MISCLASSIFICATION AND ANTIDISCRIMINATION

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Nearly every federal employment discrimination statute applies exclusively to employees. Employers can therefore exclude workers from antidiscrimination laws’ coverage by classifying them as independent contractors. Misclassified workers may challenge their independent contractor status in court, but little is known about plaintiffs’ success rates. Accordingly, this article presents the results of an original empirical study of misclassification challenges in cases brought under Title VII of the Civil Rights Act of 1964 during a recent five year period. This work is an initial step in assessing the impact of misclassification on antidiscrimination protections, and the effectiveness of misclassification challenges in pushing back.

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INTRODUCTION

A central assumption embedded in antidiscrimination law is that legal rights against job discrimination can reduce inequality that penalizing certain types of employment discrimination will produce more diverse and inclusive workplaces.\(^1\) Strong antidiscrimination protections and remedies, the story goes, can ensure that, in the words of the U.S. Supreme Court, “the workplace will be an environment free of discrimination, where race [or any other protected status] is not a barrier to opportunity.”\(^2\)

However, antidiscrimination laws’ effectiveness is not only a function of the strength of the rights and remedies that the laws confer, but also of whether the laws can even reach the groups of workers they are intended to protect.\(^3\) All federal employment discrimination statutes but one apply exclusively to employees and not to independent contractors.\(^4\) In other words, in most circumstances, employers are free to reject workers for jobs, fire them, and otherwise discriminate on the basis of race, sex, religion, national origin, color, disability, and age, and to be absolutely explicit about their reasons for doing so, as long as those workers carry the label of “independent contractor.” Employers can thus write groups of workers out of most antidiscrimination laws’ coverage by using their power to classify their workforce, creating work arrangements in which workers are labeled “independent contractors” rather than “employees.”

While true independent contractors do exist,\(^5\) a large body of scholarship has identified a

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1. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 72 (1977) (“From the outset, Congress has said that ‘[t]he purpose of [Title VII] is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin.’

2. Ricci v. DeStefano, 557 U.S. 557, 580 (2009); see also Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (holding that “the central statutory purposes” of Title VII are “eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination”).

3. In fact, the effectiveness of Title VII of the Civil Rights Act of 1964 in improving the labor market outcomes of classes of workers protected by the statute remains a somewhat open question. Joni Hersch & Jennifer Bennett Shinall, Fifty Years Later: The Legacy of the Civil Rights Act of 1964, Vanderbilt University Law School Law and Economics Working Paper No. 14-33 SSRN at 46 (Nov. 25, 2014) (“Our review of the literature evaluating the effects of the Civil Rights Act of 1964 has centered on Title VII, finding some evidence that this title has improved wage and employment outcomes for African Americans and women in the labor market. At the same time, we acknowledge the limitations inherent in assessing the true impact of Title VII given the data constraints.”).

4. 42 U.S.C. § 1981 requires all people to receive the same treatment as white citizens in contracting, and so has been used by contracted workers to pursue race and national origin discrimination claims. Danielle Tarantolo, From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce, 116 YALE L.J. 170, 184 (2006) (explaining Section 1981’s coverage of contracted workers). Otherwise, independent contractors are barred from bringing claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Equal Pay Act, and the Age Discrimination in Employment Act. Contractors also fall outside the coverage of other federal statutes that provide rights on the job: the National Labor Relations Act (protecting workers’ rights to organize, bargain collectively, and engage in concerted activity); the Occupational Safety and Health Act (protecting workers’ rights to a safe workplace); the Fair Labor Standards Act (guaranteeing the minimum wage and overtime pay); and the Family and Medical Leave Act (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 exclusion of independent contractors from coverage of federal antidiscrimination laws, with the single exception of 42 U.S.C. § 1981).

5. The archetypal example of an independent contractor in the legal literature is the plumber. 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 discrete
growing trend of employers’ “misclassifying” workers as independent contractors who are properly employees.\textsuperscript{6} In some extreme cases, workers who were previously classified as employees arrive at their jobs only to find that they have 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.\textsuperscript{7} Research also suggests that those workers who are most at risk for misclassification are also those who have historically been targets of job discrimination: women and members of ethnic and racial minority groups.\textsuperscript{8} Misclassification thus has the effect of removing legal protection against discrimination from those workers who may need it most.

However, misclassified workers who experience discrimination are not entirely out of luck, as they may challenge their independent contractor status in court. Misclassification becomes a threshold dispute that a court must resolve before proceeding to the substance of a worker’s discrimination claims.\textsuperscript{9} In this view, the misclassification question is key to the antidiscrimination project, as workers who cannot win a misclassification challenge cannot gain access to equality rights. However, little is known about plaintiffs’ success rates in misclassification challenges.

This article contributes to the literatures on misclassification and antidiscrimination by presenting the results of an original empirical study of all employment discrimination cases brought under Title VII of the Civil Rights Act of 1964 (“Title VII”) in federal district courts over the five-year period between 2009 and 2013 in which workers made misclassification arguments that resulted in a decision available on Westlaw. This work is an initial step in assessing the impact that the misclassification trend may have on antidiscrimination protections, and the effectiveness of misclassification challenges in pushing back. While misclassification itself has received much scholarly attention, largely in connection with workers’ wage and hour claims under the Fair Labor Standards Act, the connection between misclassification and...
antidiscrimination has not been fully explored theoretically or empirically. In addition, while the substantive and procedural narrowing of Title VII protections has been examined extensively in legal scholarship, misclassification has rarely been identified as one of the barriers facing Title VII plaintiffs.

Accordingly, in Part I, this article defines “misclassification” and summarizes the legal and social science literatures on the misclassification trend. Part II describes the data and methodology used in the article’s original empirical study of misclassification challenges in Title VII cases. Part III presents the results: the characteristics of the workers in the data set who made misclassification challenges, the characteristics of the defendants, the legal test(s) used by the courts, and the outcomes of the workers’ misclassification arguments. Specifically, sixty-four percent of plaintiffs lost on the misclassification question, ending their Title VII claims completely at the threshold of the case. Four variables were associated with a plaintiff’s misclassification loss: the presence of a race discrimination claim in the case, the presence of a failure to hire claim in the case, the plaintiff’s *pro se* status, and the court’s failure to use any legal test to determine employee status. Part IV discusses the implications of these results for both misclassification and antidiscrimination law reform proposals, and Part V concludes.

I. The Problem of Misclassification

A. “Misclassification” Defined

“Misclassification” refers here to employers’ practice of improperly categorizing workers as independent contractors. Despite their label, misclassified workers are not true contractors, as their work arrangements fail to meet the requirements for independent contractor status.

Those who study misclassification tend to use one or both of two measures for...
distinguishing between employees and independent contractors: courts’ interpretations of federal employment laws’ definitions of “employee” and/or Internal Revenue Code provisions that distinguish between independent contractors and employees. A brief summary of these two measures is below, though this article focuses primarily on courts’ treatment of the misclassification question under federal employment law, as a threshold question to be resolved in Title VII cases.

The Internal Revenue Service (IRS) uses a twenty-factor test to determine whether a worker is an employee or an independent contractor. The IRS groups these factors into three broad categories: (1) the extent of the employer’s control over the worker’s behavior, considering whether the employer controls “what the worker does and how the worker does his or her job”; (2) the extent of the employer’s control of the worker’s finances, considering, inter alia, the employer’s method of payment and whether the worker or employer provides the supplies and tools necessary for the job; and (3) the type of relationship between the employer and worker, considering whether there is a written contract governing the employment relationship, and whether the worker receives benefits such as insurance and paid leave from the employer. These distinctions are significant for tax purposes, because employers whose workers are employees must comply with withholding and tax payment requirements. Employees also receive a W-2 form at tax time, whereas workers who are independent contractors receive a 1099 form, and must fulfill their own tax payment obligations.

 Courts in antidiscrimination cases also consider a variety of factors in determining a worker’s contractor or employee status. Courts’ starting point is the definition of “employee” found in Title VII and other federal discrimination statutes: “any individual employed by an employer.” Yet this definition so obviously lacks content that the U.S. Supreme Court has described it as “completely circular and explain[ing] nothing.” In the absence of clear statutory

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14 Id.
17 42 U.S.C. § 2000e(f) (“The term ‘employee’ means an individual employed by an employer . . . .”). Federal antidiscrimination statutes define “employee” in the same way. Ann C. McGinley, Functionality or Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws, 57 S.M.U. L. Rev. 3, 9 (2004) (“The EEOC, the administrative body with authority to write guidelines interpreting Title VII and the ADEA and to promulgate regulations under Title I of the ADA, has concluded that issues concerning coverage of Title VII, the ADEA, and the ADA should be interpreted in pari materia.”). For an analysis of the employer-independent contractor distinction in labor law, see Linder, supra note 5 at 190. For the National Labor Relations Board’s most recent take on the definitions of “employee” and “independent contractor,” see FedEx Home Delivery, an Operating Division of FedEx Ground Package Systems Inc. and International Brotherhood of Teamsters, Local Union No. 671, NLRB Case Nos. 34-CA-012735 and 34-RC-002205.
18 Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (describing the “employee” definition found in the Employee Retirement and Income Security Act); see also Emily A. Spieler, Employment Law and the Evolving Organization of Work—A Commentary, 6 NORTHEASTERN UNIV. L.J. 287, 292 n. 27 (collecting federal labor and employment laws’ definitions of “employer” and noting that “none of the federal statutes ever attempted to include even a reasonably useful definition of the key terms of ‘employee’ and ‘employer.’ In fact, the statutory definitions
guidance, courts take a totality of the circumstances approach, using two main rubrics: the common law approach, which adopts the principles of agency law and focuses primarily on the employer’s control over the putative employee, or the economic realities test, which focuses more broadly on the relationship of economic dependence between worker and employer.

Courts that adopt the common law approach follow a line of Supreme Court cases that includes *Community for Creative Non-Violence v. Reid* and *Nationwide Mutual Insurance Co. v. Darden*. Taken together, these cases hold that when Congress used the term “employee” in employment statutes without further definition, it intended to import “the conventional master-servant relationship as understood by common-law agency doctrine.” As the *Reid* court explained in a passage quoted later by *Darden*:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Though *Reid* and *Darden* themselves concerned employee status for purposes of copyright ownership and the Employee Retirement Income Security Act (ERISA), later courts have imported the *Reid-Darden* factors into Title VII cases. These courts often privilege the issue of an employer’s control over all other factors, stating, for example, that “courts should emphasize . . . the common law control portion of the test,” despite the Court’s admonition in *Reid* that “the extent of control the hiring party exercises . . . is not dispositive.”

Other courts in Title VII cases have adopted an alternative test that has its origins in the Fair Labor Standards Act’s (FLSA) definition of the employment relationship, as interpreted by the U.S. Supreme Court in *Rutherford Food Corp. v. McComb* and *Goldberg v. Whitaker House Co-op*. Courts interpreting the FLSA have developed an “economic realities” test, which looks...

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21 *Darden*, 503 U.S. at 322-23.
22 *Reid*, 490 U.S. at 751-52; *Darden*, 503 U.S. at 318 (quoting *Reid*).
23 Maltby & Yamada, *supra* note 4 at 253 (noting that “[t]he Darden decision has significantly influenced judicial interpretations under Title VII,” and collecting cases).
25 *Reid*, 490 U.S. at 752.
to four factors: “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”

This FLSA economic realities analysis has seeped into Title VII and other antidiscrimination jurisprudence.

Despite their different names and sets of factors, however, these two tests for employment status have become somewhat intermingled in practice. Many courts use what they call a “hybrid” test, combining factors from the traditional agency/control analysis with the economic realities factors. And according to the recently revised Restatement (Third) of Employment Law, “[d]ecisions 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.” The Fifth Circuit provides an example of this muddling of tests in a recent Title VII case, applying what it called the “economic realities/common law control test.”

Thus, when a court faces a misclassification challenge at the threshold of an antidiscrimination case, whichever set of factors it chooses, its task is essentially the same: to disregard the label that the employer has chosen for the employment relationship and attempt to determine the worker’s true status, looking variously to evidence concerning agency, control, and/or the economic realities of the employment relationship.

B. The Scope of the Problem

Whether measured according to IRS rules, the common law test, or the economic realities test, commentators agree that misclassification is a widespread and growing problem. Much of
the research on misclassification has focused on the tax dollars lost when misclassified, or “1099,” workers fail to pay the correct taxes on their income. If those workers had been properly classified, the thinking goes, then their employers would have withheld taxes throughout the year, preventing underpayment by the workers themselves at tax time. At least eleven states, three federal agencies, unions, journalists, and advocacy groups have conducted studies of the scope of the misclassification problem from the perspective of lost tax revenues, resulting in estimates, for example, of $125 million lost tax revenues in Illinois in the years 2001 to 2005 and $50 million in annual losses in Rhode Island. Likewise, “[a] report by the Government Accountability Office estimated that in 2006 alone, the federal government lost out on $2.72 billion in Social Security, unemployment and income taxes because of employee misclassification.”

33 Mandy Locke & Franco Ordoñez, Why Is Worker Misclassification a Problem? newsobserver.com (Sept. 4, 2014), available at http://www.mcclatchydc.com/static/features/Contract-to-cheat/Why-is-misclassification-a-problem.html?brand=nao (“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.”).


40 Id. 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
Not only do government tax collections suffer, but misclassification also places workers themselves at a significant disadvantage as compared to their “employee” counterparts. Scholars have detailed the many disadvantages that misclassified workers face: they are, by virtue of their “contractor” status, denied health benefits, paid sick or vacation leave, unemployment insurance, workers’ compensation, and disability benefits. They suffer higher rates of workplace injuries and many are paid lower wages than their employee counterparts; they live and work, in the words of theorist Guy Standing, in a state of “precarity.”

While research abounds on misclassification’s tax impacts and its effects on workers, less clear is the distribution of misclassification across the workforce and the characteristics of misclassified workers themselves. As labor scholar Annette Bernhardt puts it, “we have very little data” on the misclassified workforce. The difficulty is that misclassification is a form of “disguised work,” an employment arrangement that is hard for researchers to identify because employers have obscured the true status of their workers. The multiplicity of legal tests and

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to businesses 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.” Id.

41 See, e.g., Carré & Wilson, supra note 49 at 1 (“Employee misclassification creates severe challenges for workers, employers, and insurers as well as for policy enforcement. Misclassified workers lose access to unemployment insurance and to appropriate levels of worker compensation insurance. Also, they are liable for the full Social Security tax. They lose access to employer-based benefits as well. For employers, the practice of misclassification creates an uneven playing field. Employers who classify workers appropriately have higher costs and can get underbids by employers who engage in misclassification. The collection of Unemployment Insurance tax, and to some degree that of the income tax, are adversely affected by misclassification. Worker Compensation insurers experience a loss of premiums.”).


43 GUY STANDING, THE PRECARIAT: THE NEW DANGEROUS CLASS 9-11 (2011) (defining members of the “precariat” as lacking all forms of security connected to their work, as well as lacking political power and representation).


45 International Labour Organisation, International Labour Conference, Report V, The Scope of the Employment Relationship 24-25 (2003), available at http://www.ilo.org/public/english/standards/relm/ilc/ilc91/pdf/rep-v.pdf (“A disguised employment relationship is one which is let an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by 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.”).
uncertainty around the definitions of “employee” and “independent contractor” add to the problem of identifying those workers who are most at risk for misclassification.

What studies that do exist have exploited overlaps in federal data sources to identify the occupation categories in which misclassified workers are most commonly employed. For example, in research that has not yet been cited in legal scholarship, labor economist Barry Hirsch and others have compared the way that workers characterize their own wage and salary income, earned as employees, when responding to the U.S. Census Bureau’s Current Population Survey (CPS) against the W-2 employee income that employers report for those same workers to the Social Security Administration (SSA). In theory, a worker who is properly classified as an employee would report her own wage and salary income via the CPS, and that same income would also appear in her employer’s reported W-2 information in the SSA data. When a worker reports wage and salary income in the CPS, but there is no corresponding W-2 income for her in the SSA data, this mismatch signals a possible misclassification.47 TABLE 1 illustrates this mismatch.

**TABLE 1: CPS AND SSA EMPLOYEE INCOME REPORTING AND IMPLICATIONS FOR EMPLOYMENT STATUS**

<table>
<thead>
<tr>
<th>Worker reports employee income to CPS</th>
<th>Employer reports employee income to SSA</th>
<th>Implication for employment status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Yes</td>
<td>Properly classified as an employee</td>
</tr>
<tr>
<td>Yes</td>
<td>No</td>
<td>Misclassified as an independent contractor (employer error)</td>
</tr>
<tr>
<td>No</td>
<td>Yes</td>
<td>Worker error</td>
</tr>
<tr>
<td>No</td>
<td>No</td>
<td>Properly classified as an independent contractor</td>
</tr>
</tbody>
</table>

It is important to note that misclassification rates as gleaned from CPS-SSA mismatches

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47 The mismatch may also be evidence that the worker was paid “off the books,” i.e. that she was considered an employee by her employer but the employer paid her in such a way as to avoid tax reporting requirements. The CPS-SSA comparison method does not distinguish between mismatches caused by misclassification and those caused by off-the-books payment arrangements. Bollinger et al., *supra* note 46 at 14; see also Katherine 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 Payroll Fraud: Targeting Bad Actors Hurting Workers and Businesses, Testimony before the Senate Committee on Health, Education, Labor, and Pensions and the Subcommittee on Employment and Workplace Safety, 113th Congress (Nov. 12, 2013) (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.”).
are not measuring workers’ classification against some Platonic notion of what their classification “should” be in the abstract. Indeed, as the discussion above revealed, courts’ approach to the misclassification question is highly fact-specific and guided by differing sets of factors, making it difficult to discern an abstract definition of “the employee” and “the independent contractor” in the first place. What the CPS-SSA mismatch technique measures is a mismatch in perceptions: the worker’s perception of her income as deriving from an employment relationship versus the employer’s perception of that income as deriving from a contractual relationship. Whether either party’s perception is influenced by the IRS’s twenty factors, the common law control test, the economic realities analysis, or some other, different conception of employment status, is unknown.

Nevertheless, by mining the CPS and SSA data, Hirsch and his collaborators are able to identify high incidences of mismatches in “the construction trades (e.g., painters, drywall installers, roofers, brick masons, laborers, and helpers); dishwashers; cooks; dining attendants and bartender helpers, and food preparation workers; grounds maintenance workers; and agricultural and fishing related workers.”48 These findings duplicate those of other studies, which have also found widespread misclassification in the construction industry,49 as well as among child care and home health care workers.50

Though these studies do not report the demographics of the workers employed in high-misclassification occupations, U.S. Bureau of Labor Statistics (BLS) workforce data provide more demographic detail. Table 2 below lists high-misclassification occupations from Hirsch’s and others’ work and reports the percentage of workers in each occupation, as of 2014, who were women, Black or African-American, Asian, and Hispanic or Latino, the categories used by the BLS. Notably, these BLS figures are drawn from the Current Population Survey, the same data used by Hirsch and his collaborators, capturing the same group of workers who reported their wage and salary income analyzed above.

Table 2: Percent of Total Employed Persons by Sex, Race, and Hispanic or Latino Ethnicity, Selected Occupations51

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48 Bollinger et al., supra note 46 at 14.
50 Marc Roemer, Using Administrative Earnings Records to Assess Wage Data Quality in the March Current Population Survey and the Survey of Income and Program Participation, U.S. Census Bureau, Technical Paper No. TP-2002-22 at 25 Table 9 (Nov. 2002) (listing child care providers- private household and –family as two of the top five occupations most at-risk for underground and misclassified work arrangements); Ruckelshaus, supra note 47 (listing occupations at high risk of misclassification as “construction, day labor, janitorial and building services, home health care, agriculture, poultry and meat processing, high-tech, delivery, trucking, home-based work, and the public sectors”).
TABLE 2 shows that many of the jobs identified by researchers as most at risk for misclassification are occupied heavily by members of racial or ethnic minorities. Large numbers of jobs in the construction trades, for example, are held by Hispanic or Latino workers: fifty-eight percent of roofers in 2014 identified as Hispanic or Latino, as did almost half of painters, construction, and maintenance workers. While most construction workers in the CPS data were men, other occupations at risk for misclassification are dominated by women: almost ninety-six percent of child care workers in the 2014 data were women, as were almost eighty-nine percent of home health aides. These latter two occupations, too, were held by sizable numbers of racial and ethnic minority women: thirty-eight percent of child care workers were African-American, Hispanic, or Latina, while over half of home health workers also fell into these groups.

Viewing these demographic data together with the findings of Hirsch and other researchers, a picture emerges of misclassified workers as front-line, blue-collar workers who are members of racial and ethnic minorities.\(^5^2\) While men dominate construction and maintenance

\(^{52}\) Note, however, that true independent contractors—as distinguished from true employees who are misclassified as independent contractors—may also hold high-paying, high-skilled jobs. Katherine V.W. Stone, Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers, 27 BERKELEY J. EMP. & LAB. L. 251, 279 (2006) (“Independent contractors are a bi-modal group. Some are highly skilled professionals or craftspeople who work for multiple customers using their own tools and deploying their talents and their entrepreneurial abilities. Others are low skilled individuals who work as essentially day laborers, usually for a single employer on whom they are dependent for work. It is difficult to tell from the available data how
occupations, care-giving jobs that are at high risk for misclassification are held almost exclusively by women. Strikingly, these characteristics also describe a set of workers who have historically been subject to job discrimination, and for whom Title VII should provide key workplace protections: women and members of racial and ethnic minority groups. However, Title VII’s protections remain unavailable as long as a worker is labeled an independent contractor.

Misclassified workers’ exclusion from the bulk of federal antidiscrimination law compounds the problems they already face by virtue of their contractor status. If a misclassified worker experiences discrimination on the job, her independent contractor status blocks her from seeking redress through Title VII, unless she can convince a court to look beyond her “contractor” label and re-classify her as an employee for purposes of the lawsuit. The data examined in Part II give a small window onto courts’ resolution of misclassification disputes in Title VII cases, revealing that, more often than not, courts side with employers and rule against workers who challenge their independent contractor status at the threshold of a discrimination case.

II. Data and Methodology

This article investigates the extent to which misclassification blocks workers from bringing and winning Title VII employment discrimination claims. It not only reports plaintiffs’ rates of winning and losing misclassification challenges in Title VII cases, but also seeks to identify the characteristics of the plaintiffs, defendants, litigation, and judges and courts that were associated with winning and losing misclassification arguments.

Viewed graphically, the data analyzed here look like the picture in FIGURE 1.

many of the 10.3 million independent contractors in the United States are of each group. However, the industry breakdown gives some indication. It shows that almost forty percent of independent contractors are in the financial, professional, business, education and health services industries. These individuals are likely to be of the first type of independent contractors--skilled professionals who operate what are essentially small businesses selling their own services. Another nearly thirty-two percent, or 3.3 million individuals, are in construction, agriculture, manufacturing, and transportation. These are likely to be what are termed “dependent independent contractors”--those who have little independence or autonomy and depend upon another business for their livelihood.

53 See notes 41-43, supra, and accompanying text (describing the difficulties faced by misclassified workers). In addition to their Title VII exclusion, misclassified workers are also excluded from other federal employment protections such as the right to the minimum wage and overtime, the right to organize into a union, and the right to family and medical leave. Tomassetti, supra note 10 at 11-12 [draft pagination] (noting independent contractors’ near wholesale exclusion from the protections of federal employment laws).
Workers in the inner dark gray circle are those about whose employment status there is no dispute. If they experience discrimination on the job, there is no extra, initial misclassification hurdle to overcome; they proceed with their Title VII claim directly. Workers in the outside white band are those who are classified as independent contractors by employers, but believe themselves actually to be employees. These workers must first convince a court that they are misclassified in order to proceed with a discrimination lawsuit. They may choose never to file a lawsuit, or they might file a lawsuit and lose on the misclassification question, remaining employees in their own eyes but contractors in the eyes of their employers and the courts. These workers have no access to legal protections against job discrimination. Finally, those few workers in the light gray middle band are those who are successful in convincing a court that they were misclassified. These workers then gain access to Title VII’s protections.

The analysis presented here seeks to describe and explain workers’ movement inward from the periphery, from the outer white band to the light gray band in the middle, to assess the effectiveness of misclassification challenges in opening up workers’ access to the protections of antidiscrimination laws.\(^\text{54}\) This work is situated within a line of empirical studies on the fate of Title VII plaintiffs in federal court that have identified various barriers to workers’ ability to enforce their antidiscrimination rights.\(^\text{55}\) As yet, misclassification has not been fully explored as one such barrier; this article attempts to fill that hole in the literature. Moreover, though misclassification has received ample attention in the context of wage and hour claims under the Fair Labor Standards Act, antidiscrimination scholars, by and large, have left it unexamined.\(^\text{56}\)

Therefore, this article presents the results of an original empirical study of the universe of 112 Title VII cases brought in federal district courts over the five-year period between 2009 and

\(^{54}\) The use of the term “periphery” is deliberate here, as labor economists describe workers who hold contingent, precarious jobs — including those who are misclassified — as peripheral workers. See Charlotte S. Alexander, \textit{Explaining Peripheral Labor: A Poultry Industry Case Study}, 33 \textit{Berkeley J. Emp. & Lab. L.} 353, 355 (2012) (“The distinction between ‘core’ and ‘peripheral’ labor derives from the work of economists Michael Piore, Peter Doeringer, and others on labor market segmentation.”).

\(^{55}\) See note 11, \textit{supra} (collecting studies).

\(^{56}\) See \textit{supra} note 10.
2013 in which workers made misclassification arguments that resulted in a decision available on Westlaw. This study uses a five-year, rather than longer, period in order to produce a manageable number of cases, as the process of hand-coding data from each case is time- and resource-intensive, requiring a close reading not only of the opinion available via Westlaw, but also a review of the entire case docket available via the federal courts’ Public Access to Court Electronic Records (PACER) system and relevant court documents filed in the case.

After receiving training by the author on coding protocols57 and completing research and readings on the issue of misclassification, two law student coders reviewed each of the cases produced by an initial Westlaw search to determine whether they fit within the data set, i.e. whether the court engaged with the misclassification question directly, or merely mentioned the search terms in passing.58 Coders considered all decisions available on Westlaw, not just those that were designated “published” with a citation to the Federal Reporter. Through this process, coders identified 112 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.59 Inter-coder reliability

58 Specifically, this data set represents all cases responsive to the search terms “advanced: ("title vii" and "independent contractor") & DA(aft 12-31-2008 & bef 01-01-2014)” in Westlaw’s federal district courts database. That search produced 602 results, from which coders identified 112 cases that were properly in the data set. As part of this process, the coders identified and removed 33 decisions from the data set that were duplicates, i.e. the underlying case generated more than one opinion responsive to the search terms that appeared in the original 602 search results. The goal of this project was to code the 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.
59 Coders also identified seven 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, No. CIV.A. 12-267, 2013 WL 5786457, at *3 (W.D. Pa. Oct. 28, 2013) (“The first issue that the Court must address is whether Plaintiff, 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 is deciding between independent contractor and employee status, they are excluded from the 112 examined here because of this article’s exclusive focus on workers misclassified as contractors. Likewise, courts in fifty-three cases addressed another similar issue: the question of which separate entities could be joined together and treated collectively as a plaintiff’s employer. This issue can come up when a plaintiff seeks to join together multiple putative employers in order to meet Title VII’s minimum required fifteen employees for the statute’s coverage, or because the alleged discriminator works for an entity that is separate from the plaintiff’s nominal employer, but the plaintiff asserts that both entities are integrated and functionally the plaintiff’s joint employer. See, e.g., Bruce v. Ladies Choice Fitness Ctr. Columbia, Inc., No. 3:12-CV-2678-JFA-SVH, 2013 WL 3320785, at *3 (D.S.C. July 1, 2013) (plaintiff attempting to joint multiple entities as a single defendant-employer in order to meet the fifteen employee minimum); Palacios v. Sure Sys., LLC, No. 2:08-CV-755 CW, 2009 WL 5216854, at *7 (D. Utah Dec. 30, 2009) (plaintiff attempting to joint multiple entities in order to reach the conduct of supervisor employed by a company other than her nominal employer). This “integrated employer” or “de facto employer” analysis often overlaps with the employee-independent contractor analysis because courts consider similar questions of the putative joint employer’s level of control over workers. See, e.g., Kerr v. WGN Contl Broad. Co., 229 F. Supp. 2d 880, 886 (N.D. Ill. 2002) (“It is true that control is a major factor in the common law agency test that is often used to determine a direct employment relationship. This does not mean, however, that a Title VII plaintiff must effectively demonstrate a direct employment relationship with a defendant. Instead, the de facto/indirect analysis is appropriately used where it is clear that a putative defendant does not directly employ the plaintiff, but nevertheless controls the plaintiff’s employment to the point that it would contravene the intent of Title VII for the putative defendant to avoid liability for its own discriminatory actions.”). However, these cases are also excluded from the data set because the joint employer question is analytically distinct from the misclassification
was assured because coders worked as a pair, checking their conclusions with one another, and then reported their findings to the author during weekly meetings. The author served as the final arbiter of any differences of opinion, and also performed a final review and cleaning of the data before analysis.  

The advantage of this method is that it identifies the full universe of misclassification Title VII cases available on Westlaw during the five year period and mines them for information, rather than merely sampling the universe and attempting to draw inferences from the sample. The disadvantage is that some federal court decisions may not appear on Westlaw, and we do not know whether the 112 cases identified here are representative of the unknown number of non-Westlaw-available cases in which federal courts addressed the misclassification issue in a Title VII case. It is likely that the undercount not substantial, but due to this limitation, the data presented in this article are suggestive, not conclusive.

A. Dependent Variable: Misclassification Outcomes

The principal dependent variable of interest – the variable that this research is attempting to describe and explain – is the outcome of plaintiffs’ misclassification challenges. In other words, to what extent did the plaintiffs in the data set lose their claims at the outset of their Title VII cases due to a court’s determination of independent contractor status, and to what extent did

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60 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 PSYCH. PUB. POL. AND L. 54, 61 (“Cases were coded by five graduate research assistants who were knowledgeable about theories of contemporary discrimination and employment litigation. These research assistants received extensive training on the use of coding materials, including several training sessions with the principal investigators and other coders to discuss the coding materials and to practice coding. Twenty-five practice cases were assigned to research assistant pairs and to one principal investigator. After coding these 25 cases independently, research assistant pairs and the corresponding principal investigator met to discuss and reach consensus on coding for those cases. Feedback from these training sessions was used to revise the coding sheets and training materials. After the principle investigators were satisfied that research assistants had a common understanding of definitions and the coding process, data collection for this project began. Two research assistants were assigned to each case, with about 50 cases assigned to individual research assistants. All possible combinations of research assistants were used to create these coder pairs, resulting in 10 unique coder pairs. Research assistants coded each case independently, met to discuss their coding, and then discussed each case until they reached consensus.”).

61 For perspective: case filing statistics from the Administrative Office of the U.S. Courts show that over 71,009 cases with the Nature of Suit code 442 (“Civil Rights- Employment”) were filed in federal district courts in the years 2009 through 2013. United States Courts, Caseload Statistics Data Tables, annual Table C-2, “Cases Commenced, by Basis of Jurisdiction and Nature of Suit” (2009-2013), available at http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (listing case filing data by Nature of Suit code). In some unknown number of those cases, the plaintiff made a threshold misclassification challenge; in some unknown number of those cases, the court rendered a decision on the misclassification question; in 112 of those cases—the data set assembled here—the court issued a decision that is available via Westlaw. An alternative method of assembling the data set would have required coders to examine each of the 71,009 case filings directly via PACER to find the particular set of cases that are responsive to this article’s research question. This would be prohibitively time-consuming and laborious. Using Westlaw to access court decisions is a less comprehensive, though more practicable, method.

62 Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 WIS. L. REV. 107, 121 (2007) (observing that “in the age of the Internet,” nearly all decisions by federal judges are reported “on Lexis, Westlaw, or in specialty reporters”).
those claims survive beyond the misclassification issue? In addition, which characteristics of the plaintiffs, defendants, litigation, and judges and courts were associated with misclassification wins and losses?

Here, we define a misclassification “win” as any case in which the plaintiff had the opportunity to proceed with her Title VII claim. This includes cases in which the court addressed the misclassification issue at 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 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 the plaintiff to be an independent contractor on summary judgment.63

The data also yield two additional variables concerning case outcomes. First, coders divided cases into those in which courts employed one of the tests for independent contractor status described above, and those in which the court short-circuited that analysis and declared the plaintiff an independent contractor based on the existence of an employment contract or the plaintiff’s own admission of independent contractor status. This dependent variable allows exploration of whether the test a court uses – common law, economic realities, or no test at all – is associated with a misclassification win or loss for the plaintiff. More broadly, it allows testing of the Restatement of Employment’s conclusion that there is really no functional difference among the tests that courts use in distinguishing between independent contractors and employees in Title VII cases.64

In addition, for the cases that survived beyond the misclassification step, coders recorded the ultimate outcome of the underlying Title VII claims as a settlement, win, or loss for the plaintiff. Coders counted both complete and partial wins for the plaintiff as a “win,” meaning that if a plaintiff won her Title VII claims in part but had other parts dismissed, her Title VII claims outcome would appear in these data as a “win.”65

B. Independent Variables: Plaintiff, Defendant, Litigation, and Judge/ Court Characteristics

For each case in the data set, coders also recorded the following ten independent variables, loosely grouped into those that describe the plaintiff, the defendant, the litigation itself, and the court and judge in the case. 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 in Title VII cases. The choice and construction of these variables was guided by previous empirical work by Laura Beth Nielsen, Bob Nelson, and Ryon

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63 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.
64 Restatement (Third) of Employment Law, supra note 30 at § 1.01 PFD (observing the “lack of any sharp distinction between the common-law test. . . and a multifactor economic-realities test”).
65 This practice follows other empirical work. Nielsen, et al., supra note 11 at 183 (coding plaintiff “wins” “if the plaintiff wins any part of a verdict”).
Lancaster on the fate of Title VII cases in federal court.66

**TABLE 3: INDEPENDENT VARIABLES BY GROUPING**

<table>
<thead>
<tr>
<th><strong>Plaintiff descriptors</strong></th>
<th><strong>Values</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff’s representation</td>
<td>Plaintiff had attorney or was pro se</td>
</tr>
<tr>
<td>Plaintiff’s occupation67</td>
<td>Manager, professional; sales, service, office; or blue collar and other</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Defendant descriptors</strong></th>
<th><strong>Values</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Defendant’s industry68</td>
<td>Construction, manufacturing, transportation; information, finance, professional; public administration, health, education; or other services</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Litigation descriptors</strong></th>
<th><strong>Values</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Title VII claim type(s)</td>
<td>Race, sex, religion, national origin, color, and/or retaliation, as well as intersectional claims involving more than one discrimination type</td>
</tr>
<tr>
<td>Primary fact pattern giving rise to the Title VII claim</td>
<td>Hiring, firing, or harassment/ pay/ other working conditions</td>
</tr>
<tr>
<td>Nontraditional Title VII claim69</td>
<td>Claims involving disparate impact; same-group harassment; opposite-power harassment; sexual orientation or gender identity discrimination; claims involving multi-racial plaintiffs; and/or cases involving implicit bias or subjective decision-making of the kind alleged in <em>Wal-Mart Stores v. Dukes</em></td>
</tr>
</tbody>
</table>

66 Nielsen et al., *supra* note 11 at Appendix (listing variables).


68 See *id*.

69 Here, coders were asked to identify any claims that alleged disparate impact; same-group harassment, i.e. women harassing women; opposite-power harassment, i.e. a women harassing a man; sexual orientation or gender identity discrimination; claims involving multi-racial plaintiffs; and cases involving implicit bias or subjective decision-making of the kind alleged in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The theory is that courts may be using a threshold misclassification dispute to “weed out” Title VII claims that are substantively controversial and that would require the court to engage in statutory boundary-pushing if she were to allow the underlying Title VII
Basis for the court’s misclassification decision | Common law test; economic realities, hybrid test; or no test employed  
---|---

**Judge and court descriptors** | **Values**
---|---
District court | 94 federal district courts
Year of misclassification decision | 2009-2013
Political party of the presiding judge’s nominating President | Republican, Democrat, or Magistrate (political party unknown)

Notably, this table does not contain a variable that purports to measure the merits of a plaintiff’s misclassification challenge. Other researchers have used various proxies to assess a claim’s merits, but constructing such a variable is difficult, as the merits of a claim are often in the eye of the beholder. Instead of attempting to get at the merits of misclassification challenges through coding, then, this project takes as a starting assumption that a substantial percentage of the workforce is misclassified. A random audit of New Jersey employers, for example, found that “38 percent of employers were . . . misclassifying their workers and much, much higher rates of misclassification [were] found in certain industries.” Another report summarizes studies of misclassification in eleven states, finding misclassification rates from claims to proceed. Because judges may be loath to reach the stage of boundary-pushing, they may use misclassification as an early tool to dismiss those “edge” Title VII claims. See, e.g., Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1343 (2012) (discussing judges’ reluctance to push the boundaries of Title VII).

As discussed further below, some courts dismissed plaintiffs’ claims on the pleadings, finding that plaintiffs had admitted their independent contractor status or insufficiently alleged their employee status. These courts did not use either the common law or economic realities factors, but instead dismissed the plaintiffs’ claims outright.

This variable is used as a proxy for the judge’s own political party, and 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 (2006) (using political party of judge’s nominating President as a proxy for judge’s own political ideology). For three cases, the parties consented to refer the case entirely to the magistrate judge, who then issued the misclassification decision. Because magistrate judges are appointed by the federal district court judges and not by the President, no proxy for their political party is available.

Nielsen, Nelson, and Lancaster provide an insightful summary of the difficulties in attempting to code the quality of a case: “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 11 at 181.

Socolow, supra note 34.
thirteen to twenty-three percent. These studies provide a base rate of sorts against which to measure the plaintiff win and loss frequencies found in the data examined here: if the studies are correct in identifying misclassification rates from thirteen to thirty-eight percent, then thirteen to thirty-eight percent of the Title VII plaintiffs in this article’s data likely have meritorious misclassification claims.

These studies, however, report misclassification rates for all workers. The workers of interest in this article are a smaller set: those who are covered by Title VII, and who experienced discrimination and/or retaliation on the job that is itself covered by Title VII. It may be that workers in this subset are more likely to be misclassified than workers on the whole, as employers who discriminate may be more likely to skirt their legal obligations in other ways and misclassify their workers. One might assume, therefore, that the true misclassification rate among the workers whose cases are studied here – and therefore the merits of their misclassification challenges – is on the higher end of the range.

III. Results

This Part discusses both descriptive statistics, or the frequency with which each dependent and independent variable appears in the data set, as well as the associations between the independent and dependent variables that are statistically significant, or likely the result of an actual relationship rather than chance. Though the small size of the data set presents some difficulties, the data do reveal statistically significant associations between plaintiff misclassification losses and four independent variables: (1) the presence of a race discrimination claim in the case, (2) the fact pattern underlying the discrimination claim, (3) the plaintiff’s pro se status, and (4) whether the court used any of the independent contractor tests or no test at all. Each is discussed below, along with notable independent variables that were not statistically significantly correlated with a misclassification win or loss, perhaps contrary to expectations.

A. Descriptive Statistics

TABLE 4 in the appendix reports frequencies and percentages for all variables collected by the coders; this section discusses some key findings. With respect to the main dependent variable of interest, misclassification outcomes, sixty-four percent of plaintiffs lost on the misclassification question, ending their Title VII claims completely. Of the remaining plaintiffs’ Title VII claims that proceeded, sixty-eight percent ultimately settled (representing twenty-four percent of all cases); thirty percent lost on later pretrial motions or at trial (eleven percent of all cases); and three percent – only one case, or one percent of all cases — ended in at least a partial plaintiff’s win.

These relatively dismal plaintiff success rates align generally with those found in other

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74 Kelsay, et al., supra note 34 at 3.
75 A discussion of Title VII coverage can be found in David C. Butow, Counting Your Employees for Purposes of Title VII: It’s Not As Easy As One, Two, Three, 53 WASH. & LEE L. REV. 1103, 1104 (1996).
76 See generally JAMES T. MCCLAVE & TERRY SINCICH, STATISTICS Chapter 8.3 (2009) (describing statistical significance).
77 Generally, the more observations there are in a data set, the less problematic statistical analysis becomes. See generally PAUL D. ELLIS, THE ESSENTIAL GUIDE TO EFFECT SIZES: AN INTRODUCTION TO STATISTICAL POWER, META-ANALYSIS AND THE INTERPRETATION OF RESEARCH RESULTS (2010) (discussing statistical power).
empirical studies of how Title VII plaintiffs fare in federal court, though they also reveal some interesting differences. For instance, in Nielsen, Nelson, and Lancaster’s work on Title VII litigation, 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. In comparison, in this article’s data, seventy-five percent of plaintiffs lost their Title VII claims, twenty-four percent of cases settled, and one percent of plaintiffs won at trial. While these differences could be explained by differences in the two studies’ data and methodology, the lower overall plaintiff loss rates in Nielsen et al.’s work might suggest that Title VII plaintiffs who must overcome a misclassification challenge face a harder task than Title VII plaintiffs as a general matter: seventy-five percent of plaintiffs in the former category lose their Title VII claims, whereas only forty percent of antidiscrimination plaintiffs generally suffer a loss.

Descriptive statistics also give us a picture of the plaintiffs, defendants, litigation, and court/judge characteristics in the data set. About two-thirds of the plaintiffs had an attorney, while one-third were pro se. Forty-four percent of plaintiffs made a race discrimination claim, fifty-one percent made a sex claim, and twenty-one percent made a claim of religious, national origin, or color discrimination. Over ninety percent of plaintiffs made claims that were at the intersection of more than one protected class, alleging discrimination, for example, on the basis of race, sex, and color. In addition, almost half—forty-eight percent—of plaintiffs made a retaliation claim.

With respect to the fact patterns that gave rise to Title VII claims, approximately equal numbers of plaintiffs alleged a discriminatory termination or harassment/discriminatory working conditions (forty-six percent and forty-four percent, respectively), whereas a smaller number alleged discrimination with respect to hiring. This, too, aligns with previous scholarly work that has identified a drop in the number of employment discrimination cases that allege a failure to hire.

Finally, courts in the data set employed the common law test much more frequently than the economic realities test or a hybrid of the two. Courts used the common law agency/control analysis in fifty-seven percent of cases, and the economic realities or hybrid test in thirty percent. Courts used no test at all, and summarily declared the plaintiff to be an independent contractor on the basis of her pleadings or an admission, in fifteen cases. Courts’ use, or non-use, of these misclassification tests is discussed further below.

B. Statistically Significant Results

78 Nielsen et al., supra note 11 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 (2009), supra note 11 at 127.

79 Nielsen and her co-authors examined case filing data rather than judicial decisions available via Westlaw. They assembled and coded a random sample of 1,672 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 Equal Employment Opportunity Commission. Nielsen et al., supra note 11 at 181 (describing data and methodology).

80 Jessica Fink, Unintended Consequences: How Antidiscrimination Litigation Increases Group Bias in Employer-Defendants, 38 N.M. L. Rev. 333, 345 (2008) (collecting studies and noting that “[w]hile ‘failure to hire’ cases initially made up the bulk of the courts' Title VII dockets, such discrimination litigation increasingly has involved employee discharge cases”).
Four independent variables were correlated, to a statistically significant extent, with a plaintiff’s misclassification loss: (1) the presence of a race discrimination claim in the case, (2) the fact pattern underlying the discrimination claim, (3) the plaintiff’s pro se status, and (4) whether the court used any of the independent contractor tests or no test at all. Table 5 in the appendix lists these and all other independent variables, reporting the percentage of cases that fall into each variable category that were misclassification losses for the plaintiffs.

As Table 5 illustrates, seventy-one percent of plaintiffs who made a race discrimination claim lost on the misclassification question, compared to only fifty-nine percent of those who made no race discrimination claim. Almost ninety-two percent of plaintiffs who alleged discriminatory failure to hire lost their claims, while smaller percentages of plaintiffs with other fact patterns lost. Eighty-three percent of pro se plaintiffs lost their misclassification challenges, compared to fifty-three percent of represented plaintiffs. Lastly, one hundred percent of plaintiffs lost in cases in which courts employed no test for independent contractor status, whereas fifty-nine percent of plaintiffs lost their misclassification challenges when courts used any of the tests for independent contractor status. The remainder of this section discusses these four results, ending with a discussion of some surprising non-results.

i. Race Discrimination Claims

If a plaintiff in this data set alleged race discrimination, she was more likely to lose her misclassification challenge than plaintiffs who did not make a race discrimination claim. Because the question of a worker’s true employment status should not turn on her race, or her accusations of race discrimination, it would seem odd that the outcome of this threshold question might be influenced by the type of substantive Title VII claim she brings. However, one possible explanation might be found in courts’ desire to rid their dockets of Title VII race discrimination cases, which might, in the eyes of judges, appear to be meritless, frustrating, and needlessly stuck in the past.

In her collection of writing on race in America, essayist Eula Biss describes her experience teaching college in Iowa, where she encountered what other writers have called an ideology of post-racialism:

Racism, I would discover during my first semester teaching at Iowa, does not exist. At least not in Iowa. Not in the minds of the twenty-three tall, healthy, blond students to whom I was supposed to teach rhetoric. . . My students considered my interest in these subjects very antiquated. These things, they

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81 Notably, as discussed further below, a court’s choice between the common law and economic realities test, or even use of a hybrid test, did not predict whether the plaintiff would win or lose a misclassification challenge. In other words, the court’s use of one or the other test (as long as it used a test at all) made no difference to the misclassification outcome.

82 Mario L. Barnes, Erwin Chemerinsky & Trina Jones, A Post-Race Equal Protection?, 98 GEO. L.J. 967, 968 (2010) (“[P]ost-racialism is a set of beliefs that coalesce to posit that racial discrimination is rare and aberrant behavior as evidenced by America's and Americans' pronounced racial progress.”); Sumi Cho, Post-Racialism, 94 IOWA L. REV. 1589, 1594 (2009) (defining post-racialism as “a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action”).
informed me with exasperation, had already been resolved a long time ago, during the sixties.\footnote{Eula Biss, Notes from No Man's Land: American Essays 137 (2009).}

Far-right political commentator Ann Coulter provides a far coarser and inelegant summary than Biss, describing racism as “invented” and remarking, “There is more cholera in America than there is racism.”\footnote{Jamal Booker, Ann Coulter Says ‘There is No Racism in America’, (Jan. 10, 2014), available at http://issuehawk.com/jamal/2014/01/10/ann-coulter-says-there-is-no-racism-in-america.html.}

According to Coulter’s version of post-racialism, race is no longer a relevant identity category in today’s United States, and those who claim to have experienced racism are, at best, mistaken and, at worst, deceitful manipulators intent on playing the race card at every turn. The attraction of post-racialism is not limited to the far-right, however; some on the political left have also embraced post-racialism for its promise of uniting people across racial boundaries.\footnote{Cho, supra note 82 at 1602 (discussing scholars’ approaches to post-racialism).}

Regardless of the political leanings of its proponents, however, the upshot of a post-racial belief system is a profound skepticism of race-based identities and claims of race-specific treatment such as those that are at the center of a Title VII race discrimination lawsuit.

Previous work by this author in conjunction with [CO-AUTHORS] has explored the effects of post-racialism on judges and juries: if legal decision-makers adopt the belief that the United States has moved beyond race and racism, then those plaintiffs who continue to allege acts of race discrimination might be perceived as trouble-makers and whiners, and their seemingly frivolous claims subject—rightly—to dismissal.\footnote{CITATION OMITTED; see also 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.”); Hon. 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.”).}

A second possible explanation for the higher misclassification loss rate in race discrimination case is judges’ own explicit or implicit bias against African-American plaintiffs. Indeed, sixty-nine percent of the race discrimination claims in this data set were filed by African-American plaintiffs, and past research has suggested that federal judges hold implicit biases against African-American litigants. Bennett, supra note 86 at 706 (collecting studies on federal judges’ implicit racial biases). Of course, the causal relationship between implicit bias and actual courtroom outcomes can be debated, but, drawing on this research, Judge Mark W. Bennett of the U.S. District Court for the Northern District of Iowa “wonder[s] if those judges who grant summary judgment or vote to affirm these grants [in employment discrimination cases] more frequently than the norm would also test higher than the federal judge norm on the IAT [a psychological test that has been used in attempting to measure implicit racial bias].”\footnote{Nancy Gertner, Losers' Rules, 122 YALE L.J. ONLINE 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].”).}
ii. Failure to Hire Claims

The second variable associated with plaintiffs’ misclassification losses is the fact pattern underlying her discrimination claims: those plaintiffs alleging a discriminatory failure to hire were more likely to experience a misclassification loss than those plaintiffs who alleged discriminatory firing, harassment, or discrimination in pay or other terms and conditions of work.

As already noted, failure to hire claims have fallen as a percentage of federal courts’ employment discrimination dockets. 88 This may be because discriminatory hiring claims are notoriously difficult for plaintiffs to prove, as plaintiffs in the position of a rejected applicant may lack any sense of why they were rejected (other than their own suspicions of discrimination) and must wait until discovery to amass the statistics or other evidence supporting their claim. 89 In much of the same dynamic as described with respect to race discrimination claims, therefore, judges may 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.

A less insidious explanation for hiring discrimination claims’ failure rate on the misclassification question might be that the independent contractor-employee distinction is itself bound up with the question of whether a worker has properly been hired. In other words, if uncertainty and pretext are already clouding the hiring decision – because racism, sexism, or other bias was at work to deny the plaintiff a job – then that same uncertainty and pretext might also be clouding the worker’s status. Was the worker denied a job as an employee—a failure to hire— but engaged instead as an independent contractor? Was she denied employment of any sort? And were those denials made on permissible or prohibited grounds? Thus, the association between a hiring discrimination claim and a misclassification loss may be somewhat endogenous, as the question of the worker’s employment status and the question of the worker’s hiring suffer from the same underlying uncertainty.

iii. Pro Se Plaintiffs

At first glance, the third statistically significant result, that pro se plaintiffs were more likely to lose their misclassification challenges than plaintiffs with an attorney, may be unsurprising. Indeed, Nielsen et al.’s study similarly found a plaintiff’s pro se status to be a powerful predictor of the plaintiff’s overall success: “One in five plaintiffs acts as his or her own lawyer, operating pro se over the course of the lawsuit, and they are almost three times more likely to have their cases dismissed, are less likely to gain early settlement, and are twice as likely to lose on summary judgment.” 90 Pro se plaintiffs—at least those who are not themselves lawyers— lack training in civil procedure and the underlying substantive law governing their case; they may be unaware of pleading requirements or filing deadlines; they may be unskilled at conducting discovery or lack the resources to do so. Moreover, the fact that a plaintiff is pro se may signal something about the merits of her case: if she tried and failed to find a lawyer to

88 Fink, supra note 80 at 345.
89 Id. at 346 (“[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.”).
90 Id. at 188.
represent her, then her allegations of discrimination (or, in this case, her threshold allegations of employee status), may be weak.91

However, a closer look at the pro se cases in this data set reveals something more than the typical pro se story. Of the thirty pro se plaintiffs who lost their misclassification challenge, in eleven cases, the court used no test at all to determine their employee or independent contractor status, and instead made a decision based on the plaintiffs’ own characterization of themselves as independent contractors in their pleadings or on the existence of a written employment contract. In a 2010 case, for example, the court dismissed the plaintiff’s Title VII claim, stating, “In her Complaint, Plaintiff states that she was ‘a Contractor onsite for Wolters Kluwer.’ As an independent contractor, rather than an employee of Wolters Kluwer, Plaintiff has no Title VII claim against this defendant.”92 Another court dismissed a plaintiff’s Title VII claim because of the existence of a written contract, holding that “the Agent Agreement establishes that plaintiff was an independent contractor with the [defendant]. As a result, [the plaintiff] has not met the preliminary requirement of establishing a claim for religious discrimination.”93

By relying solely on the plaintiff’s own characterization of her employment status or on the existence of a contract, courts are missing the entire point of a misclassification inquiry, which is to disregard the worker’s label and instead to examine the underlying facts of the employment relationship.94 The whole purpose of a misclassification challenge is to set aside the labels that workers carry in the workplace; if courts are directed to disregard employers’ labeling of workers, then they should equally disregard plaintiffs’ use of the independent contractor label in their pleadings, particularly if those plaintiffs are pro se.95

Moreover, the existence of a contract, in and of itself, does not render an employee an independent contractor. Employers can, and do, require workers to sign sham contracts purporting to govern their employment relationship96; the mere existence of a contract, like the

91 Nielsen et al., supra note 11 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.”).
94 Watson, 2012 WL 6022514, at *2 (“While it is accurate that courts have generally ruled that independent contractors are not employees and are, therefore, not covered under Title VII, they have been careful to do so based not on an assigned label[.]”).
95 If a plaintiff were to continue to label herself as an independent contractor even during discovery, then a court would be more justified in granting summary judgment on her claims, as there would be no dispute going forward as to her employment status. However, to base a dismissal on the pleadings on the plaintiff’s self-description as an independent contractor, particularly if the plaintiff is pro se, seems to contradict the letter and spirit of both the common law and economic realities tests, and to ignore the mandate that courts construe pro se plaintiffs’ pleadings liberally. See Estelle v. Gamble, 429 U.S. 97, 106 (1976) (holding that “a pro se complaint . . . however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”) (internal quotation marks and citations omitted).
96 Ruckelshaus (2013), supra note 46 at 4 (“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 because I felt my back was up against the wall. I have a family. My fiancé was in school. I’m the only bread winner.’”). See also Peeples v. Prestige Delivery Sys., Inc., No. CIV.A. 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
mere existence of the “independent contractor” label, is not dispositive of the worker’s true employment status. As Julia Tomassetti has observed, courts that engage in this sort of reasoning, in which the existence of a label or a 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.”

iv. No-Test Decisions

Courts’ conclusory decisions that plaintiffs were independent contractors, without reference to either the common law or economic realities test, were not confined to the pro se cases in the data set. Indeed, courts’ failure to use any legal test for employee status represents the fourth statistically significant result: every time a court issued a misclassification decision without using either the common law or economic realities test, the outcome was invariably a loss for the plaintiff.

Because these no-test decisions represented a death sentence for plaintiffs’ Title VII claims, we ran a logistic regression to explore the test-no-test distinction further, to identify variables that were associated with a court’s dismissing a plaintiff’s misclassification challenge out of hand. TABLE 6 in the appendix shows the full regression results. Though the small number of observations limits the utility of regression modeling, TABLE 6 shows three statistically significant results. Plaintiff’s pro se status, the presence of a race discrimination claim in the case, and the presence of a nontraditional Title VII claim in the case were all associated with no-test decisions. The coefficients for all three variables are negative, indicating that a case in which any of those variables was present, a court was less likely to use a test for independent contractor or employee status and more likely to summarily deny a plaintiff’s misclassification challenge.

Why, then, might courts ignore the rich body of law around independent contractor status in this particular set of cases? As discussed above, a plaintiff’s pro se status might have some signaling effect, causing a court to search for a relatively easy way to dismiss a Title VII case at the outset rather than invest time and energy in shepherding a pro se plaintiff through subsequent stages of litigation. And rather than engage in a fact-intensive analysis of the plaintiff’s true employment status, a dismissal for failure to state a claim upon which relief can be granted, relying on the plaintiff’s own admission of independent contractor status in her complaint, would seem to be an easy way out.

Similarly, plaintiffs who bring nontraditional Title VII claims, pushing the boundaries of

sign the 2006 agreement without the opportunity to negotiate its terms and without the benefit of legal counsel”).


98 Regression modeling is a statistical and econometric method that allows investigators to determine associations between changes in independent variables, e.g. the type of Title VII claim that a plaintiff brings, as well as the political party of the presiding judge and the test she uses for employee status, and the variable of interest, or the dependent variable, such as the outcome of a plaintiff’s misclassification challenge. See generally PETER KENNEDY, A GUIDE TO ECONOMETRICS 241-45(2008) (explaining the logit model, the type of regression used when the dependent variable, as here, is capable of only two values).

99 For an explanation of this article’s definition of nontraditional Title VII claims, see TABLE 3.

100 Correlation tables do not reveal high levels of correlation among the independent variables listed in TABLE 6.
what the statute has previously been interpreted to cover, might face a judge seeking easy
dismissal at a case’s outset. As Katie Eyer and other legal scholars have observed, judges and
juries in employment discrimination cases may be reluctant to “see” discrimination as it is, and
“[t]his effect . . . is further accentuated outside of the context of stereotypical disparate treatment
fact patterns (including, for example, circumstances where claims are based on disparate impact
and/or involve nonstereotypical actors, such as minority-on-minority discrimination).”101

Finally, the data suggest that plaintiffs who bring race discrimination claims are more
likely to face swift and summary dismissal, with no analysis under any test for employment
status. These outcomes might be seen as courts’ search for a quick way to dispose of race
discrimination cases without engaging with either the common law or economic realities test. As
explained in the discussion of post-racialism above, it may be that judges are particularly
suspicious of the merits of race discrimination claims, as opposed to claims alleging other types
of discrimination, and that this level of suspicion in fact reflects judges’ own conscious or
unconscious post-racial beliefs.

Finally, courts who issue no-test decisions may also be influenced by the Supreme
Court’s pair of cases that instituted a heightened pleading standard for plaintiffs’ allegations of
wrongdoing in civil cases, *Bell Atlantic v. Twombly*102 and *Ashcroft v. Iqbal*.103 These cases
were decided before or at the beginning of the data set examined in this article, and so their
effects would likely be felt in judges’ misclassification decisions. Indeed, of the cases in which
judges applied no test for plaintiffs’ employment status, approximately seventy-three percent
cited the *Twombly/Iqbal* pleading standard, whereas *Twombly* and *Iqbal* were cited in only
twenty-seven percent of cases in which courts applied the common law or economic realities
test.104 *Twombly* and *Iqbal* therefore loom particularly large in this subset of the data. This
result seems to add credence to critics’ fear that the *Twombly* and *Iqbal* pleading rules may erect
inordinately high procedural barriers for plaintiffs with meritorious claims, or at least may
suggest that citation to *Twombly* and *Iqbal* provide justification for judges to dismiss cases that
they are already inclined against.105

Thus, the results concerning the no-test variable are worrisome. Courts in these cases are

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101 Eyer, supra note 69 at 1278 (“[E]ven when there is substantial evidence of traditional invidious discriminatory
intent (including so-called direct evidence) most people will decline to make attributions to discrimination. This
effect, moreover, is further accentuated outside of the context of stereotypical disparate treatment fact patterns
(including, for example, circumstances where claims are based on disparate impact and/or involve nonstereotypical
actors, such as minority-on-minority discrimination). Thus, across a wide array of factual circumstances--ranging
from traditional disparate treatment to more complex forms of bias--psychology scholars have documented that most
people do not ‘see’ discrimination, except where there is effectively no plausible alternative.”).

102 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007) (holding that “[w]hile a complaint attacked by a Rule
12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds
of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action’s
elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the
assumption that all of the complaint's allegations are true.”).

103 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (holding that “the tenet that a court must accept as true all of the
allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a
cause of action, supported by mere conclusory statements, do not suffice”).

104 This difference is significant at the 0.01 level.

105 See Jonah B. Gelbach, *Material Facts in the Debate Over Twombly and Iqbal*, 68 STAN. L. REV. __, 5-6 of draft,
of the heightened pleading standards on plaintiffs’ chances in court); see also Gertner, supra note 87 at 117
(identifying *Iqbal* and *Twombly* as creating formidable barriers to Title VII plaintiffs).
ceding their duty to discern the true nature of the employment relationship for Title VII purposes entirely to the employer. If the employer draws up a contract that the worker signs, or if the worker repeats her employer-given contractor label in her pleadings, then the worker’s claim to employee status would seem to be extinguished from the start.

v. Independent Variables with No Statistically Significant Results

Though the analysis of this article’s data produced only four statistically significant results, examining variables that did not produce such a result can yield some insight as well. Again, a caveat is warranted: the results here were likely influenced by the small sample size; coding more years’ worth of data would perhaps uncover statistically significant relationships between misclassification outcomes and additional independent variables. Nevertheless, it is interesting to note that neither a judge’s political ideology nor a judge’s choice between the two main tests for employment status appeared to influence misclassification outcomes. These non-results run contrary to the preoccupations of antidiscrimination scholarship, which has raised concerns about politically conservative judges’ using a variety of strategies to terminate viable Title VII claims106 and has urged judges to adopt the economic realities test over the common law test so as to give plaintiffs a better chance at reaching the merits of their Title VII claims.107

Taking this latter point first, the non-result with regard to the judge’s choice of test would seem to confirm the position summarized in the Restatement of Employment that there is no functional difference between and among the various tests that courts use to classify an employment relationship. Whether the court uses a test or not is significant to misclassification outcomes, but once a court chooses a test and engages in an analysis of the common law or economic realities factors, the choice of test makes no difference as a statistical matter. Interestingly, then, and contrary to the preoccupations of legal scholarship, the outcome of plaintiffs’ misclassification challenges is influenced more by other factors—some of which have been identified by the analysis presented here—than by the particular legal framework that the judge chooses to employ.

The other variable of interest that did not produce a statistically significant result was the judge’s imputed political party. Though one might expect judges who were nominated by Democratic Presidents to side with workers more frequently than Republican-nominated judges, the data here do not yield that result. This may be because misclassification, standing alone, is not a particularly politically freighted issue; judges all along the political spectrum could theoretically decide a worker’s true employment status without resort to their ideological beliefs. Moreover, judges at all points on the political spectrum may be equally influenced by the desires

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106 See, e.g., Christopher Smith, Polarized Circuits: Party Affiliation of Appointing Presidents, Ideology, and Circuit Court Voting in Race and Gender Civil Rights Cases, 22 HASTINGS WOMEN’S L.J. 157, 185 (2011) (drawing on work by Cass Sunstein and others to conclude that “Republican judges have become more ideologically conservative on civil rights issues, while Democratic judges have maintained a constant judicial ideology or have even trended slightly more conservative”).

107 See, e.g., Dowd, supra note 10 at 114 (advocating for the economic realities test over the common law test; “A liberal definition of employee status is 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.”).
explored above — and, indeed, received training on the subject — to rid their dockets of bothersome, time-consuming, difficult employment discrimination plaintiffs.108

IV. Implications and Reform Proposals

The misclassification of workers as independent contractors is a many-layered problem. Misclassification results in lost tax revenues for government. It results in lost job benefits for workers, who labor without the sick leave and health benefits that many of their employee counterparts enjoy. Misclassification’s indirect effects are no less troubling: though the misclassification trend seems disproportionately to affect workers who have historically been subject to job discrimination, misclassification blocks those workers from seeking redress under most federal employment discrimination laws.

A narrow solution to this last problem would be to allow misclassified workers to appeal to a court to reclassify them for the sake of a Title VII case, to bring them out of the periphery illustrated in FIGURE 1 and into the Title VII-covered core. And federal employment law does provide this solution in name, though the results discussed in this article suggest that very few workers are actually able to make the leap from periphery to core. Workers are stymied in their attempts to challenge their misclassification, particularly those workers who make race discrimination and discriminatory hiring claims. Moreover, the discussion in Part III above suggests that some judges may be shirking their responsibility to engage seriously with the misclassification question, and instead relying blindly on workers’ contracts and labels as independent contractors. This is troubling, as it functionally cedes all power to employers to define who is and is not covered by Title VII. Thus, the fail-safe that a misclassification challenge should represent for misclassified Title VII plaintiffs appears to be malfunctioning.

These results lend support to the growing chorus of demands from scholars to revisit or abolish the independent contractor-employee distinction within federal employment law. Some scholars propose reforming employment discrimination law “to explicitly include independent contractors [a]s the best way to protect these workers in the midst of a changing labor market.”109 These reforms could draw on the example of state antidiscrimination laws that cover independent contractors and employees on equal terms. The Pennsylvania Human Relations Act, for example, renders it an “unlawful discriminatory practice”:

For any employer because of the race, color, religious creed, ancestry, age, sex, national origin or non-job related handicap or disability or the use of a guide or

———

108 Gertner, supra note 87; Cho, supra note 82 (discussing the appeal of post-racialism to both conservatives and liberals); cf. Smith, supra note 106 at 185 (noting that judges appointed by Presidents from both political parties increase in their conservatism toward civil rights cases the longer they spend on the bench).
109 See, e.g., Maltby & Yamada, supra note 4 at 274; see also Stone, supra note 52 at 284 (“Individual employment laws, such as unemployment insurance, workers’ compensation, minimum wage, family and medical leave, and discrimination protection must be interpreted to apply to all workers, be they regular, temporary, or dependent independent contractors.”); Linder, supra note 18 at 223 (“By what possible rationale should laws designed to prevent work-related discrimination against those who are other than healthy, young white men prohibit a plumbing contractor from refusing to hire a plumber merely because he or she is black, female, disabled, or old, while permitting a textile manufacturer to refuse services from a solo plumbing contractor on the basis of the same prejudices? The ADEA, Title VII, and the ADA should be amended to delete employee status as a coverage requirement.”).
support animal because of the blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.\textsuperscript{110}

By erasing the distinction between employee and independent contractor in discrimination law, this sort of reform removes the threshold barrier that is the misclassification challenge and would allow discrimination plaintiffs to proceed more easily to the merits of their claims.

A second set of reform proposals would maintain the existing independent contractor-employee distinction in federal employment law, but would create a third category for “dependent contractors.” Borrowing from employment law concepts in place in Canada, Scandinavia, and Europe, this category of workers “are not employees under the traditional legal tests, but nonetheless are recognized as deserving of some employee-like legal protections by virtue of working in positions of economic dependence.”\textsuperscript{111} As Stephen Befort explains the German approach:

\begin{quote}
[A]n intermediate group of “employee-like persons” are technically self-employed, yet nonetheless treated as employees for some purposes because they are “economically dependent and are in similar need of social protection.” Thus, employee-like persons are covered by statutes relating to workplace health and safety, the prevention of sexual harassment, and collective bargaining. On the other hand, these dependent contractors are not covered by Germany's Act on Protection against Dismissals and the Act on Working Time. This dichotomy apparently reflects the notion that statutory coverage should be broader where basic societal interests are at stake than where the interests in question relate more narrowly to the status of an individual worker.\textsuperscript{112}
\end{quote}

Notably, this dependent contractor classification seems to overlap with the economic realities test to some extent, as both are concerned with the extent of the worker’s reliance on the employer as a matter of fact, rather than a matter of label. Yet even if the United States were to add a third status to its employment law regime, there would still likely be a fight at the outset of any employment dispute in which a worker’s status dictates a law’s coverage, and we may see results similar to those suggested by this article’s analysis: workers categorized as independent contractors may have a hard time convincing unsympathetic courts to move them out of that peripheral category and into the slightly less peripheral category of dependent contractor.


\textsuperscript{111} Stephen F. Befort, \textit{Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment}, 43 B.C. L. Rev. 351, 454 (2002); see also Micah Prieb Stoltzfus Jost, \textit{Independent Contractors, Employees, and Entrepreneurialism Under the National Labor Relations Act: A Worker-by-Worker Approach}, 68 WASH. & LEE L. REV. 311, 337 (2011) (“Perhaps the clearest and simplest solution is the creation of a ‘dependent contractor’ category. Such a classification would be a legal recognition of the reality that shades of gray exist between the completely integrated and dependent employee and the fully independent, small-business-operating contractor.”).

\textsuperscript{112} Befort, supra note 111 at 455.
Still more scholars propose redefining employment in entirely different ways. Matt Bodie, for example, proposes replacing the concept of control from the common law employee test with the concept of participation: “At this point in our history, it makes sense to consider an employee to be one who participates in joint production within the context of a firm, rather than one who is controlled by an employer. Such a conception of employment as participation will enable us to better understand the reasons why we have a common conception of employment that ribbons throughout our law. Because employees participate within a firm, they are responsible to the firm, and the firm is responsible both to and for them.”113 Likewise, Richard Carlson proposes “alternative rule[s] of coverage” for each segment of employment law, suggesting that coverage be dictated for each statute by statute-specific factors rather than by the unhelpful single concept of “employee.”114 Finally, Noah Zatz, discussing the employee-independent contractor distinction in the context of the National Labor Relations Act, joins Katherine Stone in suggesting that legislatures and courts abandon “the old model built on stable workforces bargaining with a single employer” and extend labor and employment laws’ protections to new worker-employer relationships and concomitant “new forms of worker organization.”115

In the end, if the goal of our antidiscrimination regime is to confer legal rights against job discrimination so as to reduce inequality, the first set of reform proposals outlined above seems the most sensible: to do away with the employee-independent contractor distinction entirely within antidiscrimination law. The distinction, from the very beginning, has lacked content, and even when armed with an array of tests and factors as guidance, the analysis presented in this article suggests that courts’ misclassification decisions may be influenced less by any given legal test than by the desire to rid their dockets of inconveniently complicated employment discrimination claims.116 Rather than tinker with the current line-drawing between employee and independent contractor, then, the best course would seem to be to erase those lines and refocus the inquiry under Title VII and other federal employment statutes on the central question of discrimination.

CONCLUSION

This article has presented the results of an original empirical study of the outcomes of Title VII plaintiffs’ misclassification challenges in federal court over five years, 2009 to 2013. A large majority—sixty-four percent—of plaintiffs lost on the misclassification question, and those losses were felt disproportionately by plaintiffs who alleged race discrimination, discrimination in hiring, and by pro se plaintiffs. Notably, though scholars have paid much attention to the various tests that courts employ in distinguishing between independent contractors and employees, the particular test that a court deployed was not statistically

114 Carlson, supra note 5 at 368.
116 Gertner, supra note 81.
significantly associated with a particular misclassification outcome.

The results presented here are partial and suggestive; further research is needed. Indeed, further research is needed on all aspects of the so-called new economy, in which work no longer resembles the traditional ideal of a stable job with a single employer, job security, and a path for advancement.\(^{117}\) Labor scholar Annette Bernhardt has sketched out a research agenda for filling in the considerable blanks in the legal and social science literatures, including investigating misclassification’s prevalence and the characteristics of misclassified workers.\(^{118}\) This article begins that work, but there is more to be done to draw an accurate portrait of the misclassified worker, to identify with specificity the problems caused by misclassification, and to formulate effective legal and policy solutions.


\(^{118}\) Bernhardt, supra note 44 at 2 (“The main goal in this paper is to identify key data gaps and research questions that need to be answered, in order to better understand trends in workplace restructuring during the era of growing inequality.”); id. at 7 (describing “the problem of misclassification, where unfortunately we have very little data”).
### Table 4: Frequency Table: All Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misclassification win for plaintiff</td>
<td>40</td>
<td>35.7%</td>
</tr>
<tr>
<td>Misclassification loss for plaintiff</td>
<td>72</td>
<td>64.3%</td>
</tr>
<tr>
<td>Title VII claims settlement(^{119})</td>
<td>27</td>
<td>67.5% of 40 [24.1% of 112]</td>
</tr>
<tr>
<td>Title VII claims loss for plaintiff</td>
<td>12</td>
<td>10.7% of 112</td>
</tr>
<tr>
<td>Title VII claims win for plaintiff</td>
<td>1</td>
<td>2.5% of 40 [0.9% of 112]</td>
</tr>
<tr>
<td>Republican judge</td>
<td>69</td>
<td>61.6%</td>
</tr>
<tr>
<td>Democratic judge</td>
<td>40</td>
<td>35.7%</td>
</tr>
<tr>
<td>Magistrate judge (political party unknown)</td>
<td>3</td>
<td>2.7%</td>
</tr>
<tr>
<td>Plaintiff had attorney</td>
<td>76</td>
<td>67.9%</td>
</tr>
<tr>
<td>Pro se plaintiff</td>
<td>36</td>
<td>32.1%</td>
</tr>
<tr>
<td>Race discrimination claim</td>
<td>49</td>
<td>43.7%</td>
</tr>
<tr>
<td>No race discrimination claim</td>
<td>63</td>
<td>56.3%</td>
</tr>
<tr>
<td>Sex discrimination claim</td>
<td>57</td>
<td>50.9%</td>
</tr>
<tr>
<td>No sex discrimination claim</td>
<td>55</td>
<td>49.1%</td>
</tr>
<tr>
<td>Religious, national origin, and/or color discrimination claim</td>
<td>23</td>
<td>20.5%</td>
</tr>
<tr>
<td>No religious, national origin, and/or color discrimination claim</td>
<td>89</td>
<td>79.5%</td>
</tr>
<tr>
<td>Retaliation claim</td>
<td>54</td>
<td>48.2%</td>
</tr>
<tr>
<td>No retaliation claim</td>
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<td>51.8%</td>
</tr>
<tr>
<td>Intersectional claim</td>
<td>102</td>
<td>91.1%</td>
</tr>
<tr>
<td>No intersectional claim (single claim type)</td>
<td>10</td>
<td>8.9%</td>
</tr>
<tr>
<td>Hiring</td>
<td>12</td>
<td>10.7%</td>
</tr>
<tr>
<td>Firing</td>
<td>51</td>
<td>45.5%</td>
</tr>
<tr>
<td>Harassment, pay, working conditions</td>
<td>49</td>
<td>43.8%</td>
</tr>
<tr>
<td>Nontraditional claim</td>
<td>16</td>
<td>14.3%</td>
</tr>
<tr>
<td>Traditional claim</td>
<td>96</td>
<td>85.7%</td>
</tr>
<tr>
<td>Occupation: manager, professional</td>
<td>53</td>
<td>47.3%</td>
</tr>
<tr>
<td>Occupation: sales, service, office</td>
<td>41</td>
<td>36.6%</td>
</tr>
<tr>
<td>Occupation: blue collar and other</td>
<td>18</td>
<td>16.1%</td>
</tr>
</tbody>
</table>

\(^{119}\) Title VII claim outcomes were coded only for the cases that survived the misclassification step. The frequency figures therefore sum to forty rather than 112. Percentage figures are reported as both percent of forty and percent of 112.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Industry: construction, manufacturing, transportation</td>
<td>24</td>
<td>21.4%</td>
</tr>
<tr>
<td>Industry: information, finance, professional</td>
<td>30</td>
<td>26.8%</td>
</tr>
<tr>
<td>Industry: public administration, health, education</td>
<td>43</td>
<td>38.4%</td>
</tr>
<tr>
<td>Industry: other services</td>
<td>15</td>
<td>13.4%</td>
</tr>
<tr>
<td>Test: common law</td>
<td>64</td>
<td>57.1%</td>
</tr>
<tr>
<td>Test: economic realities, hybrid</td>
<td>33</td>
<td>29.5%</td>
</tr>
<tr>
<td>No test</td>
<td>15</td>
<td>13.4%</td>
</tr>
<tr>
<td>Year 2009</td>
<td>21</td>
<td>18.7%</td>
</tr>
<tr>
<td>Year 2010</td>
<td>29</td>
<td>25.9%</td>
</tr>
<tr>
<td>Year 2011</td>
<td>20</td>
<td>17.9%</td>
</tr>
<tr>
<td>Year 2012</td>
<td>24</td>
<td>21.4%</td>
</tr>
<tr>
<td>Year 2013</td>
<td>18</td>
<td>16.1%</td>
</tr>
</tbody>
</table>

**Note:** \( N = 112 \)
<table>
<thead>
<tr>
<th>Variable</th>
<th>Total cases</th>
<th>Wins</th>
<th>Losses</th>
<th>Percent losses</th>
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</thead>
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<tr>
<td>Republican judge</td>
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<tr>
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<td>72.5%</td>
</tr>
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</tr>
<tr>
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<td>26</td>
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<tr>
<td>Sex discrimination claim</td>
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<td>21</td>
<td>36</td>
<td>63.2%</td>
</tr>
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<tr>
<td>Retaliation claim</td>
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</tr>
<tr>
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<td>Hiring</td>
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<td>91.7%*</td>
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<tr>
<td>Firing</td>
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<td>23</td>
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<td>54.9%*</td>
</tr>
<tr>
<td>Harassment, pay, working conditions</td>
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<td>33</td>
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<tr>
<td>Nontraditional claim</td>
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<td>Occupation: manager, professional</td>
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<tr>
<td>Occupation: blue collar and other</td>
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</tr>
<tr>
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<td>54.7%</td>
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<tr>
<td>Test: economic realities, hybrid</td>
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<td>22</td>
<td>66.7%</td>
</tr>
<tr>
<td>Test (any)</td>
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<td>57</td>
<td>58.7%**</td>
</tr>
<tr>
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<td>15</td>
<td>100.0%*</td>
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</table>

**Note:** †p < 0.10; *p < 0.05; **p < 0.01
### Table 6: Regression Results: Test versus No Test

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>Standard error</th>
<th>P-value</th>
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<tbody>
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<td>Pro se plaintiff</td>
<td>2.282424</td>
<td>.802493</td>
<td>0.004**</td>
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<td>-</td>
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<td>Sex discrimination claim</td>
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</table>

**Note:** †$p < 0.10$; *$p < 0.05$; **$p < 0.01$