

**JOINT STATEMENT OF
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The courts of appeals must maintain a consistent and principled application of the . . . statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.

Albemarle Paper Company v. Moody,
422 U.S. 405, 421-22 (1975) (Stewart, J.)

Today we are releasing a report by two highly distinguished professors from Cornell Law School, Theodore Eisenberg and Stewart J. Schwab, who are at the forefront of empirical research on the federal court system. The report, "Double Standard on Appeal: An Empirical Analysis of Employment Discrimination Cases in the U.S. Courts of Appeals," is based on computerized data maintained by the federal judiciary.

The Eisenberg-Schwab Report highlights a disturbing disparity in the way federal appellate courts treat employment discrimination cases in comparison to other types of cases. It would appear that employment discrimination plaintiffs are treated as second class citizens in the workplace and as second class litigants in the federal courts of appeals. For example, when a plaintiff appeals a defendant's victory at trial, she has no more than a 5% chance of reversing the defendant's victory on appeal; but if a defendant appeals a plaintiff's trial victory, the defendant has an incredible 43% chance of reversing the plaintiff's victory.

The 43% success rate for defendants who appeal is particularly troubling when one considers that these are cases in which plaintiffs typically have already overcome difficult summary judgment motions, prevailed at trial, and survived post-trial motions. Further, employment discrimination cases that reach trial are almost always fact-intensive, and appellate courts are obligated to defer to the district court fact-finders with respect to factual determinations. The results reported in the Eisenberg-Schwab Report suggest that federal courts of appeals use this deference to trial court findings as a shield for winning employers, but toss that shield away when a plaintiff's trial court victory is appealed.

The few employment discrimination plaintiffs who prevail against powerful employers (and the corporate law firms defending them) are today's unsung heroes. But empirical evidence shows they are not treated fairly on appeal and are too frequently robbed of their hard-won victories by federal appellate judges, who may be distanced from the realities of discrimination in the workplace. The apparent double standard towards employment discrimination plaintiffs in the federal courts of appeals debases the intent of Congress in enacting legislation to reduce civil rights violations in the workplace. There may be other troubling consequences of this appellate bias, as well, such as employers becoming more brazen in their unlawful conduct, defense lawyers becoming more aggressive in their litigation tactics, and litigants who have meritorious complaints of workplace discrimination being further demoralized.

We hope the Eisenberg-Schwab Report will spur a national dialogue in the legal community, in Congress and in the workplace about what appears to be a systemic judicial bias against employment discrimination plaintiffs in our federal appellate courts. Perhaps there are innocent explanations for the double standard on appeal, but the disturbing implications of this report will never be understood unless such a dialogue takes place.

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