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Anne-Marie Hakstian

Jerome D. Williams

Sam Taddeo

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The More Things Change, the More They Stay the Same: Online Platforms and Consumer Equality

Anne-Marie Hakstian,* Jerome D. Williams** & Sam Taddeo***

Abstract

Title II of the Civil Rights Act, along with its counterpart state laws, have protected the rights of racial minorities in the United States for decades. Section 1981 has guaranteed contract rights for all people, regardless of race, since 1868. But times are changing. Racial discrimination claims against 21st century technology companies face challenges when brought under existing laws. Even the relatively current Communications Decency Act (CDA) is unhelpful to consumers attempting to seek redress from online platforms. In this article, we analyze the only cases of consumer discrimination brought against providers of the sharing economy and highlight some of the obstacles faced by plaintiffs. Next, we evaluate state and federal laws commonly relied upon by plaintiffs in traditional consumer discrimination cases. Our unique contribution involves a detailed review of outcomes of claims at various stages of litigation from motions to dismiss and motions for summary judgment to trials and appeals in both state and federal court. The study's results provide lawyers, practitioners, and policymakers with information about litigants' success rates and inform our proposals for

* Anne-Marie Hakstian, Professor and Pre-Law Advisor, Salem State University, Salem, MA.

** Jerome D. Williams, Distinguished Professor and Prudential Chair in Business, Research Director of The Center of Urban Entrepreneurship & Economic Development at Rutgers, The State University of New Jersey, and past Executive Vice Chancellor and Provost of Rutgers University-Newark.

*** Sam Taddeo, J.D., Law clerk to the Honorable Lourdes Lucas, J.S.C., Superior Court of New Jersey, Law Division, 2020–2021.

amending the law to accommodate consumer discrimination claims against online platforms.

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I. INTRODUCTION

"Which monkey is gonna stay on the couch?" asked "Kate."[1] "Get your things and get the f--- out of my house."[2] The African American men who had booked accommodations in her town home complied and prepared to leave, but Kate wasn't finished. As they packed their things, the young Airbnb host labeled them criminals and stated that she did not feel safe with them in her home.[3] She complained that the party of five was too large and when they replied that the listing allowed for up to five people, retorted with the "monkey" comment.[4]

Flying in from all over the U.S. to meet in New York, the men used the website Airbnb.com[5] to secure lodging for their stay.[6] According to Meshawn Cisero, one member of the party, things "felt off" from the moment they arrived at the front door around eleven o'clock in the evening, beginning with their encounter of a resident not mentioned in the listing.[7] As they walked upstairs, the group met a man, described as the host's spouse, who was "very

1. Dominique Mosbergen, *Airbnb Host Kicks Out Black Guests After Calling Them 'Monkeys,'* HUFFINGTON POST (June 4, 2019, 8:00 AM), https://www.huffpost.com/entry/airbnb-host-black-guests-monkeys-racist_n_5cf635e4e4b0e346ce845be3.

2. Timothy Bella, *'Which Monkey is Gonna Stay on the Couch?': Airbnb Host Kicks Out Black Guests in Racist Exchange*, THE WASHINGTON POST (June 3, 2019, 3:45 AM), https://www.washingtonpost.com/nation/2019/06/03/airbnb-racism-host-monkey-black-men-new-york/?utm_term=.84c69e0c9b67.

3. *Id.*

4. Mosbergen, *supra* note 1.

5. *About Us*, AIRBNB, https://press.airbnb.com/about-us/ (last visited Sept. 18, 2020). Airbnb is a provider at the forefront of the platform economy. *Id.* Since its founding in 2008, it has risen to become one of the most prominent platforms of the platform economy. *Id.* Airbnb bills itself as "a trusted community marketplace for people to list, discover, and book unique accommodations around the world" that "connects people to unique travel experiences, at any price point, in more than 34,000 cities and 191 countries." Laura W. Murphy, *Airbnb's Work to Fight Discrimination and Build Inclusion*, AIRBNB.COM: THE AIRBNB BLOG 2 (Sept. 8, 2016), https://blog.atairbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf.

6. Christina Capatides, *Group of Black Friends Kicked Out of Airbnb by Host Who Called Them "Monkeys,"* CBS NEWS (June 4, 2019, 5:49 PM), https://www.cbsnews.com/news/group-of-black-friends-kicked-out-of-airbnb-by-host-who-called-them-monkeys-airbnbwhileblack/.

7. Aliya Semper Ewing, *#AirbnbWhileBlack: Host Calls Black Men 'Monkeys' and 'Criminals' Before Kicking Them Out [Updated]*, THE ROOT (JUNE 1, 2019, 8:15 PM), https://www.theroot.com/airbnbwhileblack-host-calls-black-men-monkeys-and-1835179161 ("'There was someone's father with a dog [and they weren't] described in the posting,' said Cisero. . . . The posting noted the owner and spouse would be on site but didn't mention any additional residents.").

polite" to them and would be so for the duration of their brief stay.[8] The host's spouse showed them to their rooms—"two private bedrooms on the top floor of an owner-on-site Upper East Side residence."[9]

Getting prepared for an evening out, the friends began playing music.[10] Soon afterward, they received their first warning from the host's spouse, despite having been previously told that "noise shouldn't be a problem because they were on the third floor."[11] The men turned off the music and continued to socialize.[12] It was around the time that a fifth friend arrived at the residence when they received a second warning from the host's spouse.[13] Shortly after one a.m., Kate confronted the friends.[14]

Following their removal from the premises, the men contacted Airbnb, and through its "Open Doors" policy, the company assisted in providing the group with a new place to stay.[15] It took further action to have Kate removed as a host from the platform.[16] In a Reddit post dated June 1, 2019, a user claiming to be Kate's boyfriend stated that Airbnb deleted their account, causing them to lose their bookings.[17] But the damage was done. Two days later, Kenneth Simpson, a member of the group, told *The Washington Post* that he remained upset and that the incident was "another real-life situation where we had to experience the feeling of hopelessness as a black

8. *Id.*

9. Capatides, *supra* note 6.

10. Ewing, *supra* note 7 ("[This] was also stated on the Airbnb listing page for the private bedrooms.").

11. *Id.*

12. *Id.*

13. *Id.*

14. Mosbergen, *supra* note 1.

15. *See* Bella, *supra* note 2; *see also Fighting Discrimination and Creating a World Where Anyone Can Belong Anywhere*, AIRBNB.COM: THE AIRBNB BLOG (Sept. 8, 2016), https://blog.atairbnb.com/fighting-discrimination-and-creating-a-world-where-anyone-can-belong-anywhere/ ("Starting October 1[, 2016], if a Guest anywhere in the world feels like they have been discriminated against in violation of our policy—in trying to book a listing, having a booking canceled, or in any other interaction with a host—we will find that Guest a similar place to stay if one is available on Airbnb, or if not, we will find them an alternative accommodation elsewhere. This program will also apply retroactively to any Guest who reported discrimination prior to today. All of these Guests will be offered booking assistance for their next trip.").

16. Ewing, *supra* note 7 ("Update: 6/2/19, 7:20 a.m. ET: Airbnb public affairs rep, Ben Breit, gave the below-written statement to The Root . . . 'We have a strict nondiscrimination policy, which we are enforcing to remove the host from our platform.'").

17. TooN (@Kartoon_1911), TWITTER (June 2, 2019, 10:03 PM), https://twitter.com/Kartoon_1911/status/1135411639707197440 (hidden under sensitive material; must click "View").

American."[18]

Corroborating this and other anecdotes in which customers of color experienced unfair treatment, Harvard Business School researchers conducted a field study and found that "guests with distinctively African American names are 16 percent less likely to be accepted relative to identical guests with distinctively white names."[19] Unfortunately, Airbnb isn't the only online platform on which discrimination is revealing itself.[20] Another prominent category of service provider in the platform economy consists of what are known as transportation network companies (TNCs).[21] TNCs include entities such as Uber and Lyft.[22] As with African American guests on Airbnb, African American passengers on Uber and Lyft are confronted by the prospect of discrimination.[23] In fact, a team of researchers from the nation's leading universities conducted a field experiment that concluded as much.[24]

The study involved research assistants of different races and genders who hailed rides on Uber and Lyft in Boston, Massachusetts and Seattle,

18. Bella, *supra* note 2.

19. Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J. 1, 1 (2017).

20. *See* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L. J. 1271, 1284 (2017). There are a variety of alternative names for the new business model, including "sharing economy," "gig economy," "1099 economy," etc. *Id.* This essay shall adopt the term "platform economy" because the term best captures the intrinsic nature of the relationship between the online platform and relevant businesses. *Id.* n.73. Furthermore, the term properly "encompasses [the] growing number of digitally enabled activities in business, politics, and social interaction." Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 ISSUES IN SCI. & TECH. 3 (Spring 2016), https://issues.org/the-rise-of-the-platform-economy/#:~:text=We%20prefer%20the%20term%20%E2%80%9Cplatform,%2C%20politics%2C%20and%20social%20interaction. With the traditional linear model of marketplace competition, businesses "directly create and control inventory via a supply chain." Alex Moazed, *Platform Business Model—Definition / What is it? / Explanation*, APPLICO, https://www.applicoinc.com/blog/what-is-a-platform-business-model/ (last visited Sept. 19, 2020). Platform models "create[] value by facilitating exchanges between two or more interdependent groups, usually consumers and producers." *Id.*

21. *Commercial Ride-Sharing*, NAT'L ASS'N OF INS. COMM'RS: THE CTR. FOR INS. POL'Y & RES. https://www.naic.org/cipr_topics/topic_commercial_ride_sharing.htm (last updated Mar. 4, 2020).

22. *Id.* TNCs operate by "us[ing] mobile technology to connect potential passengers with drivers who use their personal vehicles to provide transportation for a fee." *Id.*

23. *See* Gillian B. White, *Uber and Lyft are Failing Black Riders*, THE ATLANTIC (Oct. 31, 2016), https://www.theatlantic.com/business/archive/2016/10/uber-lyft-and-the-false-promise-of-fair-rides/506000/.

24. Yanbo Ge et al., *Racial and Gender Discrimination in Transportation Network Companies* 1–2 (NAT'L BUREAU OF ECON. RES., Working Paper No. 22776, 2016), https://www.nber.org/papers/w22776.pdf.

Washington.[25] Drivers for both Uber and Lyft have the option to cancel rides they schedule with riders, but face penalties if they do so too often.[26] In Boston, the research assistants studied how often drivers cancelled when they saw that riders had "Black names" versus "White names."[27] The cancellation rates for Uber riders with African American-sounding names were 11.2% and 8.4% for Black males and females respectively, while they were 4.5% and 5.4% for males and females with White-sounding names respectively.[28] With Lyft, male names of both races had about the same cancellation rate, and female African American names faced a lower cancellation rate than White names.[29]

In Seattle, African American riders experienced longer wait times for their ride requests to be accepted.[30] This finding was particularly significant in the case of Uber where the wait times for African American riders were 30% longer than for Whites.[31] Furthermore, the study found that the travel time for African American riders on Uber was 8% longer, adjusting for differences in trip length.[32]

Ultimately, the study concluded that discrimination is occurring with "at least some drivers for both UberX and Lyft . . . on the basis of the perceived race of the traveler."[33] Despite the strong stance taken by providers against it,

25. *Id.*

26. *Id.* at 1.

27. *Id.* at 1–2.

28. *Id.* at 16–17. The names were chosen from lists that were developed as part of a study wherein the names selected had been "strongly identified" as White or African American by a panel. *Id.* at 13; *see* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakeisha and Jamal? A Field Experiment on Market Discrimination*, 94 AM. ECON. REV. 991, 998 (2004) (finding that resumes with White-sounding names received 50% more interviews than resumes with African American-sounding names); *see also* Ronald Fryer & Steven Levitt, *The Causes and Consequences of Distinctively Black Names*, 119 Q. J. ECON. 767, 801 (2004) (discussing the "stark differences in naming patterns between Blacks and Whites").

29. Ge, et al., *supra* note 24, at 17. The results of both the Seattle and Boston studies appear to suggest Lyft drivers discriminated against riders of color less frequently than Uber drivers. *Id.* However, this finding can be attributed to the different design of Lyft's platform. *See id.* at 19. Lyft drivers see the name and photo of prospective passengers before accepting the trip request, whereas Uber drivers only see a passenger's location and star rating—but not the name—before they accept. *Id.* With no record of an acceptance, instances of discrimination on Lyft can therefore go unnoticed as the victim would not even know if the driver has looked at their request and profile. *See id.*

30. *Id.* at 9.

31. *Id.*

32. *Id.*

33. *Id.* at 19.

racial discrimination persists as an ever-present threat in the platform economy.[34]

What is the "platform economy?"[35] Platform models of business allow for greater diversity of services and new opportunities for connecting with potential business partners and customers.[36] Through "increased information sharing between different players and circulation of data," online platforms eliminate trade barriers and open up economic systems in ways not possible through traditional models.[37] Although some had hoped that old biases would not infect consumer transactions in the new platform economy, it appears that discrimination is often facilitated by the most fundamental aspects of the peer-to-peer business model, namely the use of profile photos and user names.[38]

At the top of Airbnb's "diversity and belonging" page, just above a picture of CEO Brian Chesky, is a statement declaring discrimination to be the "greatest challenge" Airbnb is facing.[39] Airbnb states that it "exists to create a world where anyone can belong anywhere."[40] Its "greatest goal" is to

34. *See id.* Like Airbnb, both Uber and Lyft are aware of, and firmly denounce, discrimination on their platforms. *See Uber Non-Discrimination Policy*, UBER.COM: LEGAL, https://www.uber.com/legal/policies/non-discrimination-policy/en/ (last modified Jan. 12, 2020); *Anti-Discrimination Policies*, LYFT.COM, https://help.lyft.com/hc/en-us/articles/115012923767-Anti-Discrimination-Policies (last visited Sept. 20, 2020). In its community guidelines, Uber informs users that it does not tolerate discriminatory conduct based on a host of characteristics, including race and national origin. *Uber Community Guidelines*, UBER.COM: LEGAL, https://www.uber.com/legal/en/document/?country=india&lang=en&name=general-community-guidelines (last modified Apr. 17, 2020). Uber's non-discrimination policy reiterates its prohibition on racial discrimination and warns that "[a]ny user found to have violated this prohibition will lose access to the Uber platform." *Uber Non-Discrimination Policy*, *supra*. Similarly, Lyft's policy emphasizes "maintaining an inclusive and welcoming community" and that "[d]iscrimination of any kind may result in the offender's immediate deactivation." *Anti-Discrimination Policies*, *supra*.

35. *See, e.g.*, Leong & Belzer, *supra* note 20; Kenny & Zysman, *supra* note 20.

36. *See* Leong & Belzer, *supra* note 20; Kenny & Zysman, *supra* note 20.

37. Daisy Chan, Freek Voortman & Sarah Rogers, *The Rise of the Platform Economy*, DELOITTE 1, 2 (2018), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/humancapital/deloitte-nl-hc-reshaping-work-conference.pdf.

38. *See* Ge, et al., *supra* note 24, at 18–20; *see also* Anne Elizabeth Brown, Ridehail Revolution: Ridehail Travel and Equity in Los Angeles, UCLA 140–41 (2018) (unpublished Ph.D. dissertation, UCLA) (available at https://escholarship.org/uc/item/4r22m57k) (suggesting modifying rider and photo names policies as means to reduce discrimination on ridehail platforms).

39. *Our Diverse Global Community Makes Airbnb Possible*, AIRBNB.COM, https://www.airbnb.com/diversity (last visited Sept. 20, 2020).

40. Airbnb, Inc., *2020 Airbnb Update*, HOSPITALITYNET (Jan. 22, 2020), https://www.hospitalitynet.org/news/4096620.html.

"build[] an inclusive platform for all hosts and guests."[41] To that end, Airbnb has taken steps to remedy the problem of discrimination on its platform.

In 2016, the organization reached out to Laura Murphy, former head of the American Civil Liberties Union's legislative office in Washington, D.C., to review aspects of the company's diversity and inclusion efforts.[42] Airbnb adopted several changes Ms. Murphy recommended.[43] In particular, Airbnb's stronger non-discrimination policy commits "to do more than comply with the minimum requirements established by law."[44] Specific guidelines for hosts inside the United States forbid various actions based on race, namely declining guests, imposing different terms or conditions on guests, or indicating any racial preference for or against guests when posting a listing.[45]

Although previously reluctant to modify their policy, in October 2018, Airbnb announced a booking policy change whereby guests are no longer required to provide a profile photo and hosts who ask guests to provide one only see the photo after they accept the booking.[46] In addition, hosts must initiate their request for a photo before they receive a reservation request.[47] Under the new policy, guests whose reservations are canceled after they provide a photo can file a complaint with Airbnb and hosts who violate the policy may be permanently banned from using the platform.[48] Airbnb's revised policy represents a compromise between demands from civil rights groups concerned about profile photos facilitating discrimination and the interests of rental hosts who want information about guests who have access to their homes.[49]

While the platform economy creates new opportunities for growth, its rise also presents new challenges for society.[50] There are increasing concerns that

41. *Our Diverse Global Community Makes Airbnb Possible*, *supra* note 39.

42. *Id.*

43. *Id.*

44. Murphy, *supra* note 5, at 28.

45. *Id.* at 29.

46. Sam Fulwood III, Airbnb Announces Booking Policy Change to Head Off Outcry Over Persistent Racial Discrimination, THINKPROGRESS (Oct. 24, 2018, 3:41 PM), https://thinkprogress.org/airbnb-changes-photo-policy-combat-racial-discrimination-4f71c375553a/ (describing Airbnb's 2018 change to its photo policy).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.; see* Kenney & Zysman, *supra* note 20 (enumerating the difficulties of adjusting to a platform economy); Leong & Belzer, *supra* note 20, at 1271 (describing the potential for

current law is ill-equipped to deal with the new model where platforms can be viewed as mere facilitators of peer-to-peer transactions between consumers and providers.[51] Indeed, platforms differ from traditional places of public accommodation in the sense that they do not provide services directly to customers.[52] Compare hotel and taxi cab companies to Airbnb and Uber, through which services are provided by hosts or drivers.[53] In the new business model, there is a degree of separation between the platforms and consumers that may be effective in shielding them from the reach of anti-discrimination laws.[54] Plaintiffs bringing lawsuits against online platforms are presented with challenges because these companies operate in what is largely a gray area of the law.[55] Furthermore, it is unclear that current laws provide adequate protection for consumers of color in the brick-and-mortar marketplace.[56]

We begin this paper by examining the three consumer discrimination cases to date brought against sharing economy platforms. These three suits in which plaintiffs of color sought redress from Uber and Airbnb are analyzed in detail. In Part III, we examine the effectiveness of state public accommodations laws in comparison with the federal laws that aim to provide plaintiffs with relief from consumer discrimination. Our unique analysis of current law presented in Part IV explores plaintiffs' success at different stages of litigation, from surviving defendants' motions to dismiss and motions for summary judgment, to jury and bench trials, and finally, to appellate review in both state and federal court. Suggestions for amending the law to ensure fairness for plaintiffs when they bring claims against platform economy providers are presented in Part IV.

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discrimination in platform economies).

51. *See* Leong & Belzer, *supra* note 20, at 1271 (describing the inapplicability of current discrimination law to the platform economy); Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 BERKELEY TECH. L. J. 1183, 1186–87 (2017) (explaining the influence of platform design on customer interactions).

52. *See* Kenney & Zysman, *supra* note 20 (contrasting the platform economy with traditional companies that ship goods to consumers).

53. *See id.*

54. *See* Chitra Ramaswamy, *'Prejudices Play Out in the Ratings We Give'–The Myth of Digital Equality*, THE GUARDIAN (Feb. 20, 2017, 2:00 PM), https://www.theguardian.com/technology/2017/feb/20/airbnb-uber-sharing-apps-digital-equality; *see also* Levy & Barocas, *supra* note 51, at 1187 ("Platforms routinely disclaim legal responsibility for all kinds of harms propagated by their users against one another, and have largely been successful in so doing.").

55. Levy & Barocas, *supra* note 51, at 1186–87.

56. *See* Murphy, *supra* note 5, at 3 (describing the history of anti-discrimination laws and their ineffective enforcement).

II. PUBLIC ACCOMMODATIONS CLAIMS AGAINST ONLINE PLATFORMS

We begin with a description of the only cases in which consumers have alleged race discrimination against online platforms. All three cases were decided by federal district courts in Oregon, the District of Columbia, and New York.

A. Harrington v. Airbnb

Patricia Harrington, an African American woman residing in the state of Oregon,[57] contacted Airbnb through her attorney, requesting to become a member because she was aware of the greater likelihood that she would face discrimination when attempting to book accommodations through the online platform.[58]

To appreciate Ms. Harrington's concern, it is important to understand that Airbnb users are divided into two types: hosts and guests.[59] Hosts "create profiles for themselves and their property, choose their own price and availability, and set guidelines for guests."[60] Guests review host listings and may choose to initiate communication.[61] Prior to the change in the company's policy in October 2018, as previously mentioned, both guest and host profiles contained photos and reviews from previous transactions, which could be viewed by the parties prior to beginning a new transaction.[62] If the guest requests to use the host's listing and the host agrees, the two parties "use Airbnb to confirm travel dates and expectations, and make and receive payments."[63] After the guest has completed his or her stay at the host's property, the two parties review each other, publishing their reviews in postings that are available for reference to other users in future transactions.[64]

Harrington's lawyer demanded an end to the policy requiring guests to provide a profile photo that hosts could see prior to accepting a booking

57. Complaint ¶ 1, Harrington v. Airbnb, Inc., No. 3:17-cv-00558-YY (D. Or. April 7, 2017).
58. *Id.* ¶¶ 23, 25.
59. *Id.* ¶ 5.
60. Murphy, *supra* note 5, at 2.
61. Complaint, *supra* note 57, ¶¶ 13–14.
62. Fulwood, *supra* note 46.
63. Murphy, *supra* note 5, at 2.
64. *Id.*

request.[65] Airbnb explicitly refused to change its photo policy.[66] However, the company offered to help Harrington in securing alternative accommodations in the event that a host discriminated against her in the future.[67]

Harrington filed a class action suit on March 6, 2017, in Multnomah County Circuit Court.[68] She alleged one claim under Oregon Revised Statute (ORS) 659A.403 "on behalf of '[a]ll African-American residents of Oregon who are not currently, and have never been, members of Airbnb.'"[69] In her complaint, Ms. Harrington alleged that Airbnb is directly liable for maintaining policies that "deny African-Americans full and equal accommodations, advantages, facilities, and privileges of a place of public accommodation" and "liable for aiding and abetting its hosts in unlawful discrimination . . . based on protected characteristics."[70]

The case was removed to federal court, and on September 6, 2017, Airbnb moved to dismiss Harrington's lawsuit based on two contentions: 1) that Harrington and co-plaintiffs had no claim as the lawsuit concerned "only the possibility of *future* discrimination" and 2) that Airbnb was not "a 'place of public accommodation'" as defined under ORS 659A.400(1).[71] The court agreed with Airbnb, concluding that the words "has been made," made it clear that the statute only pertained to past acts of discrimination.[72] Because the statute does not protect plaintiffs from future discrimination, the magistrate judge recommended dismissing Harrington's suit without considering

65. *See* Complaint, *supra* note 57, ¶ 25.

66. *See* Fulwood, *supra* note 46.

67. Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1088 (D. Or. 2018). Airbnb would investigate any discrimination claims and take appropriate action if necessary. *Id.* Airbnb's amenability to assisting Harrington may be based on the company's awareness, through its own research, that minority users on its platform face difficulties in securing bookings based on their protected characteristics. *See* Murphy, *supra* note 5, at 16 ("Airbnb's research also has generally confirmed public reports that minorities struggle more than others to book a listing.").

68. Harrington v. Airbnb, Inc., No. 3:17-cv-00558-YY, 2017 WL 3392496, at *1 (D. Or. 2017).

69. *Id.* at *2.

70. *Id.*

71. Harrington v. Airbnb, Inc., No. 3:17-cv-00558-YY, 2018 WL 3148245, at *1–2 (D. Or. 2018) (emphasis added).

72. *Id.* at *4 ("ORS 659A.885(7) limits who may bring suit: 'Any individual against whom any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age, if the individual is 18 years of age or older, *has been made* by any place of public accommodation, as defined in ORS 659A.400.'" (emphasis added) (citing ORS 659A.885(7))).

whether Airbnb is a place of public accommodation under ORS 659.400(1).[73]

The district court adopted the recommendations of the magistrate and granted Airbnb's motion to dismiss on April 13, 2018.[74] However, Harrington was given a fourteen-day period to file an amended complaint.[75] Joined by two additional named plaintiffs, Carlotta Franklin and Ebony Price, Harrington filed a First Amended Class Action Allegation Complaint (FAC) on April 27, 2018.[76]

Once again, Airbnb moved to dismiss the case, asserting plaintiffs failed to state a claim under Federal Rule of Civil Procedure (Fed. R. Civ. P.) 12(b)(6).[77] This time, U.S. District Judge Michael H. Simon denied Airbnb's motion to dismiss the FAC.[78] He reviewed the FAC under the standard of facial plausibility, where the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and held that Harrington and her co-plaintiffs met their burden of demonstrating that they were treated unequally because of their race and that they were injured as a result of unequal treatment under the Oregon Public Accommodations Act (OPAA).[79]

In denying Airbnb's motion to dismiss, the court held that the plaintiffs sufficiently pleaded that "Airbnb intentionally [made] many of the accommodations listed on its online platform unavailable to Plaintiffs and others on account of their race by maintaining policies that enable hosts to refuse service to prospective guests who are African-American."[80] They also adequately pleaded circumstantial evidence of discriminatory intent by establishing that Airbnb possessed more than mere knowledge of the discriminatory effects of its policies.[81] Given its knowledge of discriminatory behavior conducted via its platform, Airbnb "designed, imposed, and recommitted to features (specifically, its mandatory photograph policy) . . . in order not to lose the business of hosts who seek to discriminate on the basis

73. *Id.* at *5–6.
74. Harrington v. Airbnb, Inc., No. 3:17-cv-558-YY, 2018 WL 1778596, at *3 (D. Or. 2018).
75. *Id.*
76. Harrington v. Airbnb, Inc., No. 3:17-cv-00558-YY, 2018 WL 6133726, at *1 (D. Or. 2018).
77. *Id.*
78. Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1086–87 (D. Or. 2018).
79. *Id.* at 1089–91.
80. *Id.* at 1090.
81. *Id.*

of race or color."[82]

U.S. District Court Judge Michael H. Simon agreed with the plaintiffs that profile photographs did not reveal the kind of information Airbnb said they did, namely whether the guests were "reliable, authentic, and committed to the spirit of Airbnb."[83] However, they did reveal the race and color of the prospective guest.[84] Accordingly, Ms. Harrington and her co-plaintiffs were able to allege that Airbnb's justification for its photo policy was a pretext for discrimination.[85]

Because plaintiffs adequately alleged intentional discrimination, the court moved on to decide the next issue: whether Airbnb is a place of public accommodation under the OPAA.[86] Airbnb argued that it could not be considered a place of public accommodation under the OPAA because of the indirect nature of its relationship with guests.[87] In addition, Airbnb argued that it is a "distinctly private" organization which excludes it from the statutory definition of a public accommodation.[88] The court disagreed.[89]

First, Judge Simon explained that Airbnb's status as a private entity was a different question from whether hosts were private entities under the OPAA.[90] He concluded that Airbnb's membership requirement for hosts was by itself insufficient to qualify it as a private entity because "entities still may be open to the public 'de facto' when they are 'so unselective in their membership criteria that they are effectively public.'"[91]

Second, the court found that the OPAA covers both places and *services* that are offered to the public.[92] Reviewing the OPAA's definition under the broad standard intended by the Oregon Supreme Court, Judge Simon held that Airbnb offers a "service using its online platform to browse, locate, book, and

82. *Id.*

83. *Id.* at 1090–91.

84. *Id.* at 1090.

85. *Id.* at 1090–91 (explaining that the photograph requirement was discriminatory because it revealed the ethnicity of guests, not their character).

86. *Id.* at 1092.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1092–93 (quoting Lahmann v. Grand Aerie of Fraternal Order of Eagles, 43 P.3d 1130, 1135 (2002)).

92. *Id.* at 1093.

pay for accommodations in private homes."[93] In August 2019, the parties announced that they reached a settlement for an undisclosed amount.[94] Whereas Ms. Harrington's case dealt with the prospect of future discrimination on Airbnb's online platform, the next case concerns an incident of discrimination that had already occurred.[95]

B. Selden v. Airbnb

Plaintiff Gregory Selden, a young African American man, used Airbnb to book a room in Philadelphia in March of 2015.[96] Finding a listing he liked, he tried to book it but was told by the host that it was unavailable.[97] Continuing his search, he once again came across the listing still open and available for booking.[98] Suspicious, Selden created two fake accounts with the White-sounding names "Todd" and "Jessie."[99]

Selden applied for the listing under both fake accounts and both were accepted.[100] When he confronted the host, the response was, "people like you always victimize yourselves solely on the basis of skin color."[101] Selden publicized the exchange on his Twitter account using the #airbnbwhileblack hashtag[102] and received a number of similar stories from other users.[103]

On May 17, 2016, Selden filed a class action suit in the U.S. District Court

93. *Id.* at 1093. "The Oregon Supreme Court has declared that the definition of a place of public accommodation under the OPAA 'is intended to be a broad one and to apply to all types of businesses which offer goods and/or services to the public.'" *Id.* (quoting Schwenk v. Boy Scouts of Am., 551 P.2d 465, 469 (1976)).

94. Kiersten Willis, *Black Oregon Women Score Undisclosed Settlement in Discrimination Suit Against Airbnb*, ATLANTA BLACK STAR (Aug. 19, 2019), https://atlantablackstar.com/2019/08/19/black-oregon-women-score-undisclosed-settlement-in-discrimination-suit-against-airbnb/.

95. Rachael Krishna, *This Black Man Was Rejected by an Airbnb Host—Then Was Accepted Under a Fake White Profile*, BUZZFEED NEWS, https://www.buzzfeednews.com/article/krishrach/this-black-man-was-rejected-by-an-airbnb-host-then-was-accep (last updated May 6, 2016, 12:42 PM).

96. Russell Brandom, *Airbnb's Terms of Service Just Blocked a Racial Discrimination Case*, THE VERGE (Nov. 1, 2016, 12:36 PM), https://www.theverge.com/2016/11/1/13487510/airbnb-terms-of-service-racial-discrimination-arbitration.

97. Krishna, *supra* note 95.

98. Brandom, *supra* note 96.

99. *Id.* One of the profiles shared similar characteristics with Selden, while the other was slightly older. Krishna, *supra* note 95.

100. Krishna, *supra* note 95.

101. *Id.*

102. Brandom, *supra* note 96.

103. *Id.*

for the District of Columbia.[104] The sole named plaintiff, Selden, alleged that Airbnb violated Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a; The Civil Rights Act of 1866, 42 U.S.C. § 1981; and the Fair Housing Act, 42 U.S.C. § 3604.[105] Airbnb moved to compel arbitration based on the arbitration clause contained in the contract Selden agreed to when he signed up for the service.[106] The issues presented before the court were (1) whether Selden had agreed to Airbnb's Terms of Service; (2) if so, whether the mandatory arbitration clause applied to his claims of race discrimination; and (3) if the clause applied to his claims, whether it was enforceable.[107]

On the first question, the court found that Selden agreed to Airbnb's terms of service.[108] It classified Airbnb's Terms of Service Agreement as an online adhesion contract of the "sign-in-wrap" subtype.[109] Citing the case of *Berkson v. Gogo LLC*, the court identified three instances in which district courts tend to uphold sign-in-wrap agreements, the first being if "the hyperlinked 'terms and conditions' is next to the only button that will allow the user to continue use of the website."[110] The court found that Airbnb's sign-in-wrap agreement met this criterion because the sign-up box was placed "in roughly the middle of the page, in close proximity to all three sign-up buttons."[111] Furthermore, it was "clearly legible, appropriately sized, and unobscured by other visual elements."[112]

The court also took the opportunity to make the point that, given the ubiquity of online contracting for consumer services, "[a]ny reasonably-active adult consumer will almost certainly appreciate that by signing up for a particular service, he or she is accepting the terms and conditions of the

104. Selden v. Airbnb, Inc., No. 16-cv-00933(CRC), 2016 WL 6476934 at *3 (D.D.C. Nov. 1, 2016).

105. *Id.* ("Selden alleges that Airbnb violated Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a, which prohibits race discrimination in public accommodations; the Civil Rights Act of 1866, 42 U.S.C. § 1981, which prohibits race discrimination in the formation of contracts; and the Fair Housing Act, 42 U.S.C. § 3604, which prohibits race discrimination in the sale or rental of housing.").

106. *Id.*

107. *Id.* at *4.

108. *Id.*

109. *Id.*

110. *Id.* at *5 (quoting Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 401). The other two conditions were 2) if "the user 'signed up' to the website and was presented with hyperlinks to the terms of use on subsequent visits;" and 3) if "notice of the hyperlinked terms and conditions is present on multiple successive webpages of the site." *Id.*

111. *Id.*

112. *Id.*

provider."[113] Therefore, Selden was aware that he was contracting with Airbnb and indicated his acceptance of the terms and conditions of the agreement when he clicked the sign-up box.[114]

Next, the court considered whether the mandatory arbitration clause applied to Selden's claims of racial discrimination.[115] The clause read as follows:

> [The User] and Airbnb agree that *any dispute, claim or controversy arising out of or relating to these Terms* or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services or use of the Site or Application (collectively, 'Disputes') will be settled by binding arbitration.[116]

Applying California law,[117] the court interpreted the language of the agreement broadly, following U.S. Supreme Court precedent which supports a broad reading.[118] Accordingly the court found it "clear that Selden's claims of unlawful racial discrimination 'ar[ose] out of or relate[d] to' his use of the Airbnb service."[119]

Lastly, the court addressed the enforceability of the arbitration clause in Selden's case.[120] It reviewed Selden's two main arguments: "first, that federal civil rights claims are not subject to arbitration; and second, that the arbitration clause is unconscionable."[121]

The court disagreed with Selden's argument that "the Congressional intent for 'where and how' [he] can bring his Title II suit is clearly codified."[122] While Title II states that "[t]he district courts of the United States

113. *Id.*

114. *See id.* While "not directly under the first or second alternative sign-up buttons, any reasonably-observant user would notice the text and accompanying hyperlinks." *Id.*

115. *Id.* at *6.

116. *Id.*

117. *See id.* at *6 n.3. Since the court found that a valid agreement existed between Selden and Airbnb, it applied California law in accordance with the agreement's choice of law terms. *Id.*

118. *Id.* at *6 (mentioning the Supreme Court's finding in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 624 (1985) that it was proper to interpret an arbitration agreement contract "broadly to cover matters that touch upon the contract to be arbitrable").

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at *7.

shall have jurisdiction of proceedings initiated pursuant to this subchapter,"[123] the court held that this provision "neither guarantees a right to a federal court trial nor forbids arbitration as an alternate forum."[124] And, although the statute states that "[t]he remedies provided in this subchapter *shall be the exclusive means of enforcing the rights based on this subchapter*," the court found that "[p]laintiffs may still vindicate their statutory rights in arbitration."[125]

Selden argued that arbitrations are not neutral because businesses, as "repeat-player[s]" in arbitration, have greater experience in choosing arbitrators who will lead to decisions in their favor.[126] The court rejected this contention citing a lack of judicial support,[127] and referring to Supreme Court precedent which "repeatedly rebuffed these arguments as insufficient to preclude arbitration."[128]

With respect to Selden's contention that the agreement was an adhesion contract, and thus procedurally unconscionable, the court held that "adhesion contracts are not *per se* unconscionable under California law."[129] Secondly, the Terms of Service did not lack mutuality because they "clearly subject[ed] both parties to arbitration."[130] The court concluded that Selden's argument that arbitration is too costly for the average consumer lacked merit, given that the arbitration fees would be paid by Airbnb.[131] Therefore, the agreement was neither procedurally nor substantively unconscionable.[132]

Granting Airbnb's motion to compel arbitration, the court stayed the case.[133] Unable to appeal during the stay, Selden moved to certify the order for an interlocutory appeal, asking the court to dismiss the case in the alternative.[134] Selden's motion was denied.[135]

123. *Id.* (quoting 42 U.S.C. § 2000a-6).
124. *Id.* (citing Garrett v. Circuit City Stores, Inc., 449 F.3d 672, 678 (5th Cir. 2006)).
125. *Id.* (quoting 42 U.S.C. § 2000a-6). "Any arbitration agreement that prevents them from doing so is invalid.").
126. *Id.*
127. *Id.* at *8.
128. *Id.* at *7 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).
129. *Id.* at *8.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at *9.
134. Selden v. Airbnb, Inc., No. 16-cv-933(CRC), 2016 WL 7373776, at *1 (D.D.C Dec. 19, 2016).
135. *Id.* at *3. The standard for certifying interlocutory appeals is demanding, and "even more

On the question of whether Selden's civil rights claims were subject to arbitration, the court cited "clear authority" from the Supreme Court, "holding that arbitration agreements can be enforced under the FAA [Federal Arbitration Act] without contravening the policies of congressional enactments giving [individuals] specific protection against discrimination prohibited by federal law."[136]

The Court of Appeals for the District of Columbia Circuit dismissed Selden's appeal on February 2, 2017.[137] It granted a motion to dismiss for lack of jurisdiction filed by Airbnb while holding that "[t]he district court's order compelling arbitration and staying litigation pending arbitration is not appealable."[138] On October 2, 2017, the Supreme Court denied Selden's "writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit."[139]

C. Ramos v. Uber[140]

In contrast with *Selden*, *Ramos v. Uber Tech., Inc.* presents an instance where the victim of discrimination was successful in challenging the validity

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stringent where the Court has compelled arbitration." *Id.* at *1. Selden argued that "appellate guidance is needed on this issue because 'the [C]ourt did not . . . cite to any authority from the D.C. Circuit with respect to the nature of electronic bargaining or online adhesion contracts.'" *Id.* However, "the Court did not cite authority from the D.C. Circuit on this issue because both parties agreed that California law governed the question of contract formation. . . . [A]n electronic adhesion contract must be upheld under California law if its terms are clear and conspicuous." *Id.* "[A]s far as the Court [was] aware," the D.C. Circuit had not addressed the issue of "whether district courts must stay proceedings after all claims have been referred to arbitration and a stay has been requested, or whether they retain the discretion to dismiss such cases outright." *Id.* at *2 (quoting Goodrich v. Adtrav Travel Mgmt., 15-cv-899, 2016 WL 4074082, at *4 n.3 (D.D.C. 2016)). Nonetheless, the issuing of the stay "comport[ed] with recent practice in this district." *Id.* It also conformed to the "FAA's text, structure, and underlying policy" that "permit[ted] immediate appeal of orders hostile to arbitration . . . but bar[red] appeal of interlocutory orders favorable to arbitration." *Id.* (quoting Katz v. Cellco Partnership, 794 F.3d 341, 345 (2d. Cir. 2015) and Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79, 86 (2000)).

136. *Id.* at *2.

137. Selden v. Airbnb, Inc., 681 F. App'x. 1, 1 (D.C. Cir. 2017).

138. *Id.* Selden failed to show "that the order is appealable under 28 U.S.C. § 1292(a)(1), because it does not have the 'practical effect' of denying an injunction that 'affects predominantly all of the merits' or 'might have a serious perhaps irreparable, consequence." *Id.* He further failed to show that it was appealable "under a pendent jurisdiction theory . . . or the collateral order doctrine." *Id.*

139. Selden v. Airbnb, Inc., 138 S. Ct. 222 (Mem.) (2017).

140. 77 N.Y.S.3d 296 (N.Y. Sup. Ct. 2018).

of an arbitration clause in a suit against an online platform.[141] On July 20, 2016, plaintiff Elizabeth Ramos used the UberWAV app to try to hail an accessible vehicle from her home in Starrett City, Brooklyn.[142] Ramos, then fifty-four years old, had been using "a wheelchair since she was 12 due to scoliosis."[143] She tried the app three times over the course of an hour but was never provided with a vehicle.[144]

Ramos filed suit on July 29, 2016, alleging violations of New York Executive Law § 296 (2), the State Human Rights Law.[145] She additionally "assert[ed] a claim for violation of the Administrative Code of the City of New York § 8-107 (4) and the New York City Human Rights Law."[146] In response, Uber filed a motion to compel arbitration, supported by the affidavits of two employees.[147]

With arbitration being a "favored method of dispute resolution in New York," the issue of whether there is a valid agreement to arbitrate is to be decided by the courts.[148] The agreement to arbitrate must be "clear, explicit and unequivocal, in order for the court to compel arbitration, and must not depend upon implication or subtlety."[149]

Uber argued that Ramos's registration with Uber constituted a necessary acceptance of "Uber's terms and conditions which included an agreement to arbitrate."[150]

Describing himself as a "Technical Lead Manager," Chris Brauchli claimed that he "ha[d] access to Uber's records regarding when and where riders create accounts."[151]

He attached three screenshots to his affidavit: 1) "CREATE AN

141. *See id.* at 302; *see also* Dan Rivoli, *Uber Slammed in Lawsuit over Accessibility by Brooklyn Woman Who Uses Wheelchair*, N.Y. DAILY NEWS (Aug. 7, 2016, 8:08 PM), https://www.nydailynews.com/new-york/disabled-brooklyn-woman-slams-uber-accessibilty-lawsuit-article-1.2742076.

142. *See* Rivoli, *supra* note 141.

143. *See id.*

144. *Ramos*, 77 N.Y.S.3d at 297.

145. *Id.*

146. *Id.*

147. *Id.* at 298.

148. *Id.* (quoting Markowits v. Friedman, 144 A.D.3d 993, 996 (N.Y. App. Div. 2016)).

149. *Id.* (citing Sutphin Retail One, LLC v. Sutphin Airtrain Realty, LLC, 143 A.D.3d 972, 973 (N.Y. App. Div. 2016)).

150. *Id.* at 299.

151. *Id.*

ACCOUNT," which displays the first step in the registration process; 2) "CREATE A PROFILE," where the registrant would enter their first and last name; and 3) "ADD PAYMENT," where the registrant would enter their payment information.[152] Despite claiming that Ramos registered for Uber on November 4, 2015, Brauchli failed to "annex a copy of the screenshot of the 'Terms & Conditions' that would have appeared had Ramos clicked the phrase 'Terms & Conditions and Privacy Policy' displayed in the rectangular box" in the "ADD PAYMENT" screenshot.[153]

The court disagreed "with Brauchli's contention that the framing of the phrase 'Terms & Conditions and Privacy Policy' within [the] rectangular box [gave] reasonable notice to anyone that it [was] a clickable button."[154] The "ADD PAYMENT" screen's language was ambiguous "on its face."[155] A registrant could reasonably believe that the Terms and Conditions pertained to using a "facebook [(sic)] account or email and mobile number for sending bills and receipts."[156] Moreover, the instructions on the "ADD PAYMENT" screen did not contain "any indication advising the applicant that clicking on the words 'Terms & Conditions and Privacy Policy' will take the applicant to another screen purportedly containing Uber's terms and conditions."[157]

The court ultimately held that Ramos did not "clearly, explicitly and unequivocally" agree to arbitration when she signed up for Uber.[158] "Uber's motion improperly depend[ed] upon implication or subtlety in the interpretation of its ambiguous registration process."[159] It denied Uber's motion to compel arbitration and compelled the company to interpose an answer within thirty days of the order.[160]

As of this writing, *Harrington*, *Selden*, and *Ramos* are the only consumer discrimination cases brought against sharing economy platforms in which judges have rendered decisions. The mixed outcomes of these cases do not yet reveal whether the current laws will serve as adequate tools to protect victims of consumer discrimination in the platform economy. In fact, it is

152. *Id.* at 300.
153. *Id.* at 301.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 302.
159. *Id.*
160. *Id.*

unclear whether the current laws—either state or federal—sufficiently address the issue of consumer equality. Our focus next turns to whether the extant laws are successful in removing obstacles to full participation for all in the marketplace.

III. EFFECTIVENESS OF FEDERAL VS. STATE LAWS IN PROVIDING RELIEF FOR CONSUMER DISCRIMINATION

In this part, we assess the effectiveness of federal and state laws by reviewing the statutes' language and comparing the decisions in which courts have interpreted them. Plaintiffs generally rely on two federal laws when seeking redress for consumer discrimination: Title II of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866.

A. Public Accommodations Statutes

Title II is the federal public accommodations law.[161] Forty-five states have their own version of public accommodation laws covering nondisabled individuals.[162] Only Alabama, Georgia, Mississippi, North Carolina, and Texas do not have state public accommodation laws covering nondisabled individuals.[163] All of the state laws cover discrimination on the basis of race, as well as sex, ancestry/national origin, and religion/creed.[164]

1. Federal Public Accommodations Law

Title II of the Civil Rights Act of 1964 provides that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities,

161. 42 U.S.C. § 2000a (1964).

162. *State Public Accommodation Laws*, NCSL (Apr. 4, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx.

163. *Id.*

164. *Id.* Some states' statutes provide protection for individuals based on their membership in other categories such as: "marital status, civil union status, domestic partnership status, affectional or sexual orientation . . . pregnancy or breastfeeding, sex, gender identity or expression, disability[,] . . . [and] liability for service in the Armed Forces of the United States." N.J. STAT. ANN. § 10:5-12(a) (West 2020). California's Unruh Civil Rights Act also protects against discrimination based on medical condition, genetic information, primary language, and immigration status. CAL. CIV. CODE § 51 (West 2016). The District of Columbia's public accommodations law covers individuals based on personal appearance, family responsibilities, "matriculation, political affiliation, source of income, or place of residence or business." D.C. CODE ANN. § 2-1402.31(a) (West 2001).

privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."[165]

To qualify as a place of public accommodation under the Act, an establishment's operations must affect interstate commerce.[166] The establishment must also be among those enumerated in the statute, which includes inns, restaurants, and theaters, as well as "any establishment . . . physically located within the premises of any establishment otherwise covered by this subsection."[167]

Federal courts have construed this statute narrowly to exclude any type of establishment not included on the list. For example, in *McCrea v. Saks, Inc.*,[168] the Federal District Court for the Eastern District of Pennsylvania held that retail establishments were not covered by Title II.[169] The plaintiff, Theresa McCrea, was shopping at defendant's retail store when she got into an argument with a salesman who complained about her young daughter running through store aisles.[170] The salesman called security, ordering them to "get this 'n-----' out."[171] The court reasoned that the statute's explicit reference to "cafeterias, lunchrooms, lunch counters, and any facility 'located on the premises of any retail establishment'" clearly evinced Congress' intent to exclude retail establishments from its ambit.[172] Had Congress not intended as such, there would have been no need for such a provision.[173]

Similarly, in *Denny v. Elizabeth Arden Salons, Inc.*, the Fourth Circuit Court of Appeals upheld the dismissal of plaintiffs' claim that they were denied service by a hair salon in violation of Title II.[174] The court acknowledged that, "[t]here [could] be no doubt that plaintiffs have presented not only strong but direct evidence of the salon's intent to discriminate."[175] Indeed, the plaintiffs were expressly told that "the salon did not 'do black

165. 42 U.S.C. § 2000a(a) (1964).
166. *Id.* at § 2000a(b).
167. *Id.* at §§ 2000(b)(1–4).
168. No. CIV. A. 00-CV-1936, 2000 WL 1912726 (E.D. Pa. Dec. 22, 2000).
169. *Id.* at *2.
170. *Id.* at *1.
171. *Id.* McCrea and her family ultimately left without making their intended purchase. *Id.*
172. *Id.* at *2 (quoting § 2000a(b)(2)).
173. *Id.*
174. 456 F.3d 427, 429 (4th Cir. 2006).
175. *Id.* at 434.

people's hair.'"[176] Nonetheless, the court held that salons were not covered under Title II because they were not explicitly "mentioned in any of the numerous definitions of 'place of public accommodation.'"[177] The court disagreed with the plaintiffs' characterization of the salon as a "place of exhibition or entertainment" because the functions of a salon are not akin to those of an entertainment venue such as a theater or symphony.[178] The specificity used by Congress in delineating certain types of entertainment venues ruled out any establishments that could have any tangential entertainment value.[179] Furthermore, establishments such as salons are so common as to preclude any omission of their inclusion in the statute as mere oversight.[180]

Beyond the fairly narrow scope of the statute's coverage, the effectiveness of Title II is limited in part because it provides only for injunctive relief to the exclusion of monetary damages.[181] Therefore, a second threshold issue for Title II plaintiffs is whether they have standing to pursue a claim for injunctive relief.[182] A plaintiff must demonstrate a "real and immediate threat of repeated injury,"[183] by "[setting] forth the likelihood of a future encounter with the defendant which is likely to lead to a similar violation of some protected right."[184] The "real and immediate threat" requirement enables defendants to defeat racial discrimination claims based on one-off encounters.

In *Macer v. Bertucci's Corp.*, the improbability of future injury was used to defeat plaintiff's claim in which she alleged discrimination at a Bertucci's restaurant.[185] According to the Federal District Court for the Eastern District of New York, plaintiff's complaint "include[d] no allegations that defendant

176. *Id.* at 435. Allegedly, the salon's manager explained that "each and every one of the eight or nine hair stylists present refused to work on [plaintiff] Jean Denny's hair." *Id.*

177. *Id.* at 431.

178. *Id.* (quoting 42 U.S.C. § 2000a(b)(3) (1964)).

179. *Id.* at 434.

180. *Id.*

181. Macer v. Bertucci's Corp., No. 13-CV-2994(JFB)(ARL), 2013 WL 6235607, at *7 (E.D.N.Y. Dec. 3, 2013).

182. *Id.*

183. *Id.* (quoting Henry v. Lucky Strike Entertainment, LLC, No. 10-CV-03682(RRM)(MDG), 2013 WL 4710488, at *12 (E.D.N.Y. Sept. 1, 2013)).

184. *Id.* (quoting Joseph v. N.Y. Yankees P'Ship, No. 00 Civ. 2275(SHS), 2000 WL 1559019, at *5 (S.D.N.Y. Oct. 19, 2000)).

185. *Id.* at *7.

discriminated against plaintiff since the events in question, much less allegations that such discrimination likely will occur in the future."[186] The court had already struck down the Title II claim because plaintiff only sought monetary damages, but even if she had sought the injunctive relief allowed by the statute, the lack of evidence that future harm was "real and imminent" would still ultimately defeat her claim.[187]

Furthermore, the allegations in plaintiff's complaint did not establish a plausible claim under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a (Title II), according to the court.[188] To establish a prima facie case of discrimination, a plaintiff must plead facts showing that he or she:

> (1) is a member of a protected class; (2) attempted to exercise the right to full benefits and enjoyment of a place of public accommodation; (3) was denied those benefits and enjoyment; and (4) was treated less favorably than similarly situated persons who are not members of the protected class.[189]

The third and fourth prongs of the test have proven particularly troublesome to plaintiffs with consumer discrimination claims. *Acey v. Bob Evans Farms, Inc.* provides an example.[190] Visiting a restaurant with his daughter, plaintiff Joel Acey asked a waitress to be seated near the front of the restaurant, "which was not busy and where space was available."[191] Rather than oblige his request, the waitress took Acey to the back of the restaurant where she slammed the menus on the table, calling Acey a "damned idiot."[192]

The court rejected Acey's Title II claim based on the third and fourth prongs of the prima facie test.[193] Despite the hostile treatment, Acey failed to satisfy the third prong as he did not demonstrate that he was denied the full enjoyment or benefits of a place of public accommodation.[194] As to the fourth prong, the court noted that his complaint was "devoid of any allegations" that

186. *Id.*
187. *Id.*
188. *Id.* at *8.
189. Taylor v. Ahold, No. 3:16cv241, 2017 WL 377935, at *1 (E.D. Va. Jan. 23, 2017).
190. No. 2:13-cv-04916, 2014 WL 989201, at *4 (S.D.W.Va. Mar. 13, 2014).
191. *Id.* at *1.
192. *Id.*
193. *Id.* at *9.
194. *Id.*

non-members of a protected class were treated more favorably.[195]

Recognizing the difficulty of having to identify different treatment of similarly situated people outside of one's protected class, some courts have applied an altered version of the fourth prong.[196] Typically used in cases involving restaurants where plaintiffs often have difficulty demonstrating disparate treatment, the modified test asks whether "(a) the services were made available to similarly situated persons outside the plaintiff's protected class or (b) the plaintiff 'received services in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory.'"[197]

Even the modified standard of the fourth prong presents difficulty for plaintiffs. For example, in *Hynes v. Brasil*, plaintiff brought suit following an argument with a restaurant manager who asked him to move to a smaller table.[198] During the encounter, the manager explained that he wished to make the larger tables available for the lunch rush.[199] Hynes pointed out a woman sitting by herself at a large table, but the manager told him that she had been with a party of four that had ordered food.[200] Therefore, the court concluded that "Hynes does not point to or submit any evidence showing that other similarly situated persons . . . outside his protected class were treated more favorably."[201]

The manager repeatedly invited Hynes to order, but Hynes just replied, "possibly coffee."[202] The manager responded that he "did not 'appreciate that kind of business here.'"[203] Analyzing Hynes' claim under the modified test, the court held that the manager's actions did not meet the "markedly hostile" standard because invitations to order and explanations for asking a patron to move to a smaller table did not qualify as hostile.[204] While the manager's behavior may have eventually risen to such a level, it still did not qualify as it

195. *Id.*
196. Hynes v. Brasil LLC, No. H-17-2419, 2018 WL 1726157, at *3 (S.D. Tex. Apr. 10, 2018) (citing Fahim v. Marriott Hotel Servs. Inc., 551 F.3d 344, 350, n.2 (5th Cir. 2008)).
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at *4.
202. *Id.* at *1.
203. *Id.*
204. *Id.* at *4.

did not occur until after Hynes had become hostile himself.[205]

2. State Public Accommodations Laws

The state public accommodations laws vary in their specificity in terms of enumerating what they define as places of public accommodations. Many provide exhaustive lists,[206] while others offer little more than generalized statements.[207] The state of Wyoming provides a very broad definition of what constitutes a place of public accommodation, with its statute simply referring to places that are "public in nature, or which invite the patronage of the public."[208]

Transportation providers are mentioned frequently in lists of covered entities. Alaska's and Montana's statutes each refer to "transportation companies."[209] The statutes of Hawaii and Michigan specify transportation facilities "of any kind."[210] Massachusetts mentions "carrier[s]" for transportation as well as any facilities belonging to them.[211]

Lodging facilities are included in the statutes, often listed in the form of hotels, inns, and motels.[212] Some states employ a broader definition,[213] while allowing certain lodgings to be exempted from non-discrimination statutes.[214] Under most state laws (as well as federal law), an establishment qualifies for the "Mrs. Murphy exemption" if it is located within a building "which contains not more than five (5) rooms for rent and which is actually occupied

205. *Id.*

206. *See, e.g.*, ALASKA STAT. ANN. § 18.80.300 (West 2014); COLO. REV. STAT. ANN. § 24-34-601 (West 2014); D.C. CODE ANN. § 2-1401.02 (West 2020).

207. *See, e.g.*, CONN. GEN. STAT. ANN. § 46A-63 (West 2004); IDAHO CODE ANN. § 67-5902 (West 2005); IND. CODE ANN. 22-9-1-3 (West 2016); IOWA CODE ANN. § 216.2 (West 2019).

208. WYO. STAT. ANN. § 6-9-101 (West 2020); *see also* NCSL, *supra* note 162 (listing no definitional statute for public accommodations in Wyoming).

209. ALASKA STAT. ANN. § 18.80.300 (West 2014); MONT. CODE ANN. § 49-2-101 (West 2015).

210. HAW. REV. STAT. ANN. § 489-2 (West 2019); MICH. COMP. LAWS ANN. 37.2301 (West 2000).

211. MASS. GEN. LAWS ANN. ch. 272, § 92A (West 2016).

212. *See, e.g.*, ALASKA STAT. ANN. § 18.80.300 (West 2014); DEL. CODE ANN. tit. 6, § 4502 (West 2018); MO. ANN. STAT. § 213.010 (West 2017).

213. *See, e.g.*, COLO. REV. STAT. ANN. § 24-34-601 (West 2014) ("'[P]lace of public accommodation' means . . . any place to eat, drink, *sleep,* or *rest*.") (emphasis added); HAW. REV. STAT. ANN. § 489-2 (West 2019).

214. 42 U.S.C. § 2000a(b)(1) (1964); *see, e.g.*, ARK. CODE ANN. § 16-123-102 (West 2017); 775 ILL. COMP. STAT. ANN. 5/5-101 (West 2018).

by the proprietor of such establishment as a residence."[215]

State courts tend to interpret their own public accommodations laws broadly. For example, in *King v. Greyhound Lines*,[216] the reviewing court held that the plaintiff was the victim of discrimination under Oregon's state public accommodations law despite not being refused service.[217] In *King*, the plaintiff brought suit after being subjected to racial epithets while trying to refund a one-way bus ticket.[218] The defendant alleged that racial slurs were not actionable under the act, and the trial court agreed.[219]

The Oregon Court of Appeals reversed the lower court's decision.[220] It interpreted the state statute broadly, stating that the prohibition against "distinction, discrimination, or restriction" on the basis of race encompasses more than an outright denial of service.[221] Despite the lack of legislative history and case law on the issue, the court noted the general intent behind the legislation to prevent "operators and owners of *businesses* catering to the general public from subjecting Negroes to oppression and humiliation."[222]

A few courts have considered whether an online business qualifies as a place of public accommodation. Recently, California's Supreme Court held that the state's public accommodation law "applies to online businesses and that visiting a website with intent to use its services is, for purposes of standing, equivalent to presenting oneself for services at a brick-and-mortar store."[223] On the other hand, the Court of Appeals for the District of Columbia Circuit agreed with the lower court that a place of public accommodation must be a physical location.[224]

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215. ARK. CODE ANN. § 16-123-102(7)(A).

216. 656 P.2d 349 (Or. Ct. App. 1982).

217. *Id.* at 352.

218. *Id.* at 350.

219. *Id.* at 352. The trial court entered judgment for the defendant while sitting without a jury. *Id.*

220. *Id.* at 352.

221. *Id.* at 351.

222. *Id.* at 352.

223. White v. Square, Inc., 446 P.3d 276, 277–78 (Cal. 2019). Plaintiff sued the online platform alleging that he was prevented from using its services on the basis of his occupation. *Id.* at 278. Like the high court in California, the Massachusetts Supreme Judicial Court and the Court of Appeals of New York have held that places of public accommodation do not require a physical structure to qualify as a place of public accommodation. *See* Currier v. Nat'l. Bd. of Med. Examiners, 965 N.E.2d 829, 842–43 (Mass. 2012); *see also* U.S. Power Squadrons v. State Human Rights Appeal Bd., 452 N.E.2d 1199, 1203 (N.Y. 1983). A federal district court in New York has held that a website is a place of public accommodation. Andrews v. Blick Art Materials, 268 F.Supp.3d 381, 399 (E.D.N.Y. 2017).

224. Freedom Watch, Inc. v. Google, Inc., 816 Fed. App'x. 497, 501 (D.C. Cir. 2020). Similarly,

Another important point in interpreting state public accommodation laws lies in deciding who is protected from discriminatory acts by providers.[225] *Jackson v. Superior Court* featured a plaintiff who brought a claim for discrimination after a bank teller prevented him from giving investment advice to two bank customers.[226] Jackson was not himself a customer of the bank.[227] Ruling in Jackson's favor, the California Court of Appeal looked beyond the statutory language and determined that the legislative intent behind the law was to cover more than just "selling, buying or trading."[228] In accompanying customers to assist them with their banking business, Jackson was engaging in a protected act under the statute, the denial of which prevented him from experiencing the "'full and equal accommodations, advantages, privileges or services' of the bank."[229]

Another California Court of Appeal case, *Payne v. Anaheim Memorial Medical Center, Inc.*, is instructive on the matter of who is protected under the state's public accommodations law.[230] Plaintiff, Dr. David Payne, alleged racial discrimination against a hospital after suffering adverse treatment by colleagues that hindered his treatment of a patient.[231] The hospital argued that it was exempt from the civil rights law as Dr. Payne was not an employee.[232]

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the United States District Court for the District of New Jersey held that "a 'location' in cyberspace, such as NABI's website, is not a 'place' of public accommodation" under the New Jersey Law Against Discrimination (NJLAD). Demetro v. Nat'l Ass'n of Bunco Investigations, Civ. No. 14-6521(KM)(SCM), 2019 WL 2612687, at *15 (D.N.J. June 25, 2019). The court's holding rests on its characterization of NABI as an organization that restricts its membership. *See id.* Therefore,

> it seems likely that if the court was considering a different type of website, like an online retailer of consumer goods or services, it might more readily see similarities with the NJLAD's enumerated examples such as "any . . . retail shop, store, establishment or concession dealing with goods and services of any kind."

N.J. Stat. Ann. § 10:5-5. David Brody & Sean Bickford, *Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce*, LAWYERS' COMM. FOR CIVIL RIGHTS UNDER LAW 1, 24 (2020), https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf.

225. *See, e.g.*, Jackson v. Superior Court, 36 Cal. Rptr. 2d 207, 208 (Cal. Ct. App. 1994); *see also* James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim at First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 967–68 (2019).

226. *Jackson*, 36 Cal. Rptr. 2d 207–08.

227. *See id.*

228. *Id.* at 209.

229. *See id.*

230. 30 Cal. Rptr. 3d 230 (Cal. Ct. App. 2005).

231. *Id.* at 232–33.

232. *Id.* at 244.

Instead, the hospital said Dr. Payne's access to the hospital's facilities arose out of his membership in what could have been considered "an elite club" because the facilities were not offered to the entire public.[233] The hospital argued that Dr. Payne's access was contingent upon his "elite" status as a physician.[234] Ruling for Dr. Payne, the court held that the Unruh Civil Rights Act (UCRA) "is not restricted to those businesses or public facilities which offer their wares or services to everyone."[235] Given the qualifications necessary to become one, it was reasonable for the hospital to restrict staff privileges only to physicians.[236] However, it could not go a step further and restrict the group to members of a certain race.[237]

Wayne v. MasterShield, Inc. features a contrasting view to that in the *Payne* case on the issue of the relationships between discrimination victims and providers.[238] Samuel Sando Wayne brought suit under the Minnesota Human Rights Act (MHRA) after he was detained and harassed by security staff at Parkview, a residential apartment complex where he was staying as a guest.[239] Like the hospital in *Payne*, Parkview was selective with respect to its tenants and guests.[240] The Minnesota Court of Appeals concluded that the restriction to members of the general public, along with a limited tenant capacity and requirement that tenants "sponsor" their visitors, qualified it as a private facility and not a place of public accommodation.[241]

In interpreting the MHRA, the court gave "strong weight" to federal precedent because of "substantial similarities" between it and Title II.[242] The court took a narrow view, noting that Title II limited its definition of accommodations to an "establishment which provides lodging to transient guests" and that apartment complexes provide "private non-transient dwellings."[243] Therefore, the court found that Mr. Wayne's public accommodations claim was rightfully dismissed on summary judgment.[244]

233. *Id.* at 244–45.
234. *Id.*
235. *Id.* at 245.
236. *See id.*
237. *Id.*
238. 597 N.W.2d 917 (Minn. Ct. App. 1999).
239. *Id.* at 919.
240. *Id.* at 921.
241. *Id.*
242. *Id.*
243. *Id.* at 921–22.
244. *Id.* at 922.

The state court made a similar distinction in *Parsons v. Henry*, an Oregon case, to exclude a private construction contractor from the definition of place of public accommodation based on his performance of services only after a bid process and negotiation.[245]

State laws did not fare any better or worse in federal courts than they did in their respective states, meeting the same fate as their federal counterparts. When federal claims were either absent or evaluated independently of the state claims, federal courts tended to defer to the state courts.[246] In *Harrington v. Airbnb, Inc.*, for example, the federal district court noted the Oregon Supreme Court's broad interpretation of the Oregon Public Accommodations Act in holding that the plaintiffs sufficiently alleged that Airbnb was a place of public accommodation within the meaning of the statute.[247] Where the state court interprets the public accommodations statute broadly, federal courts are likely to adopt a similar interpretation.[248]

In *Craig v. US Bancorp*, the plaintiff alleged discrimination after withstanding over an hour's worth of delays in trying to cash a check.[249] The defendant stated that the delays were due to a "'fraud' investigation" on the account at issue, but two White test customers were able to cash checks on the account without any problem.[250] Examining Oregon's public accommodation statute, the United States District Court for the District of Oregon noted the state appellate court's interpretation that the "chief harm" of discrimination was the "greater evil of unequal treatment."[251] Applying this interpretation, the district court held that "the issue [was] not whether racial invective was used," but whether Craig suffered unequal treatment on account of his race.[252] In this case, the court found that Craig suffered unequal treatment when he faced the delay in service that caused him emotional harm.[253]

245. 672 P.2d 717, 721 (Or. Ct. App. 1983).
246. *See, e.g.*, Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1093 (D. Or. 2018); Craig v. US Bancorp, No. Civ. 03-1680-AA, 2004 WL 817149, at *2, *4 (D. Or. Apr. 14, 2004).
247. *Harrington*, 348 F. Supp. 3d at 1093.
248. *See id.*
249. *Craig*, 2004 WL 817149, at *1.
250. *Id.*
251. *Id.* at *4 (quoting King v. Greyhound Lines, Inc., 656 P.2d 349, 352 (Or. Ct. App. 1982)).
252. *Id.*
253. *Id.*

B. Section 1981 of the Civil Rights Act of 1866

Section 1981 of the Civil Rights Act of 1866 ensures the right of "[a]ll persons within the jurisdiction of the United States . . . to make and enforce contracts."[254] The statute defines making and enforcing contracts as including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[255] It has been employed by plaintiffs claiming discrimination in consumer transactions, although it is relied upon primarily in cases of employment discrimination.[256]

Because it neither limits the types of establishments covered under the statute nor does it restrict plaintiffs from seeking damages, § 1981 is a more effective tool for consumer discrimination plaintiffs.[257] The courts have adopted the burden-shifting framework for plaintiffs suing under § 1981.[258] The framework was first adopted by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, an employment-discrimination case, to guide the analysis for claims relying on circumstantial evidence.[259] The test was adapted to the consumer setting by the court in *Callwood v. Dave & Busters, Inc.*[260] Under the *Callwood* test, to establish a prima facie case of discrimination, a plaintiff must show that:

> 1) they are members of a protected class; (2) they made themselves available to receive and pay for services ordinarily provided by the defendant to all members of the public in the manner in which they are ordinarily provided; and (3) they did not enjoy the privileges and benefits of the contracted for experience under factual circumstances which rationally support an inference of unlawful discrimination in that (a) they are deprived of services while similarly situated persons

254. 42 U.S.C.A. § 1981 (West).

255. *Id.*

256. See Delaney M. Busch, Su*preme Court Clarifies Race Discrimination Claims Under 42 U.S.C. § 1981 Must Meet More Stringent "But-For" Causation Standard*, MINTZ (Apr. 17, 2020) https://www.mintz.com/insights-center/viewpoints/2226/2020-04-17-supreme-court-clarifies-race-discrimination-claims-under.

257. 42 U.S.C.A. § 1981 (West). *See* Abby Morrow Richardson, *Applying 42 U.S.C. § 1981 to Claims of Consumer Discrimination*, 39 U. Mich. J.L. Reform 119, 121 (2005).

258. *See, e.g.*, Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 868 (6th Cir. 2001).

259. 411 U.S. 792, 802 (1973).

260. 98 F. Supp. 2d 694, 707 (D. Md. 2000).

> outside the protected class were not deprived of those services, and/or (b) they received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable.[261]

A plaintiff must attempt to show that she made herself available to receive and pay for services.[262] But at what point does the contractual relationship begin? Courts that have considered this question have determined that a customer's mere presence in a business establishment is insufficient to allege that a contractual relationship exists between the customer and the business.[263] A "tangible attempt to contract" must be made.[264] In *Henderson v. Office Depot, Inc.*, for example, the District Court for the Western District of Louisiana held that a contractual relationship began the moment a customer attempted to negotiate the terms of a prospective transaction.[265] Henderson's claim for discrimination arose when the defendant store's employees failed to assist the plaintiff in purchasing a printer.[266] The court cited a broad standard put forth by the U.S. Supreme Court "expressly stat[ing] that § 1981 reaches 'all phases and incidents of the contractual relationship.'"[267]

Newman v. Borders, Inc. involved a plaintiff who was visiting a Borders bookstore intending to purchase a children's book for his nephew.[268] As he proceeded to the register, he was confronted by a security officer and accused of putting items in a shopping bag (from another store) that he was carrying.[269] After emptying the bag and proving he had not stolen from the store, Newman was denied the opportunity to view security camera footage that allegedly showed him putting items in the bag and ultimately left the store without making a purchase.[270] According to the court, because he was attempting to make a transaction by purchasing a book, it was sufficient that Newman alleged he was "thwarted in his attempt to make a purchase and close a

261. *Id.*
262. *Id.*
263. Newman v. Borders, Inc., 530 F. Supp. 2d 346, 349 (D.D.C. 2008).
264. *Id.*
265. CIVIL ACTION NO. 15-2907, 2016 WL 6653029, at *3 (W.D. La. Sept. 19, 2016).
266. *Id.* at *1.
267. *Id.* at *3 (citing Rivers v. Roadway Express, Inc., 511 U.S. 298, 306–07 (1994)).
268. *Newman*, 530 F. Supp. 2d at 347.
269. *Id.*
270. *Id.* at 348.

contract."[271]

Despite the broad *Rivers* standard, the protections given to "all phases" of the contractual relationship do not necessarily extend beyond the completion of the transaction itself.[272] *Range v. Wal-Mart Supercenter* is one example where the plaintiffs presented "adequate" evidence from which to infer discrimination based on race.[273] The incident in *Range* stemmed from security personnel demanding that plaintiffs show a receipt after making their purchase.[274] Because the discriminatory action took place after the purchase, the district court held that "the alleged discrimination was not part of the 'contract' or sale, and [could not] be the basis for liability under § 1981."[275]

Similarly, in *Youngblood v. Hy-Vee Food Stores, Inc.*, after making a purchase, Carl Youngblood was confronted by a store security officer.[276] Youngblood's argument focused on this distinction: the officer took the purchased items and did not return them to him; therefore, the transaction had not ended.[277] The appeals court held that the distinction was of "little significance."[278] The "key" question was whether a contractual duty remained when Youngblood was confronted by security.[279] The court answered in the negative, holding that the transaction ended once Youngblood paid and received the beef jerky he purchased.[280] "[N]either party owed the other any duty under the retail-sale contract."[281]

Plaintiffs bringing claims under § 1981 must demonstrate more than a "possible loss of . . . contracting opportunities."[282] The possible loss of future opportunities is insufficient.[283] In *Hynes*, the alleged discriminatory treatment by Fergus, in the eyes of the court, "did not interfere with Hynes' patronage

271. *Id.* at 349.
272. *See, e.g.*, Range v. Wal-Mart Supercenter, No. 3:08 CV 09, 2008 WL 1701870, at *4 (N.D. Ind. Apr. 8, 2008); *see also* note 267 and accompanying text (citing to Rivers).
273. *Range*, 2008 WL 1701870, at *4.
274. *Id.*
275. *Id.*
276. 266 F.3d 851, 853 (8th Cir. 2001).
277. *Id.* at 854.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. McCrea v. Saks, Inc., No. CIV. A. 00-CV-1936, 2000 WL 1912726, at *3 (E.D. Pa. Dec. 22, 2000).
283. *Id.*

of the restaurant."[284] Although the hostile treatment was the cause of Hynes' decision to leave the cafe, it did not per se interfere with his ability to make a transaction protected by § 1981.[285]

Likewise, in *McCrea v. Saks, Inc.*, the plaintiff and her daughter left the defendant's retail store after their confrontation with the store's security personnel.[286] As previously mentioned, they did so after a salesman asked security to "get this 'n-----' out."[287] In dismissing McCrea's complaint, the district court did not credit her contention that the defendant knew she wanted to purchase a shirt and concluded that she failed to demonstrate that she would have tried to purchase merchandise had she not been harassed by the defendant.[288]

Prong 3(a) parallels the "similarly situated" test previously discussed relative to the Title II analysis.[289] It is based on "the understanding that 'the comparison will never involve precisely the same set of . . . [conduct] occurring over the same period of time and under the same sets of circumstances.'"[290]

In cases involving adequate comparative evidence, courts may choose not to follow the *Callwood* test; as was the case in *Williams v. Staples Inc*.[291] The plaintiff in *Williams* suspected he was discriminated against when he was not able to cash an out-of-state check at a Staples store, but his friend, a White woman, told him that her out-of-state check was accepted during a prior visit.[292] Two testers, one White and one Black, were sent by a civil rights agency to the store.[293] The White tester's out-of-state check was accepted for payment while the Black tester's check was not.[294] The court concluded that the results of the tests, as well as the experiences of the plaintiff and his friend, were sufficient evidence to allow the plaintiff to state a prima facie case of

284. Hynes v. Brasil LLC, Civil Action No. H-17-2419, 2018 WL 1726157, at *5 (S.D. Tex. Apr. 10, 2018).
285. *See id.*
286. *McCrea*, 2000 WL 1912726, at *1.
287. *Id.*
288. *Id.* at *3.
289. *See supra* text accompanying note 197.
290. Christian v. Wal-Mart Stores Inc., 252 F.3d 862, 871 (6th Cir. 2001) (quoting Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 707 (D. Md. 2000)).
291. 372 F.3d 662, 668 n.5 (4th Cir. 2004).
292. *Id.* at 665–66.
293. *Id.* at 666.
294. *Id.*

racial discrimination.[295]

Prong 3(b) of the *Callwood* test serves as an alternative to 3(a), "account[ing] for situations in the commercial establishment context in which a plaintiff cannot [readily] identify other similarly situated persons."[296] The "markedly hostile" prong allows a fact finder to infer "'discrimination sufficient to support a prima facie case' without" the plaintiff having to prove differential treatment of similarly situated individuals.[297] Factors used in the determination of markedly hostile conduct include behavior that "is (1) so profoundly contrary to the manifest financial interests of the merchant and/or her employees; (2) so far outside of widely-accepted business norms; and (3) so arbitrary on its face, that the conduct supports a rational inference of discrimination."[298]

The Court of Appeals for the Sixth Circuit adopted the test and found that Wal-Mart engaged in "markedly hostile" behavior toward Ms. Christian.[299] The plaintiff was an African American woman shopping with her White friend at Wal-Mart.[300] She was excessively offered assistance by an employee before being accused of shoplifting and having the police called on her.[301] Considering the evidence that plaintiff and her friend were the only two shoppers in the department, and that only plaintiff was using a shopping cart,[302] the court held that Christian "raised a genuine issue of fact as to whether she received services in a markedly hostile manner."[303]

Bonner v. S-Fer International, Inc. is another case in which there was "scant" evidence of differential treatment between a plaintiff and members of a non-protected class.[304] Examining clothes at defendant's boutique, plaintiff Tasha Bonner was treated rudely by employees before being told to leave.[305]

295. *Id.* at 668 n.5.

296. Christian v. Wal-Mart Stores Inc., 252 F.3d 862, 871 (6th Cir. 2001) (quoting Callwood v. Dave & Buster's, Inc., 98 F. Supp. 2d 694, 708 (D. Md. 2000)).

297. *See id.*

298. *Id.* (quoting *Callwood*, 98 F. Supp. 2d at 708).

299. *See id.* at 872, 879.

300. *Id.* at 864–65.

301. *Id.* at 865.

302. *Id.* at 878 ("The only factual difference between these two shoppers, i.e., that Christian had a shopping cart, reinforces the inference of discrimination, because a customer with a cart presumably appears more serious about shopping than a patron who walks around without a cart.").

303. *Id.*

304. 207 F. Supp. 3d 19, 24–25 (D.D.C. 2016).

305. *Id.* at 22.

She was given conflicting explanations for the demand to leave the store, first being told she lacked a membership to shop there, but then later being told it was because of her "attitude."[306] An employee called the police while another locked the door, leaving Bonner "'trapped' in the store for 'several minutes' before she was permitted to leave."[307]

The Federal District Court for the District of Columbia noted that plaintiffs in retail discrimination cases "often arise from limited, one-off interactions with service-industry establishments."[308] Bonner may have been the only customer in the store at the time of her encounter.[309] Not being able to compare herself to White customers "should not require dismissing a claim that otherwise rests on facts supporting a plausible inference of racial discrimination."[310] Therefore, the court concluded that the store personnel's behavior could be viewed as "markedly hostile" and denied the defendant's motion to dismiss plaintiff's claim.[311]

The treatment of § 1981 claims has varied among states.[312] In *Turner v. Wong*, the Superior Court of New Jersey, Appellate Division, employed a broad construction of § 1981.[313] Comparing it to New Jersey's public accommodations law, the court deemed § 1981 to be "similarly expansive," reaching "purely private" discriminatory acts.[314] The court also held § 1981 to cover discrimination occurring "both during and after the formation of a contract."[315] This was a crucial holding for the plaintiff, Delois Turner, as she experienced discrimination during and after her purchase of a donut and coffee from defendant's store.[316] When Turner complained about her donut

306. *Id.*
307. *Id.*
308. *Id.* at 25.
309. *Id.*
310. *Id.*
311. *Id.*
312. *See* Kendall Coffey, *Civil Rights 42 U.S.C. 1981: Keeping a Compromised Promise of Equality to Blacks*, 29 U. Fla. L. Rev. 318, 325–26 (1977) (laying out the varying treatments of the statute and explaining how the lower courts and the Supreme Court deal with the vague nature of the statute); *see also* Jeremy D. Bayless & Sophie F. Wang, *Racism on Aisle Two: A Survey of Federal and State Anti-Discrimination Public Accommodation Laws*, 2 Wm. & Mary Pol'y Rev. 288, 230 (2011) (finding that the outcome of a case will vary depending on which state the action is brought in, as evidenced by differing state public accommodation statutes).
313. 832 A.2d. 240, 356 (N.J. Super. Ct. App. Div. 2003).
314. *Id.*
315. *Id.*
316. *Id.* at 345–46.

being stale and asked for a new one, the defendant uttered racial epithets and ordered her to leave the store.[317] Because she was not able to complete her original transaction, the court allowed the plaintiff to overcome the summary judgment that was entered against her at the trial level.[318]

In contrast, the court in *Lopez v. Lowe's HIW, Inc.* granted the defendant's motion for summary judgment because the plaintiff was able to complete his purchases after an African American cashier refused to help him and diverted him to a different cashier based on his race.[319] Although the appellate court affirmed the district court's decision, it did not address whether § 1981 applies after the formation of a contract.[320] Instead, it highlighted Lopez's failure to present evidence of discriminatory intent.

The analysis used by courts in evaluating state public accommodations claims was identical to the methods used for § 1981 claims, tying their fate together.[321] The results of the assessment conducted in this part suggest that state public accommodations laws and § 1981 are more effective than Title II in providing relief for victims of consumer discrimination. In Part III, we deepen our analysis by tracking the outcomes of cases in which courts ruled on defendants' motions to dismiss and motions for summary judgment.

III. PLAINTIFF SUCCESS RATES IN SURVIVING MOTIONS TO DISMISS OR FOR SUMMARY JUDGMENT

Our research uncovered only eight cases in which consumers alleging discrimination based on race have advanced to the trial stage.[322] All of them involved § 1981 claims. As shown in Figure 1, three trials resulted in findings for the plaintiffs, one of which was reversed on appeal.[323] All of the trials that

317. *Id.* at 346.

318. *Id.* at 355–56, 359–60.

319. No. 2 CA-CV 2013-0104, 2014 WL 354252, *1 (Ariz. Ct. App. Jan. 30, 2014).

320. *Id.* at *1, *3.

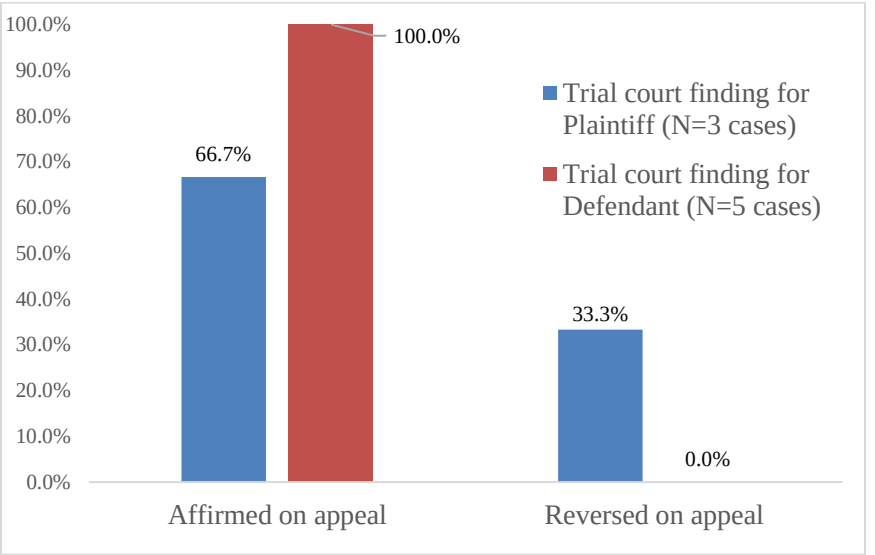
321. *See, e.g.*, Bonner v. S-Fer Int'l, Inc., 207 F. Supp. 3d 19, 24 (D.D.C. 2016); Drayton v. Toys "R" Us Inc., 645 F. Supp. 2d 149, 157–64 (S.D.N.Y. 2009).

322. *See infra* fig.1.

323. Wong v. Mangone, 450 F. App'x 27 (2d Cir. 2011), *cert. denied*, 568 U.S. 813 (2012) (jury verdict for plaintiff affirmed on appeal); Cerqueira v. Am. Airlines, Inc., 520 F.3d 1 (1st Cir. 2008) (bench trial verdict for plaintiff reversed on appeal for defendant); Hampton v. Dillard Dep't Stores, Inc., 247 F.3d 1091 (10th Cir. 2001) (jury verdict for plaintiff; defendant's judgment as a matter of law was denied by trial court and the denial was affirmed on appeal).

resulted in victories for the defendants were affirmed on appeal.[324]

FIGURE 1 | FEDERAL APPEALS COURT DECISIONS REVIEWING JURY AND BENCH TRIALS (§ 1981 CLAIMS)



Indeed, most cases end long before a trial takes place.[325] In this Part, we analyze state and federal court decisions to determine whether plaintiffs are more successful at defeating defendants' motions to dismiss or motions for summary judgment.

324. Aboeid v. Saudi Arabian Airlines Corp., 566 F. App'x 34 (2d Cir. 2014) (bench trial verdict for defendant affirmed on appeal); Bary v. Delta Airlines, Inc., 553 F. App'x 51 (2d Cir. 2014) (bench trial verdict for defendant affirmed on appeal); Odunukwe v. Bank of Am., 335 F. App'x 58 (1st Cir. 2009) (jury verdict for defendant affirmed on appeal); Lindsey v. SLT L.A., LLC, 447 F.3d 1138 (9th Cir. 2006) (jury verdict for defendant affirmed on appeal); Arguello v. Conoco, Inc., No. CIV.A. 397CV0638-H, 2001 WL 1442340 (N.D. Tex. Nov. 9, 2001), *aff'd*, 330 F.3d 355 (5th Cir. 2003), *reh'g en banc denied*, 71 F. App'x 443(5th Cir. 2003), *cert. denied*, 540 U.S. 1035 (2003) (jury verdict for plaintiff overturned by judgment as a matter of law for defendant; affirmed on appeal).

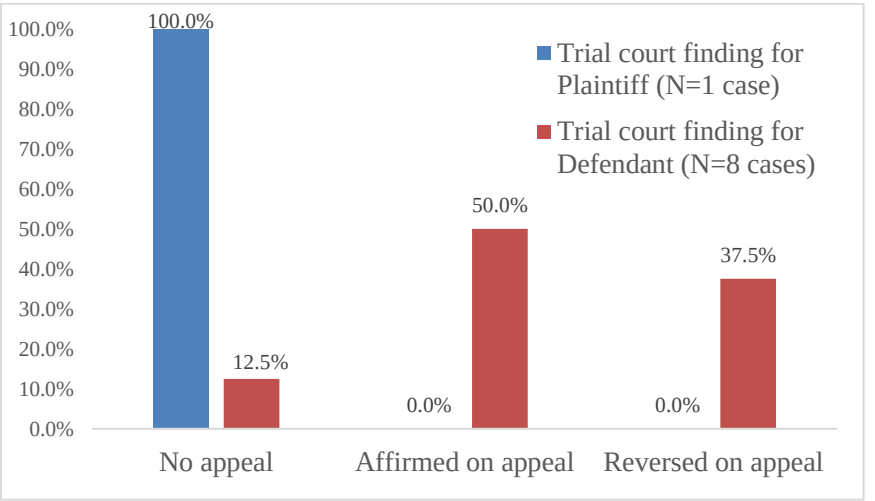
325. Deseriee A. Kennedy, *Consumer Discrimination: The Limitation of Federal Civil Rights Protection*, 66 Mo. L. Rev. 275, 330 (2001) (noting how courts narrowly construe § 1981, resulting in the dismissal of many consumer discrimination cases).

A. In State Court

1. Motions to Dismiss

A total of nine decisions from state courts involving motions to dismiss were studied.[326] Of those, only one was decided in favor of the plaintiff at the trial court level,[327] with the remaining eight cases finding for the defendant.[328] Figure 2 shows that half of the dismissals were affirmed and approximately one-third (37.5%) were reversed.

FIGURE 2 | STATE COURT DECISIONS ON DEFENDANTS' MOTIONS TO DISMISS



326. *See infra* note 322.

327. Chestnut Hill Coll. v. Pa. Human Relations Comm'n, 158 A.3d 251 (Pa. Cmmw. Ct. 2017).

328. Winchell v. English, 133 Cal. Rptr. 20 (Ct. App. 1976) (reversed trial court); Reed v. Hollywood Pro. Sch., 338 P.2d 633 (Cal. App. Dep't Super. Ct. 1959) (affirmed trial court); Coleman v. Middlestaff, 305 P.2d 1020 (Cal. App. Dep't Super. Ct. 1957) (affirmed trial court); Lambert v. Mandel's of Cal., 319 P.2d 469 (Cal. App. Dep't Super. Ct. 1957) (reversed trial court); McGill v. 830 S. Mich. Hotel, 216 N.E.2d 273 (Ill. App. Ct. 1966) (reversed trial court); Kiray v. Hyvee, Inc., 716 N.W.2d 193 (Iowa Ct. App. 2006) (affirmed trial court); Lopez v. Howth, Inc., 15 Mass. L. Rptr. 386 (Mass. Super. Ct. 2002), *aff'd*, 806 N.E.2d 128 (Mass. App. Ct. 2004) (affirmed trial court); Phila. Elec. Co. v. Pa. Human Relations Comm'n, 290 A.2d 699 (Pa. Cmmw. Ct. 1972) (at trial level, reversed interlocutory order of Human Relations Commission that favored plaintiff).

When reviewing a motion to dismiss, a court must accept as true the factual allegations set forth in the complaint and draw all reasonable inferences in favor of the plaintiff.[329] In each case where the plaintiff defeated the defendant's motion to dismiss, the court employed a broad reading of the statute at hand.

In *Chestnut Hill College v. Pennsylvania Human Relations Commission*, the court held that the Pennsylvania Human Relations Act does not absolutely exclude Catholic colleges and universities from its coverage.[330] Defendant was a Catholic college accused of unfairly expelling an African American student.[331] The court held that the college failed to cite any authority to establish it was equivalent to private, parochial primary and secondary schools.[332] The court decided that it would have been premature to grant defendant's motion to dismiss at this stage as the record remained significantly undeveloped.[333]

Some courts have considered the function of the place alleged to be a public accommodation and analogized it to those specifically enumerated by the statute. In *Lambert v. Mandel's of California*, the location at issue was a retail shoe store.[334] While not specifically enumerated by section 51 of the California Civil Code, the court held it to be similar in function to those that were because it was "open to the public generally for the purchase of goods."[335] Accordingly, it too was deemed to be a place of public accommodation and covered by the statute.[336]

Two courts relied on legislative intent in rejecting defendants' motions to dismiss White plaintiffs' claims of discrimination based on their association with Blacks. The courts in *McGill v. 830 S. Michigan Hotel*[337] and *Winchell v. English*[338] both pointed to the intent of the legislature to support a favorable interpretation for the plaintiffs.[339] In *McGill*, the Appellate Court of Illinois

329. Lopez, 15 Mass. L. Rptr. at 386.
330. 158 A.3d at 260–61.
331. *Id.* at 254.
332. *Id.* at 260.
333. *Id.* at 261.
334. 319 P.2d 469 (Cal. App. Dep't Super. Ct. 1957).
335. *Id.* at 470.
336. *Id.*
337. 216 N.E.2d 273, 277 (Ill. App. Ct. 1966).
338. 133 Cal. Rptr. 20 (Ct. App. 1976).
339. *Winchell*, 133 Cal. Rptr. at 21; *McGill*, 216 N.E.2d at 277.

cited the "obvious intention" of the legislature in extending the scope of the Illinois Civil Rights Act, a penal statute, to cover the instance at issue where the White plaintiff received discriminatory rent increases due to her having African American guests.[340] In *Winchell*, the Court of Appeals cited the "legislative purpose" of California Code section 51 to cover the plaintiffs, White individuals who were discriminated against on account of their association with African Americans.[341] Citing *McGill*, the *Winchell* court also broadly construed the "whoever makes any discrimination . . . on account of . . . color" language of section 51 to extend to discrimination based on association with individuals of color.[342]

In contrast, a trial court case, *Philadelphia Electric Co. v. Pennsylvania Human Relations Commission*, is particularly notable for the narrow reading of the state statute employed by the court.[343] In granting defendant's motion to dismiss, it construed an electrical company's offices to be places of public accommodation, but not the locations at which the services were received.[344] The plaintiffs in the case were Black customers who alleged discriminatory practices, such as stringent rules relating to security deposits and quicker termination of services for delinquencies that did not as easily result in termination in non-minority communities.[345] The court held that the plaintiffs' neighborhoods could not be considered places of public accommodation as they were not "physical location[s] to which the general public is invited to do business."[346] In the court's view, ruling for plaintiffs would have had serious policy implications because the state human rights commission would have jurisdiction over virtually any business transaction in the state.[347]

Like the trial level cases, victories for defendants at the appellate level rested on the narrow construction of the statute at issue. *Kiray v. Hyvee, Inc.* presented an instance where the plaintiff brought suit after being suspected of theft and searched by the defendant's employees upon setting off the security

340. *McGill*, 216 N.E.2d at 277.
341. *Winchell*, 133 Cal. Rptr. at 21–22. The White plaintiffs alleged discrimination by defendant mobile home park owners for subleasing their space to Black tenants. *Id.* at 21.
342. *Id.* at 21.
343. 290 A.2d 699 (Pa. Commw. Ct. 1972).
344. *Id.* at 703.
345. *Id.* at 700.
346. *Id.* at 703.
347. *Id.*

system as she was leaving.[348] The Iowa Court of Appeals dismissed her claim for failing to prove the similarly-situated prong of the *McDonnell Douglas* framework for proving discrimination.[349] Even taking into account the more lenient *Callwood* test, which allows for the establishment of a prima facie case in the absence of a similarly-situated comparator, the plaintiff's claim failed as she could not prove the defendant's actions were markedly hostile.[350] The court characterized her allegations of the defendant's employees referencing her race as vague and insufficient.[351]

2. Motions for Summary Judgment

We examined a total of seventeen state court cases that were decided at the summary judgment stage.[352] As with motions to dismiss, the results were much more favorable to defendants, as can be seen in the chart below. In fact, Figure 3 shows that only three plaintiffs survived the motion at the trial level and one of them was reversed on appeal.[353] Plaintiffs fared a bit better on appeal, where one-third of the trial court decisions granting defendants' motions for summary judgment were reversed.[354] The state and federal law claims are counted separately in the three cases where both claims were brought, because the state appeals courts affirmed the trial court decisions on

348. 716 N.W.2d 193, 195–96 (Iowa Ct. App. 2006).

349. *Id.* at 204.

350. *Id.* at 205.

351. *See id.*

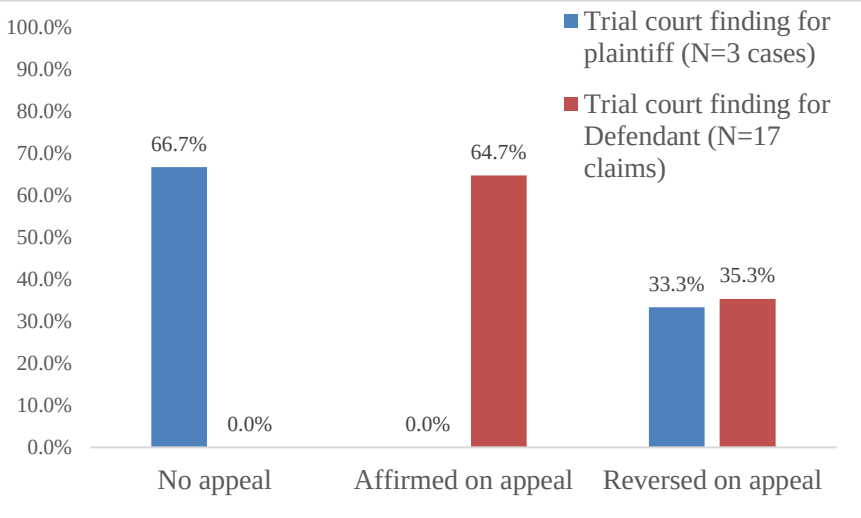
352. *See infra* fig.3.

353. Rice v. Sioux City Mem'l Park Cemetery, 60 N.W.2d 110 (Iowa 1953) (Supreme Court vacated opinion on appeal); Webster v. TJX Cos., 19 Mass. L. Rptr. 476 (Mass. Super. Ct. 2005) (trial level; no subsequent history); Hudgins v. Higginbotham, 82 Va. Cir. 152 (2011) (trial level; no subsequent history).

354. Lopez v. Lowe's HIW, Inc., No. 2 CA-CV 2013-0104, 2014 WL 354252 (Ariz. Ct. App. Jan. 30, 2014) (affirmed trial court); Colquitt v. Homer Mem'l Hosp., 771 So. 2d 818 (La. Ct. App. 2000) (affirmed trial court); McKnight v. Don Massey Cadillac, Inc., No. 218952, 2001 WL 721384 (Mich. Ct. App. Mar. 2, 2001) (affirmed trial court); Ledsinger v. Burmeister, 318 N.W.2d 558, 562 (Mich. Ct. App. 1982) (reversed trial court); Kor v. Mall of Am. Cos., No. C4-99-1701, 2000 Minn. App. LEXIS 433 (Ct. App. May 9, 2000) (affirmed trial court); Wayne v. MasterShield, Inc., 597 N.W.2d 917 (Minn. Ct. App. 1999) (affirmed trial court); Davis v. Torres, No. L-5972-08, 2012 WL 1033287 (N.J. Super. Ct. App. Div. Mar. 29, 2012) (affirmed trial court); Turner v. Wong, 832 A.2d 340 (N.J. Super. Ct. App. Div. 2003) (reversed trial court); Oklahoma Human Rights Comm'n v. Hotie, Inc., 505 P.2d 1320 (Okla. 1973) (reversed trial court); Parsons v. Henry, 672 P.2d 717 (Or. Ct. App. 1983) (affirmed trial court); Phillips v. Interstate Hotels Corp. No. L07, 974 S.W.2d 680 (Tenn. 1998) (affirmed trial court).

the federal claims but reversed them on the state law claims.[355]

FIGURE 3 | STATE COURT DECISIONS ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT



Summary judgment is properly granted where, viewing the evidence in the light most favorable to the non-moving party, the record indicates that there is "no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."[356]

In three cases, the court found that a defendant's establishment was not a place of public accommodation. As did the court in *Philadelphia Electric* discussed above, the court in *Arnett v. Domino's Pizza I, L.L.C.* based its decision on a narrow reading of Title II to confine discrimination in public accommodations to that which occurs "on the premises" of the establishment,

355. Clarke v. Kmart Corp., 495 N.W.2d 820 (Mich. Ct. App. 1992) (affirmed trial court on plaintiff's federal public accommodations law claim; reversed trial court on state civil rights act claim); Arnett v. Domino's Pizza I, L.L.C., 124 S.W.3d 529 (Tenn. Ct. App. 2003) (affirmed trial court on federal claim (TITLE II); reversed on state law claim); Demelash v. Ross Stores, Inc., 20 P.3d 447 (Wash. Ct. App. 2001) (affirmed trial court on federal § 1981 claim; reversed on state law claim).

356. Moore v. City of Creedmoor, 481 S.E.2d 14, 20 (N.C. 1997) (citing N.C.G.S. § 1A-1, Rule 56(c) (1990)).

and not elsewhere, such as the homes of the customers which the establishment serves.[357] It affirmed Domino's motion for summary judgment on the Title II claim, but reversed the lower court's grant for summary judgment on plaintiff's Tennessee Human Rights Act claim.[358] Citing legislative intent to prohibit discrimination, the court held that Domino's was a place of public accommodation under the state law by virtue of its being "an establishment which supplies goods and services to the general public."[359]

Plaintiffs' failure to prove discriminatory intent allowed defendants to prevail at the summary judgment stage. Allegations of poor service, or a refusal of service, are deemed insufficient in the absence of evidence of specific racial animus.[360] Even the phrase "you people" is inadequate evidence for a plaintiff to survive a motion for summary judgment if there is no overt reference to race.[361] Moreover, a claim that defendant overtly referred to her race may still fail when plaintiff brought suit against an employer of the persons who uttered the racial slurs.[362]

Overt references to Harold and Shirley Ledsinger's race enabled their claim to survive summary judgment when they were uttered as Harold was being kicked out of an auto parts store.[363] The plaintiffs brought suit after Harold was subjected to racial epithets while trying to complete a purchase at the defendant's establishment.[364] The suit was dismissed through summary judgment at the trial level.[365] However, the Michigan Court of Appeals

357. 124 S.W.3d at 529. The case consisted of ninety-two plaintiffs who sued Domino's for not delivering food to African American customers in a neighborhood of Memphis. *Id.* at 531.

358. *Id.* at 536–37, 539.

359. *Id.* at 539.

360. *See* Lopez v. Lowe's HIW, Inc., No. 2 CA-CV 2013-0104, 2014 WL 354252, at *4 (Ariz. Ct. App. Jan. 30, 2014) (unreported); McKnight v. Don Massey Cadillac, Inc., No. 218952, 2001 WL 721384, at *3, *6 (Mich. Ct. App. Mar. 2, 2001) (unreported); Colquitt v. Homer Mem'l Hosp., 771 So. 2d 818, 820 (App. Ct. La. 2000).

361. *See McKnight*, 2001 WL 721384 at *4.

362. *See* Davis v. Torres, No. A-1951-10T4, 2012 WL 1033287, at *4–5 (N.J. Super. Ct. App. Div. Mar. 29, 2012) (unreported).

363. Ledsinger v. Burmeister, 318 N.W.2d 558, 562 (Mich. Ct. App. 1982); *see also* Turner v. Wong, 832 A.2d 340, 255–56 (N.J. Super. Ct. App. Div. 2003) (demonstrating the state court's treatment of summary judgment motion in a discrimination case where a store customer left before completing the desired transaction after being called a racial slur).

364. *Ledsinger*, 318 N.W.2d at 560 ("It is alleged that in front of and within the hearing of third parties, defendant called Harold Ledsinger a 'n-----' and told him that he should get his 'black ass' out of the store. In addition, it is alleged that defendant stated that he 'did not want or need n----- business.'").

365. *Id.* at 560.

reversed summary judgment on plaintiffs' claim made under the state's Elliot-Larsen Civil Rights Act.[366] The key factor in the court's reversal was the presence of overt racial epithets, leading to a reasonable inference that Harold Ledsinger was denied service on account of his race.[367]

In another Michigan case, *Clarke v. Kmart Corp.*, the plaintiff was able to survive summary judgment because the Court of Appeals held that an outright denial of access to goods and services was not required to establish a violation of the state's civil rights act.[368]

In the cases involving § 1981 claims, the stage at which the contested transaction occurred was a factor that often led to a favorable result for defendants. Courts granted summary judgment where the plaintiff had not yet initiated the transaction, such as where the plaintiff was merely looking at goods, or in situations where the transaction was already complete.[369]

B. In Federal Court

1. Motions to Dismiss

We analyzed seventeen federal appellate court decisions involving motions to dismiss. At the trial court level, every decision resulted in a dismissal of plaintiffs' claims. On appeal, fourteen of these decisions were affirmed,[370] and only three decisions were reversed in favor of plaintiff.[371] The three reversals involved § 1981 claims. The dismissals of plaintiffs' Title II claims were all affirmed on appeal.

366. *Id.* at 563, 565.

367. *Id.*

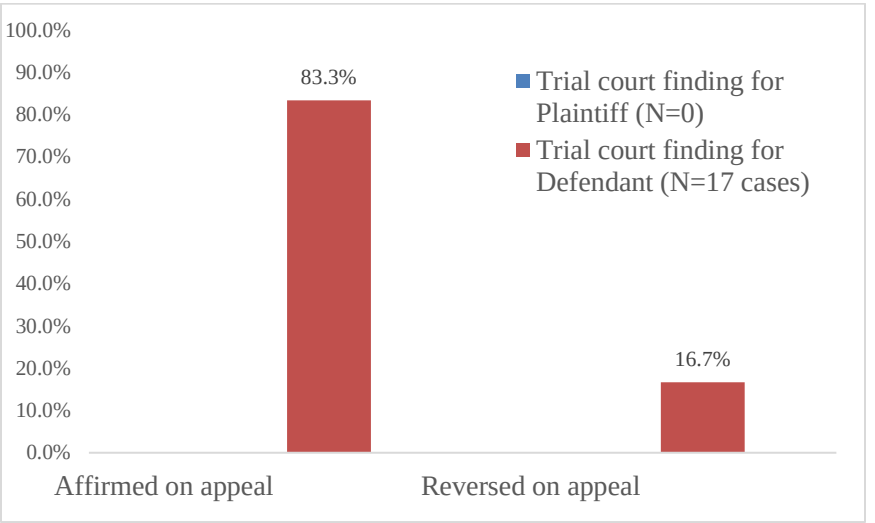
368. 495 N.W.2d 820, 822 (Mich. Ct. App. 1992).

369. *See* Demelash v. Ross Stores, Inc., 20 P.3d 447, 457 (Wash. Ct. App. 2001).

370. Shin v. Am. Airline, Inc., 726 F. App'x 89 (2d Cir. 2018) (mem.); Taylor v. Royal Ahold NV, 694 F. App'x 931 (4th Cir. 2017); Sikhs for Justice, Inc. v. Facebook, Inc., 697 F. App'x 526 (9th Cir. 2017); Strober v. Payless Rental Car, 701 F. App'x 911 (11th Cir. 2017); Rodgers v. Curators of Univ. of Mo. Sys., 634 F. App'x 598 (8th Cir. 2015) (per curiam); Hammond v. Kmart Corp., 733 F.3d 360 (5th Cir. 2013); Lopez v. Target Corp., 676 F.3d 1230 (11th Cir. 2012); Bishop v. Henry Modell & Co., 422 F. App'x 3 (2d Cir. 2011); Dunaway v. Cowboys Nightlife, Inc., 436 F. App'x 386 (5th Cir. 2011); Gregory v. Dillard's, Inc., 565 F.3d 464 (8th Cir. 2009); Billelo v. Kum & Go, LLC, 374 F.3d 656 (8th Cir. 2004); Garret v. Tandy Corp., 295 F.3d 94 (1st Cir. 2002); Stearnes v. Baur's Opera House, Inc., 3 F.3d 1142 (7th Cir. 1993); Bonner v. S-Fer Int'l, Inc., 207 F. Supp. 3d 19 (D.D.C. 2016).

371. El-Hallani v. Huntington Nat'l Bank, 623 F. App'x 730 (6th Cir. 2015); Barfield v. Commerce Bank, N.A., 484 F.3d 1276 (10th Cir. 2007); Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285 (5th Cir. 2004).

FIGURE 4 | FEDERAL COURT DECISIONS ON DEFENDANTS' MOTIONS TO DISMISS



A common issue among the Title II cases was whether the plaintiff had exhausted their administrative remedies before heading to court. Where a state or local law prohibits the act or practice at issue, a suit pursuant to Title II may not be brought before the expiration of thirty days after delivering notice of the claim to the state or local authority.[372] Courts tend to be strict in their enforcement of this prerequisite. For example, in *Strober v. Payless Rental Car*, dismissal was affirmed against a pro se plaintiff who failed to exhaust her state remedies before filing suit in federal court.[373]

Another case from the Eighth Circuit, *Billelo v. Kum & Go, L.L.C.*, involved a plaintiff who, in the words of the court, "apparently attempted to comply with the procedural requirements of 42 U.S.C. § 2000a-3(c)."[374] Billelo filed a written notice complaining about a discriminatory practice to

372. 42 U.S.C. § 2000a-3(c) (2010).
373. 701 Fed. Appx. at 913 n.3 .
374. Billelo v. Kum & Go, LLC, 374 F.3d 656, 659 (8th Cir. 2004).

the Human Relations Director of the City of Omaha, Nebraska.[375] The appeals court nonetheless affirmed the dismissal based on plaintiff's failure to exhaust administrative remedies.[376] The court cited state law expressly declaring that the Nebraska Equal Opportunity Commission administered public accommodations laws.[377] Accordingly, Billelo's filing notice to the Omaha Human Relations Director, while an attempt to comply with the requirements of 2000a-3(c), was in error and fatal to his Title II claim.[378]

An important argument in defeating § 1981 claims involves the question of a defendant's interference with a plaintiff's ability to contract. *Garrett v. Tandy* is a case where the plaintiff was accused of the theft of a laptop after he purchased goods at a RadioShack store.[379] The manager who called the police stated that all customers who were in the store during the same timeframe as the plaintiff were suspected, but the court held this statement to be "patently false."[380]

Garrett advanced two theories as to why RadioShack was liable under § 1981, neither of which were persuasive to the court because he was able to complete his purchase.[381] The first theory was that being surveilled and accompanied by employees the entire time he was in the store interfered with his ability to make desired purchases.[382] The court disagreed, noting that the employees who accompanied Garrett were helpful and courteous; they facilitated Garrett's purchases rather than impeding them.[383] The court also noted that stores have legitimate non-discriminatory reasons for escorting customers: to prevent shoplifting and vandalism of store property.[384] Garrett's second theory was that the police deprived him of the enjoyment of his purchases by intruding upon his household in search of the laptop.[385] The court found this contention to be a closer call, but nonetheless rejected it as well.[386] It held that Garrett's transaction with RadioShack was complete by

375. *Id.*
376. *Id.* at 659, 661.
377. *Id.* at 658–59.
378. *Id.* at 659.
379. 295 F.3d 94, 96 (1st Cir. 2002).
380. *Id.* at 97.
381. *Id.* at 101.
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.* at 101–02.

the time he had returned home because it was consummated when he successfully made his purchase while still at the store.[387]

Hammond v. Kmart Corp. involved a plaintiff who complained of discriminatory behavior by a Kmart employee "while she was placing items on hold in a layaway transaction."[388] After giving the clerk her ID, the clerk insinuated that Hammond was a thief and referred to the ID as a "liquor ID."[389] The clerk further claimed that she used to live near plaintiff's neighborhood, but was forced to move due to incidents with "porch monkeys" in the area.[390] Citing *Garrett*, the court affirmed the dismissal in favor of defendant, noting that Hammond did not allege that the actual transaction itself was thwarted.[391] Given that Hammond's transaction involved making payments in installments, she had multiple opportunities to show that she was impeded from making payments, but failed to do so.[392]

As mentioned, the dismissal of plaintiffs' claims was reversed in only three cases, two of which we describe here. *Causey v. Sewell Cadillac-Chevrolet Inc.* involved a plaintiff who endured racial epithets and forcible removal from a dealership after getting into an argument with employees who refused to perform repairs on his vehicle.[393] The district court granted defendant's motion to dismiss, holding that Causey could not prove he was the victim of discriminatory service.[394] The dealership claimed it wanted to avoid working on Causey's vehicle because the car was covered by the warranty.[395]

The court of appeals reversed the dismissal, finding that the use of direct epithets by an employee of authority (the manager) and outright refusal of service violated § 1981.[396] In so holding, the court specifically pointed to the "liberal pleading standard" put forth by the Supreme Court in which courts must "view[] the complaint as a whole, rather than any one statement in

387. *Id.* at 101.
388. 733 F.3d 360, 361 (1st Cir. 2013).
389. *Id.*
390. *Id.*
391. *Id.* at 365.
392. *Id.* at 364–65.
393. 394 F.3d 285 (5th Cir. 2004).
394. *Id.* at 288.
395. *Id.* at 287–88.
396. *Id.* at 289–91.

isolation."[397]

In *El-Hallani v. Huntington National Bank*, two Arab American plaintiffs brought suit after the defendant bank closed both of their bank accounts without warning.[398] An employee of the bank testified that the bank's quarterly lists of accounts to close "contained large numbers of accounts held by people . . . of Middle Eastern descent."[399] The employee further testified that the bank did not pressure employees to close similar accounts held by people who were not of Middle Eastern descent.[400]

The trial court dismissed the case, holding that plaintiffs could only demonstrate that discrimination was possible, not plausible, and that plaintiffs failed to identify any similarly-situated members of a non-protected class who were treated differently.[401] The trial court premised the plausibility standard on the precedent set forth by the *Twombly* and *Iqbal* cases.[402] Under the combined standard, a plaintiff is required "to have a greater knowledge . . . of factual details in order to draft a 'plausible complaint.'"[403]

Reversing the dismissal, the Court of Appeals for the Sixth Circuit held that the trial court interpreted the *Twombly* and *Iqbal* standard too narrowly.[404] Plaintiffs need only allege enough factual content to allow a court to draw a reasonable inference of discrimination informed by "judicial experience and common sense."[405] Although the plaintiffs did not put forth highly specific evidence, it was sufficient to meet the low bar established under precedent even without proving the different treatment of similarly-situated individuals.[406]

397. *Id.* at 289.
398. 623 F. App'x 730, 731 (6th Cir. 2015).
399. *Id.* at 732.
400. *Id.*
401. *Id.* at 732–33.
402. *Id.* (citing Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)).
403. El-Hallani v. Huntington Nat. Bank, No. 13-cv-12983, 2014 WL 988957, at *1, *5 (E.D. Mich. Mar. 13, 2014), *rev'd* 623 Fed. App'x 730 (6th Cir. 2015).
404. *El-Hallani*, 623 F. App'x at 739.
405. *Id.* at 734.
406. *Id.* at 739.

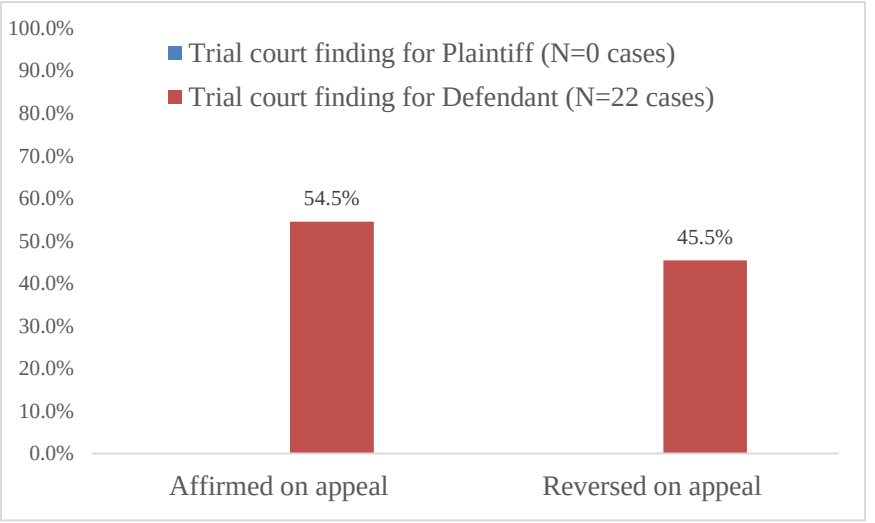
2. Motions for Summary Judgment

Next, we examined the twenty-nine appellate decisions involving motions for summary judgment, all of which initially favored the defendants. Of those, almost two-thirds were affirmed on appeal (62.1%).

Again, plaintiffs' § 1981 claims fared better than their Title II claims. Of the twenty-two cases where § 1981 claims were brought, more than half resulted in reversals in favor of the plaintiffs on appeal (54.5%).[407] Figure 5 shows the breakdown of federal appellate court decisions involving § 1981 claims.

407. Menchu v. Legacy Health, 669 F. App'x 361 (9th Cir. 2016) (affirmed for defendant); Dunaway v. Cowboys Nightlife, Inc., 436 F. App'x 386 (5th Cir. 2011) (reversed for plaintiff); Withers v. Dick's Sporting Goods, Inc., 636 F.3d 958 (8th Cir. 2011) (affirmed for defendant); Jones v. J.C. Penney's Dep't Stores Inc., 317 Fed. App'x 71 (2nd Cir. 2009) (affirmed for defendant); Keck v. Graham Hotel Sys., Inc., 566 F.3d 634 (6th Cir. 2009) (reversed for plaintiff); Green v. Dillard's, Inc., 483 F.3d 533 (8th Cir. 2007) (reversed for plaintiff); Kinnon v. Arcoub, Gopman & Assocs., 490 F.3d 886 (11th Cir. 2007) (affirmed for defendant); Banks v. Bank of Am. N.A., 505 F. Supp. 2d 159 (D.D.C. 2007) (reversed for plaintiff); Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006) (reversed for plaintiff); Lindsey v. SLT L.A., LLC, 447 F.3d 1138 (9th Cir. 2006) (reversed for plaintiff; remanded to trial where jury found for defendant on the § 1981 claim, which was then affirmed on appeal); Williams v. Staples, Inc., 372 F.3d 662 (4th Cir. 2004) (reversed for plaintiff); Chapman v. Higbee Co., 319 F.3d 825 (6th Cir. 2003) (reversed for plaintiff); Lizardo v. Denny's, Inc., 270 F.3d 94 (2nd Cir. 2001) (affirmed for defendant); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862 (6th Cir. 2001) (reversed for plaintiff); Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851 (8th Cir. 2001) (affirmed for defendant); Singh v. Walmart Stores, 225 F.3d 650 (3d Cir. 2000) (affirmed for defendant); Bagley v. Ameritech Corp., 220 F.3d 518 (7th Cir. 2000) (affirmed for defendant); Vaughn v. N.S.B.F. Mgmt., Inc., 114 F.3rd 1190 (6th Cir. 1997) (affirmed for defendant); Morris v. Office Max, Inc., 89 F.3d 411 (7th Cir. 1996) (affirmed for defendant); Alexis v. McDonald's Rests. of Mass., Inc., 67 F.3d 341 (1st Cir. 1995) (affirmed for defendant); Perry v. Command Performance, 945 F.2d 395 (3d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992) (reversed for plaintiff); Watson v. Fraternal Order of Eagles, 915 F.2d 235 (6th Cir. 1990) (reversed for plaintiff).

FIGURE 5 | FEDERAL APPEALS COURT DECISIONS ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (§ 1981 CLAIMS)

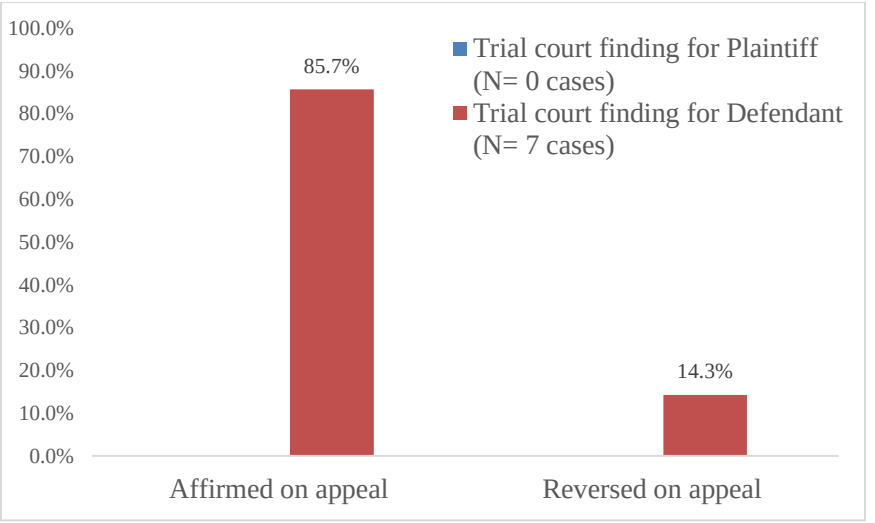


In contrast with the mixed outcomes for § 1981 claims, only one of the decisions regarding Title II claims was reversed on appeal in favor of the plaintiff,[408] while six were affirmed.[409]

408. Dunaway, 436 F. App'x at 386 (reversed for plaintiff).

409. Menchu, 669 F. App'x at 361 (affirmed for defendant); Daugherty v. The Heights, 477 F. App'x 407 (8th Cir., 2012) (affirmed for defendant); Fahim v. Marriott Hotel Servs., Inc., 551 F.3d 344, 349 (5th Cir. 2008) (affirmed for defendant); Denny v. Elizabeth Arden Salons, Inc., 456 F.3d 427 (4th Cir. 2006) (affirmed for defendant); Lizardo, 270 F.3d at 94 (affirmed for defendant); Vaughn,114 F.3rd at 1190 (affirmed for defendant).

FIGURE 6 | FEDERAL APPEALS COURT DECISIONS ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (TITLE II CLAIMS)



The most common reason cited by courts in affirming summary judgment was that the defendant had a legitimate non-discriminatory reason for their behavior.[410] One such reason is when the defendant suspected the plaintiff of theft. *Jones v. J.C. Penney's Department Stores Inc*. involved a plaintiff who brought suit after being arrested for suspected shoplifting from defendant's store.[411] The appeals court affirmed the grant of defendant's motion for summary judgment because Jones could not present any direct evidence of racial animus to rebut defendant's proffered interest in preventing shoplifting.[412] Jones did put forth evidence that a manager of defendant's store stated a seemingly inconsistent reason ("among other reasons"): that Jones, an African American woman, was not in an age-appropriate department—the women's clothing department.[413] However, the court held

410. *See, e.g.*, Jones, 317 F. App'x at 71; Vaughn v. N.S.B.F. Mgmt., Inc., No. 95-CV-70282, 1996 WL 426445 (E.D. Mich. Apr. 01, 1996).
411. *Jones*, 317 F. App'x at 75.
412. *See id.* at 74–75.
413. *Id.* at 72, 74.

that a mere scintilla of evidence, such as this statement, was not enough to preclude summary judgment in favor of the defendant.[414]

Vaughn v. N.S.B.F. Management presents a case where plaintiffs sued under § 1981 after security officers asked them to leave a mall.[415] The district court found "no question that the plaintiffs were denied access to the mall," but granted summary judgment to the defendants after agreeing they had a non-discriminatory reason for denying them such access.[416] Similar to the previous case, the plaintiffs tried to demonstrate that there were inconsistencies in the testimony of the mall officers who provided differing standards for when they would ask groups to disperse.[417] The plaintiffs additionally employed a group of seven White males, a similar number as plaintiffs' group, to visit the mall and test whether they would be asked by officers to disperse.[418]

In granting summary judgment for defendants, the district court noted that mall policy allowed for flexibility in officer discretion in asking crowds to disperse and that the White testers did not visit the mall under the same conditions as the plaintiff group.[419] The Sixth Circuit Court of Appeals agreed with the district court's reasoning and affirmed the decision.[420]

In cases where racial epithets were used, plaintiffs tended to be more successful. An example is *Green v. Dillard's, Inc.* involving an African American couple who were subjected to hostile treatment.[421] Linda McCrary, a Dillard's employee, called plaintiffs "n-----s" as they attempted to purchase a wristwatch and other merchandise from a Dillard's store.[422] The trial court granted Dillard's motion for summary judgment holding that plaintiffs were able to complete their purchases before being confronted with the racial

414. *Id.*

415. 1996 WL 426445, at *1.

416. *Id.* at *3, *7.

417. *Id.* at *3–5. One defendant said she would break up groups only if they interfered with traffic flow. *Id.* at *4. Another said he would disperse groups of over four people. *Id.* at *4. "Some officers enforced the group prohibition against families [while] others [would] not." *Id.* at *4.

418. *Id.* at *7.

419. *Id.* at *3, *7 ("The testers were sent to the mall on a week day [sic], December 22, 1994, at 10:00 a.m. . . . [T]he incident at issue occurred around 5:00 p.m. on a Saturday when the mall was crowded.").

420. Vaughn v. N.S.B.F. Mgmt., Inc., 114 F.3d 1190 (6th Cir. 1997).

421. Green v. Dillard's, Inc., 483 F.3d 533 (8th Cir. 2007).

422. *Id.* at 535.

slurs.[423] According to the court, plaintiffs no longer had any contractual interest at stake.[424] In addition, McCrary's refusal to help plaintiffs did not constitute a § 1981 violation because she did not prevent other Dillard's employees from assisting plaintiffs.[425]

The Court of Appeals for the Eighth Circuit reversed the district court's decision.[426] Holding that § 1981 protected the plaintiffs' right to shop on the same terms as White customers, the court concluded that the evidence at hand, the use of slurs, refusal to help them, and following them, constituted a series of actions which a trier of fact could determine thwarted the plaintiffs' attempt to purchase the wristwatch.[427] The use of slurs constituted direct evidence of discriminatory intent, allowing plaintiff to establish a prima facie case.[428]

In *Watson v. Fraternal Order of Eagles*, the appeals court reversed the district court's grant of summary judgment to defendant.[429] The incident in the case concerned a mother and son who visited a private club, The Order of Eagles Local 555, for a party.[430] They were the only two Black guests present and were subjected to hostile treatment and racist remarks, despite having been invited by the guests of honor.[431] The appeals court held that because no White guests were turned away, trying to turn away the Watsons constituted a violation of their ability to contract on the same terms as similarly situated members of a non-protected class, thereby contravening § 1981.[432]

Likewise, in *Denny v. Elizabeth Arden Salons, Inc.*, the defendants made overt statements about the plaintiff's race.[433] The fact that plaintiff was refused the ability to purchase a hair coloring appointment for her mother constituted a genuine issue of material fact as to whether the refusal was on race-based grounds.[434] That, the court of appeals held, is all § 1981

423. *Id.* at 537.
424. *Id.*
425. Green v. Dillard's, Inc., 422 F. Supp. 2d 1047, 1056 (W.D. Mo. 2006).
426. *Green*, 483 F.3d 541.
427. *Id.* at 535, 539.
428. *Id.* at 540.
429. 915 F.2d 235, 237 (6th Cir. 1990).
430. *Id.* at 237–38.
431. *Id.* at 238–39.
432. *Id.* at 243. Plaintiffs' Title II claim was dismissed on summary judgment because Local 555 qualified as a private establishment, exempting it from Title II. *Id.* at 237.
433. 456 F.3d 427, 435 (4th Cir. 2006).
434. *Id.* at 436.

requires.[435] The court reversed the district court decision finding in favor of plaintiff's § 1981 claim.[436]

IV. SUGGESTIONS FOR ADDRESSING CONSUMER DISCRIMINATION IN THE PLATFORM ECONOMY

Examining cases involving discrimination in places of public accommodations reveals the weaknesses in our current laws as well as potential arguments to be made against defendant online platforms.[437] Title II's narrow list of places of public accommodations provides an opening through which defendants can escape being covered by the statute.[438] As seen in *Denny v. Elizabeth Arden Salons*, common establishments such as beauty salons are likely to be excluded by courts that read the statute narrowly.[439] Today, as businesses' use of new technologies floods the marketplace, the antiquated listing of places of public accommodation is becoming increasingly out of touch. This poses problems for plaintiffs who purchase goods and services from online platforms that did not exist when the statute was written. Nearing its sixtieth birthday, Title II is in need of a makeover.

The focus must be on the functional aspects of the covered entities rather than their mere technical features in defining places of public accommodations. For example, in *Philadelphia Electric Co.*[440] and *Arnett v. Domino's Pizza I, LLC*,[441] state courts interpreted both the state and federal laws as limiting places of public accommodation to physical brick and mortar facilities. State and federal laws now must account for the fact that discrimination is just as likely to occur in the car of a ride-sharing driver or the home of an Airbnb host as at corporate headquarters. Consumer discrimination is invidious regardless of where it happens. As such, we propose that the law be amended or reinforced by regulations that broaden the definition of places of public accommodation to include the locations where

435. *Id.*
436. *Id.* at 437.
437. *See generally* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 Geo. L.J. 1271 (2017) (arguing public accommodation laws need to change to address present challenges brought by the platform economy).
438. 42 U.S.C. § 2000a(b) (2012).
439. *Denny*, 456 F.3d at 434.
440. 290 A.2d 699, 703 (Pa. Commw. Ct. 1972).
441. 124 S.W.3d 529, 537 (Tenn. Ct. App. 2003).

services are actually received.

In addition, clarification is needed to guide courts in interpreting the right to "enjoyment of all benefits . . . of the contractual relationship."[442] This would require that § 1981 be amended to emphasize that a contractual relationship can begin before and end after the point of sale transaction takes place.[443] In *Youngblood*, the court ruled that plaintiff's § 1981 claim failed because the alleged discrimination occurred after he bought beef-jerky from defendant's store.[444] The Eighth Circuit distinguished the case at hand from *Hampton v. Dillard Department Stores Inc.*, a Tenth Circuit Court of Appeals decision.[445] In that case, the court held that the defendant department store owed the plaintiff, Ms. Hampton, a continuing contractual duty after Ms. Hampton had completed her purchase at the store and then was prevented from using a coupon the store gave her for a subsequent transaction there moments later.[446] According to the *Youngblood* court, the issuance of the coupon in *Hampton* constituted a post-sale event that created a further contractual duty.[447]

Both changes could be achieved through statutory amendments or the development of a regulatory regime similar to the scheme coordinated by the U.S. Attorney General to prosecute fair housing discrimination claims or the Equal Employment Opportunity Commission (EEOC) in enforcing Title VII claims.[448] The Consumer Financial Protection Bureau (CFPB) and local consumer organizations could "investigate discrimination in public accommodations offered in the sharing economy" and enforce Title II and § 1981 against wrongdoers.[449]

Another obstacle that is certain to arise in the sharing economy is the issue of just how many host or driver denials constitute a denial of the right to contract on the app under § 1981. What if one Uber driver refuses to serve a plaintiff, but the plaintiff is able to find another one? In *Green*, the plaintiffs'

442. *See* 42 U.S.C. § 1981(b) (2012).
443. *See id.*
444. Youngblood v. Hy-Vee Food Stores, Inc., 266 F.3d 851, 854–55 (8th Cir. 2001).
445. *Id.* at 854 (distinguishing Hampton v. Dillard Dep't. Stores, Inc., 247 F.3d 1091 (10th Cir. 2001)).
446. *Hampton*, 247 F.3d at 1100.
447. *Id.*
448. *See* Norrinda Brown Hayat, *Accommodating Bias in the Sharing Economy*, 83 BROOK. L. REV. 613, 644 (2018).
449. *Id.*

claim overcame summary judgment on appeal because the court held that while the plaintiffs may still have been able to contract through another employee, the denial of service by one violated their ability to contract on the same terms as White customers.[450] If one employee can refuse service, what is to prevent another employee from doing so? A consumer in the platform economy must not be at the mercy of the individual providers, such as drivers or hosts, to be able to contract.

In addition, equipping the law for the challenges posed by the sharing economy should account for the "similarly situated" test.[451] This test has been almost insurmountable for plaintiffs in traditional venues such as restaurants or clothing stores.[452] However, online platforms have rich data about every transaction that consumers make through their app.[453] A practical method for proving differential treatment involves obtaining the data through the discovery process and analyzing the data to identify disparities in the provision of services to people based on race or ethnicity (or membership in other protected categories).[454]

This type of analysis is being used in other cases where disparate treatment is alleged.[455] For example, social scientists have studied the traffic citations issued by law enforcement officers who patrol roads and highways.[456] Comparing the proportion of citations issued by a particular officer to motorists based on their demographics to those written by his or her colleagues can provide evidence of discrimination.[457]

In *Commonwealth v. Lora*, the Supreme Judicial Court of Massachusetts held that it is permissible to offer "statistical evidence demonstrating disparate

450. *See* Green v. Dillard's, Inc., 483 F.3d 533, 539 (8th Cir. 2007).

451. *See* Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 849–50 (2002).

452. *See, e.g.*, Hynes v. Brasil LLC, No. CV H-17-2419, 2018 WL 1726157, at *3–4 (S.D. Tex. Apr. 10, 2018) (holding that plaintiff failed to prove others outside of his protected class were treated fairly because there were no other restaurant patrons in the exact situation as the plaintiff); Acey v. Bob Evans Farms, Inc., No. 2:13-CV-04916, 2014 WL 989201, at *10–11 (S.D.W. Va. Mar. 13, 2014) (holding that plaintiff failed to show that non-members of his protected class were treated more fairly than members of his protected class and that services were refused at the restaurant).

453. *See* Kenney & Zysman, *supra* note 20.

454. *See* Leong & Belzer, *supra* note 22, at 1314.

455. *See, e.g.*, Shaun L. Gabbidon, *Racial Profiling by Store Clerks and Security Personnel in Retail Establishments: An Exploration of "Shopping While Black,"* 19 J. CONTEMP. CRIM. JUST. 345, 346 (2003) https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.513.3130&rep=rep1&type=pdf.

456. *See id.*

457. *See id.*

treatment of persons based on their race" to meet the burden of establishing racial discrimination.[458] Such evidence was found sufficient only to meet the initial burden of alleging an inference of discrimination.[459] Likewise, a social scientist could present statistical evidence by analyzing the cancellation rates of a particular Uber or Lyft driver, for example.

The analyses could inquire into whether a driver cancels more often when passengers are Black or Latinx than when they are White.[460] Similar analyses could explore whether any disparities exist in the wait times for passengers of different races who request rides from a particular driver. Data showing the ratings provided by a driver (or host) pertaining to passengers (or guests) of different ethnicities could be mined as well.[461] The results of these types of analyses could reveal disparities in the race or ethnicity of the passengers (or guests) whose requests are canceled, who experience longer wait times, and who are rated more negatively after their ride with an Uber or Lyft driver or after their stay with an Airbnb host.

In determining whether a host or driver treats certain people in a disparate manner, plaintiff's counsel can also obtain the reviews written about the individual. Again, accessing the data should be relatively easy for online platforms. If a significant proportion of an individual's reviews allege discrimination, then those reviews can be used as evidence against the individual. In addition, counsel can present evidence of complaints filed against a particular driver or host.

Furthermore, users of online platforms can gather evidence of discrimination by concealing their identity. In the past, trained testers were needed to ferret out discriminatory practices.[462] Today, anyone can conduct tests by creating different profiles as Gregory Selden did. Armed with the results of such tests, plaintiffs are more likely to prove that they were treated differently than similarly-situated customers who do not belong to their protected category.

One potential weapon for online platforms in defending against claims of consumer discrimination is § 230 of the Communications Decency Act, which

458. 886 N.E.2d 688, 690 (Mass. 2008).

459. *See id.* at 701; *see also* Commonwealth v. Long, 152 N.E.3d 725 (Mass. 2020).

460. See Josh Magness, Black Passengers Wait Longer for Ubers, Taxis—and Get More Cancellations, Study Finds, MIAMI HERALD (June 28, 2018, 11:29 AM), https://www.miamiherald.com/news/nation-world/national/article213982579.html.

461. *See* Leong & Belzer, *supra* note 22, at 1312.

462. *See* Williams v. Staples, Inc., 372 F.3d 662, 666 (4th Cir. 2004).

states, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[463] In *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, Facebook successfully invoked § 230 to defeat a Title II claim by the plaintiff who claimed that Facebook blocked access to the Sikhs for Justice Facebook page at the behest of the government of India.[464] Certainly, there are valid policy arguments that internet service providers should not be liable for comments that are rude or defamatory. However, an exception must be carved out to remove the shield from comments and statements that are discriminatory and designed to discourage minority consumers from taking part in the platform's services.

Section 230 immunity may not apply if an online platform is deemed to force users to reveal content that may invite discrimination from other users. *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.* featured an instance where the website Roommates.com was sued by local fair housing councils over its requirement that new members disclose characteristics such as sex and sexual orientation when registering a new profile on the site.[465] Writing for the majority, Judge Kozinski stated that § 230 does not provide "immunity for inducing third parties to express illegal preferences."[466]

Neither Uber nor Airbnb require users to disclose their race when registering for profiles.[467] However, *Roommates.com* still provides an interesting look at how online platforms could face liability, despite § 230, based on aspects of user profiles that could invite discrimination.[468] The outcome of the *Roommates.com* case may have served as part of the impetus for Airbnb to change its policy that had allowed hosts to request the photos of prospective guests before accepting bookings.

Any suggestions for amending § 230 come at an opportune time as policy-makers are currently engaged in discussions regarding the law's future.[469]

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463. 47 U.S.C. § 230(c)(1) (2018).

464. 144 F. Supp. 3d 1088, 1089–90 (N.D. Cal. 2015*), aff'd sub nom.*, 697 F. App'x 526 (9th Cir. 2017).

465. *Id.* at 1161.

466. *Id.* at 1165.

467. *See* Leong & Belzer, *supra* note 20, at 1308.

468. *See Roommates.com*, 521 F.3d at 1165.

469. *See* Lauren Feiner, *Big Tech's Favorite Law is Under Fire*, CNBC TECH (Feb. 19, 2020, 7:40 AM), https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-

Critical of § 230 and deeming that it "has been interpreted quite broadly by the courts," U.S. Attorney General William Barr has directed the Justice Department to study § 230, and the consumer protection subcommittee of the House Committee on Energy and Commerce has held hearings on deepfakes and digital deception.[470] Although some politicians, including Joe Biden, support a complete repeal of § 230, the majority view appears to support limiting the law's protections rather than scrapping it entirely.[471] Carving a racial discrimination exception into § 230 provides one such way to limit the "liability shield" provided by the law and shift the balance in a more equitable direction between providers and consumers.[472]

Finally, the decision in *Harrington v. Airbnb* represents an entrée for future victims of discrimination in the platform economy.[473] In order to prove that a company intended to treat certain customers differently than others, plaintiffs can present evidence that the company received notice about discriminatory activity on its platform.[474] If a particular design feature contributes to the disparate treatment of a particular group of customers, the company could be expected to redesign or remove the feature to avoid facing the risk of liability.[475]

V. CONCLUSION

Thirty years ago, social scientists turned their attention to the issue of consumer discrimination. Ian Ayres conducted a pioneering study of new car sales in the Chicago area marketplace and found that dealership sales practices resulted in White men paying the least for new cars and Black women paying the most.[476] White women and Black men were second and third,

change-it.html.

470. *See id.*

471. *See id.*

472. *See id.* Representative Jan Schakowsky, the chair of the consumer protection subcommittee, stated that "right now, we think the balance favors those who want a liability shield, and [it] goes way too far in that sense." *Id.* (alteration in original).

473. 348 F. Supp. 3d 1085, 1093 (D. Or. 2018).

474. *See id.* at 1090–91.

475. *See id.* at 1090; *see also* Eric Goldman, *Racial Discrimination Lawsuit Against Airbnb Has the Potential to Change Online Marketplaces—Harrington v. Airbnb*, TECH. & MKTG. L. BLOG (Nov. 2, 2018), https://blog.ericgoldman.org/archives/2018/11/racial-discrimination-lawsuit-against-airbnb-has-the-potential-to-change-online-marketplaces-harrington-v-airbnb.htm.

476. *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817 (1991).

respectively, in the competition for good value.[477] Other researchers followed suit and still others explored perceptions of consumer discrimination among Black and White respondents.[478] Recently, marketing scholars examined lending institutions to identify any racial disparities in their practices and found customer choice to be restricted due to lenders' assumptions about them based on race.[479]

Legal scholars studying the phenomenon of race-based discrimination identified potential avenues for redress for consumers of color as well as the shortcomings of the law in addressing the problem. Thirty years later, we see that courts have not adapted to the reality of the multicultural marketplace where consumers face daily micro-aggressions. Unfortunately, the subtle racism that pervades our society continues to infect consumer transactions, even those conducted via online platforms. From a functional perspective, online platforms share much in common with the establishments known as "places of public accommodations" because they are businesses that provide services to and interact with the public at large. If accountability for all businesses, including online platforms, cannot be achieved through market forces, then the law must evolve to prevent businesses from facilitating discrimination with impunity.

477. *See* William E. Schmidt, *White Men Get Better Deals on Cars, Study Finds*, N.Y. TIMES (Dec. 13, 1990), https://www.nytimes.com/1990/12/13/us/white-men-get-better-deals-on-cars-study-finds.html.

478. *See, e.g.*, Shaun L. Gabbidon, *Racial Profiling by Store Clerks and Security Personnel in Retail Establishments: An Exploitation of "Shopping While Black,"* 19 J. CONTEMP. CRIM. JUST. 345 (2003), https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.513.3130&rep=rep1&type=pdf; Shaun L. Gabbidon, Ronald Craig, Nonso Okafo, Lakiesha N. Marzette, & Steven A. Peterson, *The Consumer Racial Profiling Experiences of Black Students at Historically Black Colleges and Universities: An Exploratory Study*, 36 J. CRIM. JUST. 354 (2008); Shaun L. Gabbidon & George E. Higgins, *Consumer Racial Profiling and Perceived Victimization: A Phone Survey of Philadelphia Area Residents*, 32 AM. J. CRIM. JUST. 1 (2007).

479. *See* Sterling A. Bone, Glenn L. Christensen & Jerome D. Williams, *Rejected, Shackled, and Alone: The Impact of Systemic Restricted Choice on Minority Consumers' Construction of Self*, 41 J. CONSUMER. RES. 451, 460 (2014).