

Employment Discrimination in the U.S. Versus the U.K.: Dismissals Prior to Jury Trials Versus Hearings on the Merits by Employment Tribunals That Include Lay Participation

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ABSTRACT

Years ago, the United Kingdom (“U.K.”) recognized the fact-intense nature of employment cases and developed a system for their adjudication—a mixed tribunal system that uses two laypeople and a judge to decide employment cases. While there have been changes to the jurisdiction of these tribunals, employment discrimination cases have been recognized as particularly fact intense among employment cases and, until recently, have been exclusively decided by the three-person tribunal. This Article compares the mixed tribunal system for employment discrimination cases in the U.K. to the system in the United States (“U.S.”) where employment discrimination plaintiffs possess a constitutional right to a jury trial. The Article concludes that despite the right to a jury trial in the U.S. and no such right in the U.K., U.K. claimants have a better opportunity to have their cases decided on the merits by a neutral party than U.S. plaintiffs. First, in the U.S., many employers require employees to consent to arbitration for any disputes that may arise. As a result, arbitrators who are paid by employers often decide employment cases, including discrimination cases, and most of the time, arbitrators find for employers and against employees. In contrast, the U.K. does not permit forced arbitration in employment cases. This Article focuses on a second reason that U.K. claimants have a better opportunity to have their cases decided on the merits by a neutral decision-maker. In the U.S., in the federal courts, where most employment discrimination cases are decided, judges dismiss these types of claims on summary judgment at a high rate before trial. In the U.K., judges do not strike employment discrimination cases at the same high rate, and instead, almost invariably, a tribunal with a judge and two laypeople tries these cases.

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INTRODUCTION

The United States (“U.S.”) and the United Kingdom (“U.K.”) share many similarities including in language and in some of their laws. For example, the U.S. derived its jury system from the English system,¹ and both nations developed civil rights laws including prohibitions on employment discrimination, harassment, and retaliation.²

Despite some similarities between the nations, differences have developed including the scope of their rights to a jury trial. Over time, the U.K. has more heavily circumscribed the right to a jury trial in both criminal and civil cases.³ Although defendants can request a jury trial

¹ See SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* 11–12 (2016); see also RENÉE LETTOW LERNER, *THE JURY: A VERY SHORT INTRODUCTION* 25–27 (2023) (discussing how the Founders came to adopt the English system’s trial by jury).

² See ALEXANDER TESIS, *WE SHALL OVERCOME* 98, 280 (2008) (describing U.S. history including the development of laws); Peter Holt & Mike Rafford, *UK Discrimination Laws Broaden Employment Protections*, ACC DOCKET, Mar. 2007, at *S1, Westlaw, 25 No. 2 ACC Docket S1 (describing U.S. influence on law in U.K.).

³ LERNER, *supra* note 1, at 113, 119–21.

for many serious criminal cases, this jury trial entitlement does not exist for almost any civil cases including employment discrimination cases.⁴

Even though no right to a jury trial exists in employment discrimination cases, the U.K. has recognized the fact-intense nature of these cases and developed a mixed tribunal system where two laypeople and a judge decide employment discrimination cases.⁵ Although a judge can strike out claims prior to a hearing by a three-person tribunal,⁶ most cases in the U.K. proceed to a decision by a tribunal without a strike out. Judges follow a case called *Anyanwu v. South Bank Student Union*⁷ where the House of Lords cautioned against the dismissal of employment discrimination claims before a hearing on the merits.⁸

The U.S. approach contrasts with that of the U.K. system. First, in the U.S., a significant number of employment discrimination cases are subject to forced arbitration.⁹ Second, there is a right to a jury trial for employment discrimination cases that are not subject to arbitration.¹⁰ Finally, the federal courts, which hear most employment discrimination cases, dismiss these claims at a high rate before trial.¹¹

This Article explores the last two differences by examining race discrimination and harassment cases subject to summary judgment and strike out in the U.S. federal courts and in the U.K. A comparison of similar cases in the U.S. and U.K. shows the respectively dismissal-prone versus dismissal-wary approaches of the two nations.

⁴ See *id.* at 121.

⁵ *Who Sits on an Employment Tribunal Panel?*, U.K. CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.uk/courts-and-tribunals/tribunals/employment-tribunal/employment-tribunal-england-wales/work-of-the-employment-tribunal/who-sits-on-an-employment-tribunal-panel/> [<https://perma.cc/W9SY-F2PS>]; Employment Tribunals Act 1996, c. 17, § 4 (Gr. Brit.) (permitting nonjudges to sit in certain cases); Equality Act 2010, c. 15, § 120 (Gr. Brit.) (providing employment tribunals jurisdiction over employment discrimination claims).

⁶ Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 38 (Gr. Brit.). Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, SI 2013/1237 (Gr. Brit.), were repealed by the Employment Tribunals (Procedure Rules) (Consequential Amendments) Regulations 2024, SI 2024/1156 (Gr. Brit.), and replaced by the Employment Tribunal Procedure Rules 2024, SI 2024/1155 (Gr. Brit.). The new version of the rules came into effect January 6, 2025. Cases cited in this Article predate the rule change and sometimes reference older rule numbers, but the substance has stayed the same.

⁷ [2001] UKHL 14 (appeal taken from Eng.) (Gr. Brit.).

⁸ *Id.* [24].

⁹ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://nyti.ms/1KMvBJg> [<https://perma.cc/AK74-P6DV>].

¹⁰ 42 U.S.C. § 1981a(c)(1). Because some states do not have discrimination laws, and state courts are often slow moving, many plaintiffs file their claims in federal court.

¹¹ Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson 2 (June 15, 2007), <https://www.fjc.gov/sites/default/files/2012/sujufy06.pdf> [<https://perma.cc/27D4-UH77>] (“Over 70 percent of the summary judgment motions in employment discrimination cases are granted in whole or in part . . .”).

Part I briefly discusses the history of the jury in the U.S. and the U.K. Part II compares discrimination cases in the U.S. and the U.K., first setting forth the similarities in the laws and then describing the differences in the fora. Thereafter, the Article sets forth the differences in the approaches of the U.S. and the U.K. courts to dismissal of employment discrimination cases before trial. This Part concludes with a case-to-case comparison using race discrimination and harassment cases. This juxtaposition demonstrates that U.S. federal courts proceed aggressively with dismissal prior to trial while U.K. courts cautiously approach dismissal before hearings. Part III explores possible reasons for the differences in approaches of the U.S. and U.K. courts to the dismissal of employment discrimination cases.

I. BRIEF HISTORY OF THE JURY IN THE U.S. AND THE U.K.

The jury in the U.S. was based on the English jury.¹² The colonists previously lived under the English system where juries decided many criminal cases and civil cases, and the power of the jury was significant.¹³ For example, in a trial in which a defendant was accused of a crime, jurors could engage in “pious perjury” where they could acquit the defendant of a particular crime when they believed the crime’s penalty did not fit the offense that the defendant had committed.¹⁴

When the colonists lived under English rule in the U.S., they believed the King took away their right to a jury trial under unjust circumstances.¹⁵ Later, they proclaimed how they were deprived of that right in their Declaration of Independence from England.¹⁶ Subsequently, they further affirmed the importance of that right in criminal cases by including the right to a jury trial in Article III of the U.S. Constitution.¹⁷ Later, they added amendments to the Constitution in the Bill of Rights that included more rights associated with the criminal jury trial¹⁸ as well as set forth a right to a grand jury¹⁹ and a right to a civil jury trial.²⁰ Although these rights to a jury trial remain in the Constitution

¹² LERNER, *supra* note 1, at 3; *see also* THOMAS, *supra* note 1, at 11–12 (discussing the various jury rights adopted by the Founders).

¹³ THOMAS, *supra* note 1, at 11–12.

¹⁴ *Id.* at 16–17 (“Engaging in what Blackstone called ‘pious perjury,’ juries could essentially sentence by choosing the offense on which the defendant was convicted.” (footnote omitted)).

¹⁵ *See id.* at 11–12.

¹⁶ THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

¹⁷ U.S. CONST. art. III, § 2.

¹⁸ *Id.* amend. VI.

¹⁹ *Id.* amend. V.

²⁰ *Id.* amend. VII.

today, juries try few cases in the U.S.—less than one percent of civil cases and less than four percent of criminal cases.²¹

Different from the U.S., in the U.K., no constitutional right to a jury trial ever existed.²² As a result, the availability of a jury trial could be altered more easily than in the U.S., and in the mid-1800s, changes to the scope of the jury trial began to occur.²³ These changes included giving judges more authority.²⁴ Today, in the U.K., a defendant can continue to request a jury trial for serious criminal cases.²⁵ However, the jury trial does not exist in civil cases with the exception of a few types of cases, such as fraud.²⁶ Despite the absence of an entitlement to a jury trial for claimants in employment discrimination cases, the U.K. has maintained a level of lay participation in this arena. Described more below, these tribunals with two laypeople and one judge are constituted to “take proper account of workplace realities” to help decide difficult cases and to “enhance[] the credibility of the Tribunals’ decisions.”²⁷

II. COMPARING DISCRIMINATION CLAIMS IN THE U.S. AND THE U.K.

A. Statutory Law for Employment Discrimination Claims

1. U.S. Employment Discrimination Laws

In the U.S., most employees are “at will.”²⁸ Employers can terminate employees for many reasons including unreasonable ones.²⁹ However, several federal laws protect against some actions by employers including discrimination, and some states and localities grant more expansive

²¹ THOMAS, *supra* note 1, at 2. The grand jury and civil jury trial rights have not been incorporated against the states. See Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 160–61 (2012) [hereinafter Thomas, *Nonincorporation*].

²² See Sally Lloyd-Bostock & Cheryl Thomas, *The Continuing Decline of the English Jury*, in WORLD JURY SYSTEMS 53, 57 (Neil Vidmar ed., 2000) (“[T]he right to trial by jury [is] governed by ordinary parliamentary statute, which in turn can be altered by a simple Act of Parliament.”); PETER LEYLAND, *THE CONSTITUTION OF THE UNITED KINGDOM* (4th ed. 2021).

²³ See Lloyd-Bostock & Thomas, *supra* note 22, at 59.

²⁴ *Id.*

²⁵ *Id.* at 61–62.

²⁶ *Id.* at 59–61.

²⁷ TRIBUNALS JUDICIARY, CANDIDATE INFORMATION PACK: NON-LEGAL MEMBERS OF THE EMPLOYMENT TRIBUNALS 2 (2019), <https://www.judiciary.uk/wp-content/uploads/2019/05/ET-Non-Legal-Members-Candidate-Information-Pack.pdf> [<https://perma.cc/JDT5-QZGR>].

²⁸ *At-Will Employment—Overview*, NAT’L CONF. STATE LEGISLATURES (Apr. 15, 2008), <https://www.ncsl.org/labor-and-employment/at-will-employment-overview> [<https://perma.cc/ZRB7-UTHB>] (“Employment relationships are presumed to be ‘at-will’ in all U.S. states except Montana.”).

²⁹ See *id.*

protection than federal law.³⁰ On the other hand, certain states and cities do not provide any protection to their citizens, so only federal law covers those individuals.³¹ Here, for the sake of simplicity, the Article describes only federal laws in the U.S.

In the Civil Rights Act of 1964,³² Congress enacted a series of civil rights protections that included prohibitions against discrimination in employment, in public accommodations, and in other areas.³³ Among other legal protections against employment discrimination, Title VII protects employees against discrimination on the basis of “race, color, religion, sex, or national origin” as well as retaliation for their complaints of discrimination.³⁴ Some years after Congress enacted Title VII, it ratified laws outlawing age discrimination and extending disability discrimination protection to employees in the private sector.³⁵ Those laws also protected against retaliation for complaints of discrimination on the basis of age and disability.³⁶ Previously, in 1866, Congress enacted what has become known as “section 1981,” which forbids race discrimination in the making of contracts.³⁷ Over time, this law became an additional protection against discrimination when the Supreme Court interpreted the law to protect against race discrimination in employment³⁸ as well as retaliation against employees for complaining about race discrimination.³⁹

U.S. law also protects against harassment in employment. In 1986, the Supreme Court decided that sex discrimination in Title VII includes harassment on the basis of sex.⁴⁰ This holding applies to other types of harassment, including racial harassment.⁴¹ As a result, harassment claims can be brought under the law.

³⁰ *Id.*

³¹ *Id.*

³² Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

³³ *See id.*

³⁴ 42 U.S.C. §§ 2000e-2 to -3.

³⁵ *See, e.g.*, Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4, 81 Stat. 602, 603 (codified as amended at 29 U.S.C. § 623) (prohibiting age discrimination and retaliation in employment); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29 (codified as amended at 42 U.S.C. § 12101) (prohibiting disability discrimination and retaliation in employment by private employers).

³⁶ 29 U.S.C. § 623 (age); 42 U.S.C. § 12101 (disability).

³⁷ Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. § 1981).

³⁸ *Johnson v. Ry. Express Agency*, 421 U.S. 454, 459–60 (1975).

³⁹ *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 448–51 (2008).

⁴⁰ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–65, 67 (1986).

⁴¹ *See Vance v. Ball State Univ.*, 570 U.S. 421, 426–27 (2013); *see also* 42 U.S.C. § 2000e-2 (prohibiting employment discrimination on the basis of “race, color, religion, sex, or national origin”).

When an employee wins a discrimination, retaliation, or harassment case, a variety of remedies are available to them dependent upon the statute. These damages may include backpay for lost wages; compensatory damages, including for emotional distress; and punitive damages.⁴² In 1991, Congress enacted a cap on the damages that employees can receive under Title VII based on the number of employees that work for a company.⁴³ Although the older law—the Civil Rights Act of 1866⁴⁴—set no cap on damages, it applied only to race cases.⁴⁵ In either circumstance, involving caps or no caps, a court can use a procedural technique called “remittitur” to further reduce any damages that a jury awards.⁴⁶ With other remitted cases as a comparison, the judge reduces the jury verdict to the maximum amount a reasonable jury could award.⁴⁷

In the U.S., awards by juries in employment discrimination cases can be significant. An old study of state court decisions found where juries decided employment discrimination cases, the median award was \$200,000, 43.1% of awards were over \$250,000, and 11.6% of awards were over \$1 million.⁴⁸ If current figures were available, they would likely be higher.⁴⁹

2. U.K. Employment Discrimination Laws

The U.K. provides more expansive protection for employment claims than the U.S. Unlike in the U.S., where an employer can fire an employee for many reasons including unreasonable ones,⁵⁰ the U.K. protects against unfair dismissal.⁵¹

⁴² See, e.g., 42 U.S.C. § 1981a (describing compensatory and punitive damages); *id.* § 2000e-5(e)(1) (describing damages including backpay).

⁴³ Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 102, 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981a).

⁴⁴ Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982).

⁴⁵ *Id.*

⁴⁶ See Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 731–32, 736–39 (2003).

⁴⁷ 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & ALLAN STEIN, FEDERAL PRACTICE AND PROCEDURE § 2815, Westlaw (database updated Sept. 2025) (describing different methods of remittitur).

⁴⁸ CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP’T OF JUST., NCJ 173426, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 7 (1996).

⁴⁹ See, e.g., Marilyn Gabriela Robb, *Juries Don’t Like Race Discrimination: Large Jury Verdicts Compensating Victims of Racial Discrimination or Harassment in the Workplace*, KATZ BANKS KUMIN (Dec. 4, 2024), <https://katzbanks.com/employment-law-blog/jury-verdicts-nationwide-discrimination-cases/> [<https://perma.cc/YWB4-W3NS>].

⁵⁰ NAT’L CONF. STATE LEGISLATURES, *supra* note 28.

⁵¹ Employment Rights Act 1996, c. 18, § 94(1) (Gr. Brit.). Beginning in 2012, most unfair-dismissal cases were decided by a sole judge. See Employment Tribunals Act 1996 (Tribunal

However, U.S. and U.K. employment law share some similarities, including the scope of the discrimination laws. In the U.K., the primary discrimination law is the Equality Act 2010.⁵² Like the U.S., the U.K. prohibits discrimination in a wide range of areas including in employment and in services.⁵³

Also, specifically similar to U.S. employment law, the Equality Act protects employees and applicants against discrimination, harassment, and victimisation⁵⁴—referred to as retaliation in the U.S. In the U.K., the law protects against discrimination on the basis of nine protected characteristics, some of which overlap with U.S. law, including race discrimination.⁵⁵

In the U.K., backpay and compensatory damages are available as well as forms of punitive damages.⁵⁶ A claimant can receive aggravated damages when an employer conducts the case in an oppressive way—though this award is rare⁵⁷—and exemplary damages for conscious and contumelious wrongdoing by the employer.⁵⁸ While a statutory framework for damages provides some guidelines for awards,⁵⁹ the U.K. does not place a cap on the damages that employees can receive, unlike some of the U.S. employment discrimination laws.⁶⁰

The verdict amounts in the U.S. and the U.K. seem quite different even when verdicts from many years ago in the U.S. are compared to the U.K. awards. Years ago, from 2000 to 2006, the median U.S. verdict was \$158,460.⁶¹ In the U.K., from 2023 to 2024, the average award in race cases was £29,532, or currently \$37,646.76.⁶² These differences may derive from a variety of differences including but not limited to who

Composition) Order 2012, SI 2012/988, Explanatory Note (Gr. Brit.). Before that time, three-person panels decided those cases. Employment Tribunals Act 1996, c. 17, § 4 (Gr. Brit.).

⁵² Equality Act 2010, c. 15 (Gr. Brit.).

⁵³ *Id.* §§ 29, 39.

⁵⁴ *Id.* §§ 13, 26–27.

⁵⁵ *Id.* § 4 (“The following characteristics are protected characteristics—age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; sexual orientation.”).

⁵⁶ See JAMES EDELMAN, MCGREGOR ON DAMAGES 1613, 1615–16 (22d ed. 2024).

⁵⁷ See *id.*

⁵⁸ *Id.* at 452–53, 617–18.

⁵⁹ Employment Rights (Increase of Limits) Order 2025, SI 2025/348, sched. (Gr. Brit.).

⁶⁰ Email from Michael Ford, Emeritus Professor, Univ. of Bristol, to author (Sept. 16, 2024, 05:28 CDT) (on file with author). Caps on damages were eliminated as a result of Case C-271/91, *Marshall v. Southampton & S.W. Hampshire Area Health Auth.*, 1993 E.C.R. I-4400, I-4411 to 12.

⁶¹ TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP’T OF JUST., NCJ 222989, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–2006, at 7 (2008).

⁶² Ministry of Justice, *Tribunals Statistics Quarterly: April to June 2024*, GOV.UK (Oct. 3, 2024), <https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-april-to-june-2024> [https://perma.cc/JM9J-N6VW] (under “Documents,” click “Employment Tribunal and Employment Appeal Tribunal 2023 to 2024”; then open the downloaded file; then click sheet “E_4”). This conversion assumes an exchange rate of 1.27.

the decision-maker is, the availability of types of damages, and medians versus averages.

B. *Fora and Procedure for Employment Discrimination Claims*

1. *Employment Discrimination Cases in the Federal Courts of the U.S.*

In theory, in the U.S. a vibrant right to a jury trial in civil cases exists in the federal courts.⁶³ Plaintiffs who bring so-called “legal” claims—where they allege damages—possess the right to a jury trial.⁶⁴ Because of the availability of legal damages such as compensatory damages in employment discrimination cases, plaintiffs who bring discrimination claims alleging such damages have a right to a jury trial.⁶⁵

To file a discrimination claim in federal court, under most laws, a plaintiff must first file a charge with the Equal Employment Opportunity Commission (“EEOC”), the federal agency responsible for employment discrimination matters, and/or the agency in the relevant state that enforces the discrimination laws.⁶⁶ Although the time requirements under the laws vary, typically, the charge must be filed less than one year after the alleged unlawful act occurred.⁶⁷

Many charges are filed with the EEOC. In 2024, employees filed over 88,500 charges.⁶⁸ There is no fee to bring a charge.⁶⁹ Soon after the EEOC receives a charge, it will send the charge to the employer and ask for a response.⁷⁰ The EEOC can decide whether there is reasonable cause

⁶³ U.S. CONST. amend. VII. Most states have a right to a civil jury trial in their state courts, although the right to a jury trial in the Seventh Amendment has not been incorporated against the states and the extent of the right in the states can vary. *See* Thomas, *Nonincorporation*, *supra* note 21, at 172–74, 192.

⁶⁴ *Curtis v. Loether*, 415 U.S. 189, 193–96 (1974).

⁶⁵ *See id.* In 1991, Congress set forth a right to compensatory and punitive damages as well as a right to a jury trial in Title VII, the main federal discrimination statute. 42 U.S.C. § 1981a. Other statutes are briefly discussed below. Regardless of the statutory right to a jury trial, such a right would exist under the Constitution once compensatory or punitive damages were available. *Curtis*, 415 U.S. at 192–94. There is arguably a right to a jury trial for backpay as well. *See* *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 441–47 (1975) (Rehnquist, J., concurring) (describing concern that backpay may be legal).

⁶⁶ 42 U.S.C. §§ 2000e-5, -16(b).

⁶⁷ *See id.* §§ 2000e-5(e), -16(c).

⁶⁸ 2024 EQUAL EMP. OPPORTUNITY COMM’N ANN. PERFORMANCE REP. 12, https://www.eeoc.gov/sites/default/files/2025-01/24-126_EEOC_2024_APR_508_1.16.25_508.pdf [<https://perma.cc/2PE3-59FP>].

⁶⁹ *Frequently Asked Questions*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/youth/frequently-asked-questions> [<https://perma.cc/WEH6-3Q8T>].

⁷⁰ *Questions and Answers for Respondents on EEOC’s Position Statement Procedures*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/employers/questions-and-answers-respondents-eeocs-position-statement-procedures> [<https://perma.cc/HJ84-DM5V>].

for the charge of discrimination.⁷¹ It can also try to resolve the claim or bring a case based on the claim.⁷² However, none of these outcomes is likely because the EEOC lacks sufficient resources to resolve the matters brought to it.⁷³ Usually, if an attorney represents the employee, she will ask the EEOC for the right to sue 180 days after the employee filed the charge.⁷⁴ Once the EEOC issues this letter, the plaintiff must bring a suit in court within ninety days of receiving it.⁷⁵

Some employment discrimination cases may not be brought in court, because companies require employees and applicants to arbitrate the claims.⁷⁶ Years ago, the U.S. Supreme Court interpreted the Federal Arbitration Act⁷⁷ to permit most employers to require applicants or employees to arbitrate their future claims against the employer, including their discrimination claims.⁷⁸ Currently, over fifty percent of employment discrimination cases do not appear in a public court and instead are resolved through private arbitration.⁷⁹

Usually, the employee and the employer choose the arbitrator through a selection process.⁸⁰ The arbitrator—a lawyer⁸¹—hears the claims in private and is paid by the employer for their work in the arbitration.⁸² Employers are often repeat customers for arbitrators.⁸³

⁷¹ 42 U.S.C. § 2000e-5(b).

⁷² *Id.* § 2000e-5(b), (f).

⁷³ Maryam Jameel, *More and More Workplace Discrimination Cases Are Being Closed Before They're Even Investigated*, Vox (June 14, 2019, 9:30 AM), <https://www.vox.com/identities/2019/6/14/18663296/congress-eeoc-workplace-discrimination> [<https://perma.cc/Y8NW-KXHT>].

⁷⁴ 42 U.S.C. § 2000e-5(f)(1).

⁷⁵ *Id.*

⁷⁶ Silver-Greenberg & Gebeloff, *supra* note 9.

⁷⁷ 9 U.S.C. §§ 1–16.

⁷⁸ *Cir. City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

⁷⁹ See Alexander J.S. Colvin & Mark D. Gough, *Mandatory Employment Arbitration*, 19 ANN. REV. L. & SOC. SCI. 131, 133 (2023). After the Me Too movement, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, under which sexual assault and sexual harassment claims are not subject to arbitration. See Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022) (to be codified at 9 U.S.C. §§ 401–402).

⁸⁰ See, e.g., AM. ARB. ASS'N, EMPLOYMENT/WORKPLACE ARBITRATION RULES AND MEDIATION PROCEDURES 12–14, 32 (2025), https://www.adr.org/media/0vrpbnm0/2025_employment_arbitration_rules.pdf [<https://perma.cc/AS84-UEC5>].

⁸¹ Although it is possible for a nonlawyer to sit as an arbitrator in an employment case, it is unlikely to occur because of the belief of the parties that the arbitrator must be knowledgeable about the discrimination law. *Arbitration at Work*, LEGAL AID AT WORK (Oct. 2024), <https://legalaidatwork.org/factsheet/arbitration-at-work/> [<https://perma.cc/5AK6-3GFD>].

⁸² See, e.g., *Employment/Workplace Fee Schedule*, AM. ARB. ASS'N (Jan. 15, 2024), <https://go.adr.org/employmentfeeschedule> [<https://perma.cc/NE7H-7LLC>]. It would be unconscionable for the employee to be required to pay because the alternative, the U.S. court system, is essentially already paid for through an employee's taxes.

⁸³ See Colvin & Gough, *supra* note 79, at 136–37.

Employers are also unlikely to reemploy arbitrators who regularly find against them and other employers.⁸⁴ Arbitrators for these cases tend to be lawyers who currently represent or formerly represented employers.⁸⁵ These dynamics likely are on display in the results of arbitration. Employers win in arbitration eighty-one percent of the time.⁸⁶ In other words, plaintiffs win only nineteen percent of arbitrations.⁸⁷ On the other hand, plaintiffs win before juries around fifty percent of the time.⁸⁸ The employer-friendly results in arbitration encourage employers to require arbitration.⁸⁹

In addition to arbitration, procedures in the federal courts can prevent a discrimination case from being heard by a jury. Under Federal Rule of Civil Procedure 12(b)(6), an employer can request dismissal at the beginning of a case by arguing that the plaintiff has presented an implausible claim.⁹⁰ After the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*,⁹¹ courts grant this motion at a high rate in employment discrimination cases.⁹² Courts also often dismiss a case after discovery upon a motion for summary judgment. Upon reviewing the materials submitted by both parties after discovery, the court can conclude that no genuine dispute of material facts exists, and the employer is entitled to judgment under the law.⁹³ To decide whether to grant summary judgment, a court examines the paper record presented by the parties and decides whether a reasonable jury could find for the plaintiff.⁹⁴ If not, the court grants summary judgment.⁹⁵ The court may hold a hearing on the motion but will not hear oral evidence such as the testimony of witnesses.⁹⁶ In an employment discrimination case where

⁸⁴ See, e.g., AM. ARB. ASS'N, *supra* note 80, at 13–15.

⁸⁵ Cf. Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *The Influence of Arbitrator Background and Representation on Arbitration Outcomes*, 9 VA. L. & BUS. REV. 43, 45–46 (2014) (discussing backgrounds in securities industry of arbitrators in securities cases).

⁸⁶ Cf. Colvin & Gough, *supra* note 79, at 135.

⁸⁷ See *id.* at 136–37.

⁸⁸ DEFRANCES & LITRAS, *supra* note 48, at 6 (reporting that in 1996, plaintiffs won 47.6% of employment discrimination jury trials).

⁸⁹ See Colvin & Gough, *supra* note 79, at 134–35 (relating data showing that the win rate is higher in arbitration than in litigation for employers).

⁹⁰ FED. R. CIV. P. 12(b)(6); see *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558, 570 (2007).

⁹¹ 550 U.S. 544 (2007).

⁹² See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2143 (2015) (finding a fifty-two percent grant rate in 2010 for Rule 12(b)(6) motions to dismiss when plaintiffs were represented by counsel compared to thirty-seven percent granted in 2006).

⁹³ See FED. R. CIV. P. 56.

⁹⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–56 (1986).

⁹⁵ *Id.* at 248–50.

⁹⁶ See FED. R. CIV. P. 56.

an employer brings a motion for summary judgment, a federal court grants this motion in part or in full over seventy percent of the time.⁹⁷

If a discrimination case goes to trial, the judge employs formal rules of evidence to govern the proceedings.⁹⁸ The parties present their cases to the factfinder, usually a jury—the decision-maker which plaintiffs generally prefer.⁹⁹ During the trial, a judge can find for one of the parties if he determines a reasonable jury could not find for the other party.¹⁰⁰ If the judge does not dismiss the case, the jury decides the outcome.¹⁰¹ Unless the parties agree otherwise, the finding by the jury must be unanimous.¹⁰² If the jury finds for the plaintiff, it will decide how much to award in damages although this amount may be subject to a statutory cap or a remittitur by the judge.¹⁰³ If the plaintiff wins, the law generally requires the employer to pay the costs of the litigation, including attorneys' fees.¹⁰⁴ The judge can also decide the jury was wrong.¹⁰⁵ He can order judgment for the losing party if he believes a reasonable jury could not have found for the winning party.¹⁰⁶ He also has the option to order a new trial.¹⁰⁷

A decision on a motion to dismiss or for summary judgment or a decision by a judge or jury at trial can be appealed to the court of appeals, and if certiorari is granted, it can be appealed to the U.S.

⁹⁷ Memorandum from Joe Cecil & George Cort to Hon. Michael Baylson, *supra* note 11, at 2; *see also* AMANDA FARAHANY & TANYA MCADAMS, BARRETT & FARAHANY, LLP, ANALYSIS OF EMPLOYMENT DISCRIMINATION CLAIMS FOR CASES IN WHICH AN ORDER WAS ISSUED ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN 2011 AND 2012 IN THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA 3 (Sept. 16, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2326697 [<https://perma.cc/CGG5-JWR2>] (finding “only 11 employment discrimination cases were not affected by summary judgment” of 226 analyzed). It bears noting that arbitrators may also grant motions for summary judgment and effectively dismiss the case on a paper record without hearing any live evidence. *See* James P. Kleinberg, *Dispositive Motions in Arbitration*, ABTL REP., Summer 2015, at 1, 2. In addition to arbitration and summary judgment, settlement is a major mechanism by which cases are resolved without a jury or even after a jury has tried a case. *See* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112–13 (2009).

⁹⁸ *See* FED. R. EVID. 1101(a)–(b).

⁹⁹ *See* DEFRAANCES & LITRAS, *supra* note 48, at 6 (finding that plaintiffs win far more often before juries, 47.6%, than judges, twenty-six percent).

¹⁰⁰ FED. R. CIV. P. 50(a).

¹⁰¹ *See* FED. R. CIV. P. 48, 50.

¹⁰² FED. R. CIV. P. 48(b).

¹⁰³ 42 U.S.C. § 1981a; *see, e.g.*, *Diaz v. Tesla, Inc.*, 598 F. Supp. 3d 809, 817, 825 (N.D. Cal. 2022) (granting in part and denying in part a motion for a remittitur).

¹⁰⁴ 42 U.S.C. § 2000e-5(k).

¹⁰⁵ *See* FED. R. CIV. P. 50.

¹⁰⁶ *Id.*

¹⁰⁷ FED. R. CIV. P. 59.

Supreme Court.¹⁰⁸ Decisions in favor of employers are generally affirmed on appeal.¹⁰⁹

2. *Employment Discrimination Cases in the U.K.*

Unlike in the U.S., in the U.K., employment tribunals decide employment discrimination cases.¹¹⁰ For most of these cases, a tribunal consists of an employment judge in addition to two “members” from the public—in other words, “laypeople” from the community who do not have legal experience.¹¹¹ However, these paid members have relevant experience. One has a management or employer perspective, and one provides the view of employees or unions.¹¹²

¹⁰⁸ FED. R. APP. P. 3.

¹⁰⁹ See Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 548 (2003).

¹¹⁰ Equality Act 2010, c. 15, § 120 (Gr. Brit.).

¹¹¹ U.K. CTS. & TRIBUNALS JUDICIARY, *supra* note 5; Employment Tribunals Act 1996, c. 17, § 4 (Gr. Brit.) (permitting nonjudges to sit in certain cases). Effective October 29, 2024, judges can decide some discrimination cases by themselves. See Panel Composition in the Employment Tribunals and Employment Appeal Tribunal 2024, PD, paras. 3, 10 (Gr. Brit.), <https://www.judiciary.uk/wp-content/uploads/2024/10/Practice-Direction-on-panel-composition-in-the-Employment-Tribunals-and-Employment-Appeal-Tribunal-Oct-2024.pdf> [<https://perma.cc/8T5G-W4W8>].

¹¹² U.K. CTS. & TRIBUNALS JUDICIARY, *supra* note 5; HM Cts. & Tribunals Serv., *HMCTS Who's Who: Employment Tribunal*, GOV.UK (June 24, 2020), <https://www.gov.uk/guidance/hmcts-whos-who-employment-tribunal> [<https://perma.cc/TBJ6-3JWQ>]; see also Employment Tribunals and Employment Appeal Tribunal (Composition of Tribunal) Regulations 2024, SI 2024/94, arts. 3–4 (providing for the consideration of members' “expertise, skills or knowledge” in forming employment tribunals); TRIBUNALS JUDICIARY, *supra* note 27, at 11 (“Employer Panel members are likely to hold experience of employment norms, practices and challenges from the perspective of the employer. Your experience may have been gained, for example, from being a business owner, holding a role in HR, investigation officer or operations manager/supervisory roles.”); *id.* (“Employee Panel members are likely to hold experience of employment norms, practices and challenges from the perspective of the employee or worker. Your experience may have been gained for example from being a trade union official, regional trade union officer, workplace representative, companion at disciplinary or grievance hearings or time spent working with an organisation such as Citizens Advice.”). There has been some criticism of the U.K. selection procedure—that little is required to be an employment judge. See Dominic Kennedy, *Tribunal System Chaos: No Experience Necessary to Be a Judge in Hearings Free-for-All*, SUNDAY TIMES (Feb. 1, 2021, 12:01 AM), <https://www.thetimes.com/article/385a4852-63fa-11eb-ab68-123bacbc1c7b> [<https://perma.cc/6GJ4-3N89>]. This criticism has mainly come from the employer side that fears unlimited damages. Videoconference Interview with Michael Ford, Emeritus Professor, Univ. of Bristol (Oct. 7, 2024). Studies have shown that few employees actually bring their claims to tribunals. Michael Ford, *Employment Tribunal Fees and the Rule of Law: R (Unison) v. Lord Chancellor in the Supreme Court*, 47 INDUS. L.J. 1, 9–10 (2018) [hereinafter Ford, *Tribunal Fees*] (discussing the Gibbons Review and other “repeated findings in government-sponsored research [showing] the very small proportion of employees who brought [employment-tribunal] claims compared with the very large number who had problems relating to employment rights”).

U.K. employment law has other differences from the U.S. In the U.K., employers cannot require applicants or employees to give up their statutory rights under the employment law including the discrimination law.¹¹³ Because of this requirement, only public tribunals hear discrimination cases in the U.K. unless both parties separately agree to arbitrate.¹¹⁴

Most U.K. employment discrimination cases follow an initial administrative procedure that has similarities to the U.S. EEOC procedure. First, all potential claimants must contact an agency—here, the Advisory, Conciliation and Arbitration Service.¹¹⁵ They must obtain a certificate with an early conciliation number, and a conciliation process may take place.¹¹⁶

Thereafter, similar to the U.S. process, within a short period of time of the alleged unlawful act upon which the employee complains, a U.K. employee must file their claim with the employment tribunal. The U.K. provides a shorter period of time to file—three months—as opposed to a longer period in the U.S.¹¹⁷ However, the time period for filing will likely increase to six months.¹¹⁸ Similar to the U.S. EEOC, a significant number of claims are filed in the U.K. From 2023 to 2024, there were approximately 93,000 claims filed with the U.K. employment tribunals.¹¹⁹ There is no filing fee to bring a discrimination claim.¹²⁰ After the tribu-

¹¹³ U.K. Dep't for Bus. & Trade, *Employment Status and Employment Rights: Guidance for HR Professionals, Legal Professionals and Other Groups*, GOV.UK (Aug. 30, 2024), <https://www.gov.uk/government/publications/employment-status-and-employment-rights/employment-status-and-employment-rights-guidance-for-hr-professionals-legal-professionals-and-other-groups> [<https://perma.cc/ZDM3-G2UQ>] (“Both statutory and common law rights and obligations (body of law formed by the decisions from Courts and tribunals) are implied into a contract of employment and cannot be overridden by the terms of the employment contract.”).

¹¹⁴ See Employment Tribunal Procedure Rules 2024, SI 2024/1155, rr. 4, 10 (Gr. Brit.); Equality Act 2010, c. 15, §§ 142–144 (Gr. Brit.).

¹¹⁵ *Make a Claim to an Employment Tribunal*, GOV.UK, <https://www.gov.uk/employment-tribunals> [<https://perma.cc/96A4-ECPW>].

¹¹⁶ See Employment Tribunal Procedure Rules 2024, SI 2024/1155, rr. 12(1)(c)(i), 13(1)(c) (Gr. Brit.); WOMBLE BOND DICKINSON, *EMPLOYMENT: ACAS EARLY CONCILIATION—WHAT YOU NEED TO KNOW* (2018), <https://www.wombledonddickinson.com/sites/default/files/2018-05/Employment%20Factsheet%20-%20ACAS%20.pdf> [<https://perma.cc/2T54-9UFY>].

¹¹⁷ Equality Act 2010, c. 15, § 123 (Gr. Brit.). The period typically is subject to a short extension to accommodate for time in conciliation, and a tribunal may extend the time period if it determines such an extension would be “just and equitable.” *Id.*

¹¹⁸ See Employment Rights Bill 2024-26, HL Bill [81] § 27BH (Gr. Brit.).

¹¹⁹ See Ministry of Just., *Tribunal Statistics Quarterly: January to March 2024*, GOV.UK (June 13, 2024), <https://www.gov.uk/government/statistics/tribunals-statistics-quarterly-january-to-march-2024/tribunal-statistics-quarterly-january-to-march-2024> [<https://perma.cc/WWK9-KL8L>] (providing the values for employment-tribunal single cases, 34,000, and employment-tribunal multiple cases, 59,000).

¹²⁰ *R (UNISON) v. Lord Chancellor* [2017] UKSC 51, [116]–[119], [2020] AC 869, 909–10 (appeal taken from Eng.) (Gr. Brit.). The institution of fees in 2013 led to a sixty-seven percent decrease in so-called “single cases.” Ford, *Tribunal Fees*, *supra* note 112, at 2. Ford discusses the

nal receives a claim, it sends it to the employer which must submit a response,¹²¹ again similar to the procedure in the U.S.

Unlike in the U.S. where the EEOC or state agency does not decide the case, the tribunal adjudicates the case. But like employers in the U.S. courts (where U.S. cases are decided), a U.K. employer can attempt to dismiss a claim before it goes to a full hearing.¹²² The U.K. has one dismissal procedure prior to a hearing as opposed to the two dismissal procedures prior to trial in the U.S. The wording of the U.S. summary judgment dismissal standard of no “reasonable jury could return a verdict for the nonmoving party”¹²³ appears to be similar to the U.K. strike-out rule of “no reasonable prospect of success.”¹²⁴

Under Rule 38, upon the request of the employer or on its own, a tribunal judge—referred to as the “employment judge”—may strike out a claim if it determines there is “no reasonable prospect of success.”¹²⁵ A claim cannot be struck out as having no reasonable prospect of success unless the parties are given a reasonable opportunity to respond in writing or, if requested, in a hearing.¹²⁶ A hearing is usually requested.¹²⁷ Different from the U.S., the tribunal judge often considers strike outs before full disclosure or discovery.¹²⁸ The employer and the claimant usually include some documents for the judge to consider to bolster their arguments.¹²⁹ However, there is no significant use of disclosure for a strike out because U.K. courts do not want a minitrial on the evidence.¹³⁰

Unlike in the U.S., where judges often dismiss cases prior to trial, in the U.K., tribunals “rare[ly]” dismiss discrimination cases before a full hearing on the merits.¹³¹ Judges sparingly use this power to strike out for “no reasonable prospect of success” in discrimination cases because

importance of the rejection of fees especially because “the responsibility for enforcement of social rights is mostly devolved to private individuals.” *Id.* at 3. Before then, a “*laissez-faire*” system with little protection for labor existed in addition to some criminal protection that existed for a short time from 1963 to 1965. *See id.* at 4.

¹²¹ Employment Tribunal Procedure Rules 2024, SI 2024/1155, rr. 16–17 (Gr. Brit.).

¹²² *Id.* r. 38.

¹²³ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹²⁴ Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 38(1)(a) (Gr. Brit.).

¹²⁵ *Id.*

¹²⁶ *Id.* rr. 38(2), 52(1)(c). The tribunal may also dismiss the employer’s response in a similar fashion. *Id.* r. 29. A hearing is required only if requested by the party responding to the strike-out motion. *Duvenage v. NSL Ltd.* (2020) UKEATS/0002/20, [26]–[32] (appeal taken from Scot.) (Gr. Brit.). The hearing is also public. *Id.*; Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 54 (Gr. Brit.).

¹²⁷ Email from Michael Ford, *supra* note 60.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Interview with Michael Ford, *supra* note 112.

¹³¹ *See Tayside Pub. Transp. Co. v. Reilly* [2012] CSIH 46, [30] (Scot.).

these types of claims are fact intense and live evidence is not presented at this stage.¹³² If the judge decides to strike out, they send notice to the parties setting out the reasons for strike out and ordering the dismissal of the claim.¹³³ If a judge decides there is some but “little reasonable prospect of success,” a judge can order a claimant to set forth a deposit of money in order to continue his case before the tribunal.¹³⁴

In the U.K., most cases—fifty-eight percent—settle.¹³⁵ If a U.K. claim is not settled or struck, the case will go to a hearing on the merits before the tribunal.¹³⁶ Hearings on the merits occur in approximately seventeen percent of employment cases.¹³⁷ Though not a perfect comparison, juries try around two percent of civil rights employment cases in the U.S.¹³⁸

Unlike formal trials in the U.S., the “[t]ribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.”¹³⁹ It conducts the hearing “to avoid undue formality” and may question parties and witnesses “to clarify the issues or elicit the evidence.”¹⁴⁰ However, “in practice the hearings are increasingly formal and tend to follow the procedure for questioning in the civil courts.”¹⁴¹ In the trial or hearing, the functions of the factfinder in the U.S. and the U.K. are similar. The tribunal’s primary function is to resolve conflicts

¹³² See *id.*; Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 38 (Gr. Brit.).

¹³³ The specific strike-out rule language is as follows:

The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—(a) that it is scandalous or vexatious or has no reasonable prospect of success; (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious; (c) for non-compliance with any of these Rules or with an order of the Tribunal; (d) that it has not been actively pursued; (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).

See Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 38(1) (Gr. Brit.).

¹³⁴ *Id.* r. 40(1) (requiring presently £1,000).

¹³⁵ U.K. DEP’T FOR BUS., ENERGY & INDUS. STRATEGY, SURVEY OF EMPLOYMENT TRIBUNAL APPLICATIONS 9 (2020), <https://assets.publishing.service.gov.uk/media/5f06c2e3e90e0712d0206e99/survey-employment-tribunal-applications-2018-findings.pdf> [<https://perma.cc/26C6-6PRK>].

¹³⁶ Employment Tribunal Procedure Rules 2024, SI 2024/1155, rr. 55–56 (Gr. Brit.). There may be several final hearings in one claim to decide liabilities, remedies, and costs. *Id.* r. 55. The employment tribunal must give parties at least fourteen days’ notice of the date of a final hearing. *Id.* r. 56(1). Parties may or may not be legally represented. HM Cts. & Tribunals Serv., *supra* note 112.

¹³⁷ U.K. DEP’T FOR BUS., ENERGY & INDUS. STRATEGY, *supra* note 135, at 11.

¹³⁸ EMERY G. LEE III & KRISTIN A. GARRI, JURISDICTIONS WITH A HIGH NUMBER OF CIVIL JURY TRIALS 16 tbl.5 (2023).

¹³⁹ Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 41(3) (Gr. Brit.).

¹⁴⁰ *Id.* r. 41(2).

¹⁴¹ Email from Michael Ford, Emeritus Professor, Univ. of Bristol, to author (Dec. 4, 2024, 05:13 CST) (on file with author).

of fact.¹⁴² It considers testimony from the parties and witnesses, as well as written representations.¹⁴³

When determining who wins, the tribunal seeks to reach a unanimous decision, but a party wins if a majority of the tribunal finds in their favor.¹⁴⁴ If the tribunal “upholds . . . [the] complaint,” it then considers the remedy to impose—typically financial compensation paid by the employer.¹⁴⁵ The tribunal will give reasons for its decision, either orally or in writing.¹⁴⁶

Claimants and employers each win about fifty percent of the time.¹⁴⁷ Unlike in the U.S. where plaintiffs usually are awarded their attorneys’ fees and costs when they win,¹⁴⁸ typically both sides pay their own costs including attorneys’ fees.¹⁴⁹ On rare occasions, a tribunal may order costs to be paid if the party was unreasonable in bringing the proceedings or acted unreasonably in how they conducted the proceedings.¹⁵⁰

Similar to the U.S.,¹⁵¹ there is an appeals process.¹⁵² Either party has the right to appeal the tribunal’s judgment to the Employment Appeal Tribunal (“EAT”), which often consists of one judge but can include three judges including lay participation.¹⁵³ Appellant can appeal “only on a point of law.”¹⁵⁴ Because of this appeal standard, it is extremely

¹⁴² See Employment Tribunal Procedure Rules 2024, SI 2024/1155, rr. 3, 41–44 (Gr. Brit.).

¹⁴³ *Id.* rr. 41–44.

¹⁴⁴ PRAC. L. EMP., EMPLOYMENT TRIBUNALS (22): DECISIONS AND JUDGEMENTS, Westlaw 7-523-6848 (database updated Aug. 2025).

¹⁴⁵ *Unfair Dismissal and Employment Tribunal Awards—a Deep Dive into the Remedies of Reinstatement and Re-Engagement*, BTO (Oct. 29, 2024), <https://bto.co.uk/blog/unfair-dismissal-and-employment-tribunal-awards-a-deep-dive-into-the-remedies-of-reinstatement-and-re-engagement/> [<https://perma.cc/JJX6-GBPU>]; see Employment Tribunal Procedure Rules 2024, SI 2024/1155, rr. 58–60 (Gr. Brit.).

¹⁴⁶ See Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 60 (Gr. Brit.); *Meek v. City of Birmingham Dist. Council* [1987] IRLR 250 (CA) at 251 (Eng.). The decision must identify the issues, state the findings of fact, identify the relevant law, and state how the law has been applied; if the judgment includes a financial award, the reasons must identify how it calculated the amount to be paid. Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 60(7) (Gr. Brit.).

¹⁴⁷ See *What Are Your Chances of Winning in an Employment Tribunal?*, PAUL DORAN L., <https://www.pauldoranlaw.com/what-are-your-chances-of-winning-in-an-employment-tribunal/> [<https://perma.cc/LZ25-76KB>].

¹⁴⁸ 42 U.S.C. § 2000e-5(k).

¹⁴⁹ See PRAC. L. EMP., EMPLOYMENT TRIBUNALS (24): COSTS, Westlaw 9-523-6852 (database updated Apr. 2025) (“Cost awards have traditionally been viewed as the exception rather than the rule.”).

¹⁵⁰ Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 74 (Gr. Brit.).

¹⁵¹ See FED. R. APP. P. 3–4.

¹⁵² Employment Appeal Tribunal Rules 1993, SI 1993/2854, r. 21 (Gr. Brit.).

¹⁵³ *Id.*; see, e.g., *Garcia v. Leadership Factor Ltd.* [2022] EAT 19, [1] (appeal taken from Eng.) (Gr. Brit.) (“This is the judgment of all three members of the appeal tribunal, to which the lay members have made a valuable contribution.”).

¹⁵⁴ LYDIA BANERJEE & GAVIN MANSFIELD, BLACKSTONE’S EMPLOYMENT LAW PRACTICE 2023, at 259 (11th ed. 2023); HM Cts. & Tribunals Serv., *How to Appeal to the Employment Appeal Tribunal*,

difficult to challenge a tribunal's factual findings.¹⁵⁵ A case does not reach a full hearing of the EAT unless it passes a permission "filter stage" where a judge determines that there is a reasonable prospect for success on the appeal.¹⁵⁶ Appeals from the EAT go to the Court of Appeal, which consists of three judges.¹⁵⁷ The EAT or the Court of Appeal must grant permission for the appeal to the Court of Appeal.¹⁵⁸ Permission for such an appeal is unlikely to be granted.¹⁵⁹ Appeals from the Court of Appeal go to the Supreme Court, which has twelve judges.¹⁶⁰ Such appeals are also rarely heard.¹⁶¹

Although most employers are represented by lawyers, it is noteworthy that a significant percentage—twenty-three percent—are not represented.¹⁶² Most claimants—fifty-nine percent—do not have representation.¹⁶³ In 2018, the median cost for representation for employers was £5,000 and for claimants was £2,500, up from 2012 where the costs were £3,000 and £2,000 respectively for employers and claimants.¹⁶⁴ It appears that attorneys' fees are less than in the U.S.¹⁶⁵ These differences may be based on the more formal proceedings in the U.S. versus the informal tribunal hearings that occur in the U.K.

In summary, the U.S. and the U.K. have some similarities in their processes for employment discrimination cases. Both the U.S. and the U.K. have governmental systems through which employment discrimination claims can proceed as well as have an appeal process. The U.S. and the U.K. also both have procedures under which a judge can order dismissal prior to a hearing or a jury trial, and the U.S. courts dismiss many more cases before trials than the U.K. tribunals dismiss before hearings.

GOV.UK (Jan. 31, 2025), <https://www.gov.uk/government/publications/how-to-appeal-to-the-employment-appeal-tribunal-t440> [<https://perma.cc/TN4Y-8LB3>].

¹⁵⁵ See BANERJEE & MANSFIELD, *supra* note 154, at 259 (explaining the complex legal and procedural hurdles involved in the EAT appeal process).

¹⁵⁶ Email from Michael Ford, *supra* note 60.

¹⁵⁷ BANERJEE & MANSFIELD, *supra* note 154, at 299; *Court of Appeal Judges*, U.K. CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judges/coa-judges/> [<https://perma.cc/826N-2LSF>].

¹⁵⁸ BANERJEE & MANSFIELD, *supra* note 154, at 299.

¹⁵⁹ See *id.* ("However, permission to appeal is likely to be granted by the EAT only if the appeal raises an important point of principle or practice or if there is some other compelling reason for the appeal court to hear the appeal.").

¹⁶⁰ GRAEME COWIE & DAVID TORRANCE, *THE UK SUPREME COURT* 6, 12–13 (2024).

¹⁶¹ See *id.* at 8.

¹⁶² See U.K. DEP'T FOR BUS., ENERGY & INDUS. STRATEGY, *supra* note 135, at 8 (finding seventy-seven percent of employers are represented at a hearing).

¹⁶³ See *id.* (finding forty-one percent of employees are represented at a hearing).

¹⁶⁴ *Id.* at 46.

¹⁶⁵ See Matthew Joseph Novian, *The Average Cost to Defend an Employment Lawsuit*, NOVIAN & NOVIAN LLP (Apr. 25, 2025), <https://www.novianlaw.com/the-average-cost-to-defend-an-employment-lawsuit/> [<https://perma.cc/7GL3-WJGV>].

To compare how employment discrimination cases fare in the U.S. and the U.K., this Article examines a select set of cases that were subject to possible summary judgment or strike out that proceeded only through the public governmental procedures in the U.S. and the U.K. The Article does not examine arbitration or settlement. As previously discussed, in the U.S., many employment discrimination cases proceed in private arbitration instead of in courts. Because the U.K. does not permit forced arbitration for employment discrimination cases,¹⁶⁶ the Article cannot compare arbitration in the U.S. to the U.K. Similarly, although settlement affects employment discrimination cases in both the U.S. and the U.K., reasons for settlement can be complex, and currently there are few studies on settlement—though settlement research is growing.¹⁶⁷

C. *General Case Law on Discrimination and Harassment*

Although the U.S. and the U.K. both protect against retaliation as well as discrimination and harassment, for the sake of simplicity, the Article examines only discrimination and harassment law.

1. *U.S. Discrimination and Harassment Law*

The federal courts have interpreted Title VII and other discrimination statutes and established extensive case law that governs discrimination law.¹⁶⁸ The law covers two types of claims. An employee can prove disparate treatment—that the employer intended to discriminate because of a protected trait.¹⁶⁹ Alternatively, an employee can prove disparate impact—that a facially neutral practice has a disparate effect on a protected group.¹⁷⁰ Because most cases are disparate treatment cases,¹⁷¹ the Article focuses on disparate treatment.

As previously mentioned, prior to trial, after the parties exchange information about their cases, employers often move for summary judgment.¹⁷² The parties present written material to the court, and the court must decide whether a genuine dispute of material fact exists and if the defendant is entitled to judgment as a matter of law.¹⁷³ The courts are supposed to make all reasonable inferences in favor of the plaintiff¹⁷⁴

¹⁶⁶ See *supra* notes 113–14 and accompanying text.

¹⁶⁷ See, e.g., Jennifer K. Robbennolt, Jessica Bregant & Verity Winship, *Settlement Schemas: How Laypeople Understand Civil Settlement*, 20 J. EMPIRICAL LEGAL STUD. 488, 490–93 (2023).

¹⁶⁸ See *supra* Section II.A.1.

¹⁶⁹ Ricci v. DeStefano, 557 U.S. 557, 577 (2009).

¹⁷⁰ *Id.*

¹⁷¹ See *id.* at 577–78.

¹⁷² See *supra* Section II.B.1.

¹⁷³ FED. R. CIV. P. 56(a).

¹⁷⁴ Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

and order summary judgment for the employer only if a reasonable jury could not find for the plaintiff.¹⁷⁵ Again, as previously mentioned, in circumstances where employers request summary judgment, judges grant these motions most of the time, with the consequent result that most plaintiffs who do not settle before trial lose their cases before trial.¹⁷⁶

Most courts apply what is referred to as the “*McDonnell Douglas* test”¹⁷⁷ to determine whether they should dismiss discrimination cases on summary judgment.¹⁷⁸ Under this test, the plaintiff has the burdens of persuasion and production to show the prima facie case.¹⁷⁹ First, the plaintiff shows she is in a protected class.¹⁸⁰ Second, she shows she was qualified for the position.¹⁸¹ Third, the plaintiff shows she suffered an adverse action such as termination or not being promoted.¹⁸² Fourth, the plaintiff shows circumstances that suggest discrimination.¹⁸³ Proving the prima facie case is not a difficult burden.

Once the plaintiff has proven the prima facie case, a rebuttable presumption of discrimination exists.¹⁸⁴ The burden of production shifts to the employer to show a legitimate nondiscriminatory reason for its decision.¹⁸⁵ If the employer offers almost any reason including outrageous ones, this suffices to satisfy the employer’s burden as long as the employer’s reason is not discrimination.¹⁸⁶

Once the employer meets this low burden, the burden of production shifts back to the employee to show the employer has offered a reason that is a pretext or cover-up for discrimination.¹⁸⁷ To show discrimination, the plaintiff can also offer evidence unrelated to the employer’s proffered reason for its decision.¹⁸⁸ Most importantly, the employee must show the employer acted because of discrimination.¹⁸⁹ In other words, disproving the employer’s reason is not sufficient by itself if the court does not believe the employer acted for a discriminatory reason.¹⁹⁰ For example, courts have recognized an employer could offer a false reason for its decision even in circumstances when it did

¹⁷⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

¹⁷⁶ *See supra* Section II.B.1.

¹⁷⁷ *E.g.*, *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 581 (6th Cir. 1992).

¹⁷⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798–803 (1973).

¹⁷⁹ *Id.* at 802.

¹⁸⁰ *See id.*

¹⁸¹ *See id.*

¹⁸² *See id.*

¹⁸³ *Id.* The prima facie case will vary. *Id.* at 802 n.13.

¹⁸⁴ *See id.*

¹⁸⁵ *See id.*

¹⁸⁶ *See id.* at 802–05.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.*; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141–43 (2000).

¹⁹⁰ *See Reeves*, 530 U.S. at 143.

not discriminate.¹⁹¹ At this stage of the *McDonnell Douglas* test, courts often decide that the employee has not met her burden or, in other words, decides a reasonable jury could not find pretext.¹⁹² As a result, the court orders summary judgment.¹⁹³

In their assessment of whether to order summary judgment, U.S. courts often use doctrines or inferences that they have created—that the statutory text does not support.¹⁹⁴ As one example, for years, courts dismissed cases because they decided employers’ discriminatory actions were not bad enough.¹⁹⁵ They had added a requirement that employees must suffer an adverse action.¹⁹⁶ Courts would decide that some of the alleged unlawful actions by the employer were not sufficiently bad to constitute actionable discrimination.¹⁹⁷ In one case, Black employees were given outside work and White employees were given inside work, and the Fifth Circuit decided this employer action was not significant enough to be discrimination covered under the statute.¹⁹⁸ Similarly, a court found legal an employer’s policy giving male employees weekends off while requiring women to work weekends.¹⁹⁹ A recent Supreme Court decision changed this long-standing case law to decide that most actions taken because of a protected trait will be covered under the statute.²⁰⁰

Despite that decision, many other doctrines and inferences remain. As previously mentioned, the *McDonnell Douglas* framework requires very little of employers and essentially mandates employees prove the employer discriminated against them without the benefit of calling witnesses at a trial. The courts also use the “stray remarks” doctrine.²⁰¹ They will find that a discriminatory remark was stray—not made by a relevant person or too distant in time—and thus cannot be used to show the employer discriminated against the employee.²⁰² Moreover, in their decisions to order summary judgment for the employer, courts often discuss how the employer had an honest belief in its decision or

¹⁹¹ See *id.* at 147.

¹⁹² See SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA’S COURTS UNDERMINE DISCRIMINATION LAW* 111–23 (2017).

¹⁹³ See *id.*

¹⁹⁴ See *id.* at 59–86.

¹⁹⁵ See *id.* at 40–44, 59.

¹⁹⁶ See *id.* at 44–46.

¹⁹⁷ See *id.*

¹⁹⁸ *Peterson v. Linear Controls, Inc.*, 757 F. App’x 370, 372–73 (5th Cir. 2019) (finding no adverse employment action because the acts “do not concern ultimate employment decisions”).

¹⁹⁹ *Hamilton v. Dallas County*, No. 20-cv-00313, 2020 WL 7047055, at *2 (N.D. Tex. Dec. 1, 2020) (finding that this difference in scheduling between male and female employees was an “ultimate employment decision” and, thus, not actionable), *rev’d*, 79 F.4th 494 (5th Cir. 2023).

²⁰⁰ See *Muldrow v. City of St. Louis*, 601 U.S. 346, 354–56 (2024).

²⁰¹ SPERINO & THOMAS, *supra* note 192, at 59–69.

²⁰² *Id.*

that courts should not sit as super-personnel departments over employers' decisions.²⁰³ These are just some of the court-created doctrines and inferences used to dismiss cases on summary judgment.²⁰⁴

Under some U.S. discrimination law, a plaintiff will win where she shows the employer had mixed motives—discriminatory and nondiscriminatory ones—for a decision and the employer shows it would have made the same decision in the absence of discrimination.²⁰⁵ Because only one law allows this type of proof and the courts' use of the mixed-motive analysis has been quite limited, the Article focuses on cases that use the *McDonnell Douglas* test.

As discussed above, U.S. employees can also sue for harassment. The Supreme Court has set forth a test with several prongs for an employee to satisfy to show they faced harassment.²⁰⁶ This Article focuses on only hostile work environment claims, which constitute the bulk of harassment claims.

To prove a hostile environment, the plaintiff must first show unwelcome conduct based on the plaintiff's protected trait.²⁰⁷ Then, the plaintiff must show that the conduct was “sufficiently severe or pervasive ‘to alter the [employee’s] conditions . . . and create an abusive working environment.’”²⁰⁸ The court will consider a number of factors that include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”²⁰⁹ The court will determine whether a “reasonable person” would find the conduct so severe or pervasive to satisfy the test.²¹⁰ Plaintiffs with very good evidence of harassment often do not prove a hostile environment because of the difficult barriers that the courts of appeals have created to show severe or pervasive conduct by the alleged harasser.²¹¹

If the plaintiff shows a hostile environment, then the employer may have an affirmative defense.²¹² In those circumstances, it has the burden

²⁰³ *Id.* at 73–83.

²⁰⁴ *See generally id.* at 30–86 (discussing many of these doctrines and inferences). In a recent concurrence, Justice Thomas questioned the use of the *McDonnell Douglas* test and other court-created doctrines and inferences. *See Ames v. Ohio Dep’t of Youth Servs.*, 605 U.S. 303, 313–26 (2025) (Thomas, J., concurring).

²⁰⁵ *See* 42 U.S.C. § 2000e-2(m).

²⁰⁶ *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67–68 (1986); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993); *see also* SPERINO & THOMAS, *supra* note 192, at 111–23 (explaining this test in detail).

²⁰⁷ *Meritor*, 477 U.S. at 68.

²⁰⁸ *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

²⁰⁹ *Harris*, 510 U.S. at 23.

²¹⁰ *Id.* at 21.

²¹¹ *See* SPERINO & THOMAS, *supra* note 192, at 32–40.

²¹² *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

of persuasion and burden of production to show it “exercised reasonable care to prevent and correct promptly any . . . harassing behavior” and the “employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”²¹³ If an employer has a policy against harassment and the employee did not report the harassment, the employee will likely lose the case on summary judgment.²¹⁴

2. *U.K. Discrimination and Harassment Law*

Similar to U.S. law, U.K. law prohibits both “direct” discrimination and “indirect” discrimination, which are respectively disparate treatment and disparate impact under U.S. law.²¹⁵ Also like the U.S., the U.K. protects against harassment.²¹⁶

In the U.K., to prove discrimination directly or to prove intentional discrimination, an employee *B* must show “*A* treats *B* less favourably than *A* treats or would treat others” “because of a protected characteristic.”²¹⁷ Similar to the U.S., in the U.K., the critical question is whether the employer discriminated against an employee on the basis of a protected characteristic.²¹⁸

Despite commonalities, there are significant differences between the application of the discrimination law in the U.K. and the U.S. U.S. courts dismiss cases before trial more often than not by rationalizing employers’ behaviors.²¹⁹ On the other hand, U.K. courts rarely dismiss cases because they recognize the fact-intense nature of these cases and note how difficult it is to prove discrimination.²²⁰ The House of Lords has held a tribunal’s power to strike out claims should be used only in “the most obvious and plainest cases.”²²¹ In stressing these claims should not be dismissed except in extraordinary circumstances, it said, “[i]n this

²¹³ *Id.*

²¹⁴ *See id.*

²¹⁵ *See* Equality Act 2010, c. 15, §§ 13, 19 (Gr. Brit.); *supra* notes 169–70 and accompanying text.

²¹⁶ Equality Act 2010, c. 15, § 26 (Gr. Brit.).

²¹⁷ *Id.* § 13(1) (emphasis added). Although detriment and less favorable treatment are distinct concepts under the Act, in most cases, courts have found that where an employee has been treated less favorably, they have also been subject to a detriment. *See, e.g.,* *Deer v. Univ. of Oxford* [2015] EWCA (Civ) 52, [48] (Eng.).

²¹⁸ *See* *Nagarajan v. London Reg’l Transp.* [2000] 1 AC 501 (HL) 515 (appeal taken from Eng.) (Gr. Brit.) (recognizing unconscious bias can motivate a discriminator to act and “[c]onduct of this nature . . . falls squarely within the language of [the definition of direct race discrimination]”).

²¹⁹ *See supra* Section II.C.1.

²²⁰ *See, e.g.,* *Glasgow City Council v. Zafar* [1998] ICR 120 (HL) 125 (appeal taken from Scot.) (Gr. Brit.) (noting the lack of direct evidence in discrimination cases because most do not broadcast their prejudices).

²²¹ *Anyanwu v. S. Bank Student Union* [2001] UKHL 14, [24] (appeal taken from Eng.) (Gr. Brit.).

field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest.”²²²

Further, the courts have emphasized the difficulty of proving racial discrimination cases. They state there is a lack of direct evidence in these cases.²²³ They also state employers usually do not recognize their own discriminatory behavior and do not always actually have bad motives where illegal discrimination has occurred:

It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption that “he or she would not have fitted in.”²²⁴

As a result, under U.K. law, the claimant need not prove every element of their case, and once the plaintiff has shown a prima facie case of discrimination, a reverse burden of proof exists under which the employer must show that it did not discriminate.²²⁵

To establish a prima facie case, a claimant must allege facts that would lead “‘a reasonable tribunal [to] properly conclude’ from all the evidence” that there has been discrimination.²²⁶ If a claimant establishes the prima facie case, the tribunal must find that discrimination occurred unless the employer can produce a genuine, nondiscriminatory reason for the treatment.²²⁷ Unlike in the U.S., the employer has a significant burden. It must do more than just articulate a nondiscriminatory reason for the adverse action; the employer must “*prove* the factual validity of its legitimate nondiscriminatory reason.”²²⁸

In *X v. Y*,²²⁹ for example, the EAT rejected a tribunal’s decision to dismiss a case after a hearing.²³⁰ On the evidence, the EAT decided

²²² *Id.*; see also *Cmty. L. Clinic Solics. v. Methuen* [2012] EWCA (Civ) 571, [8], [16] (Eng.) (holding an employee’s age discrimination claim should not be stricken because further fact development and examination were warranted to determine whether discrimination occurred).

²²³ *Wong v. Igen Ltd.* [2005] EWCA (Civ) 142, [6] (Eng.).

²²⁴ *Id.* (quoting *King v. Gr. Brit.-China Ctr.* [1991] IRLR 513 (CA) at 518 (Eng.)).

²²⁵ See Equality Act 2010, c. 15, § 136(2) (Gr. Brit.) (“If there are facts from which the court could decide, in the absence of any other explanation, that a person . . . contravened the provision concerned, the court must hold that the contravention occurred.”); David A. Lacy & Alexandra S. Ray, *Reckoning with Employment Discrimination in a “Post Racial” Era*, 26 J.C.R. & ECON. DEV. 41, 54–55 (2011).

²²⁶ *Madarassy v. Nomura Int’l PLC* [2007] EWCA (Civ) 33, [57] (Eng.).

²²⁷ Equality Act 2010, c. 15, § 136(1)–(3) (Gr. Brit.); see, e.g., *Wong v. Igen Ltd.* [2005] EWCA (Civ) 142, [17]–[18] (Eng.).

²²⁸ Lacy & Ray, *supra* note 225, at 64.

²²⁹ (2013) UKEAT/0322/12 (appeal taken from Eng.) (Gr. Brit.).

²³⁰ *Id.* [2], [61]–[64].

the tribunal could have concluded that the claimant proved his prima facie case.²³¹ By finding there were breaches of contract, the tribunal could find there was discriminatory intent.²³² Because of this, under the reverse burden of proof, the employer was required to show why it acted as it did.²³³ In other words, the employer must show that it did not discriminate.

The U.K. courts have said that the effectiveness of the discrimination law depends on shifting the burden of proof to the employer:

[P]laintiffs could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent the burden of proving that his practice is not in fact discriminating.²³⁴

The Court of Appeal has explained in some cases it is obvious whether discrimination occurred, but in others, it is not. In these nonobvious situations, the employer must show that it did not discriminate:

Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in *North West Thames Regional Health Authority v. Noone*, “almost common sense.”²³⁵

Unlike the U.S., the U.K. also explicitly recognizes the existence of unconscious bias. In *Nagarajan v. London Regional Transport*,²³⁶ the House of Lords—then the highest appeal court in the U.K.²³⁷—stated that for race, the proper inquiry is “whether the employer realised it

²³¹ *See id.* [61].

²³² *Id.*

²³³ *See id.*

²³⁴ *Wong v. Igen Ltd.* [2005] EWCA (Civ) 142, [9] (Eng.).

²³⁵ *Id.* [6] (citation omitted) (quoting *King v. Gr. Brit.-China Ctr.* [1991] IRLR 513 (CA) at 518 (Eng.)).

²³⁶ [2000] 1 AC 501 (HL) (appeal taken from Eng.) (Gr. Brit.).

²³⁷ *From House of Lords to Supreme Court*, UK PARLIAMENT (July 23, 2009), <https://www.parliament.uk/business/news/news-by-year/2009/07/from-house-of-lords-to-supreme-court/> [<https://perma.cc/8MUX-KNFW>].

at the time *or not*, race was the reason why he acted as he did.”²³⁸ The House of Lords emphasized, “[a]n employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant’s race.”²³⁹ That belief is irrelevant, as “[m]embers of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination.”²⁴⁰

Moreover, in the U.K., to strike out a claim under Rule 38, there is a difficult, two-step process.²⁴¹ First, the tribunal decides whether there is no reasonable prospect of success.²⁴² Second, it determines whether it should exercise its discretion to strike out the claim.²⁴³ This two-step process emphasizes the discretionary and permissive nature of Rule 38. Even if the ground for strike out is met, the tribunal may still allow the case to proceed to a hearing.²⁴⁴

Turning to harassment, the U.S. and the U.K. both protect against harassment of an employee or an applicant.²⁴⁵ However, similar to the lesser proof required for UK discrimination claims, it is easier to prove harassment in the U.K. than in the U.S. In the U.K., harassment occurs if two requirements are met. First, an employee “engages in unwanted conduct related to a relevant protected characteristic” of the employee-claimant.²⁴⁶ The other employee’s conduct can be unwanted even if the claimant does not complain about the conduct to the employer.²⁴⁷ The claimant must also show that the unwanted conduct had the purpose or effect of violating the employee’s dignity or creating an “intimidating, hostile, degrading, humiliating or offensive environment” for the employee.²⁴⁸ To determine whether an employee’s conduct has had such effect, the employment tribunal considers “(a) the perception of

²³⁸ *Nagarajan v. London Reg'l Transp.* [2000] 1 AC 501 (HL) 515 (appeal taken from Eng.) (Gr. Brit.) (emphasis added).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *See* Employment Tribunal Procedure Rules 2024, SI 2024/1155, r 38 (Gr. Brit.); *Hasan v. Tesco Stores Ltd.* (2016) UKEAT/0098/16, [2], [17]–[19] (appeal taken from Eng.) (Gr. Brit.).

²⁴² *See* *Hasan v. Tesco Stores Ltd.* (2016) UKEAT/0098/16, [2], [17]–[19] (appeal taken from Eng.) (Gr. Brit.) (noting the permissive nature of Rule 38—then Rule 37—and finding employment judge erred in failing to consider whether to exercise its discretion in striking out a claim on the basis that it had no reasonable prospect of success).

²⁴³ *See id.*

²⁴⁴ *See id.* [18] (providing factors relevant to the tribunal’s exercise of discretion including “the early stage of the proceedings, the ability to direct that Further and Better Particulars of each claim be specified and the absence of any application on the part of the Respondent for striking out”).

²⁴⁵ Equality Act 2010, c. 15, § 40 (Gr. Brit.); *see supra* notes 40–41 and accompanying text.

²⁴⁶ Equality Act 2010, c. 15, § 26(1)(a) (Gr. Brit.).

²⁴⁷ *See, e.g., Munchkins Rest. Ltd. v. Karmazyn* (2010) UKEAT/0359/09, [15], [23] (appeal taken from Eng.) (Gr. Brit.) (noting conduct can be unwelcome even if the employee does not complain about the harassment).

²⁴⁸ Equality Act 2010, c. 15, § 26(1)(b) (Gr. Brit.).

[the claimant]; (b) the other circumstances of the case; [and] (c) whether it is reasonable for the conduct to have that effect.”²⁴⁹

Unlike in the U.S., in the U.K., the claimant does not have to prove “severe or pervasive” conduct to win a harassment case.²⁵⁰ Under U.K. law, the tribunal also takes into account whether the employer took all reasonable steps to prevent the act,²⁵¹ and it is not relevant if the employer did not approve of or did not know of the harassment.²⁵² In other words, unlike in the U.S., the employer has a more active responsibility to be aware of harassment in its workplace. Relatedly, unlike in the U.S., where the employee will likely lose if they did not comply with the employer’s policy to report harassment, in the U.K., any such failure of the employee to comply with an employer policy is not significant to proving the employee’s claim.²⁵³

D. Comparison of Cases in the U.S. and the U.K.

Race discrimination was a primary motivator for both U.S. and U.K. employment discrimination law,²⁵⁴ so for simplicity of comparisons, the Article focuses on race as a protected characteristic. The Article compares racial discrimination cases and harassment cases that U.S. courts dismissed on summary judgment and cases that U.K. tribunals struck out for “no reasonable prospect of success”²⁵⁵ or, alternatively, refused to or did not strike out. While it can be difficult to compare cases with different facts, in their own decision-making processes, courts regularly do so to make decisions. Also, while it can be hard to juxtapose distinct procedures, U.S. Rule 56 for summary judgment and U.K. Rule 38 for strike out are each the primary method by which judges dispose of discrimination cases before a trial or hearing.²⁵⁶ These procedures are comparable for this Article’s purposes to show the types of cases that do not reach a merits determination by a jury or a tribunal. Importantly,

²⁴⁹ *Id.* § 26(4).

²⁵⁰ *See supra* Section II.C.1.

²⁵¹ *See* *Caniffe v. E. Riding of Yorkshire Council* [2000] IRLR 555 (EAT) 558 (appeal taken from Eng.) (Gr. Brit.).

²⁵² Equality Act 2010, c. 15, § 109(3) (Gr. Brit.); *see, e.g., Jones v. Tower Boot Co.* [1997] 2 All ER 406 (CA) at 408–09, 416 (Eng.) (holding employment tribunal was entitled to find racial abuse including burning, assaulting, and whipping acts took place in the course of employment, even though not authorized). Even when an employee is not in the protected group, they can be subjected to harassment when another employee uses racist language. *Noble v. Sidhil Ltd.* (2016) UKEAT/0375/14, [55] (appeal taken from Eng.) (Gr. Brit.) (holding repeated racist language and views expressed to another White employee could be against the Act if unwanted).

²⁵³ Interview with Michael Ford, *supra* note 112.

²⁵⁴ *See* ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964*, at 2 (1990); *Race Relations Act 1965*, c. 73 (Gr. Brit.).

²⁵⁵ Employment Tribunal Procedure Rules 2024, SI 2024/1155, r. 38(1)(a) (Gr. Brit.).

²⁵⁶ *See supra* Section II.C.

regardless of unavoidable differences, the general approaches of U.S. judges and U.K. judges help show why most U.K. employment discrimination cases reach hearings at the same time that most U.S. cases do not reach trial.

Westlaw was searched to obtain racial discrimination cases and racial harassment cases decided on summary judgment in the U.S. Although there are criticisms for using Westlaw because it does not include all decided cases,²⁵⁷ this critique is not relevant for this Article. The Article examines only the general practices of the U.S. courts and does not, for example, engage in an empirical study. For the U.K., this Article discusses the relevant court of appeal's cases and uses a searchable database of employment cases to find racial discrimination cases and racial harassment cases decided by the EAT, including ones that were struck out under Rule 38.²⁵⁸ To select U.S. and U.K. cases to feature, this Article used cases that had similarities in their facts to compare the results in the cases.

1. *Comparing Discrimination Cases in the U.S. and the U.K.*

As previously mentioned, in the U.S., despite their fact-intense nature, discrimination cases, including ones alleging racial discrimination, rarely reach trial.²⁵⁹ Even though the U.S. statutory law is extremely broad, the courts have narrowly interpreted the law in favor of employers by using many doctrines and inferences—some of which are described above²⁶⁰—that move cases toward dismissal on summary judgment.

²⁵⁷ See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214–17 (2013) (critiquing use of Westlaw and Lexis for empirical studies as underinclusive).

²⁵⁸ See Zoe Adams, Abi Adams-Prassl & Jeremias Adams-Prassl, *Online Tribunal Judgments and the Limits of Open Justice*, 42 LEGAL STUD. 42, 42 (2022) (“Since February 2017, Employment Tribunal decisions from England, Wales, and Scotland have been made freely available online at www.gov.uk. At the time of writing, the website lists over 70,000 decisions, uploaded as individual .pdf or text files, searchable by keywords, jurisdiction code, and date.”). The following database was searched: HM Cts. & Tribunals Serv. & Emp. Appeal Tribunal, *Employment Appeal Tribunal Decisions*, GOV.UK, https://www.gov.uk/employment-appeal-tribunal-decisions?tribunal_decision_categories%5B%5D=practice-and-procedure [<https://perma.cc/9F7T-BGSA>].

²⁵⁹ See *supra* Section II.C.1. As one former federal judge noted,

today’s plaintiff stands to lose unless he or she can prove that the defendant had explicitly discriminatory policies in place or that the relevant actors were overtly biased. It is hard to imagine a higher bar or one less consistent with the legal standards developed after the passage of the Civil Rights Act, let alone with the way discrimination manifests itself in the twenty-first century.

Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 110, 112 (2012) (“[D]ivining a person’s intent is messy and complex and . . . this issue usually involves a material dispute of fact for a jury to decide.”).

²⁶⁰ See *supra* Section II.C.1.

In most cases that proceed past discovery, employers move for summary judgment, and courts overwhelmingly grant those motions.²⁶¹

The U.K. case law contrasts with the U.S. case law. In the U.K., except under rare circumstances, discrimination cases go to a hearing. In almost every U.K. case where a tribunal or appellate court considers strike out, they cite *Anyanwu* for the proposition that tribunals should rarely use their power to strike out discrimination claims. Unlike in the U.S., U.K. case law focuses on the importance of discrimination cases and the difficulty in deciding discrimination cases.

Cases vividly illustrate the differences in perspectives of the judges in the U.S. and the U.K. For example, in the U.S., despite the existence of stark facts showing discrimination in the workplace, courts often refuse to permit a jury to decide the question of whether the employer discriminated. After an examination of the paper record, courts decide a reasonable jury could not find discrimination.

As one illustration, in *Clack v. Rock-Tenn Co.*,²⁶² the Black plaintiff alleged racial discrimination in his termination and claimed a White person replaced him.²⁶³ The employer asserted it fired the plaintiff for insubordination after the plaintiff's White supervisor alleged the plaintiff refused to do some work.²⁶⁴ The plaintiff had a different view of the alleged insubordination. He asserted that the job that the supervisor insisted he perform was the responsibility of another White employee.²⁶⁵ Further, the plaintiff presented evidence from a former White foreman who stated the plaintiff's supervisor engaged in significant discrimination against the plaintiff.²⁶⁶ This discrimination included that the plaintiff's supervisor made racist remarks about the plaintiff such as saying the plaintiff "is nothing but a fucking n—," "I am going to get rid of him," and I want to "string him up."²⁶⁷ The former foreman also asserted the supervisor treated Black employees more harshly than White employees, and the company knew about the supervisor's actions and permitted it.²⁶⁸ The plaintiff also presented evidence that the supervisor purposefully bumped the plaintiff earlier the same day that the supervisor assigned plaintiff improper work.²⁶⁹

After the trial court ordered summary judgment for the employer, the Court of Appeals for the Sixth Circuit affirmed judgment for

²⁶¹ See *supra* note 97 and accompanying text.

²⁶² 304 F. App'x 399 (6th Cir. 2008).

²⁶³ *Id.* at 400–02, 402 n.1.

²⁶⁴ *Id.* at 400–02; *Clack v. Rock-Tenn Co.*, No. 06-cv-119, 2007 WL 1983802, at *4 (E.D. Tenn. July 3, 2007) (White supervisor), *aff'd*, 304 F. App'x 399.

²⁶⁵ *Clack*, 304 F. App'x at 401; *Clack*, 2007 WL 1983802, at *6 (White employee).

²⁶⁶ *Clack*, 304 F. App'x at 400–03.

²⁶⁷ *Id.* at 403 n.2.

²⁶⁸ *Id.* at 402–03.

²⁶⁹ *Id.* at 401.

the employer.²⁷⁰ It decided the supervisor did not influence the decision-maker who fired the plaintiff for insubordination.²⁷¹ The court acknowledged the decision-maker “knew of animosity between [the plaintiff and the supervisor] and may have known that [the supervisor] had made hostile, racist comments about [the plaintiff], if not directly to him.”²⁷² However, the decision-maker had asserted he terminated the plaintiff’s employment based only on an independent investigation.²⁷³ Although the plaintiff argued he had not been insubordinate, the court rejected his contention and said the decision-maker honestly believed that he properly fired plaintiff for insubordination.²⁷⁴ It said,

“so long as the employer honestly believed in the proffered reason given for its employment action” and that honest belief is “reasonably grounded on particularized facts that were before it at the time of the employment action,” a plaintiff “cannot establish pretext even if the employer’s reason is ultimately found to be mistaken, foolish, trivial or baseless.”²⁷⁵

Although the court focused on the employer’s “honest belief,” the court ignored other evidence that favored the plaintiff. There were stark facts of discrimination, and the plaintiff presented a very different, seemingly very possible view of what had happened. Other cases where courts rely on the employer’s honest belief will be discussed further below.

Price v. Valvoline, L.L.C.,²⁷⁶ another discrimination case that also has a harassment claim, shows a pattern of how difficult it is for plaintiffs to reach juries because of the regular acceptance by the U.S. courts of employers’ asserted reasons for their decisions. In *Price*, the Black plaintiff alleged race discrimination in his termination and racial harassment during his employment.²⁷⁷ Valvoline argued plaintiff was fired because he violated the attendance policy, and it presented evidence that plaintiff had been warned about his attendance.²⁷⁸ Similar to the facts in *Clack*, the plaintiff had a very different view of his termination than his employer. He presented evidence that his mixed-race supervisor told plaintiff “you people always want something for free,” and a White assistant manager called plaintiff a “lazy boy.”²⁷⁹ Also, the White

²⁷⁰ *Id.* at 400.

²⁷¹ *Id.* at 405–06.

²⁷² *Id.* at 405.

²⁷³ *Id.* at 405–06.

²⁷⁴ *Id.* at 406.

²⁷⁵ *Id.* (quoting *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998)).

²⁷⁶ 88 F.4th 1062 (5th Cir. 2023).

²⁷⁷ *Id.* at 1064.

²⁷⁸ *Id.* at 1066.

²⁷⁹ *Id.* at 1065; *Price v. Valvoline, LLC*, No. 21-cv-03683, 2023 WL 2796499, at *1 (S.D. Tex. Mar. 3, 2023) (mixed-race supervisor and White assistant manager), *aff’d*, 88 F.4th 1062.

plant manager—who also was one of the plaintiff’s supervisors—said the plant “needed more diversity” when he knew the plant’s makeup was predominantly Black workers.²⁸⁰ Further, the White plant manager used the n-word with the only Black supervisor when discussing the use of that word among Black workers.²⁸¹ The plaintiff also presented evidence of this supervisor “nitpicking [his] work, ‘ . . . yell[ing] . . . ,’ [and] not being forthright with him concerning his status in the attendance point system.”²⁸²

The district court ordered summary judgment for the employer, and the Court of Appeals for the Fifth Circuit affirmed.²⁸³ The Fifth Circuit held that Valvoline fired plaintiff for his violations of the attendance policy.²⁸⁴ It decided that even if the plaintiff had direct evidence that Valvoline discriminated against him, the court should consider what Valvoline would have done if it had not discriminated.²⁸⁵ The Fifth Circuit decided that, absent the discrimination, Valvoline would have made the same decision to terminate based on the plaintiff’s violations of the attendance policy, so plaintiff could not win.²⁸⁶

U.K. law contrasts with this U.S. law. In the U.K., judges recognize the possible influence of discriminatory remarks on the employer’s actions and do not privilege the employer’s asserted reason for its decision. In *Walters v. Avanta Enterprise Ltd.*,²⁸⁷ a U.K. employer alleged that Walters, the claimant, committed wrongdoing.²⁸⁸ The claimant, a Black Caribbean employee, worked as a job coach for just over a year.²⁸⁹ Her manager was of Bengali descent.²⁹⁰ In December, the manager threw chocolates at her team and “jokingly suggested that she had chosen the chocolates for everyone’s personalities.”²⁹¹ When she threw a Bounty bar at the claimant, the manager said to her, “I wasn’t trying to say you’re a coconut[.]”²⁹² When another employee asked what the manager meant, the manager explained the racial slur.²⁹³ Four months later, in April, the manager placed the claimant on a performance improvement plan,²⁹⁴ and thereafter, the claimant alleged she was constructively

²⁸⁰ *Price*, 88 F.4th at 1065; *Price*, 2023 WL 2796499, at *3 (White plant manager).

²⁸¹ *Price*, 88 F.4th at 1065.

²⁸² *Id.* at 1067.

²⁸³ *Id.* at 1064.

²⁸⁴ *See id.* at 1066.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ (2017) UKEAT/0127/17 (appeal taken from Eng.) (Gr. Brit.).

²⁸⁸ *Id.* [1].

²⁸⁹ *Id.* [2].

²⁹⁰ *Id.*

²⁹¹ *Id.* [3].

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* [7].

discharged based on her race.²⁹⁵ The claimant admitted that she had not met the targets in the plan.²⁹⁶

The employment tribunal (“ET”) judge struck out the race discrimination claim.²⁹⁷ The judge decided that the manager’s allegedly discriminatory comment and the termination of the claimant were not sufficiently connected.²⁹⁸ Additionally, it recognized that the employee had admitted that she did not meet the plan’s targets.²⁹⁹ The EAT allowed the employee’s appeal or, in other words, reversed the ET’s decision.³⁰⁰ The ET should have considered how the manager would have treated “a hypothetical white comparator.”³⁰¹ It decided the manager’s comment was evidence of her discriminatory attitude toward the claimant.³⁰² Further, the claimant had made sufficient allegations of discriminatory treatment by her manager in how the employee was treated when she did not reach her targets and also in not receiving help from the manager to achieve them.³⁰³ Citing *Anyanwu*, the EAT ordered that the case proceed to a hearing.³⁰⁴

A comparison of *Clack*, *Price*, and *Walters* illustrates the very different treatment of discrimination in the two systems in the U.S. and the U.K. In the U.S. cases, the courts accepted the employers’ proffered reasons for their decisions to fire the plaintiffs—respectively that the employee was insubordinate and that the employee did not meet expectations for attendance.³⁰⁵ At the same time, they disregarded evidence that discrimination permeated the workplace.³⁰⁶ On the other hand, in the U.K., in *Walters*, the EAT did not accept the employer’s proffered reason for the termination of the employee of not meeting targets.³⁰⁷ Instead, in concluding that the case should proceed to a hearing, it discussed how a White comparator could have been treated, the specific discriminatory treatment of the claimant by the manager regarding the performance plan, and the manager’s discriminatory comment about the plaintiff.³⁰⁸

The U.K. essentially presumes a case should proceed to a hearing upon the presentation of evidence that the employer could have

²⁹⁵ *Id.* [1], [9].

²⁹⁶ *Id.* [28].

²⁹⁷ *Id.* [1], [28].

²⁹⁸ *See id.* [10]–[14].

²⁹⁹ *Id.* [28].

³⁰⁰ *Id.* [32]–[48].

³⁰¹ *Id.* [42].

³⁰² *Id.*

³⁰³ *Id.* [41]–[43].

³⁰⁴ *Id.* [32], [48].

³⁰⁵ *See supra* notes 264–86 and accompanying text.

³⁰⁶ *See supra* notes 264–86 and accompanying text.

³⁰⁷ *See supra* notes 287–304 and accompanying text.

³⁰⁸ *See supra* notes 287–304 and accompanying text.

discriminated. Different from this approach, even where the plaintiff has a significant amount of evidence of discrimination, U.S. judges continue to privilege the employer's nondiscriminatory reason for its decision and require the plaintiff to prove that the employer did not discriminate—without the plaintiff being able to present any witnesses. For example, in *Barrow v. Georgia Pacific Corp.*,³⁰⁹ there were multiple allegations of racial harassment including the use of the n-word by supervisors.³¹⁰ These allegations are discussed more below.³¹¹ The plaintiff alleged that he was denied several promotions because of his race while the company asserted that the plaintiff was not qualified.³¹² At the same time, White employees received the promotions instead of the plaintiff.³¹³ The Court of Appeals for the Eleventh Circuit affirmed the trial judge's decision to dismiss the claim on summary judgment.³¹⁴ Despite allegations of pervasive racial harassment at the company, the Eleventh Circuit decided that the company presented enough evidence that the plaintiff was not qualified, that the plaintiff did not show he was qualified, and that the plaintiff did not show that the company discriminated against him.³¹⁵

Different from the dismissal-prone approach in the U.S., U.K. cases require the tribunal to be cautious and to consider its discretion not to strike out a case. This reasoning is seen in *Silape v. Cambridge University Hospitals NHS Foundation Trust*.³¹⁶ There, the employee, a Black nurse, worked for a hospital for fifteen years.³¹⁷ Twelve years into her employment, she was moved to a different ward while others of different races were not.³¹⁸ After the move, she alleged other discriminatory treatment led to stress and anxiety, doctor's visits, and eventually not working for a year.³¹⁹ During this time that she did not work, she was not allowed to visit the hospital and access its computers, but she asserted that others in similar circumstances were allowed to visit the hospital and access the computers.³²⁰ She also alleged that the hospital did not fairly examine her claim that her manager treated her worse and made unfair complaints about her work.³²¹ Instead, the hospital upheld her manager's claims that the claimant had acted inappropriately toward

³⁰⁹ 144 F. App'x 54, 57 (11th Cir. 2005).

³¹⁰ *Id.* at 57–58; *Barrow v. Ga.-Pac. Corp.*, No. 01-cv-00141, slip op. at 2 (S.D. Ala. Apr. 11, 2003), *aff'd*, 144 F. App'x 54.

³¹¹ *See infra* notes 431–37 and accompanying text.

³¹² *Barrow*, 144 F. App'x at 57–58.

³¹³ *Id.* at 58.

³¹⁴ *Id.* at 56–60.

³¹⁵ *Id.*

³¹⁶ (2017) UKEAT/0285/16 (appeal taken from Eng.) (Gr. Brit.).

³¹⁷ *See id.* [1], [5].

³¹⁸ *See id.* [5].

³¹⁹ *See id.* [6]–[10].

³²⁰ *Id.* [10], [17]–[18].

³²¹ *Id.* [17]–[18].

the manager including challenging her decisions.³²² The claimant alleged that the hospital's treatment of her led to a scheduled disciplinary hearing where the claimant could lose her job.³²³ When the claimant was told she would be terminated, she resigned.³²⁴ Subsequently, the claimant brought a number of claims.³²⁵

The ET judge struck the claims and held that the claimant had not shown that the hospital's alleged actions were because of race or disability and had not shown she had been treated less favorably than comparators.³²⁶ The EAT noted that the ET had not discussed its responsibility to be cautious in its discretion to strike.³²⁷ Further, the EAT panel disagreed that the claimant had not identified comparators.³²⁸ The claimant had stated the employer had treated her differently than others on sick leave and had treated an internal complaint that the claimant had made differently than her manager's internal complaint.³²⁹ The EAT also disagreed that the claimant had not shown the difference in treatment was because of the protected traits; she had alleged comparators who did not have her protected traits.³³⁰ Citing *Anyanwu*, the EAT concluded that the ET had not taken the claimant's allegations at their "highest" and had inappropriately struck them as having no reasonable prospect of success.³³¹

Similarly, in *Hasan v. Tesco Stores Ltd.*,³³² the EAT expressed concern that the ET should have considered its discretion not to strike.³³³ In that case, on its own initiative, the ET judge struck all the claims on the basis that they had no reasonable prospect of success.³³⁴ In reinstating the claims, the EAT stated that the ET "applied too stringent a test" when deciding to strike the race and age claims³³⁵ and also improperly struck out the victimisation claim.³³⁶ Citing *Anyanwu*, the court concluded that actual factfinding in a hearing could have revealed very different conclusions.³³⁷ Additionally, although the tribunal had examined whether

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.* [11].

³²⁵ *Id.* [16].

³²⁶ *Id.* [19].

³²⁷ *Id.* [29].

³²⁸ *Id.* [30], [39].

³²⁹ *Id.* [31]–[32].

³³⁰ *Id.* [33]–[34].

³³¹ *Id.* [24], [34]–[39], [46].

³³² (2016) UKEAT/0098/16 (appeal taken from Eng.) (Gr. Brit.).

³³³ *Id.* [17]–[18].

³³⁴ *Id.* [1].

³³⁵ *Id.* [15]. The EAT also expressed concern about the lack of notice to the claimant that his race and age claims could be struck at an upcoming hearing. *Id.* [13].

³³⁶ *Id.* [16].

³³⁷ *Id.* [15]–[16].

Rule 38 had been met, it should have considered whether it *should* exercise its discretion to strike out a claim.³³⁸

Another case, *Qdos Consulting Ltd. v. Swanson*,³³⁹ shows the limited power to strike out. The claimant, Swanson, had brought two previous cases against other employers, including one where he lost at a hearing and one which was struck out.³⁴⁰ In the past, Swanson had even been required to pay significant costs to one of the employers.³⁴¹ In the present case, Qdos terminated Swanson who was of Afro-Caribbean descent.³⁴² Swanson asserted several claims against Qdos including race discrimination.³⁴³ He did not have direct evidence of discrimination and relied on unfavorable treatment, his race, and the treatment of actual or hypothetical comparators.³⁴⁴ On the other hand, Qdos alleged that it fired the claimant because of gross misconduct, and it had evidence of complaints from clients.³⁴⁵

The ET refused the employer's request to strike or order a deposit, and the EAT affirmed the ET's decision.³⁴⁶ It emphasized that once the claimant showed the prima facie case of discrimination, the employer must show it did not discriminate.³⁴⁷ Further, the test is not "whether [a] claim is likely to fail nor . . . whether it is possible that his claim will fail."³⁴⁸ To strike there must be "no reasonable prospect of success."³⁴⁹ Citing *Anyanwu*, the EAT recognized that "discrimination cases should not be struck out except in the very clearest circumstances."³⁵⁰ The EAT also emphasized the law questions were "often highly fact-sensitive" and should generally be decided after a hearing.³⁵¹ Additionally, the EAT pointed out that "there is generally no direct evidence of discrimination, so it is necessary to draw inferences."³⁵² It also emphasized that the high cost of proceedings could "tempt[]" the tribunal to take a "procedural shortcut" and dismiss a case, but the tribunal should not do so.³⁵³ The EAT recognized the claimant here had alleged unreasonable

³³⁸ *Id.* [17]–[18].

³³⁹ (2012) UKEAT/0495/11 (appeal taken from Eng.) (Gr. Brit.).

³⁴⁰ *Id.* [24]–[26].

³⁴¹ *Id.*

³⁴² *Id.* [4].

³⁴³ *Id.* [8]–[26].

³⁴⁴ *Id.* [16]–[24].

³⁴⁵ *Id.* [5].

³⁴⁶ *Id.* [2], [48]–[50].

³⁴⁷ *Id.* [39].

³⁴⁸ *Id.* [42] (quoting *Balls v. Downham Mkt. High Sch.* (2010) UKEAT/0343/10, [6] (appeal taken from Eng.) (Gr. Brit.)).

³⁴⁹ *Id.* [48].

³⁵⁰ *Id.* [43].

³⁵¹ *Id.*

³⁵² *Id.* [47].

³⁵³ *Id.* [49].

treatment, his protected status, and unfavorable treatment in comparison to others. Accordingly, the claimant may be able to raise an inference of discrimination. Also, the employer may not be able to show it terminated the claimant for nondiscriminatory reasons. Consequently, the EAT decided the case should go to a hearing.³⁵⁴

This U.K. approach of requiring the employer to show it did not discriminate upon a prima facie case of discrimination contrasts with U.S. cases, where, as seen above in *Clack*, the U.S. courts often simply accept the employer's statement that it did not discriminate.³⁵⁵ In *Sampson v. Konica Minolta Business Solutions USA, Inc.*,³⁵⁶ the Black plaintiff, a named account executive ("NAE"), alleged racial discrimination in Konica Minolta's decision to change his assignments.³⁵⁷ The company asserted a legitimate nondiscriminatory reason that the changes to NAE assignments were necessary to eliminate unnecessary travel to effect a boost in the performance of NAEs like the plaintiff.³⁵⁸ Plaintiff had previously held accounts in some of the areas of the country to which he had been reassigned.³⁵⁹ Among other evidence, the plaintiff asserted that the company did not change the accounts of another NAE who was not Black in the same way as it did for the plaintiff and other Black employees.³⁶⁰

The Ninth Circuit affirmed the trial court's decision that a reasonable jury could not find that Konica Minolta discriminated against the plaintiff.³⁶¹ The company had presented sufficient evidence that the alleged comparator was not an NAE.³⁶² Moreover, in affirming summary judgment, the court emphasized that it "[k]e[pt] in mind that the ultimate question is whether 'an employer honestly believed' its non-discriminatory reasons and did not act based on race."³⁶³ Konica Minolta had "honestly believed" its reasons for changing the plaintiff's assignments, and thus, it did not act on the basis of race.³⁶⁴

*Torlowei v. Target*³⁶⁵ is another case where the court stressed it should believe the employer's reasoning. There, the Black plaintiff worked on collections for Target to obtain payment agreements with

³⁵⁴ See *id.* [50].

³⁵⁵ See *supra* notes 262–75 and accompanying text.

³⁵⁶ No. 23-15458, 2024 WL 3409847 (9th Cir. July 15, 2024).

³⁵⁷ See *id.* at *1.

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at *2.

³⁶¹ *Id.* at *2–3.

³⁶² *Id.*

³⁶³ *Id.* at *2 (quoting *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002)).

³⁶⁴ *Id.* at *3.

³⁶⁵ No. Civ. 02-933, 2004 WL 229081 (D. Minn. Feb. 3, 2004), *aff'd per curiam*, 401 F.3d 933 (8th Cir. 2005).

customers who owed money to Target.³⁶⁶ The computer system would call these unpaying customers and send these calls to employees.³⁶⁷ Rarely, but at times, after the customer had already received a call and agreed to a payment by working with an employee, the computer call system sent the same customer to another employee.³⁶⁸ In the circumstance in question, the plaintiff received such a repeat call to a customer to obtain a payment, and the customer became irate.³⁶⁹ Plaintiff registered the payment to prevent another call to the customer and took credit for the payment agreement.³⁷⁰ Subsequently, Target terminated the plaintiff and asserted her termination was the result of the plaintiff taking credit for another employee's work.³⁷¹ The plaintiff alleged that this type of behavior occurred regularly and that other employees had similarly taken credit for her work on two occasions.³⁷² Numerous employees submitted affidavits to support the plaintiff's assertion that the plaintiff had engaged in a common practice.³⁷³ Although the plaintiff alleged a White coworker had committed a similar violation and had not been terminated, the district court decided that the plaintiff could not show that the employees who had done this practice in the past were not in her protected group.³⁷⁴ This decision was partially based on finding that the evidence that the plaintiff presented from two other employees was inadmissible hearsay evidence.³⁷⁵

In its short decision where it affirmed the district court's decision, the Court of Appeals for the Eighth Circuit said that the plaintiff failed to show a prima facie case of race discrimination.³⁷⁶ The court also repeated the line that "we should believe the employer"—an inference against discrimination that continues to appear in so many U.S. cases. It stated, "[w]e have oft repeated the maxim that '[f]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions.'"³⁷⁷

³⁶⁶ *Id.* at *1, *5.

³⁶⁷ *Id.* at *1.

³⁶⁸ *Id.*

³⁶⁹ *Id.* at *2.

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² *Id.* at *5.

³⁷³ *Id.*

³⁷⁴ *Id.* at *5–8.

³⁷⁵ *See id.* at *7.

³⁷⁶ *Torlowei v. Target*, 401 F.3d 933, 935 (8th Cir. 2005) (per curiam).

³⁷⁷ *Id.* (alteration in original) (quoting *Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998)). The case law created by judges is inconsistent with the broad language of the statutes. *See SPERINO & THOMAS, supra* note 192, at 31; *Gertner, supra* note 259, at 109 ("Changes in substantive discrimination law since the passage of the Civil Rights Act of 1964 were tantamount to a virtual repeal. This was so not because of *Congress*; it was because of *judges*." (footnote omitted)).

The U.K. has a very different approach regarding the employer's asserted reason for its decision as well as how to treat documentation from the employer. Its courts do not give deference to the employer's reason. In *Javed v. Blackpool Teaching Hospitals NHS Foundation Trust*,³⁷⁸ the claimant had previously brought unsuccessful claims to the ET.³⁷⁹ Under the facts here, the employer, Blackpool, had complained about the performance of the claimant who was of Pakistani descent.³⁸⁰ The claimant asserted a grievance related to Blackpool's complaint about his performance and alleged Blackpool had discriminated against him on the basis of race.³⁸¹ After Blackpool terminated Javed, Javed brought claims, many of which the ET judge struck outright and others for which the judge required a deposit.³⁸² In its decision for strike out and a deposit, the ET emphasized the employer had made its decision after an investigation and cited documents that the employer provided.³⁸³ It also discussed the late timing of the claimant's allegations of race discrimination.³⁸⁴

In largely reversing the ET, the EAT stated that many discrimination cases would not survive strike out if they relied on the employer's conclusion that it did nothing wrong.³⁸⁵ It also recognized that employees may not claim discrimination for a variety of reasons including that an employer may victimise or retaliate against them.³⁸⁶ Moreover, employers almost never indicate that they are discriminating in documents.³⁸⁷ The EAT upheld the appeal for virtually all of the claims that were struck and ordered a hearing.³⁸⁸

Similarly, in *Sharma v. New College Nottingham*,³⁸⁹ the EAT went out of its way to show discrimination was a possible reason for the employer's decision. There, the claimant who was of Indian descent alleged racial discrimination and harassment by his employer.³⁹⁰ The employer asserted the claimant did not do his work in a timely manner and presented contemporaneous documents to support its position on

³⁷⁸ (2017) UKEAT/0135/17 (appeal taken from Eng.) (Gr. Brit.).

³⁷⁹ *Id.* [4], [42].

³⁸⁰ *Id.* [4].

³⁸¹ *Id.*

³⁸² *Id.* [1].

³⁸³ *Id.* [17], [20]–[30].

³⁸⁴ *Id.* [17]–[19].

³⁸⁵ *Id.* [41].

³⁸⁶ *Id.* [45].

³⁸⁷ *Id.* [52].

³⁸⁸ *Id.* [59]–[71] (striking allegation forty that employer took too long to investigate). On the decision to require a deposit order, the EAT overturned the judge's decision on the basis that it was improper to find so after a paper trial. *Id.* [65], [67]–[70].

³⁸⁹ (2011) UKEAT/0287/11 (appeal taken from Eng.) (Gr. Brit.).

³⁹⁰ *Id.* [1]–[3], [11].

which the ET judge relied.³⁹¹ Thus, the ET ordered a deposit because the claim had little reasonable prospect of success.³⁹² The ET decided “because the contemporaneous documentation which appears to be perfectly proper and polite in tone does not bear out the allegations made somewhat belatedly by the Claimant of discriminatory treatment towards him as Chair of the grievance, I conclude that this claim has little reasonable prospect of success.”³⁹³ The EAT disagreed.³⁹⁴ While recognizing such employer documentation existed, it stated that behind this “façade,” the employee had alleged that the employer harassed him.³⁹⁵ A deposit was inappropriate, and a hearing on the merits of the case was appropriate.³⁹⁶ There were disputed facts on why the employer acted as it did.³⁹⁷

2. Comparing Harassment Cases in the U.S. and U.K.

As previously mentioned, similar to discrimination claims, U.S. courts frequently dismiss harassment claims before trial on summary judgment. Despite broad statutory language, the U.S. Supreme Court has interpreted this language to require that a plaintiff must prove “sufficiently severe or pervasive” conduct.³⁹⁸ The recent case of *EEOC v. Village at Hamilton Pointe, LLC*³⁹⁹ shows the difficulty of proving such harassment in the U.S. The EEOC alleged claims on behalf of multiple Black employees of a long-term care center.⁴⁰⁰ Among other evidence of harassment, Hamilton Pointe had posted an assignment for care of a resident of the center that indicated that African American males could not care for this resident; it stated, “No African American Males to Provide Care.”⁴⁰¹ A Black female worker complained about this posting, but the posting remained in place for three days.⁴⁰² Further, the nursing director had confirmed that Hamilton Pointe had accommodated racial

³⁹¹ *Id.* [4]–[5], [13], [17].

³⁹² *Id.* [17], [20].

³⁹³ *Id.* [17].

³⁹⁴ *Id.* [18]–[21], [30].

³⁹⁵ *Id.* [27].

³⁹⁶ *Id.* [29]–[30].

³⁹⁷ *Id.* [18]–[30].

³⁹⁸ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

³⁹⁹ 102 F.4th 387 (7th Cir. 2024).

⁴⁰⁰ *Id.* at 400. In another case, the Black plaintiff alleged the manager who made the recommendation to demote the plaintiff to part-time work said “she was going to ‘fire that n—— today.’” *Nelson v. United Parcel Serv., Inc.*, 337 F. App’x 561, 562–64 (7th Cir. 2009). The court of appeals decided that this was “the *only* evidence of discrimination on the basis of race in the entire record,” and it did not prove that United Parcel Service terminated the plaintiff because of his race. *Id.* at 563–64.

⁴⁰¹ *Hamilton Pointe*, 102 F.4th at 408.

⁴⁰² *Id.*

preferences of residents.⁴⁰³ The Black worker also alleged that the n-word was used many times over the course of her career although she did not testify that she had heard it at Hamilton Pointe.⁴⁰⁴ This worker resigned and alleged a hostile work environment.⁴⁰⁵ The Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment and its finding that the worker did not experience a racially hostile work environment.⁴⁰⁶ Because the posting was removed and the posting did not concern her specifically, the racial harassment was not sufficiently severe or pervasive to constitute a hostile work environment.⁴⁰⁷

In the same case, another Black plaintiff alleged that she saw an assignment sheet that stated "no blacks allowed" for the care of a particular resident.⁴⁰⁸ Also, on multiple occasions, the plaintiff was told that Black males could not care for certain residents.⁴⁰⁹ Additionally, she stated that residents used the n-word and other racial slurs many times.⁴¹⁰ She also reported that two White coworkers harassed Black employees, including writing them up inappropriately.⁴¹¹ Additionally, the plaintiff heard the wife of Hamilton Pointe's administrator refer to her as "black girl."⁴¹² The Seventh Circuit also affirmed the district court's decision that these actions against this plaintiff were not severe or pervasive enough to create a hostile or abusive working environment.⁴¹³

Another Black plaintiff also saw the posting prohibiting Black males from an assignment for a particular resident.⁴¹⁴ She also told Hamilton Pointe that darker-skinned Black employees were treated worse than her and other employees.⁴¹⁵ Despite her complaint, this behavior continued.⁴¹⁶ Also, a resident told her she smelled like pork.⁴¹⁷ Additionally, without any tact or care, White nurses told her that residents were racist.⁴¹⁸ In affirming summary judgment, the Seventh Circuit emphasized that the plaintiff did not directly suffer from much of the harassment, and the other harassment was not sufficiently severe or pervasive.⁴¹⁹

⁴⁰³ *Id.*

⁴⁰⁴ *Id.* at 409.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 409–10.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 410.

⁴⁰⁹ *Id.* at 410–11.

⁴¹⁰ *Id.* at 411.

⁴¹¹ *Id.* at 411–12.

⁴¹² *Id.* at 412.

⁴¹³ *Id.* at 412–13.

⁴¹⁴ *Id.* at 414.

⁴¹⁵ *Id.* at 413.

⁴¹⁶ *Id.* at 413–14.

⁴¹⁷ *Id.* at 414.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 414–15.

The case details twelve other employees who alleged similar harassment.⁴²⁰ In each case, the Seventh Circuit affirmed the district court's decision that no reasonable jury could find the environment sufficiently severe or pervasive to constitute a hostile work environment for the Black employees.⁴²¹

Another case, *Fortson v. Carlson*,⁴²² further shows the state of the law of harassment in the U.S. A Black dispatcher for trucks at a chicken-feed mill alleged many incidents of racial harassment over his two and a half years of employment.⁴²³ These included being referred to as "black ass," "black ass fool," "one dumb black ass," "no good mother fucker," and "sorry ass fuck."⁴²⁴ He was also threatened with "I'll have your black ass fired" and, worse, "[w]e will take you out."⁴²⁵ The plaintiff complained about the behavior, but the employer took no actions against the perpetrators.⁴²⁶ After the plaintiff fell asleep on the job, less than a week later, the employer terminated him.⁴²⁷ The Court of Appeals for the Eleventh Circuit affirmed the district court's decision to dismiss the race discrimination case on summary judgment based on the plaintiff failing to file his claim on time.⁴²⁸ Moreover, the court decided that the plaintiff could not prove a hostile environment including that the racial comments and threats of the employees were sufficiently severe or pervasive to constitute a hostile work environment for plaintiff.⁴²⁹ The court concluded the acts of harassment toward the employee did not interfere with his work performance.⁴³⁰

Barrow v. Georgia Pacific Corp. is yet another case that shows how difficult it is to prove racial harassment in the U.S. Here, the Eleventh Circuit affirmed the district court's dismissal of seven plaintiffs' harassment claims on summary judgment.⁴³¹ For example, a plaintiff alleged a plethora of racist behavior including "displays of the rebel flag on tool boxes and hard hats, the letters 'KKK' on a bathroom wall and on a block-saw console, and a noose in another employee's locker."⁴³² The plaintiff also alleged the use of racial slurs, including a superintendent calling him the n-word three times in a year, calling him "boy" many times, and telling

⁴²⁰ *Id.* at 415–38.

⁴²¹ *Id.*

⁴²² 618 F. App'x 601 (11th Cir. 2015).

⁴²³ *Id.* at 602–04.

⁴²⁴ *Id.* at 603.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 604.

⁴²⁷ *Id.* at 604–05.

⁴²⁸ *Id.* at 605.

⁴²⁹ *Id.* at 605–08.

⁴³⁰ *Id.* at 608.

⁴³¹ *Barrow v. Ga. Pac. Corp.*, 144 F. App'x 54, 57 (11th Cir. 2005).

⁴³² *Id.*

him “he was going to kick [his] ‘black ass.’”⁴³³ Additionally, the employee alleged another supervisor called him the n-word and said he “would ‘cut’ him” if he looked at a White girl.⁴³⁴ Yet another supervisor called him “black boy,” and even another called him “dumb ass.”⁴³⁵ The Eleventh Circuit decided these were “isolated, sporadic instances of racial harassment over his more than fourteen years of employment.”⁴³⁶ They were not “sufficiently severe or pervasive to alter the conditions of [his] employment and create an abusive working environment.”⁴³⁷

In searches of U.K. cases, no cases were discovered that were struck out and have facts that are even remotely close to the facts of the U.S. harassment cases that were dismissed on summary judgment. As a result, instead, the Article examines U.K. harassment cases where there were no applications to strike and the cases went to hearings. These cases of racial harassment that went to hearings show the difference in how the U.K. has treated allegations of racial harassment. In *Cam v. Matrix Service Development and Training Ltd.*,⁴³⁸ the claimant alleged a colleague used racist language, including using a parody of an accent with his home town name “Staines,” using the term “white trash,” saying “[a]ll white people look the same,” and referring to “disgusting European men.”⁴³⁹ After the ET panel found against the claimant on his racial harassment claim,⁴⁴⁰ the EAT allowed an appeal by the claimant and decided the case should be reconsidered.⁴⁴¹ It found that the ET erred in not deciding whether the supervisor had used the term “white trash” and also erred in not deciding

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 58.

⁴³⁷ *Id.* (alteration in original) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). In another case, the Court of Appeals for the Second Circuit affirmed summary judgment against a Black physical education teacher, holding he did not suffer a racially hostile work environment. *Berrie v. Bd. of Educ.*, 750 F. App'x 41, 44 (2d Cir. 2018). Among other assertions, the plaintiff alleged the following: A faculty member sent him a photo of a minority teenager and made racially derogatory comments about it including references to students at the school; the principal entered his gym and hit a floor hockey ball striking the teacher in the head, commenting “I did it,” and following being hit by the ball, the superintendent sent him an article by a Black author about not being angry; in response to a spelling error, the principal said “can’t you guys spell?”; a fellow teacher said “he talked ‘too black’” and said “she had a constitutional right to use the ‘n-word’”; and a person urinated in his coffee pot. *Id.* at 44–46. In yet another case, as for the racial harassment claim, the court decided that the plant manager’s use of two terms, “you people” and “boy,” was not sufficiently “severe” to constitute a hostile work environment, and the plaintiff’s other allegations regarding his employer’s actions were “facially neutral” so they did not support the plaintiff’s claims of racial harassment. *Price v. Valvoline, L.L.C.*, 88 F.4th 1062, 1067 (5th Cir. 2023).

⁴³⁸ (2013) UKEAT/0302/12 (appeal taken from Eng.) (Gr. Brit.).

⁴³⁹ *Id.* [4].

⁴⁴⁰ *Id.* [11].

⁴⁴¹ *Id.* [13]–[27].

“whether the remarks were on the grounds of race.”⁴⁴² Moreover, discussing language in an email sent to the claimant, the EAT recognized that although the email did not contain “overtly racist language,” such overt language was not required to prove racial harassment.⁴⁴³ The ET had found the email “bordered on the offensive” in a number of ways and, as a result, the ET should have considered the email in its analysis of whether racial harassment occurred.⁴⁴⁴

*Mathebula v. Time 4 U Ltd.*⁴⁴⁵ is another U.K. harassment case where there was no application to strike and where it was decided after a hearing.⁴⁴⁶ The ET found for the employer,⁴⁴⁷ but the EAT allowed the appeal and sent the case back to a different ET so that it could “consider the matter afresh.”⁴⁴⁸ Here, the Black claimant had alleged that his supervisor had referred to Black employees as “monkeys” and subsequently decreased his pay.⁴⁴⁹ In deciding to find for the employer, the ET did not make a specific finding about whether the term “monkeys” had been used.⁴⁵⁰ The EAT found that the ET had erred in failing to make these findings.⁴⁵¹ If the supervisor made this comment, there may be an inference of discrimination, and thus, the employer may be required to show it did not discriminate.⁴⁵²

The harassment law is pretty consistent across the U.S. In *Reedy v. Quebecor Printing Eagle, Inc.*,⁴⁵³ the Black employee alleged a racially hostile environment that caused him to resign.⁴⁵⁴ The actions included another employee calling him “[f]ucking n—” and throwing money at him; seeing another Black employee called “punk ass n—” and told “they were going to ‘whip his punk ass’”; and watching another employee accusing a Black employee of stealing his property, “exclaiming that ‘all you n— steal’” and throwing “a metal blade” at that employee.⁴⁵⁵ Additionally, the employee’s name was written on the bathroom wall along with “smoked crack, white crack,” and “coon”; an ape was drawn; and “all n— must die” was written.⁴⁵⁶ The court stated

⁴⁴² *Id.* [23]–[24].

⁴⁴³ *Id.* [26].

⁴⁴⁴ *Id.*

⁴⁴⁵ [2024] EAT 89 (appeal taken from Eng.) (Gr. Brit.).

⁴⁴⁶ *Id.* [1].

⁴⁴⁷ *Id.* [16].

⁴⁴⁸ *Id.* [54].

⁴⁴⁹ *Id.* [25]–[26].

⁴⁵⁰ *Id.* [37]–[39].

⁴⁵¹ *Id.* [38].

⁴⁵² *Id.*

⁴⁵³ 333 F.3d 906 (8th Cir. 2003).

⁴⁵⁴ *Id.* at 907.

⁴⁵⁵ *Id.* at 908–09.

⁴⁵⁶ *Id.* at 909.

this was “painted over.”⁴⁵⁷ Afterward, more appeared, including his name and “kill all n——.”⁴⁵⁸ When reporting this, the plaintiff was told, “I got it off once. What do you want me to do, tear the wall down?”⁴⁵⁹ The employer did not remove this last racist statement until after the plaintiff resigned.⁴⁶⁰

Although the Court of Appeals for the Eighth Circuit reversed the lower court decision to dismiss the plaintiff’s harassment case, in doing so, the court said, “we acknowledge that this is a close case”⁴⁶¹ The court also went on to affirm the dismissal of the plaintiff’s constructive discharge claim.⁴⁶² Despite the severe environment of racial harassment, the court decided the plaintiff “failed to present sufficient evidence for a jury to find that a reasonable person in Mr. Reedy’s position would have found the conditions of his employment so intolerable that he would be forced to quit.”⁴⁶³

In another recent case before another court of appeals, in *Mack v. J.M. Smuckers Co.*,⁴⁶⁴ the Black employee alleged a racially hostile environment and discrimination.⁴⁶⁵ The allegations included being singled out and criticized for not wearing the right equipment when a White employee also was not wearing this equipment; two employees calling him “idiot” and “boy” and following him and blocking him from leaving the plant; a White employee knocking off things from his lunch table; another employee calling him the n-word; and other employees following him around to intimidate him.⁴⁶⁶ He reported the actions, nothing changed, and ultimately he quit.⁴⁶⁷ Even after he quit, he received phone calls from work where “he was told to get out of town” and the “n-word” was used.⁴⁶⁸

The Court of Appeals for the Tenth Circuit affirmed the district court’s finding that no discrimination occurred.⁴⁶⁹ It decided that an inference of discrimination did not arise from the actions at the workplace.⁴⁷⁰ Moreover, the court affirmed that the plaintiff proved no racially hostile work environment.⁴⁷¹ The n-word was used only once, and the

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² *Id.* at 910.

⁴⁶³ *Id.*

⁴⁶⁴ No. 22-3195, 2023 WL 5217705 (10th Cir. Aug. 15, 2023).

⁴⁶⁵ *Id.* at *1.

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at *1, *4.

⁴⁷⁰ *Id.* at *4.

⁴⁷¹ *Id.* at *4–5.

supervisor did not say it.⁴⁷² The court did not discuss the possible effect of the other alleged actions by employees against the plaintiff.⁴⁷³ While the court said the “incidents . . . [were] distressing,” they did not amount to harassment under the law.⁴⁷⁴

The U.K. case of *Richmond Pharmacology Ltd. v. Dhaliwal*⁴⁷⁵ is a case where, again, there was no application to strike out and the case was decided after a hearing.⁴⁷⁶ The claimant who was British and of Indian origin was employed by Richmond for approximately five years.⁴⁷⁷ She was known to do good work.⁴⁷⁸ However, after she gave notice to leave her employment, she was later told that her performance had fallen.⁴⁷⁹ During that subsequent meeting, one of her managers, who was also one of the co-founders and co-owners of the company, specifically advised her to act in certain professional ways because they would probably interact again in the future—that is, “unless you are married off in India.”⁴⁸⁰ After his comment, the claimant would not proceed with the meeting without human resources being present.⁴⁸¹ She filed a grievance regarding this meeting and asserted the company did not adequately address this grievance.⁴⁸² The case’s evidence included that the claimant had mentioned that her parents wanted her to get married and that she would be visiting India soon.⁴⁸³ After a hearing, the ET found for the claimant, and the EAT affirmed the decision.⁴⁸⁴ The EAT stated, “it is plain that [the remark of the manager, co-founder, and co-owner] as the tribunal found it to have been expressed—and specifically the phrase ‘married off’—did evoke the stereotype of forced marriage.”⁴⁸⁵

A U.K. religious harassment case that went to a hearing with little evidence of discrimination also demonstrates the contrast in approaches

⁴⁷² *See id.* at *5.

⁴⁷³ *See id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ (2009) UKEAT/458/08 (appeal taken from Eng.) (Gr. Brit.).

⁴⁷⁶ *Id.* [1], [22].

⁴⁷⁷ *Id.* [2].

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* [3]–[4].

⁴⁸⁰ *Id.* [4].

⁴⁸¹ *Id.* [5].

⁴⁸² *Id.*

⁴⁸³ *Id.* [6].

⁴⁸⁴ *Id.* [22].

⁴⁸⁵ *Id.* [21]. As the EAT said in conclusion,

We accept that the facts here may have been close to the borderline, as the tribunal indeed indicated by the size of its award. But we are satisfied that the tribunal, which clearly considered the case most conscientiously, was entitled to hold that what it found [the manager, co-founder, and co-owner] to have said did indeed fall on the wrong side of the line. We can see no error of law in its decision and this appeal must be dismissed.

Id. [22].

in the U.S. and the U.K. In *Ali v. Heathrow Express Operating Co.*,⁴⁸⁶ the Muslim claimant, an airport worker, alleged discrimination based on the procedures at the airport.⁴⁸⁷ To test security, various items were sent through security.⁴⁸⁸ In one security test, they sent through a bag with some suspicious items and a note stating “Allahu Akbar,” which is a statement that has been made in some terrorist attacks.⁴⁸⁹ While after a full hearing the tribunal rejected the discrimination allegations of the claimant, the case was not struck before the hearing despite the small amount of evidence of harassment.⁴⁹⁰

III. EXPLORING DIFFERENCES IN OUTCOMES IN EMPLOYMENT DISCRIMINATION CASES IN THE JURY-BASED U.S. AND THE JURYLESS U.K.

Although both the U.S. and the U.K. broadly protect against discrimination on the basis of protected characteristics including race,⁴⁹¹ a comparison of case law from the countries shows it is far more difficult to reach a factfinder in the U.S. than in the U.K.⁴⁹²

As previously discussed, the Article does not compare apples to apples when it considers Rule 38 strike out in the U.K. against Rule 56 summary judgment in the U.S. Among other things, as mentioned, full discovery often occurs before courts consider summary judgment, whereas only some documents have been exchanged when strike out is considered.⁴⁹³ With that said, Rule 56 summary judgment and Rule 38 strike out, respectively, are the stages for dismissal that occur before a merits trial or hearing, and under both summary judgment and strike out the employer sets forth on paper their best argument for winning before trial.⁴⁹⁴

Under Rule 56, in the usual circumstance where an employer moves for dismissal of the plaintiff’s claims, a judge decides whether a reasonable jury could find for the plaintiff.⁴⁹⁵ Rule 38 also uses “reasonable”; an employer asks for strike out where it argues the employee has no reasonable prospect for success.⁴⁹⁶

⁴⁸⁶ [2022] EAT 54 (appeal taken from Eng.) (Gr. Brit.).

⁴⁸⁷ *Id.* [1]–[5].

⁴⁸⁸ *Id.* [6].

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* [2], [4].

⁴⁹¹ *See supra* Section II.A.

⁴⁹² *See supra* Section II.D.

⁴⁹³ *See supra* Section II.B.

⁴⁹⁴ *See supra* Section II.B.

⁴⁹⁵ *See supra* Section II.B.1.

⁴⁹⁶ *See supra* Section II.B.2.

Although the U.S. and U.K. dismissal standards appear to have similarity through the use of “reasonable” in the standard and rule, the nations have interpreted their discrimination and harassment law very differently. The highest U.K. courts have proclaimed how rare dismissal should be on strike out and appeals courts even criticize decisions of tribunals which do not quote and cite the high courts’ authority that cases rarely should be dismissed.⁴⁹⁷ In the U.S., although the U.S. Supreme Court has instructed lower courts to make all reasonable inferences in favor of the plaintiff and not to make credibility determinations on summary judgment, the Court itself has created difficult standards for plaintiffs in discrimination cases to satisfy on summary judgment, including the *McDonnell Douglas* test and the “severe or pervasive” standard for sexual harassment.⁴⁹⁸ Additionally, the Court has not questioned most of the lower courts’ case law that favors the employer’s perspective, including the “honest belief” doctrine, “courts are not super-personnel departments” doctrine, and the “stray remarks” doctrine.⁴⁹⁹ In describing the law that the courts have created, one former federal judge described the almost impossible battle the plaintiff faces:

In effect, today’s plaintiff stands to lose unless he or she can prove that the defendant had explicitly discriminatory policies in place or that the relevant actors were overtly biased. It is hard to imagine a higher bar or one less consistent with the legal standards developed after the passage of the Civil Rights Act, let alone with the way discrimination manifests itself in the twenty-first century.⁵⁰⁰

In some ways, the language of the U.S. and U.K. decisions speak for themselves. The U.S. courts privilege the reason the employer gives for its employment decisions while the U.K. tribunals assert employers may cover up discrimination or may not know they are discriminating even though they are doing so.⁵⁰¹ In the U.S., cases with a significant amount of evidence of discrimination do not reach a trial, whereas U.K. discrimination cases with less evidence of discrimination reach hearings.⁵⁰² In harassment cases, similarly, in the U.S., it can be very difficult to reach trial with even significant evidence of harassment, whereas cases with much less evidence reach a hearing in the U.K.⁵⁰³ Also in the U.K., a much greater

⁴⁹⁷ See *supra* Section II.C.2.

⁴⁹⁸ See *supra* Section II.C.1.

⁴⁹⁹ See *supra* Section II.C.1.

⁵⁰⁰ Gertner, *supra* note 259, at 110.

⁵⁰¹ See *supra* Section II.D.1.

⁵⁰² See *supra* Section II.D.1.

⁵⁰³ See *supra* Section II.D.2.

burden is placed on employers to be aware of harassment as opposed to the burden on employees in the U.S. to tell employers of harassment.⁵⁰⁴

So why are cases treated so differently by U.S. courts and U.K. courts? There are many possible reasons for the differences. First, differences may be the result of who decides the ultimate question of discrimination in each system. Under this theory, judges trust a system more when they participate in the decision-making process. Thus, U.K. judges who take part in decision-making dismiss cases less often than their U.S. colleagues who do not participate in decision-making with juries. One potential criticism of this theory is the U.K. judge is only one of the three decision-makers on the tribunal so their vote can be irrelevant if the lay people decide differently. As a result, judges would not decide differently in the U.K. versus the U.S. based on their participation in the decision-making. Regardless of this critique, it could be that any participation helps a judge believe he has significant influence regardless of the possibility of being outvoted.

The background of the judges who decide may be a second possible reason for different results in the U.S. and the U.K. Federal judges are appointed by the President of the U.S.⁵⁰⁵ A large percentage of federal judges previously served as lawyers for corporations and/or as prosecutors, so they tend to have specific backgrounds tied to corporations and government.⁵⁰⁶ Increasingly, though it is rare, some judges even leave the bench to go back to represent corporations or to engage in arbitration where employers pay their fees.⁵⁰⁷ These past or potential future associations may affect judges' current decisions to dismiss cases, whether conscious or not.

U.K. judges have different backgrounds resulting from its process for its selection of judges. For approximately twenty years, the Judicial Appointments Commission has selected judges based on an application

⁵⁰⁴ See *supra* Section II.C.2.

⁵⁰⁵ See U.S. CONST. art. II, § 2, cl. 2.

⁵⁰⁶ See JOANNA SHEPHERD, JOBS, JUDGES, AND JUSTICE 5–6 (2021), https://demandjustice.org/wp-content/uploads/2021/02/Jobs-Judges-and-Justices_Joanna-Shepherd-report_2021.pdf [<https://perma.cc/HC4R-4UEC>] (reporting that during the Obama and Trump Administrations, “at least one-third of the nominees had served as federal prosecutors for at least three years” and forty to fifty percent of nominees spent significant time representing large corporations); Brian Fallon & Christopher Kang, *No More Corporate Lawyers on the Federal Bench*, ATLANTIC (Aug. 21, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/no-more-corporate-judges/596383/> [<https://perma.cc/3ZZJ-ZFSC>].

⁵⁰⁷ See, e.g., *Hon. Shira A. Scheindlin*, BOIES SCHILLER FLEXNER, <https://www.bsflp.com/people/shira-scheindlin.html> [<https://perma.cc/275J-EP56>]; *John Gleeson*, DEBEVOISE & PLIMPTON, <https://www.debevoise.com/johngleeson> [<https://perma.cc/8XFK-AXWR>]; *Katherine B. Forrest*, PAUL, WEISS, <https://www.paulweiss.com/professionals/partners-and-counsel/katherine-b-forrest> [<https://perma.cc/4ADV-7ZMJ>]; *Hon. Bernice Bouie Donald*, JAMS, <https://www.jamsadr.com/donald/> [<https://perma.cc/7QBL-RXHC>].

process.⁵⁰⁸ Prior to this process, the bar recommended judges.⁵⁰⁹ Because of the different selection processes, the past legal experiences of U.K. employment judges appear to be more varied than those of U.S. federal judges.⁵¹⁰ Also, those judges often practice in addition to acting as judges.⁵¹¹ These differences may cause U.S. judges to be more likely to dismiss employment discrimination cases.⁵¹²

Third, the jurisprudence of the U.S. Supreme Court on summary judgment pushed judges to dismiss more cases before trial⁵¹³ while the U.K. courts have pushed in the opposite direction.⁵¹⁴

Fourth, employment discrimination cases are a significant portion of the caseload that goes to a jury trial. A recent study shows employment discrimination cases constitute at least 13.2% of the cases that went to jury trial in the U.S. federal courts from 2010 to 2019.⁵¹⁵ Employment discrimination cases had a jury trial rate of two percent versus the overall jury trial rate of 0.7%.⁵¹⁶ These rates may cause judges to be particularly motivated to dismiss them to lessen their loads pretrial and/or eliminate the possibility of trials.

Fifth, U.S. federal judges have another incentive to dismiss cases: The judges are placed on a list if motions are pending for more than six months.⁵¹⁷ A study found that judges were more likely to dismiss cases near this time period where they were close in time to being placed on the list.⁵¹⁸

⁵⁰⁸ Mary L. Clark, *Judges Judging Judicial Candidates: Should Currently Serving Judges Participate in Commissions to Screen and Recommend Article III Candidates Below the Supreme Court Level?*, 114 PA. ST. L. REV. 49, 59 (2009). For more on the selection process, see *Guidance on the Application Process*, JUD. APPOINTMENTS COMM'N, <https://judicialappointments.gov.uk/guidance-on-the-application-process-2/> [<https://perma.cc/E6QN-MEQ7>].

⁵⁰⁹ See Jud. Appointments Comm'n, *Judicial Appointments*, U.K. CTS. & TRIBUNALS JUDICIARY, <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/jud-appts/> [<https://perma.cc/Y96S-ZAHK>] (describing history and nonpolitical process).

⁵¹⁰ See U.K. CTS. & TRIBUNALS JUDICIARY, *supra* note 5.

⁵¹¹ *Id.* (providing that two-thirds of U.K. employment judges are fee-paid judges who are still in practice and are drawn from experts in employment law and one-third are full-time salaried judges).

⁵¹² A study of bench trials in state courts found judges found for plaintiffs in eminent domain and employment discrimination cases the least often. DEFRANCES & LITRAS, *supra* note 48, at 6. This study helps support an idea that judges may not be as convinced of the merits of employment discrimination cases, and this tendency may cause them to find against plaintiffs on summary judgment.

⁵¹³ See *supra* notes 90–97 and accompanying text.

⁵¹⁴ See *supra* notes 8, 131 and accompanying text.

⁵¹⁵ LEE & GARRI, *supra* note 138, at 16 tbl.5.

⁵¹⁶ *Id.* at 13 tbl.3, 16 tbl.5. Additionally, approximately thirty-two percent of the other cases tried by jury were other civil rights cases. See *id.* at 16 tbl.5.

⁵¹⁷ Miguel F.P. de Figueiredo, Alexandra D. Lahav & Peter Siegelman, *The Six-Month List and the Unintended Consequences of Judicial Accountability*, 105 CORNELL L. REV. 363, 375–77 (2020).

⁵¹⁸ *Id.* at 371.

Sixth, possibly related to the background of federal judges, Supreme Court jurisprudence, and/or docket pressure, U.S. judges may be particularly motivated to eliminate employment discrimination cases because they are instructed to do so. Former federal judge Nancy Gertner said, “[i]n baby judge school, one trainer went so far as to begin a session on employment discrimination by saying, ‘Here’s how you get rid of these cases!’”⁵¹⁹

Seventh, a federal judge has argued that judges usually write decisions only to grant summary judgment, and those decisions create “Losers’ Rules.”⁵²⁰ In other words, decisions that grant summary judgment create heuristics that judges use to dispose of cases.⁵²¹

An eighth reason for the difference in the U.S. and the U.K. dismissal rates may be that the U.K. may be more favorable toward employees than the U.S. and thus less likely to dismiss an employee’s case before a hearing. For example, the U.K. protects against unfair dismissal,⁵²² unlike the U.S. The U.K. also does not allow employers to require arbitration, whereas the U.S. permits employers to require arbitration.⁵²³ Additionally, there is stronger support for unions in the U.K. than in the U.S.⁵²⁴

Finally, it is possible that the different histories or cultures of the U.S. and U.K. could contribute to judges’ willingness to dismiss cases—a complicated subject beyond the scope of this Article.⁵²⁵

CONCLUSION

Despite significant similarities in the employment discrimination law, the U.S. and U.K. have very different approaches to how they handle employment discrimination cases. The U.S. has a dismissal-prone approach and the U.K. a dismissal-wary approach. While the Article sets forth possible reasons for this dismissal, future study can yield additional information about the possible causes for these differences.

⁵¹⁹ William G. Young, *A Lament for What Was Once and Yet Can Be*, 32 B.C. INT’L & COMPAR. L. REV. 305, 315–16 n.58 (2009) (quoting Nancy Gertner, U.S. Dist. Judge for the Dist. of Mass., Address Before the Massachusetts Bar Foundation (Jan. 26, 2006)).

⁵²⁰ See Gertner, *supra* note 259, at 110–23.

⁵²¹ See *id.*

⁵²² See *supra* note 51 and accompanying text.

⁵²³ See *supra* notes 78, 113 and accompanying text.

⁵²⁴ Steven Daniels, *Trade Unions in the UK and US Have Become More Powerful Despite Political Interference and Falling Memberships*, CONVERSATION (Nov. 9, 2023, 12:25 PM), <https://theconversation.com/trade-unions-in-the-uk-and-us-have-become-more-powerful-despite-political-interference-and-falling-memberships-215842> [<https://perma.cc/33XG-97CL>] (reporting that 22.3% of employees were unionized in the U.K. versus 10.1% in the U.S.).

⁵²⁵ See, e.g., Suzanne Model & Gene Fisher, *Unions Between Blacks and Whites: England and the U.S. Compared*, 25 ETHNIC & RACIAL STUD. 728, 738–43 (2002) (finding White people in the U.K. are more likely to have a Black partner than in the U.S.).