

TESTIMONY OF CYRUS MEHRI
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING: BARRIERS TO JUSTICE:
EXAMINING EQUAL PAY FOR EQUAL WORK

SEPTEMBER 23, 2008

EXHIBIT 5



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Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?

by

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Methodology

- Official data from U.S. courts
 - » Every district court & appellate case fiscal 1979-2007
 - » Compare category 442: "Civil Rights: Jobs" to other civil cases
 - $\frac{2}{3}$ are Title VII cases (race or sex discrimination)
 - Also disability, age, FMLA, and other cases
- First article, Journal of Empirical Legal Studies (2004)
 - » Peer reviewed, analyzes data through 2001
- Current article, Harvard Law & Policy Review (forthcoming)
 - » Analyzes latest available data
 - » Some through 2007 & complete dataset through 2005





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THREE AREAS OF FOCUS

- Number of Cases over Time
- Plaintiff Win Rates in District (Trial) Courts
- Plaintiff Success on Appeal





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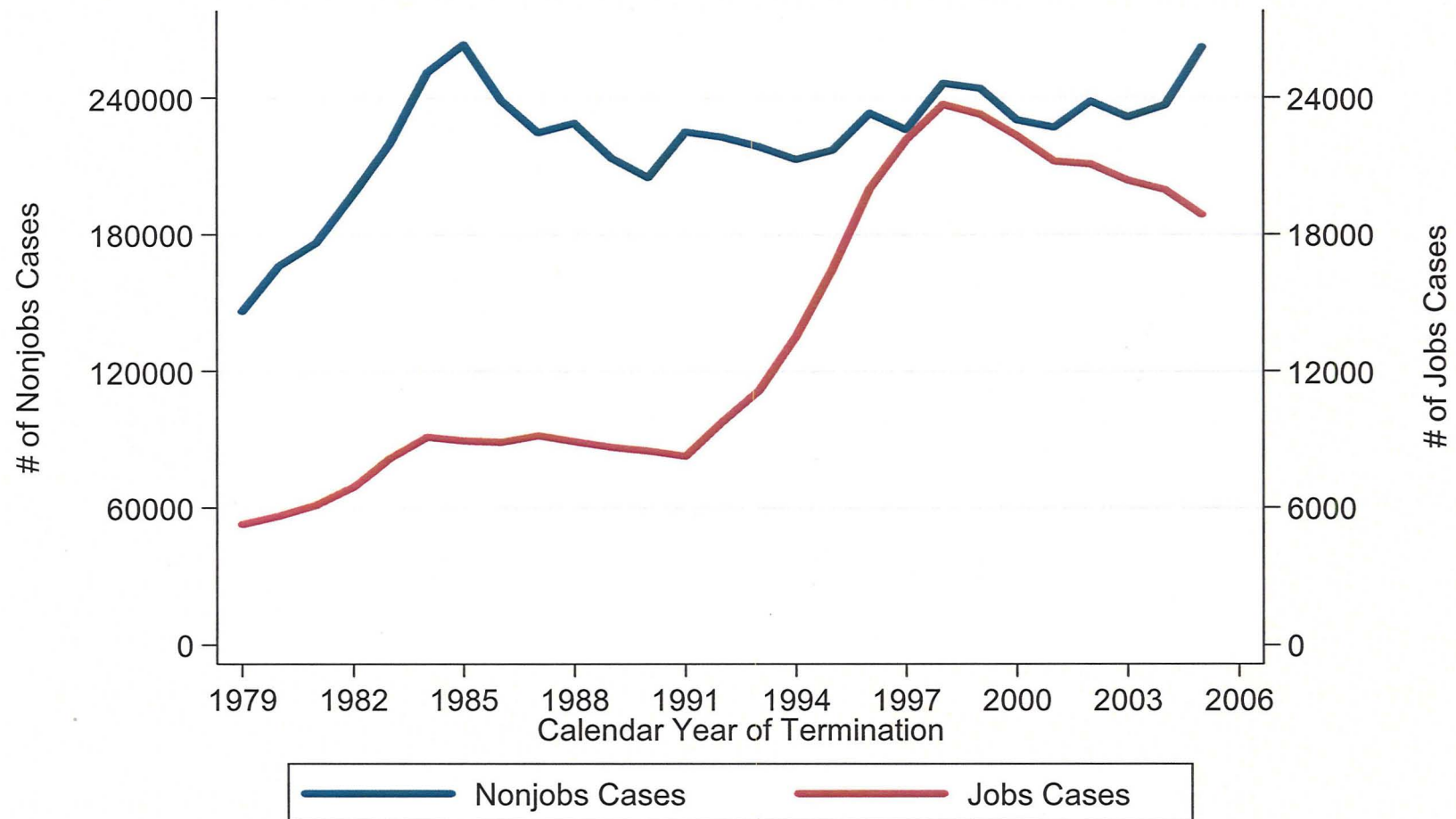
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Core Findings

- Startling drop in employment discrimination cases since 1999
 - » Absolute drop of 21% through 2005, 37% through fiscal 2007
 - » Relative drop from 10% of total civil caseload to 6%
- Win rates in trial court low
 - » Trial win rate: 29%
 - » Judge-trial win rate: 20%
- Employment discrimination plaintiffs fare badly on appeal
 - » 41.1% reversal rate for worker trial victories
 - » 8.7% reversal rate for employer trial victories



Display 5: Numbers of Cases for Employment Discrimination and Other Civil Cases, 1979–2005, U.S. District Courts. This graph of AO data shows the differently timed rises in employment discrimination and other cases, looking at those terminated since 1979. The other cases peaked in 1985 at 263,804, and they were at 262,239 in 2005. Employment discrimination cases peaked in 1998 at 23,722, but they dropped by 2005 to 18,859.





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Display 5A: Change in District-Court Employment Discrimination Cases Terminated, by Circuit, Calendar Years 1998 Through 2005.

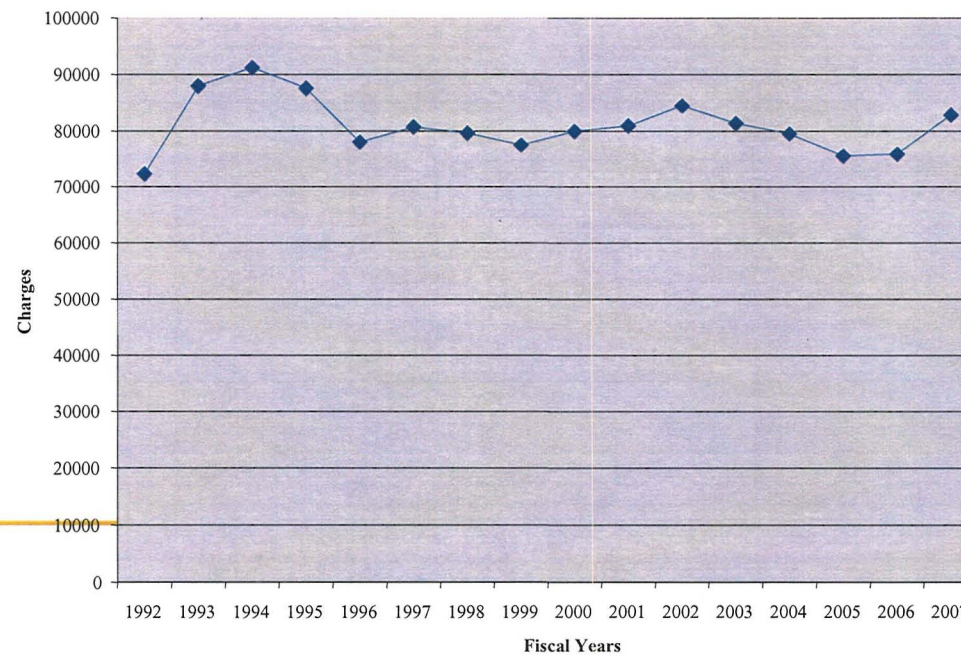
<i>Circuit</i>	<i># of Cases: 1998</i>	<i># of Cases: 2005</i>	<i>% Change</i>	<i>Mean Year-to-Year Rate of Change</i>
11	4116	2675	-35	-.94
5	2578	1942	-25	-.90
4	1713	1324	-23	-.89
8	2000	1447	-28	-.88
6	2145	1746	-19	-.86
2	2024	1677	-17	-.86
9	2898	2327	-20	-.84
10	1529	1189	-22	-.82
7	2459	2009	-18	-.79
3	1504	1651	+10	-.43
DC	360	357	0	-.33
1	393	509	+30	+.33
Nationwide Total	23,719	18,853	-21	



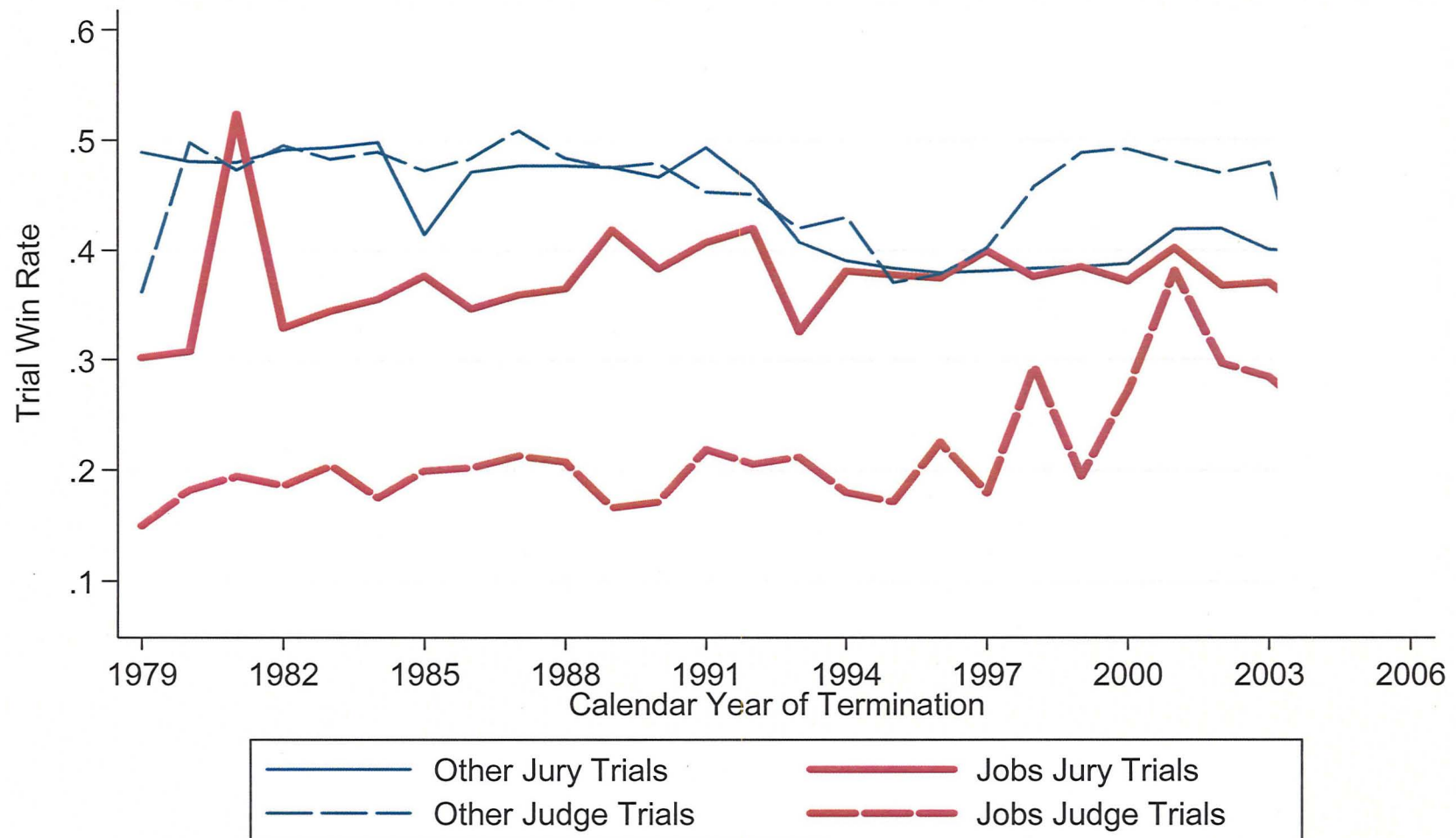
EEOC Charge Statistics

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007
Total Charges	80,680	79,591	77,444	79,896	80,840	84,442	81,293	79,432	75,428	75,768	82,792

Total Charges FY 1992-2007



Display 16: **Plaintiff Win Rates at Jury and Judge Trials in Employment Discrimination and Other Civil Cases, 1979–2006, U.S. District Courts.** The top two lines of this graph of AO data show the nearly indistinguishable plaintiff win rates in jury and judge trials in nonjobs cases. The bottom two lines show the large gap in jury and judge win rates in jobs trials.



Display 16A: Plaintiff Win Rates at Pretrial, Trial, and Judge Trial in Employment Discrimination and Other Civil Cases, 1979–2006, U.S. District Courts.

	<i>Jobs Cases</i>	<i>Other Cases</i>
Pretrial	3.59%	21.05%
Trial	28.47%	44.94%
Judge Trial	19.62%	45.53%

Display 4A: Reversal Rates on Appeals By Plaintiffs and Defendants from Their Trial Losses, 1988-2004, U.S. Court of Appeals. This table of AO data for the calendar years available compares the average reversal rate, for employment discrimination and other civil cases, when defendants and plaintiffs appeal their losses.

<i>Type of Case</i>	<i>Reversal Rates</i>	
	<i>Percent of Defendants' Appeals Reversed After Trial Loss (#reversals/#appeals)</i>	<i>Percent of Plaintiffs' Appeals Reversed After Trial Loss (#reversals/#appeals)</i>
Jobs	41.1	8.7
Nonjobs	35.1	14.7



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Explaining Core Findings

- Why the huge drop in cases: 37% in 8 years?
 - » EEOC charges remain constant, which suggests no reduction in workplace discrimination
 - » Our explanation: plaintiffs see tough row, especially in certain circuits, and so now are perhaps turning to ADR or state courts
- Why low win rate at trial, especially judge trials?
 - » Consistent with other findings for jobs cases, such as fewer early terminations, lower plaintiff win rate on pretrial motions, and more trials
 - » Our explanation: judges demand more of jobs plaintiffs than juries do
- Why double standard on appeal?
 - » No clear selection effects, there being no evidence that at trial plaintiffs' cases are comparatively weak
 - » Our explanation: appellate judges perceive trial decisionmakers as pro-plaintiff, and hence scrutinize employees' victories below while gazing benignly at employers' victories





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THANK YOU