Antidiscrimination law doesn't actually dismantle social hierarchies

Instead, it preserves managerial authority, dominated by white men, and reproduces hierarchies by focusing on individual harm — rather than disrupts hierarchies.

Are civil rights truly rights if we have to pay to get them through the legal system? Does law disrupt social hierarchies or perpetuate them? Authors Ellen Berrey, Robert L. Nelson, and Laura Beth Nielsen dig for the answers to these crucial questions in *Rights on Trial*.

Their finding: employers, agencies, and courts often re-inscribe the very hierarchies discrimination law was designed to attack, making discrimination both an intentional and structural problem. Civil rights law doesn't actually affect social change by correcting discriminatory behavior at work because it upholds the bias through stereotypes that created the discrimination in the first place.

Here's the reality about use of and access to justice:
Most targets don't involve the legal system. Only a tiny fraction of targets approach the EEOC, predominantly around race, sex, disability, and age. A Rutgers study revealed that "more than a third… of those who reported unfair treatment in the workplace opted not to do anything…. Some 29% said they reported the incident to a supervisor, 19% filed a complaint according to company procedures, 10% avoided certain areas or people in the office, 4% quit, and 2% confronted the person. Only 3% said they sued the company or their coworker."
The high dollar wins shown in the media are rare. When targets sue, they generally gain small settlements (median of $30,000) or lose. And much of those settlements simply go to legal fees. In addition, "national and local media coverage of employment cases report… a win rate nearly three times the actual win rate of 32%."
It's rare that decisions are made on merits of cases. Most often, there is no official decision of the case facts as "only 6% of cases reach trial." In fact, most plaintiffs never have the opportunity to present their facts.
There's a huge asymmetry of power in workplaces and in courts. One-shot plaintiffs challenge repeat player corporations, who vilify individual plaintiffs and increase the adversarial nature of the conflict. The system favors the haves (training, experience, and resources — an army) over the have-nots.
Legal representation is crucial. Many plaintiffs don't hire lawyers, giving them huge disadvantages. If they do hire lawyers, the lawyer generally controls how the case is litigated and often insists on settlement. Meanwhile, employers always have legal representation and much more control over litigation decisions.
Most outcomes are confidential. When plaintiffs settle their claims, they typically sign a non-disclosure agreement that prevents meaningful change.
It's a systemic problem, not an individualized problem. Research points to a widespread, systemic problem of implicit biases. Yet courts address the issue as a set of individual cases of intentional misbehavior based on smoking guns.

The history of civil rights law in the U.S.

In 1966, when the EEOC started collecting data on the race and gender composition of workplaces, white men were overwhelmingly overrepresented in power positions. African American men and women and white women were dramatically underrepresented in them relative to their numbers in the labor force.

While Title VII of the Civil Rights Act of 1964 fostered some progress for white women, white men still retain power in the U.S. private sector workforce. Discrimination continues — and at an unchanged rate. There are major earning disparities between racial and gender groups. In 2014, median incomes were:

"Asian American men:	$59,766
White men:	$58,712
Asian American women:	$48,419
White women:	$44,236
African American men:	$41,167
African American women:	$35,212
Latino men:	$35,114
Latina women:	$30,289" (almost half of the median income for Asian American men)

Yet the early years of Title VII seemed promising. Back then, the Supreme Court fostered change by holding

that plaintiffs did not need to prove discriminatory intent since discrimination could be presumed with certain workplace practices (passing over quality minority candidates for white candidates and not paying men and women equally for equal work, for example). Remedies included back pay.

By the late 1980s and 1990s, courts limited what constituted discrimination and the likelihood of a discrimination claim getting to trial or proven in court. Judges often claimed that employers having any EEO compliance programs in place to prevent discrimination meant discrimination didn't happen.

Trends in discrimination case outcomes

Those with legal representation (aka money) are most likely to have successful case outcomes. "Plaintiffs who do not have a lawyer ["one in four plaintiffs"] have their cases dismissed at a 40% rate compared to 11% for plaintiffs with lawyers." More privileged social groups obtain better results, ironic in an area of law intended to protect disadvantaged groups. Case dismissals often result from plaintiff misunderstandings (read: no education from a lawyer) and can cost plaintiffs court fees. Plaintiffs can also lose on settlement or all counts of summary judgment, when the defendant argues that there is no material issue of fact to be decided on and aggressively sets a deadline.

Settlement is the most common outcome of cases "with an estimated median of $30,000." "Plaintiffs win something 60% of the time." Trials are rare and "return a victory for the plaintiff one time in three." Coupled with the fact that courts dismiss or terminate a significant portion of cases, even when plaintiffs have lawyers, most plaintiffs do not have the merits of their cases heard in court when they sue. Attorney fees provide incentive to settle, even if plaintiffs don't believe the settlement amount is fair, and sometimes employers sue employees for those fees.

Unlawful firing is the most prevalent cause of action followed by discriminatory retaliation, promotion, pay, and hiring.

Individualizing cases is far more common than showing systemic problems. Disparate *treatment* cases mean showing discriminatory intent, while disparate *impact* cases mean showing that employment practices have a statistically disproportionate effect on a protected group. Disparate treatment cases are far more common as plaintiffs most often challenge their individual mistreatment versus the employment practices that impact a group of workers.

Collective legal mobilization leads to better outcomes but is far less common than individual cases ("one case in 10"). The common scenario is one-shot litigants and their cases that avoid policies that affect protected groups and instead allow employers to position issues as individual problems or personality conflicts.

How the adversarial conflict escalates

Plaintiffs often look to law or organization policy to object to management decisions, especially with new managers feeling threatened by high performers. They observe race and/or gender bias and attempt to resolve it through their employers' internal channels: meetings with HR or higher-ups or ethics hotlines. Sometimes employers analyze and tackle claims at the source and help managers learn from mistakes to prevent future cases. Most of the time, they either assume managers handle the claim or simply don't investigate or investigate only to understand if the employee has a legit legal claim and to re-position the claim as a miscommunication and meritless. Because of this encouragement to report problems, plaintiffs report surprise to hostile reactions from employers when they report, assuming they will be receptive. With no resolution or with termination — and without awareness of the asymmetry of power in the workplace and legal system — employees contact a lawyer or the EEOC to try to obtain fair treatment.

Meanwhile, employers treat the situation as an adversarial conflict and focus on both minimizing legal risk to protect managerial hierarchy and on maximizing their own interests. Employers often:
Pose claims as ambiguous, incomplete, irrational, misguided, greed-driven, or frivolous and vilify complaining employees.
Position the employee as source of the problem — a lack of fit, a breakdown in a relationship, or unrelated performance issues — and use negative performance evaluations to foreshadow termination.
Give advanced notice to the legal department to check documentation of talks, warnings, and chances to improve.
Mandate arbitration to resolve issues outside of court.
Offer generous severance pay plans (for signed waivers) to treat employees well on the way out to avoid lawsuits.
Spout a commitment to discrimination-free workplaces through training (which teaches employees they have few rights and to tolerate mistreatment). In other words, they bring law to the workplace to keep law out of it.
Individualize problems to avoid discrimination liability.
Feel that management may make objective business decisions employees don't like or even mistreat but not discriminate against employees. They often believe protected employees try to exploit their status for financial gain. Due to attorney fees and outcomes, they are never fully satisfied with case outcomes or feel vindicated.

When they sue, plaintiffs often realize power shifts from the abuser to the employer, dramatically increasing issues for plaintiffs. The major stress and complete life upheaval for employees is just a problem for employers. Employees often:
Feel confused and naive with less legal experience and resources.
Receive little to no help from unions, who don't often use their power in individual cases (harmful to future negotiations).
Are subject to evaluations from employers' physicians, opening up the potential for false accusations and digging up dirt.
Lose the ability to pay for basic living expenses (mortgage, bills, and food), nevermind attorney fees, and suffer psychological harm and loss of identity associated with the job if they're terminated.
Are subject to public undermining of their character and competence.

How race determines access to legal representation

A form of institutional and interpersonal racism, people of color are far less likely to obtain legal representation due to:

Their search for lawyers: inadequate information and networks, a lack of trust in the legal profession, and high cost (including fees for initial assessments). Payment for attorneys falls into three categories:

Contigency fee, paying the bulk only if a client prevails, and contingency fee plus, an upfront fee designed to screen serious clients or an hourly fee added to funds from the award if the case prevails.
Crucial factors to make economic sense: potential damages, which excludes low wage earners given their average annual earnings; potential to win, which often requires smoking gun evidence; minimal work in case of loss.
Hourly fee, guaranteeing payment regardless of outcome.
Crucial factors to make economic sense: clients understanding the unpredictability of recovery; clients with money.
It's a backup plan for those who can't convince contingency lawyers to accept their cases.
Pro bono and informal representation. Some lawyers prefer clients with strong cases who have public interest goals and aren't money-driven. Many operate quietly and without advertising for business, so they're hard to find.

Lawyers' selection of clients: prejudice through questions of credibility, merit, demeanor, and ability to pay (or racist code that degrades targets). To take on a discrimination case (which lawyers say they take a small fraction of and are highly selective with), lawyers have to make a cost-benefit analysis. They need to perceive workplace discrimination, plaintiff's seriousness about pursuing a case, and that the plaintiff and claim can withstand the trial since likelihood of a successful outcome isn't high — so who can quickly sell a compelling story, who can establish credibility in court, who's prepared, and who can read discouraging assessments as tests of commitment rather than rejection.

Through implicit bias, attorneys may reproduce the class and racial biases these targets perceive at work. For example, the preference for preparedness might disadvantage those with less education, less access to resources and opportunities, and less general knowledge about law and the legal process — all affecting presentation styles.

Unmeritorious cases do not seem to be the main reason that people of color are less likely to have lawyers. The reason is the highly selective process — with implicit bias — that ultimately results in only about 10% of people inquiring about cases becoming clients.

So groups most affected by discrimination may be the least likely to have the resources to mount effective challenges in court with representation — ironic considering that the legal system better serves non-minority groups.

How employers have major legal advantages

While some plaintiffs understand that the legal system is a game they have to play once they sue, plaintiffs have far less control and receive much less support from their attorneys compared to employers.

There's a huge asymmetry of power. There are major differences in:
Frequency of playing the game. Defense attorneys are repeat players and can devise systems to minimize legal risk. Plaintiffs are one-shotters who have to rely on others for strategy. Defense attorneys represent organizations with which they either have ongoing, long-standing relationships or with whom they are trying to cultivate one. (Legal defense funds and a specialized plaintiffs bar may help level the playing field somewhat.)
Power in number of team members and financial resources. Most defendant organizations seem to have more attorneys, a legal risk budget, and discounted legal fees for their preferred provider relationships. Representation is a given, and money shapes legal strategies (whether or not to pursue claims versus settling and implementing policies and practices to minimize liability). Meanwhile, plaintiffs have to use limited personal resources. Money is often a barrier to obtaining and keeping representation.
Quality of lawyer/client relationships. Defense lawyers have high status. Their clients — employers — call the shots. Employers report feeling in control and work closely with outside counsel, who play a minor role by giving advice and reinforcing such decisions as documenting employee underperformance, while HR departments as part of management play the major role, doing business the way they wanted. Counsel collaborate in a shared commitment to advance employers' larger business interests, such as disposing costly cases or destroying the business plan of plaintiff lawyers who sue repeatedly by taking them to trial, winning, and making it public. Plaintiff lawyers typically have lower status. Plaintiffs heavily rely on them for knowledge and decision-making. Plaintiffs' main concerns about their lawyers are self-serving interests, commitment, expertise, emotional connection, communication, competence, close relationship with defense counsel, and honesty. In other words, they generally have negative views of them in (yet another) asymmetrical power imbalance with them where they suffer more emotional and psychological harm. Yet some plaintiff lawyers describe plaintiffs as confused, defiant, and unrealistic, expecting results from unfair but not illegal treatment since most states have at-will employment and can terminate an employee for any reason or no reason at all so long as the reason is not illegal. Some learn clients have not told the truth about some aspects of their claim. Mistrust can increase tension. Others consider clients know-it-alls, harming their cases in court. Plaintiff lawyers must also manage clients' emotional needs and understanding, often rendering them anywhere from insensitive to caring by clients.
Expectations. Plaintiff lawyers reported needing to also manage expectations, including explaining that with settlements, employers guarantee payment (even if only for legal fees) but make no admission of guilt. Plaintiff lawyers frame issues, educate clients, offer advice, and lay down subtle ultimatums. (Some do put critical decisions on plaintiffs, letting them have their day in court or laying out options. Some who strongly influence or dictate decisions miscalculate.)

The support of rights but not employees advocating for them

Adversarialism and opposing views — rather than addressing potential discrimination — informs each side's actions and perceptions. Plaintiffs see themselves as the little guy in a litigation system stacked against them with adversaries who **believe discrimination exists — just not in their cases:**
Defendants who insist they abide by the law yet find flaws with every individual case by using stereotypes. They become defensive and can escalate tensions with abusive legal tactics such as using summary judgment motion to tell plaintiffs they have 45-day time limit to take depositions, etc.. Inundated with other cases, plaintiff lawyers often push for an early settlements to get rid of the case, giving no attention to the merits of the case fro either side as they jockey for position. Judges who often don't see discrimination evidently in cases without smoking gun evidence and play a role not just in decisions but in reaching them by supporting defenses' lies, resulting in perceived unfairness. (Plaintiffs generally have more confidence in juries.)

Meanwhile, plaintiffs simply want justice and change in how people think about race, gender, disability, and age in the workplace. Getting justice means defining what is and isn't discrimination. Employers get to define discrimination through a set of advantages: more experience, resources, and honoring of their dignity and less at stake with fewer consequences — re-inscribing the very ascriptive hierarchies the plaintiffs challenge.

The result for plaintiffs on the disadvantaged end: the process is the punishment. It's dehumanizing, inflexible, and an obstruction of justice because it's usually not based on merits of the case.

Plaintiffs assume the law is an unbiased path to justice but quickly learn it's a degrading system full of obstacles. From the getgo, they expect to be treated as equals to their employers yet fail to receive personal responses from EEOC and FEPA employees. The adversary moves from the offending supervisor to the defense attorneys and upper management, who vilify the employee. Employers convince current employees to lie for them, and there's little opportunity in the process to counter these lies, nevermind share their versions of what happened to them. They also belittle plaintiffs, characterizing them as naïve about what discrimination is and the system and manipulators and reducing claims to personality conflicts and complaining employees to problems — poor performers, not intelligent, stubborn, vengeful, conniving, hypersensitive, arrogant, lazy, unreliable, difficult, resistant to change, emotional, irrational, angry, malicious, or mentally ill. They assign some of these attributes to plaintiff lawyers also, considering them greedy, corrupt, unethical, and naïve and looking for a hook of race or gender because fairness is not a legal issue.

The wide variety of perceptions of outcomes

In the vast majority of employment civil rights cases, law leaves untouched the hierarchies and the alleged injustices that gave rise to employment civil rights litigation in the first place. Regardless, because satisfaction with outcome doesn't necessarily equate to winning, there's difficulty in defining what's a win or a loss:
Plaintiffs often get little or nothing of value — and suffer. Lawsuits can take a toll on plaintiffs: loss of their jobs (including structure and meaning) and identities, financial insecurity (including bankruptcy), toll on families (including divorce), mistrust, alcoholism and drug abuse, depression, and doctor bills — even if they win the case. Many plaintiffs simply want to be reinstated in their jobs, not large sum of money nor a verdict of guilt for the employer by the court. Other times, small settlements satisfy plaintiffs because plaintiffs have a chance to tell their stories. Winning might mean recovering an amount of money deemed fair or significant enough to make the organization change their behavior. All plaintiffs wanted compensation, vindication, and organizational change.
Employers seldom have to acknowledge they committed discrimination. They may not feel satisfied unless they obtain vindication against the charge of discrimination. And regardless of the outcome, the employer gets an attorney bill.

Goals change in each case as reality and understandings shift. The case generally settles when both parties agree on compensation. As cases progress, plaintiffs prioritize financial compensation because employers are willing to give it. Vindication and organizational change are rarely part of the outcome because the defense typically calls the shots. Some never offer settlements, concerned with the possible signals settlements send to other workers. Some mount all-out defenses, despite the cost, to discourage future litigation. Some only settle when it's clear they did something wrong. But most decisions are based on cost-benefit analyses (except in government) and risk assessment. Settlement is more likely when there's more risk — with a goal of making the smallest settlements possible. Employers want the problem to go away and tire of spending money and the fight.

Plaintiffs are most often disappointed with the outcome, believing it had little or nothing to do with merits of their claim and lacking the ability to tell their stories but accepting money to stop the stress and cost. They feel financial compensation is inadequate, the offending individuals had not had consequences, and the discriminatory practices continued. Some don't accept settlements to achieve justice and hold the employer accountable. Some simply want to tell their versions of the story in front of their former employer. Others want the organization to change and termination for the offender. Many plaintiffs sue to vindicate their view that the employer did was wrong.

Plaintiffs are left with both disappointing outcomes and major burdens: first the job conflict and termination, deciding to sue, and the lawsuit itself, including its cost. With the income loss from termination, the lawsuit fees create serious stress, making it difficult to pay mortgages, monthly bills, and associated medical expenses. Bankruptcy is an ironic but frequent outcome since the remedies for employment civil rights are explicitly designed to make up for lost earnings.

The process takes a much higher emotional, physical, and financial toll on plaintiffs than it does on defendants.

Stereotyping and the re-inscription of hierarchies

Employers deny discrimination, assert managerial prerogatives, individualize problems, and denigrate plaintiffs. They offer small monetary awards, isolate disputes from the workplace by refusing to reinstate employees, and require that plaintiffs sign confidentiality agreements with settlements. Courts legitimize these practices, ignoring the asymmetry of power in the workplace and in litigation.

Employers, lawyers, and courts fail to challenge — and even reinforce — hierarchies through stereotypes. Stereotypes fuel discrimination against those who have been negatively stereotyped in favor of those who are positively typed. They're cultural constructs about social reality used to justify asymmetrical social relations. They influence whether people get jobs, advance, support themselves financially, and achieve career goals. For example, white men typically occupy higher-status positions with substantially higher pay, validated by stereotypes of men as more competent, which help keep white men in those positions. Employers use stereotypes to maintain the unequal hierarchy.

Law is a system that legitimizes stereotypes by leaving most alleged acts of discrimination unaddressed. The process does not prevent managers from wielding their authority to discriminate and reinforces defenses' construction of plaintiffs as problems and their claims as meritless.

COMMON STEREOTYPES

African-Americans

Lazy or stupid: draws from notions of self-improvement, personal responsibility, work ethic reinforced by the perception that they're unfairly favored by social policies allowing capable individuals to not work. When termination is rooted in discrimination, failure to perform is often the excuse and likely to be believed by lawyers and courts.
Dangerous or criminally violent (men) or bitchy, angry, or overbearing (women): Black womanhood means masculinized strength and hard labor plus promiscuity and a caricature as possessive, nagging, and irate.

Women

Hysterical: allows employers to belittle or dismiss women's grievances as overly emotional and irrational, as if actions are not guided by reason and perceptions. Some managers fail to promote women by asserting that women too easily become emotional and out-of-hand from PMS or delusional about their health and their competencies as revealed by crying at work.
Sex objects for men: reveals the dual power dynamics of male sexual dominance over women and employers' control over workers. Stereotypes of women as sex objects and irrational can be mutually reinforcing, normalizing the sexualized work environment to serve men. African-American women are stereotyped as hypersexual and deviant in contrast to the common stereotype of white women as innocent and pure.
Inferior workers: codes men and male dominance in the neutral vocabulary of merit, competence, and effectiveness — a good old boy club — and women as less valuable and less capable. Women often get jobs elsewhere because they see limits to upward mobility.

People with disabilities

There's a belief that able-bodied people are the norm, and people with disabilities are deficient and inferior. The medical model makes the disability the problem, and medical mediation individualizes it. The law is mediated through the doctor's office. Many plaintiffs report problems with their employers' paperwork, which reinscribe disability discrimination. There's an alternative: the environment, not the individual, is the problem. From this perspective, the disability is a product of social, cultural, and environmental barriers, not by an individual's impairment. This model is institutionalized in law; the ADA requires employers to provide reasonable accommodations to employees with disabilities to enable them to perform equally at their jobs. Stereotypes assign the problem to plaintiffs' medicalized disabilities, not employers' failure to accommodate.
Faking it or not really disabled: implies disingenuous representation of a problem and reinforced by the assumption that a disability is visible, diagnosed, and easily understood by people who aren't medical experts. This stereotype puts the problem all in targets' heads, who are assumed to be asking for special privileges.
Unable to work: perpetuated when stress from discrimination renders a person with disabilities less able to work.
Abnormal, peculiar, freakish, repulsive, or crazy: fueled by rumors, spread by managers, that are intentional misrepresentations of behaviors and prey on misunderstandings of disabilities. They frame people employees problems — mentally ill, unstable and unpredictable, or drug addicted — turning disabilities into mental health stigma and feeding feelings of discomfort, disgust, or fear. Defamation cases can be too difficult to prove.

Age

Age discrimination is often excused with technological and organizational change (politics or budget pressures, for example), putting older workers under the supervision of younger managers. When employers downsize or modernize, older workers more often pay the price because they may be more expensive or moved to positions or departments from animosity toward them. Law often minimizes the connection between decisions and ageism.
Less competent and less productive: comes from negative views towards aging itself and connected to a cost-benefit calculation that makes managers reluctant to invest in training those closer to retirement (even if younger workers are more likely to change jobs). There may also be unfair expectations on older workers take more responsibility.
Resistant to change/out of touch: reaffirms managers' authority to dismiss perceived troublemakers as unable to fit in

What can be done

Plaintiffs, courts, and employers tend to not see discrimination as a systemic problem. Courts and employers tend to address discrimination individually. The result: a general commitment to the ideals of civil rights while delegitimizing workers claims and blaming victims — with a diluting of law, undermining of rights, and reproduction of hierarchy. Discrimination law is not intended to disrupt the authority of the managers in running the employer organization, which are overwhelmingly managed by the traditionally advantage social group in American society: white men.

Frivolous claims are a myth. While implicit bias is the more common form of discrimination, most instances of reported discrimination were not subtle. Still, the vast majority of potential grievants do not file with the EEOC or in federal court. "Only one in 100 potential African-American grievants filed a charge with the EEOC, and 13 in 10,000 potential African-American grievants filed a federal lawsuit." Plaintiff attorneys take only about "one and 10 cases."

So what can we do? Despite the powerful opposition from business and insurance companies to efforts expand access to civil justice for plaintiffs, here are possible ways to fix the re-inscription of ascribed hierarchies:

1. Ban non-disclosure agreements (NDAs). The most common outcome of cases is a settlement that includes a confidentiality provision about the outcome of the case. Such agreements reduce the likelihood that taking legal action will create fundamental change in the organization.

2. Class action lawsuits. Cases involving larger classes of plaintiffs and which aim at the systemic discrimination are far more likely to succeed in court and to impact the employing organization. Systemic cases under the EEOC may become more important as a source of collective litigation.

3. Publicly reporting of the gender and racial makeup of workforces. Employers with 100+ employees and federal contractors with 50+ employees currently must submit an EON1 report indicating the gender and racial makeup of broad occupational categories of their workforce. If the data were made public, it would allow potential plaintiffs and attorneys an opportunity to assess the likelihood that illegal discrimination plays a role in the reward structures of employers.

4. Making de-identified wage and salary data available by protected category through the Paycheck Fairness Act proposed in Congress. While the data may reveal equity, in many cases it could reveal disparities that employers could voluntarily remedy or allow workers to file suit. California has already passed the Fair Pay Act that protects the rights of workers to ask about the compensation of coworkers in similar jobs.

5. Expanding the infrastructure of public interest lawyering. Some public interest law organizations provide representation on employment civil rights cases. If these organizations could obtain more support for systemic employment civil rights litigation from government, labor, community organizing, or philanthropic sources, it might increase the overall level of collective legal action. We need to understand the relatively limited capacity of public interest law firms in employment civil rights.

6. Providing more resources to the EEOC and state fair employment agencies or FEPAs, who can develop better forms of communication to and support of charging parties, and addressing racial disparities in legal representation.

7. Convincing management to adopt policies and practices less subject to bias. Less than 10% of the American workforce currently belong to unions. If a new generation of diversity officers can make the case to management that it's in the best interest of the organization to adopt personnel policies and practices that are less subject to bias, it might promote opportunities for traditionally disadvantaged groups. Broader social and political changes may support a new framework for civil rights in the workplace. As the workplace becomes increasingly heterogeneous demographically and employers work to maintain a committed workforce, employers may turn to rights-based personnel systems.

8. Furthering social movements that focus on economic inequality as a social problem, including effort to raise the minimum wage. Other societies approach employment law with a more collectivist orientation. In some countries, this approach results in a more worker-friendly outcome.

The deeply held and opposing views of plaintiffs lawyers and defense lawyers indicate that the prospects for finding win-win, commonsensical ways to improve the system of employment civil rights litigation will likely prove elusive. There is a fundamental conflict between a rights-based legal order in employment and the managerial and social hierarchies that control workplace relationships.

But the combination of the threat of litigation, activist campaigns, and the leadership of professionals inside organizations can make rights real. These processes could be aided by employee campaigns.

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