracts in their misclassification decisions, and whether that reliance is correlated with success or failure for the plaintiffs, all else equal.

101. *See, e.g.*, Hunt v. Mo. Dep't of Corr., 297 F.3d 735, 741 (8th Cir. 2002) (noting that when determining whether an individual is an employee or independent contractor for Title VII purposes, courts are cautioned against relying on the existence of a contract that refers to a party as an independent contractor); Allen v. U.S. Sec'y of Def., No. 4:10CV1928 FRB, 2012 WL 401062, at *4 (E.D. Mo. Feb. 8, 2012) (discussing the same); Feldmann v. N.Y. Life Ins. Co., No. 4:09CV2129MLM, 2011 WL 382201, at *8 (E.D. Mo. Feb. 3, 2011) ("The existence of a contract referring to a party as an independent contractor does not end the inquiry." (quoting Schweiger v. Farm Bureau Ins. Co. of Neb., 207 F.3d 480, 483 (8th Cir. 2000))).

102. Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 81 (8th Cir. 1996); *see also, e.g.*, Davis v. N.Y. Sports Officials' Council, No. 7:09-CV-0514 GTS/GHL, 2010 WL 3909688, at *6 (N.D.N.Y. Sept. 30, 2010) ("[C]ourts in this circuit look 'beyond mere labels in assessing whether defendant is an employer, and apply the common law of agency to determine whether an individual is an independent contractor or an employee for purposes of Title VII . . . .'" (quoting Deshpande v. Medisys Health Network, Inc., No. 07-CV-0375, 2010 WL 1539745, at *10 (E.D.N.Y. Apr. 16, 2010))); Bigalke v. Neenah Foundry Co., No. 05-C-29, 2006 WL 1663717, at *2 (E.D. Wis. June 9, 2006) ("[A]llowing employers' verbiage and *ipse dixit* to be outcome determinative would allow employers to evade Title VII entirely simply by using the term 'independent contractor' when the individual is really an employee.").

3. Critical Realism

The third possible explanatory theory is critical realism. Again returning to Nielsen and her co-authors:

> The critical realist sees the social organization of litigation systematically working against certain parties and social groups. Plaintiffs, as one-shot litigants, are at a serious disadvantage compared to defendants, who more often are repeat players. Socially privileged groups, in better-paying jobs, with more education, with more influence within the work organization, will convert these social resources into legal resources. As a result, they should enjoy greater success in litigation.[103]

Thus, unlike the two formalist theories summarized above, according to critical realism, the law and the contract do not matter to litigation outcomes as much as the identity and status of the parties to the litigation and the social context within which a lawsuit unfolds.

Here, one might predict two results if critical realism is at work. First, one might observe lower misclassification win rates by plaintiffs in blue-collar occupations and in occupations with high percentages of women and people of color—those with lower social status and less power to bend litigation results in their favor. One might also observe more plaintiff wins in decisions made by Democrat-appointed judges. Though it is not clear that a misclassification decision is itself ideological, the misclassification question might be seen as crucial to the project of keeping the courts open to employment discrimination plaintiffs, a view perhaps more associated with politically liberal Democratic appointees.

Second, the critical realist might predict a bias against plaintiffs whose underlying substantive Title VII claims are generally disfavored by the courts—here, perhaps race and national origin discrimination plaintiffs. At first glance, a plaintiff's allegations of a particular kind of discrimination would seem to be unrelated to the plaintiff's allegations about her proper employment classification. Nevertheless, other research has established that race and national origin discrimination cases, as compared to cases alleging other types of discrimination, fare particularly poorly in court.[104] Previous work by this

103. Nielsen et al., *supra* note 8, at 180.

104. *See, e.g.*, David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 516 (2003) (reporting low success rates in jury trials in discrimination cases filed by women and minorities); Wendy Parker, *Lessons in*

author with Camille Gear Rich and Zev Eigen has also hypothesized about the effects of a post-racial ideology—the idea that "true" racism rarely occurs any more—in shaping judges' and juries' views of race discrimination claims as meritless.[105] It is possible, therefore, that judges might use the misclassification decision as an early way to rid their dockets of race and national origin discrimination cases that they view as nuisance claims. Indeed, former U.S. District Court Judge Nancy Gertner relates that federal judges are explicitly coached to find procedural and other grounds for early dismissal in order to eliminate complex and time-consuming employment discrimination cases from their dockets.[106] Thus, critical realism would predict greater losses on the misclassification question for plaintiffs who are themselves less wealthy and powerful, who bring disfavored claims of discrimination, and whose cases are adjudicated by politically conservative judges.

It bears repeating that these three theories may both complement and contradict one another in interesting ways; they are presented here to provide a loose framework for analysis and a set of possible views on the regression results, not as a way to prove which theory is more "right" than the others. We turn, then, to the data.

*Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 893 (2006) (presenting data on race discrimination plaintiffs' losses in federal court).

105. Camille Gear Rich et al., *Post-Racial Hydraulics: The Hidden Dangers of the Universal Turn*, 91 N.Y.U. L. REV. 1 (2016) (describing the hypothetical by Camille Gear Rich and Zev Eigen); *see also* Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 705 (2013) ("The implications of post-racialism beliefs, to the extent that these views taint judges' perceptions of employment discrimination cases, are extremely problematic for current summary judgment practices."); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 556 (2001) ("When it comes to race cases, which are generally the most difficult claim for a plaintiff to succeed on, courts often seem mired in a belief that the claims are generally unmeritorious, brought by whining plaintiffs who have been given too many, not too few, breaks along the way.").

106. Nancy Gertner, *Losers' Rules*, 122 YALE L.J.F. 109, 117 (2012) ("At the start of my judicial career in 1994, the trainer teaching discrimination law to new judges announced, 'Here's how to get rid of civil rights cases,' and went on to recite a litany of [strategies].").

C. REGRESSION RESULTS

Table 3 below reports regression results. The analysis here uses logistic regression to identify statistically significant associations between the independent variables coded from each case and the dependent variable—the outcome of plaintiffs' misclassification challenges.[107] Regression allows us to estimate the strength of any association between, for example, specialist attorney representation and a misclassification win, holding all other variables constant. Measuring statistical significance is necessary to determine whether associations that appear between variables are reliable, or whether they are actually a result of measurement or other error.[108]

107. *See* JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 68 (4th ed. 2009) (explaining multiple regression analysis as allowing the researcher to "explicitly control for many other factors that simultaneously affect the dependent variable"). Because the dependent variable here can take only two values (the plaintiff wins or loses on the misclassification question), this analysis employs logistic regression, or logit. However, the output, or coefficients, produced by a logistic regression equation are extremely difficult to interpret. This Article follows other empirical legal scholarship in transforming the regression coefficients into marginal effects, holding all other variables at their means, which better lend themselves to interpretation. Consistent with Epstein and others, Table 3 thus reports marginal effects in the "Coefficient" column. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE 22 (2013) (describing use of marginal effects at means and reporting of transformed coefficients). As an alternative to logit, other researchers prefer the probit model; still others, particularly in applied economics, advocate using the linear probability model (LPM). *See* LEE EPSTEIN & ANDREW D. MARTIN, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH 215–21 (2014) (discussing choice of logit model for regressions involving binary dependent variables). Following common practice in empirical legal scholarship, logit was used to produce the results discussed below, though, notably, the set of statistically significant results produced by running logit, probit, and LPM here differs only slightly. *See* Marc F. Bellemare, *Love It or Logit, or: Man, People *Really* Care About Binary Dependent Variables*, MARC F. BELLEMARE: AGRIC., DEV., & FOOD POL. (June 10, 2013), http://marcfbellemare.com/wordpress/9024 ("[B]ecause no estimator is perfect, you should you [sic] always estimate all three (LPM, probit, and logit) and compare their results to make sure nothing is amiss."). For a discussion of the tradeoffs among logit, probit, and LPM, see JOSHUA D. ANGRIST & JÖRN-STEFFEN PISCHKE, MOSTLY HARMLESS ECONOMETRICS: AN EMPIRICIST'S COMPANION (2009). and see also WOOLDRIDGE, *supra* at 247–50 (explaining use of LPM for a binary dependent variable, discussing shortcomings, and noting that logit or probit are often used instead).

108. More specifically, measures of statistical significance derive from a process called hypothesis testing, which determines whether one can confidently reject the "null hypothesis," or the position that "in the universe, no relationship exists between two variables or no difference exists between two groups on a particular attribute." LARRY D. BARNETT, THE PLACE OF LAW: THE

**Table 3: Regression Results**

| *Variable* | *Coefficient* | *Standard Error* | *95% Confidence Interval* | |
|---|---|---|---|---|
| Non-specialist attorney representation | 0.173 | 0.112 | -0.047 | 0.393 |
| Specialist attorney representation | 0.362* | 0.111 | 0.144 | 0.580 |
| White-collar plaintiff occupation | 0.011 | 0.146 | -0.274 | 0.297 |
| Percent of workers misclassified in occupation | 0.012 | 0.008 | -0.004 | 0.027 |
| Percent of workers in occupation: women | 0.029 | 0.016 | -0.002 | 0.060 |
| Percent of workers in occupation: Black or African American | -0.048 | 0.098 | -0.240 | 0.144 |
| Percent of workers in occupation: Asian | -0.020 | 0.079 | -0.175 | 0.135 |
| Percent of workers in occupation: Hispanic or Latino | 0.112 | 0.065 | -0.015 | 0.239 |
| Race discrimination claim in case | -0.036 | 0.116 | -0.263 | 0.192 |
| Sex discrimination claim in case | 0.040 | 0.109 | -0.175 | 0.254 |
| Other discrimination claim in case | 0.184 | 0.152 | -0.114 | 0.483 |

ROLE AND LIMITS OF LAW IN SOCIETY 417 (2011). Measures of statistical significance are commonly deployed as a way to deal with the error that is introduced when a random sample is drawn from a larger population and then conclusions from the sample are applied to the whole. Some argue that there is no need to consider statistical significance when considering data drawn from an entire population rather than from a sample. *See, e.g.*, *id.* (contending that there is no need to compute statistical significance when the data examined "come from the entire universe of interest"). However, this view is not universal among empiricists, many of whom argue that measures of statistical significance are necessary even when one's data arguably describes an entire population. This is because even observations from an entire putative "population" are almost always applied to other, larger, imagined superpopulations, which include additional, future occurrences that are presently unobserved. *See, e.g.*, Andrew Gelman, *How Do You Interpret Standard Errors from a Regression Fit to the Entire Population?*, STATISTICAL MODELING, CAUSAL INFERENCE, AND SOCIAL SCIENCE (Oct. 25, 2011), http://www.andrewgelman.com/2011/10/25/how-do-you-interpret-standard-errors-from-a-regression-fit-to-the-entire-population (discussing need to compute some measure of uncertainty because no putative population is ever truly a population). This Article takes the latter position: although coders here collected the entire population of Title VII misclassification decisions from 2005 through 2014 available on Westlaw, as explained in Part II.B above, the data set cannot properly be considered a complete population. Thus, the article deploys measures of statistical significance, using a single asterisk to denote significance at the .05 level. *See* EPSTEIN & MARTIN, *supra* note 107, at 283 (discussing denoting statistical significance at .05 level); WOOLDRIDGE, *supra* note 107, at 135–36 (discussing statistical significance and choice of significance levels).

| *Variable* | *Coefficient* | *Standard Error* | *95% Confidence Interval* | |
|---|---|---|---|---|
| Retaliation claim in case | 0.027 | 0.104 | -0.177 | 0.231 |
| Failure to hire fact pattern in case | -0.276* | 0.077 | -0.427 | -0.125 |
| Termination fact pattern in case | -0.194 | 0.209 | -0.604 | 0.217 |
| Harassment/discriminatory conditions claim in case | -0.125 | 0.192 | -0.501 | 0.251 |
| Reference to written contract in case | -0.258* | 0.090 | -0.434 | -0.083 |
| 2006 | -0.121 | 0.183 | -0.480 | 0.238 |
| 2007 | 0.337 | 0.282 | -0.215 | 0.889 |
| 2008 | 0.075 | 0.327 | -0.565 | 0.715 |
| 2009 | -0.035 | 0.209 | -0.445 | 0.375 |
| 2010 | -0.086 | 0.194 | -0.467 | 0.295 |
| 2011 | 0.128 | 0.260 | -0.381 | 0.636 |
| 2012 | 0.116 | 0.228 | -0.332 | 0.563 |
| 2013 | 0.189 | 0.292 | -0.384 | 0.761 |
| 2014 | 0.448 | 0.238 | -0.018 | 0.914 |
| First Circuit | 0.682* | 0.198 | 0.294 | 1.071 |
| Second Circuit | 0.359* | 0.178 | 0.010 | 0.709 |
| Third Circuit | 0.281 | 0.194 | -0.100 | 0.662 |
| Fourth Circuit | 0.347* | 0.163 | 0.027 | 0.667 |
| Sixth Circuit | -0.064 | 0.091 | -0.243 | 0.115 |
| Seventh Circuit | -0.051 | 0.085 | -0.218 | 0.116 |
| Eighth Circuit | 0.265 | 0.214 | -0.154 | 0.684 |
| Ninth Circuit | 0.103 | 0.143 | -0.177 | 0.383 |
| Tenth Circuit | 0.110 | 0.195 | -0.273 | 0.493 |
| Eleventh Circuit | 0.087 | 0.154 | -0.215 | 0.389 |
| D.C. Circuit | 0.560* | 0.269 | 0.032 | 1.087 |
| Democrat-appointed judge | -0.159 | 0.104 | -0.362 | 0.045 |

*Notes*: $N = 154$; $*p < 0.05$; pseudo $R^2 = 0.352$. Coefficients are reported as marginal effects at mean values of all variables. For the non-binary variables (attorney representation, circuit, year), the variables in the base category are pro se, the Fifth Circuit, and 2005. All other listed variables are binary; their opposite value is in the base category.

In interpreting the regression results in Table 3, each number listed in the "Coefficient" column should be considered in conjunction with its corresponding value that has been left

out of the equation, or assigned to the "base category."[109] For example, Table 3 tells us the probability of a plaintiff's misclassification win when a judge refers to a written contract between the parties (the value included in the regression equation), as compared to cases with no such reference (the value in the base category). For variables that can take on more than two values, the value assigned to the base category is noted at the end of Table 3.[110] Table 3 also reports standard errors and ninety-five percent confidence intervals to give a sense of the precision of the estimates, or the range of values that the coefficient could take on above and below the figure reported in Table 3.[111]

Turning to the results, we can see from Table 3 that five independent variables were associated at a statistically significant level with a plaintiff's misclassification win, as indicated by the coefficient's positive sign: specialist attorney representation and decisions made by courts within the First, Second, Fourth, and D.C. Circuits. More specifically, the probability of a plaintiff misclassification win increased by 0.362 for plaintiffs with specialist representation, as compared to pro se plaintiffs. This 0.362 difference represents a 348% increase over a pro se plaintiff's win probability.[112] Notably, the difference in win

109. As Lee Epstein and her co-authors explain it, in logistic regressions, "one of the variables is left out of the regression equation, with the result that the coefficients of the other variables indicate their relation to that one." EPSTEIN, LANDES & POSNER, *supra* note 107, at 23.

110. The results for independent variables that are continuous—those that report the percentage of misclassified workers and demographics of workers in each occupation—are interpreted differently. For those, the regression equation estimates the impact on the dependent variable from a one unit increase in the independent variable. The transformation of logistic regression coefficients using marginal effects at means (MEMs) complicates this somewhat. However, none of the continuous variables produced statistically significant results in the regression reported in Table 3. *See* RICHARD WILLIAMS, MARGINAL EFFECTS FOR CONTINUOUS VARIABLES 3, https://www3.nd.edu/~rwilliam/stats3/Margins02.pdf (last revised Jan. 23, 2016) ("MEMs for continuous variables measure the *instantaneous rate of change*, which may or may not be close to the effect on P(Y=1) of a one unit increase in $X_k$.").

111. *See* EPSTEIN & MARTIN, *supra* note 107, at 238–40 (advocating for reporting not only standard errors but also ninety-five percent confidence intervals).

112. A pro se plaintiff's win probability was 0.104; the predicted probability for specialist-represented plaintiffs was 0.466; the 0.362 difference represents a 348 percent increase over the pro se plaintiff's misclassification win probability. *See* EPSTEIN, LANDES & POSNER, *supra* note 107, at 24 (discussing calculation of percentage change in outcome probability). Taking account of the ninety-five percent confidence interval, however, we can see that the coef-

probabilities between pro se and non-specialist represented plaintiffs was not significant, meaning that we cannot draw any conclusions from those results in Table 3. Nevertheless, it is clear from other research that pro se plaintiffs operate at a significant disadvantage as compared to represented plaintiffs, whether due to the underlying lack of merit of their claims or lack of attorney guidance; this finding aligns with that research.[113]

The other set of variables that were positively correlated with a plaintiff's misclassification win were a district court's location in the First, Second, Fourth, and D.C. Circuits. Cases decided in these circuits fared better than those decided by courts in the Fifth Circuit, the value in the base category. The "Circuit" variable was included in the regression to capture potential differences in geography, court makeup, and in the legal rules that courts employ in misclassification cases. Here, an explanatory note is in order.

Though the coders originally recorded whether each district court used the common law or hybrid test for employee status, this "test" variable was not used in the regression reported in Table 3. This is because in fourteen cases, courts used no test at all, and conclusorily declared the plaintiff an independent contractor on the basis of the pleadings, the existence of a written contract, or a plaintiff admission.[114] When the "test" variable is included in the regression, it creates problems, as the fourteen no-test values perfectly predict plaintiff misclassification losses. When the no-test values are dropped, the choice between the common law and hybrid tests turns out to have no statistically significant effect on the misclassification outcome—possibly lending support to the Restatement's position that the two tests are functionally equivalent in practice.[115]

ficient could be as low as 0.144 and as high as 0.580, meaning that the misclassification win probability for specialist-represented plaintiffs could actually increase (as compared to pro se plaintiffs) by between 138 and 558 percent.

113. *See* Nielsen et al., *supra* note 8, at 188–89 (finding that pro se plaintiffs in their sample were "almost three times more likely to have their cases dismissed, [we]re less likely to gain early settlement, and [we]re twice as likely to lose on summary judgment. . . . The powerful effect of legal representation might be explained as a selection effect. That is, obtaining legal representation reveals an otherwise unmeasured variable of quality of case").

114. In the remaining 140 cases, seventy-one percent of courts used the common law test and twenty-nine percent used the hybrid test.

115. RESTATEMENT (THIRD) OF EMP'T LAW § 1.01 cmt. d–e (AM. LAW INST., Proposed Final Draft 2014).

Moreover, a court's use of no test at all was highly correlated with a plaintiff's pro se status and with the misclassification decision's reference to a written contract, variables that themselves produced significant results. For these reasons, the "test" variable was dropped from the regression.[116]

Moreover, among the courts that did use a test, their choice of the common law or hybrid test was highly correlated with the circuit in which they were located. As Table 4 shows, all misclassification decisions issued by district courts in the Fifth Circuit, for example, that used a test used the hybrid test. This is in contrast with the Second Circuit, in which courts used the common law test in all nineteen decisions.

**Table 4: District Courts' Employee Status Test Usage by Circuit**

| *Circuit* | *Common Law Test* | *Hybrid Test* | *No Test* |
|---|---|---|---|
| First Circuit | 9 | 0 | 0 |
| Second Circuit | 19 | 0 | 0 |
| Third Circuit | 13 | 0 | 1 |
| Fourth Circuit | 13 | 2 | 3 |
| Fifth Circuit | 0 | 12 | 1 |
| Sixth Circuit | 8 | 1 | 1 |
| Seventh Circuit | 6 | 5 | 1 |
| Eighth Circuit | 8 | 4 | 1 |
| Ninth Circuit | 13 | 3 | 3 |
| Tenth Circuit | 4 | 2 | 1 |
| Eleventh Circuit | 3 | 10 | 1 |
| D.C. Circuit | 3 | 2 | 1 |
| Total | 99 | 41 | 14 |

*Note*: *N*=154

Because the hybrid test is generally seen as more plaintiff-friendly than the common law test, one would expect decisions from common law-heavy circuits to favor plaintiffs less frequently.[117] This is not the case in the regression results shown

116. *See* KENNEDY, *supra* note 63, at 197 (discussing dropping highly correlated, or collinear, variables).

117. *See, e.g.*, Dowd, *supra* note 7, at 114 (advocating for the economic realities test over the common law test: "A liberal definition of employee status is

in Table 3: in the common law-heavy First, Second, and Fourth Circuits, as well as the mixed D.C. Circuit, variables produced better plaintiff win probabilities than in the Fifth. This could be read as further confirmation of the Restatement's position that the common law and hybrid tests actually converge in reality,[118] seen in combination with the lack of statistical significance of the "test" variable on its own. However, the circuit differences observed here are likely also the result of a combination of unobserved factors, including perhaps the varying political ideologies and compositions of the panels that issue precedential misclassification decisions.[119]

Finally, two variables were negatively associated with plaintiff misclassification wins at a statistically significant level: the presence of a failure to hire fact pattern in the underlying Title VII case and the reference to a written contract between the parties in the misclassification decision. The probability of a misclassification win for those plaintiffs alleging a discriminatory failure to hire decreased by 0.276 as compared to those plaintiffs who made no such allegation, a drop of ninety percent. For those cases in which the decision referred to a written contract, the predicted probability of a misclassification win decreased by 0.258, or a seventy percent drop as compared with those decisions in which no reference appeared.[120]

critical to that goal, as part of an interlocking structure that guarantees the broadest possible access to protection against employment discrimination. The economic realities test ensures that goal by focusing on the employer's ability to erect arbitrary, unnecessary barriers to employment opportunities based on race, sex, religion or national origin. This broad test is essential to guaranteeing that the policies and goals of Title VII will be achieved").

118. *See* RESTATEMENT (THIRD) OF EMP'T LAW § 1.01 cmt. d–e.

119. *See generally* EPSTEIN, LANDES & POSNER, *supra* note 107 (discussing influences on circuit judges' decision-making). There is also the question of whether and how well district courts, whose decisions are studied here, actually follow circuit court guidance in deciding which legal test to employ.

120. Taking account of the ninety-five percent confidence intervals for both the failure to hire and written contract variables, we can see that the coefficient for failure to hire could range from -0.427 to -0.125 and the coefficient for the written contract variable could range from -0.434 to -0.083. This means that the misclassification win probability for plaintiffs with failure to hire claims could actually decrease by between 139 and 41 percent, and the win probability could decrease with the presence of a written contract reference by between 118 and 22 percent.

## IV. DISCUSSION

This Part returns to the three theories summarized above to contextualize the regression results and make some normative critiques about courts' processing of misclassification challenges. First, with regard to legal formalism, as the previous Part explained, a court's choice of the common law or hybrid test did not produce a statistically significant change in a plaintiff's probability of winning a misclassification challenge. Nor did the variable that captured the relative misclassification risk in a plaintiff's occupation—a rough merits proxy—have a statistically significant impact on a plaintiff's win probability.

It may be tempting to interpret these non-results as a refutation of legal formalism and confirmation of critical realism, i.e., the position that legal rules do not matter as much as other factors in influencing the outcome of legal disputes.[121] However, regression coefficients that are not statistically significant cannot be read as such: they merely fail to prove or disprove a relationship (or lack thereof) between the independent and dependent variables.[122] Alternatively, these results could be seen as confirmation of the Restatement's position that the two ostensibly separate legal tests are not actually all that different.[123] In this view, the lack of a result with respect to the "test" variable does not mean that courts are disregarding the law, but rather that the law they are applying cannot be meaningfully divided into "common law" and "hybrid" approaches. The non-result may therefore be an artifact of the lack of distinction between the two values that the "test" variable can take on.

In fact, some of the other regression results suggest that the law may matter in ways that are consistent with legal formalism. The fact that plaintiffs who were represented by specialist attorneys are so much more likely to succeed in their misclassification challenges than pro se plaintiffs may suggest that attorneys can gauge the strength of a claim against some legal standard, and that courts do, in fact, employ that same legal standard in deciding wins and losses.[124]

121. *See supra* Parts III.B.1, III.B.3.

122. *See* WOOLDRIDGE, *supra* note 107, at 135–37 (explaining interpretation of regression non-results).

123. RESTATEMENT (THIRD) OF EMP'T LAW § 1.01 cmt. d–e.

124. *See* Nielsen et al., *supra* note 8, at 178 ("The formal legal model would assume that the behavior of lawyers in accepting, defending, and settling cases will reflect their knowledge of the law and their prediction of how a judge or jury would decide a case.").

The lower probability of a misclassification win for plaintiffs with hiring discrimination claims may also support a legal formalist view.[125] As a general matter, hiring discrimination claims tend to be particularly hard for plaintiffs to win. This is because plaintiffs who are in the position of a rejected applicant may lack evidence about why they were rejected (other than their own suspicions of discrimination) and must wait until discovery to amass the statistics or other proof supporting their claim.[126] Judges may therefore be consciously or unconsciously targeting discriminatory hiring claims for dismissal on the misclassification question, to avoid having to engage with those cases' messy fact patterns later in litigation.[127] The formal proof requirements that doom the underlying Title VII hiring claim may thus be casting a shadow earlier in the case to doom a plaintiff's misclassification challenge as well.

A less tangential connection between the presence of a failure to hire claim in a lawsuit and a misclassification loss might stem from the nature of the allegations and proof that a worker must present in order to win the misclassification claim itself. Both versions of the employee status test require courts to consider a variety of fact-specific criteria in distinguishing between employees and independent contractors, including, inter alia, the worker's schedule and method of payment and the putative employer's record keeping and level of control.[128] When a worker has never been hired, he or she has no facts from which to draw to make a showing on these factors. Thus, the worker is in the position of arguing about what his or her hypothetical work relationship *would have looked like* had he or she been hired. This would seem to be an exceedingly difficult task, making hiring discrimination cases particularly hard to win on the misclassification question.[129] Consistent with a legal formal-

125. *See supra* Part III.B.1.

126. *See* Jessica Fink, *Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants*, 38 N.M. L. REV. 333, 346 (2008) ("[I]t always has been harder for an individual to 'prove' that he or she was wrongfully passed over for a position than that he or she was wrongfully fired.").

127. *See id.*

128. *See* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) (describing factors considered in the common law test); Oestman v. Nat'l Farmers Union Ins., 958 F.2d 303, 305 (10th Cir. 1992) (describing factors considered in the hybrid common law-economic realities test).

129. Non-traditional employment relationships present additional conceptual difficulties in drawing "hiring" and "firing" lines. For example, imagine a worker who is labeled an independent contractor and engaged for a particular

ist view, the proof requirements of the law, and the plaintiff's inability to meet them, would seem to explain the plaintiff's loss.[130] Thus, buried within the regression results are some legal formalist hints that the law does matter to judges' misclassification decisions, though the common law-hybrid distinction seems to matter less than some commentators would believe.[131]

Second, contractual formalist theories find support in the regression result regarding judges' references to written contracts: in cases with such a reference, a plaintiff's misclassification win probability was seventy percent lower than in cases with no such reference.[132] These cases, which represented just over one-third of the data set, were of two types: those in which courts cited the presence of a contract in conclusorily declaring the plaintiff an independent contractor, and those in which courts cited a contract but also engaged in a multifactor analysis, ultimately ruling against the plaintiff. In an example of the latter, a Northern District of Indiana court stated the following:

> The best evidence of Jones' independent contractor status is contained within the plain language of the Agreement itself. Jones is identified as, and signed the Agreement as, an independent contractor. The term "independent contractor" is used on numerous occasions throughout the [two]-page document. By signing the Agreement Jones acknowledged its contents and cannot now be heard to claim she thought she was an employee of AWS.[133]

Though the court went on to consider a variety of facts about the parties' underlying work relationship,[134] the outcome of the plaintiff's misclassification challenge was likely predetermined by the court's characterization of the parties' written contract as the "best evidence of [the plaintiff's] independent contractor status."[135]

job. The job ends, and she is not engaged again when another job becomes available. Is this a termination or a failure to hire?

130. *See* Nielsen et al., *supra* note 8, at 178 ("The outcome of a case should be determined by how well a plaintiff meets the formal requirements for making and proving a claim of discrimination.").

131. *See, e.g.*, Dowd, *supra* note 7, at 114 (advocating for the ostensibly broader economic realities test over the common law test to achieve Title VII's broad remedial purpose).

132. *See supra* Part III.B.2.

133. Jones v. A.W. Holdings, LLC, No. 109cv284 WCL, 2011 WL 488634, at *13–14 (N.D. Ind. Feb. 7, 2011); *see also* cases cited *supra* note 100.

134. *Jones*, 2011 WL 488634, at *13–19.

135. *Id.* at *13 (considering economic realities factors). Of course, a correlation between plaintiff misclassification losses and the presence of a written contract does not necessarily mean that the contract caused the loss. Work relationships in which a written contract was present might also feature more

As Julia Tomassetti has observed, courts that engage in this sort of reasoning, in which the existence of a written contract serves a sort of talismanic purpose, are "construct[ing] the written work contract as an institutional marker of non-employment, and . . . this construction is often a misleading use of contractual formalism."[136] Indeed, the misclassification analysis requires courts to set aside the labels that the parties assign to their working relationship and instead to consider the facts of the relationship as it actually operated.[137] Courts that fail to engage with this sort of analysis are employing what Barton Beebe has labeled in a different context "a 'fast and frugal' heuristic[] to short-circuit the multifactor analysis" required by either the common law or hybrid approach.[138]

The upshot of courts' reliance on written contracts is that they functionally cede the power to define the parties' relationship to the parties themselves. This is troubling on a practical level because of the possibility of sham contracts that are not bilateral at all; workers may sign them not because they intend to create an independent contractor relationship, but because they fear losing their job if they refuse.[139] Such a sham contract

indicia of independence on the part of the worker. However, in cases like *Jones*, causation appears more likely, as the court expressly characterized the contract as the "best evidence" of the worker's status.

136. Tomassetti, *supra* note 6, at 1114; *see also* Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917) (criticizing contractual formalism for viewing "the precise word was the sovereign talisman").

137. *See supra* Part III.B.2.

138. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1581 (2006) (discussing judges' shortcuts in the context of multifactor trademark infringement analyses). Thanks to Robert Bird for this insight.

139. *See* Russell v. BSN Med., Inc., 721 F. Supp. 2d 465, 474 (W.D.N.C. 2010) (describing a worker who was pressured to sign a contract labeling her an independent contractor and "was told multiple times she would be fired if she did not sign the Agreement by a specific date"; noting the employer's "obvious incentive from a legal liability standpoint to memorialize in writing that Russell was an independent contractor rather than an employee"); Peeples v. Prestige Delivery Sys., Inc., Civil Action No. 11-2373, 2011 WL 6303246, at *3 (E.D. Pa. Dec. 16, 2011) (dismissing the plaintiff's Title VII claims on the ground that he had signed an "Independent Contractor Operating Agreement," despite evidence that "Plaintiff [had been] compelled to sign the 2006 agreement without the opportunity to negotiate its terms and without the benefit of legal counsel"); *Payroll Fraud Hearing*, *supra* note 29, at 4 (statement of Catherine K. Ruckelshaus, National Employment Law Project) ("When job opportunities are scarce, workers face increased pressure to acquiesce to independent contractor arrangements. An Ohio worker who agreed in 2010 to be labeled an independent contractor as a condition of getting a job building housing for the homeless under a federal grant explained, 'I went along with it

then becomes indistinguishable from the employer-imposed unilateral "independent contractor" label that courts are so quick to reject.[140]

On a more theoretical level, courts' reliance on the existence of a written contract between the parties to short-circuit the misclassification inquiry threatens to undermine the non-waiver principle that is the bedrock of employment law.[141] As Cynthia Estlund explains, "[M]ost employee rights—such as the right to be paid a minimum wage or to be free from discrimination—cannot be waived ex ante."[142] Estlund comments that, due to the variety of mandates and prohibitions imposed by employment and labor statutes, "[t]he vast and varied domain of employee rights has made the employment relationship as much a creature of public law as of private law."[143] Public law statutes like Title VII therefore create a set of inalienable employment rights, which workers cannot waive and employers cannot contract around, even with a willing partner.[144] Courts

because I felt my back was up against the wall. I have a family. My fiance [sic] was in school. I'm the only bread winner.'").

140. *See supra* Part III.B.2.

141. Thanks to comments by Noah Zatz for prompting this thought.

142. Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 388 n.19 (2006) (citing Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 739–40 (1981)) recognizing that the Fair Labor Standards Act's protections against substandard wages and oppressive conditions "cannot be abridged by contract or otherwise waived"); Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) ("[T]here can be no prospective waiver of an employee's rights under Title VII.").

143. Estlund, *supra* note 142, at 387.

144. *See* Eisenberg v. Advance Relocation & Storage, Inc., 237 F.3d 111, 116 (2d Cir. 2000) ("While the rights to intellectual property can depend on contractual terms, the right to be treated in a non-discriminatory manner does not depend on the terms of any particular contract. Rather, these 'public law' rights were vested in workers as a class by Congress, and they are not subject to waiver or sale by individuals." (citation omitted)); Yu v. N.Y.C. Hous. Dev. Corp. (HDC), No. 07 Civ. 5541(GBD)(MHD), 2011 WL 2326892, at *28 (S.D.N.Y. Mar. 16, 2011) ("[D]efendants' argument that plaintiff's employment status was agreed upon in the Consulting Agreement is without merit. . . . Employers cannot simply contract their way around the antidiscrimination laws, since these laws create rights that 'are not subject to waiver or sale.' Thus, 'employment contracts, no matter what the circumstances that justify their execution or what the terms, may not be used to waive protections granted to an individual under [Title VII] or any other [A]ct of Congress.'" (quoting *Eisenberg*, 237 F.3d at 116–17)); *cf.* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092–93 (1972) (discussing inalienability in property rights); Michael C. Harper, *Union Waiver of Employee Rights Under the*

in misclassification cases whose decisions are predetermined by the existence of a written contract make inroads on inalienability, allowing the parties to enact a prospective super-waiver not only of their Title VII rights, but also of the great majority of all other federal labor and employment rights whose coverage turns on employee status.[145]

Third, the regression results neither fully corroborate nor contradict the critical realist position that the parties' social status is an important predictor of success in litigation. The regression yielded no statistically significant results for the white-collar plaintiff occupation variable, for instance, one that might predict plaintiff success in a critical realist world. Nor were plaintiffs who brought disfavored race and national origin discrimination claims less successful on the misclassification question, at a statistically significant level, than those who made other types of discrimination allegation. Nor did plaintiffs who held jobs associated heavily with women or people of color fare worse than other workers.[146]

However, the striking success of specialist-represented plaintiffs, interpreted above as possible support for the legal formalist position that high-merit cases win more often, could also be interpreted as support for the critical realist position that more socially powerful plaintiffs win more often. As Nielsen et al. put it, the assumption is that more socially powerful and wealthier plaintiffs "will convert these social resources into legal resources" such as specialist attorneys.[147]

Yet the real confirmation for the critical realist position might not be found by examining the results of cases that are actually filed in court. As Part II.C above explored in its discussion of selection effects, critical realism could be deployed to explain the slippage between the categories of misclassified workers who are most likely to experience discrimination and those plaintiffs who actually file Title VII cases and challenge their independent contractor status. That the workers in the

*NLRA: Part I*, 4 BERKELEY J. EMP. & LAB. L. 335 (1981) (discussing inalienable rights in labor law); Michael L. Wachter, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1368 (1988) (same).

145. *See Eisenberg*, 237 F.3d at 116–17; *Yu*, 2011 WL 2326892, at *28.

146. The fact that there were no statistically significant results with respect to these variables does not mean that no relationship exists as a matter of fact, just that none can be discerned from these data.

147. Nielsen et al., *supra* note 8, at 180.

former category tend to hold lower wage, bluer-collar jobs than the plaintiffs in the latter would be no surprise to the critical realist.

## CONCLUSION

This Article has asked two questions. First, to what extent is misclassification removing Title VII coverage from workers who are otherwise likely to become antidiscrimination plaintiffs? Second, how are courts resolving Title VII misclassification disputes, acting to bring workers back into the statute's ambit?

From the foregoing analyses, we can suggest some tentative answers. First, misclassification appears to be both gendered and raced, pulling disproportionate numbers of women and workers of color out of Title VII's coverage. Of the eight occupations that are most at risk for misclassification and contribute the most misclassified workers to the economy, women and/or people of color are overrepresented in seven. And women of color are overrepresented in four: hairdressers, maids and housekeepers, teacher assistants, and door-to-door sales workers and street vendors. This suggests that misclassification may be undermining the protections offered by Title VII by removing workers from the statute's reach. Second, the workers who turn to the courts to challenge their improper classification and gain access to Title VII are a different group from those just described. Consistent with previous research and with the critical realist perspective, the workers who use the courts are generally better paid and thus more socially privileged than the larger population of potential Title VII plaintiffs who are misclassified. These results raise serious, though far from novel, questions about access to justice.

Third, even those workers who use the courts do not fare very well, as two-thirds lose their misclassification challenges. And fourth, misclassification losses are unevenly distributed, as specialist attorney representation and circuit location predict greater plaintiff misclassification win probabilities; underlying hiring discrimination allegations and judges' references to written contracts predict lower win probabilities. This final finding is particularly interesting, and troubling, given its implications for the inalienability of employment rights.

These conclusions highlight multiple areas in which further study is needed. Specifically, this Article has set aside the two central questions of why misclassification occurs in the oc-

cupations identified in the Roemer research, and why gender and race distributions occur as they do among those high misclassification occupations. Solving those riddles would help in constructing solutions to the misclassification problems identified here.

## APPENDIX

**Table 5: Occupations Most at Risk for Misclassification, as Measured by CPS-DER Mismatch Rate (Numbers in Thousands)**[148]

| *Occupation* | *Total Workers in Occupation* | *Misclassified Workers in Occupation* | *Percent of Workers Misclassified* |
|---|---|---|---|
| Real estate brokers and sales agents | 1,027 | 450 | 43.8 |
| Barbers | 79 | 26 | 32.9 |
| Fishers and related fishing workers | 78 | 22 | 28.2 |
| Miscellaneous social scientists and related workers | 37 | 9 | 24.3 |
| Clergy | 953 | 217 | 22.8 |
| Dentists | 163 | 37 | 22.7 |
| Maids and housekeeping cleaners | 919 | 160 | 17.4 |
| Childcare workers | 482 | 76 | 15.8 |
| Carpet, floor, and tile installers and finishers | 312 | 43 | 13.8 |
| Hairdressers, hairstylists, and cosmetologists | 1,287 | 175 | 13.6 |
| Lawyers | 1,488 | 185 | 12.4 |
| Judges, magistrates, and other judicial workers | 1,488 | 185 | 12.4 |
| Door-to-door sales workers, news and street vendors, and related workers | 782 | 82 | 10.5 |
| Teacher assistants | 1,176 | 115 | 9.8 |
| Farmers, ranchers, and other agricultural managers | 444 | 43 | 9.7 |
| Management analysts | 480 | 45 | 9.4 |
| Musicians, singers, and related workers | 259 | 24 | 9.3 |
| Insurance sales agents | 1,345 | 115 | 8.6 |

148. ROEMER, *supra* note 26.

| *Occupation* | *Total Workers in Occupation* | *Misclassified Workers in Occupation* | *Percent of Workers Misclassified* |
|---|---|---|---|
| Securities, commodities, and financial services sales agents | 874 | 74 | 8.5 |
| Taxi drivers and chauffeurs | 422 | 35 | 8.3 |
| Court, municipal, and license clerks | 194 | 15 | 7.7 |
| Artists and related workers | 234 | 15 | 6.4 |
| Carpenters | 2,801 | 164 | 5.9 |
| Psychologists | 553 | 31 | 5.6 |
| Physicians and surgeons | 1,444 | 79 | 5.5 |
| Photographers | 276 | 15 | 5.4 |
| Construction laborers | 2,361 | 128 | 5.4 |
| Advertising sales agents | 359 | 18 | 5.0 |
| Designers | 1,305 | 59 | 4.5 |
| Roofers | 481 | 20 | 4.2 |
| Property, real estate, and community association managers | 764 | 30 | 3.9 |
| First-line supervisors of construction trades and extraction workers | 1,412 | 55 | 3.9 |
| Painters, construction and maintenance | 1,101 | 42 | 3.8 |
| Grounds maintenance workers | 2,290 | 78 | 3.4 |
| Driver/sales workers and truck drivers | 7,636 | 241 | 3.2 |
| Sales representatives, wholesale and manufacturing | 4,084 | 121 | 3.0 |
| Sales representatives, services, all other | 1,614 | 47 | 2.9 |
| Miscellaneous agricultural workers | 2,522 | 69 | 2.7 |
| Automotive service technicians and mechanics | 2,134 | 55 | 2.6 |
| Marketing and sales managers | 10,750 | 226 | 2.1 |

*Notes*: All occupations listed had CPS-DER mismatch likelihood ratios of at least one percent, per Roemer. Mismatch percentages, rather than likelihood ratios, are reported here, due to the difficulty of reverse-engineering Roemer's table without access to the underlying data. Occupation names listed here have been converted to their closest equivalent among the standardized occupations used in Bureau of Labor Statistics data.

**Table 6.1: Descriptive Statistics: Categorical Variables**

| *Variable* | *Frequency* | *Percent* |
|---|---|---|
| Misclassification win for plaintiff | 53 | 34.42 |
| Misclassification loss for plaintiff | 101 | 65.58 |
| Misclassification win cases only: | | |
| Title VII win for plaintiff | 3 | 5.66 |
| Title VII settlement | 34 | 64.15 |
| Title VII loss for plaintiff | 12 | 22.64 |
| Case still open | 4 | 7.55 |
| All cases: | | |
| Title VII win for plaintiff | 3 | 1.95 |
| Title VII settlement | 34 | 22.08 |
| Title VII loss for plaintiff | 113 | 73.38 |
| Case still open | 4 | 2.60 |
| Pro se plaintiff | 53 | 34.42 |
| Non-specialist attorney representation | 45 | 29.22 |
| Specialist attorney representation | 56 | 36.36 |
| Blue-collar plaintiff occupation | 50 | 32.47 |
| White-collar plaintiff occupation | 104 | 67.53 |
| Overlap occupations: | | |
| Judges, magistrates, and other judicial workers | 1 | 0.65 |
| Clergy | 1 | 0.65 |
| Real estate brokers and sales agents | 3 | 1.95 |
| Hairdressers, hairstylists, and cosmetologists | 0 | 0.00 |
| Teacher assistants | 0 | 0.00 |
| Door-to-door sales workers, news and street vendors, and related workers | 3 | 1.95 |
| Maids and housekeeping cleaners | 0 | 0.00 |
| Defendant industry: | | |
| Trucking, construction, maintenance | 24 | 15.58 |
| Retail | 7 | 4.55 |
| Manufacturing, agriculture | 8 | 5.19 |
| Package delivery | 7 | 4.55 |
| School, university | 10 | 6.49 |
| Medical, health, social services | 28 | 18.18 |
| Media, entertainment | 11 | 7.14 |
| Government | 26 | 16.88 |
| Financial services, insurance, other professional services | 33 | 21.43 |
| Race discrimination claim in case | 68 | 44.16 |
| No race discrimination claim in case | 86 | 55.84 |
| Sex discrimination claim in case | 82 | 53.25 |

| *Variable* | *Frequency* | *Percent* |
|---|---|---|
| No sex discrimination claim in case | 72 | 46.75 |
| Any other discrimination claim in case: | 35 | 77.27 |
| Religious discrimination claim in case | 15 | 9.74 |
| No religious discrimination claim in case | 139 | 90.26 |
| National origin discrimination claim in case | 23 | 14.94 |
| No national origin discrimination claim in case | 131 | 85.06 |
| Color discrimination claim in case | 7 | 4.55 |
| No color discrimination claim in case | 147 | 95.45 |
| No other discrimination claim in case | 119 | 77.27 |
| Retaliation claim in case | 75 | 48.70 |
| No retaliation claim in case | 79 | 51.30 |
| Failure to hire fact pattern in case | 15 | 9.74 |
| No failure to hire fact pattern in case | 139 | 90.26 |
| Termination fact pattern in case | 83 | 53.90 |
| No termination fact pattern in case | 71 | 46.10 |
| Harassment/discriminatory conditions claim in case | 74 | 48.05 |
| No harassment/discriminatory conditions claim in case | 80 | 51.95 |
| Democrat-appointed judge | 60 | 38.96 |
| Republican-appointed judge | 94 | 61.04 |
| Common law agency test | 99 | 64.29 |
| Hybrid test | 41 | 26.62 |
| No test | 14 | 9.09 |
| Reference to written contract in case | 52 | 33.77 |
| No reference to written contract in case | 102 | 66.23 |
| First Circuit | 9 | 5.84 |
| Second Circuit | 19 | 12.34 |
| Third Circuit | 14 | 9.09 |
| Fourth Circuit | 18 | 11.69 |
| Fifth Circuit | 13 | 8.44 |
| Sixth Circuit | 10 | 6.49 |
| Seventh Circuit | 12 | 7.79 |
| Eighth Circuit | 13 | 8.44 |
| Ninth Circuit | 19 | 12.34 |
| Tenth Circuit | 7 | 4.55 |
| Eleventh Circuit | 14 | 9.09 |
| D.C. Circuit | 6 | 3.90 |
| 2005 | 9 | 5.84 |
| 2006 | 12 | 7.79 |
| 2007 | 10 | 6.49 |
| 2008 | 9 | 5.84 |
| 2009 | 18 | 11.69 |
| 2010 | 25 | 16.23 |

| *Variable* | *Frequency* | *Percent* |
|---|---|---|
| 2011 | 18 | 11.69 |
| 2012 | 22 | 14.29 |
| 2013 | 14 | 9.09 |
| 2014 | 17 | 11.04 |

**Table 6.2: Descriptive Statistics: Continuous Variables**

| *Variable* | *Minimum* | *Maximum* | *Mean* | *Median* | *Standard Deviation* |
|---|---|---|---|---|---|
| Percent of workers misclassified in occupation | 0.0 | 43.8 | 3.9 | 0.0 | 7.01 |
| Number of workers misclassified in occupation (in thousands) | 0.0 | 450.0 | 59.3 | 0.0 | 99.9 |
| Percent of workers in occupation: women | 0.0 | 22.0 | 3.7 | 4.0 | 3.46 |
| Percent of workers in occupation: Black or African American | 0.0 | 3.0 | 0.4 | 0.0 | 0.57 |
| Percent of workers in occupation: Asian | 0.0 | 2.0 | 0.4 | 0.0 | 0.74 |
| Percent of workers in occupation: Hispanic or Latino | 0.0 | 5.0 | 0.9 | 1.0 | 0.93 |