The Business, Entrepreneurship & Tax Law Review

Volume 7 | Issue 2 Article 10

2024

Finding the Goldilocks of Employment Discrimination: The Confusing Approaches to Temporal Proximity.

Jordan Roling

Finding the Goldilocks of Employment Discrimination: The Confusing Approaches to Temporal Proximity.

Jordan Roling[*]

ABSTRACT

There has been substantial discourse between federal circuit courts in determining causality for employment discrimination cases. The article begins with a real-life case of a woman diagnosed with potentially cancerous tumors who, after filing an Equal Employment Opportunity Commission (EEOC) complaint, faced adverse actions by her employer. The central question is how temporal proximity, the time between the complaint and adverse actions, plays a role in determining causality. The article examines the varying approaches of different circuit courts, some of which rely solely on temporal proximity to establish a causal connection, while others demand additional evidence. It also discusses the widespread use of summary judgment, which often results in the dismissal of employment discrimination cases. The article argues that the burden on plaintiffs should be lightened, and more cases should go before juries where juries can make informed decisions. The article proposes modifications to the McDonnell Douglas framework to eliminate the requirement for additional evidence and reduce the burden of proof for plaintiffs. This is to ensure that more cases are heard by juries, potentially offering a fairer outcome for plaintiffs in employment discrimination cases. The article suggests that these changes may require action from lawmakers or judges and highlights the importance of addressing this issue in the current legal landscape.

[*] B.S. in Business Administration, Truman State University, 2020. J.D. Candidate, University of Missouri School of Law, 2024. Associate Member, Business, Entrepreneurship, and Tax Law Review, 2022-2023. I would like to thank Professor Sandra Sperino for her invaluable comments, advice, and encouragement during the writing process.

I. INTRODUCTION

Dawn Jakomas was diagnosed with potentially cancerous tumors and promptly informed her employer, the City of Pittsburgh ("City"), of her condition.[1] Requiring surgery, Dawn then took an approximately one-year, City-approved leave from employment.[2] Just a day before she was scheduled to take medical leave, the City stripped her of her managerial duties and supervisory position.[3] While on leave, Dawn filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging discrimination on the basis of her perceived disability of cancer.[4] After her hiatus, Dawn resumed work but without her previous managerial responsibilities.[5] Her employment lasted less than two months before she was terminated, just four months after Dawn filed an EEOC complaint.[6]

The presented facts lead to the question of whether Dawn's employer engaged in retaliation against her for filing an EEOC complaint. She has the right to pursue damages for retaliation, regardless of whether she can substantiate her disability claim. Before establishing her case to a jury, Dawn will likely need to survive a motion for summary judgment by the City. The judge will assess the elements of an employment discrimination case and determine whether Dawn can present her case to a jury. How should a judge treat the four-month separation between Dawn filing the EEOC complaint and her termination?

The Federal employment discrimination law has a conundrum. How long between an employee filing a claim with the EEOC for unlawful discrimination and retaliatory termination is too attenuated? Is one year too long? Four months? Six weeks? Additionally, what period of time is so short that courts consider this transient interval sufficient to establish the causal connection of an unlawful termination? Courts have extreme variances on deciding that magic number, and there are extreme swings between circuits and splits within them.

This article explores broadly the difference between the circuits and looks more specifically at summary judgment in employment discrimination cases. With barriers on both sides of the temporal requirement, a seeming Goldilocks sweet spot for time duration has been created. This article argues that there should be no bright-line rules barring either employers or employees. Judges have excessive power at summary judgment. Evidence of causal connection should be heard by a jury and therein evaluated on its merits. To achieve this holistic jury review, courts must lighten the burden on plaintiffs.

II. BACKGROUND

A. Federal Employment Discrimination Law Generally

The foundation of federal employment discrimination law lies in four key statutes: Title VII, the Age Discrimination in Employment Act ("ADEA"), the

1. Jakomas v. City of Pittsburgh, 342 F. Supp. 3d 632, 639 (W.D. Pa. 2018).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Jakomas v. City of Pittsburgh, 342 F. Supp. 3d 632, 654 (W.D. Pa. 2018).

Americans with Disabilities Act ("ADA"), and Section 1981 of 42 U.S.C. Title VII of the Civil Right Act of 1964.[7] Title VII's primary force is derived from two provisions. Under Section 2000e-2(a), it is unlawful for employers to discriminate based on an "individual's race, color, religion, sex, or national origin."[8] Under Section 2000e-3, it is unlawful for employers to discriminate against an employee because he or she has engaged in Section 2000e-2(a) proceedings.[9] That section states:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.[10]

Section 2000e-3 prohibits retaliatory action by an employer against an employee who files a discrimination claim with the EEOC. Retaliation claims and discrimination claims are distinct, and the proof of one is not a prerequisite for establishing the other.

B. The McDonnell Douglas Framework

In 1973, the Supreme Court decided *McDonnell Douglas Corp. v. Green*, which created a three-part burden-shifting framework.[11] Using this framework, the plaintiff first establishes a prima facie case of discrimination by a preponderance of the evidence.[12] The *McDonnell Douglas* burden-shifting framework also governs claims of retaliation.[13] To establish a prima facie case of retaliation, a plaintiff must show "(1) that [he] engaged in a protected activity; (2) that the defendant had knowledge of [his] protected conduct; (3) that the defendant took an adverse employment action towards [him]; and (4) that there was a causal connection between the protected activity and the adverse employment action."[14] Each element does not need to be proven by a preponderance of the evidence to survive summary judgment.[15]

Second, if the employee successfully establishes a prima facie case, a mandatory presumption of discrimination is created, and the burden shifts to the employer to provide a non-discriminatory reason for the termination of employment.[16] During this part, the employer frequently provides proof that the plaintiff committed misconduct or did not possess the necessary skills or qualifications for a specific job.[17] Finally, if the employer meets this burden, "then the mandatory presumption evaporates into a permissive inference, and the burden shifts back to the employee to

7. 42 U.S.C. § 2000e-2(a)(1991).
8. *Id.*
9. 42 U.S.C § 2000e-3(a) (1964).
10. *Id.*
11. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).
12. *McDonnell Douglas Corp*. 411 U.S. at 802. *See also* Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).
13. Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 523 (6th Cir. 2008).
14. *Id.* (quoting Weigel v. Baptist Hosp. of E. Tennessee, 302 F.3d 367, 381 (6th Cir.2002)).
15. Singfield v. Akron Metro. Hous. Auth., 389 F.3d 555, 563 (6th Cir. 2004).
16. *McDonnell Douglas Corp*., 411 U.S. at 802.
17. *Id.* at 803.

show by a preponderance of the evidence that the employer's proffered reason for discharge was actually a pretext intended to hide unlawful discrimination."[18]

"'[P]retext' ... often must be read as shorthand for indicating that a defendant's proffered discriminatory explanation for adverse employment action is a pretext for unlawful discrimination, not that it is merely false in some way."[19] A plaintiff may establish pretext by demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence....'"[20] For this inquiry, any additional evidence that supports the claim that the employee's protected trait was the reason behind the result can also be used by the plaintiff.[21]

C. Temporal Proximity

How much weight should the court give to the time period between notice of an employee's EEOC complaint and their termination? These are the "temporal proximity" questions that arise from the causal connection element of a prima facie case for retaliation. "Temporal proximity is simply a legal term that is used to describe events that occurred relatively close to each other."[22]

To establish this element, a plaintiff may use the temporal proximity between the protected conduct and the negative outcome.[23] Circuit courts have been far from consistent in their approaches to temporal proximity. The two main approaches that this article will discuss are temporal proximity establishing the causal connection element and temporal proximity barring plaintiffs from surviving summary judgment.

i. Temporal Proximity Alone Establishing Casual Connection

In *Clark County School Dist. v. Breeden*, the Supreme Court ruled that plaintiffs in retaliation cases who only use temporal proximity to establish causality between the protected activity and the adverse action must be a "very close" period of time.[24] Circuit courts have held that a plaintiff needs only temporal proximity to establish the causal connection element of a prima facie case.[25] These courts argue

18. Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998).

19. Strate v. Midwest Bankcentre, Inc., 398 F.3d 1011, 1017 (8th Cir.2005).

20. Sheridan v. E.I. DuPont De Nemours & Co., 100 F.3d 1061, 1066–67 (3d Cir. 1996) (en banc) (quoting Ezold v. Wolf, Block, Schorr & Solis–Cohen, 983 F.2d 509, 531 (3d Cir. 1992).

21. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981).

22. Hayber, McKenna & Dinsmore, *What is Temporal Proximity and How Can It Be Used To Help Prove Wrongful Termination*, HARBER, MCKENNA & DINSMORE, LLC: BLOG (March 10, 2020), https://www.hayberlawfirm.com/2020/03/10/what-is-temporal-proximity-and-how-can-it-be-used-to-help-prove-wrongful-termination.

23. Smith v. Allen Health System, 302 F.3d 827, 833 (8th Cir. 2002) (holding that temporal proximity between protected act and adverse employment action can establish the necessary causal connection).

24. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001).

25. *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir.1998) (citing Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir.1989)) ("[E]vidence that the alleged adverse action occurred shortly after the employer became aware of the protected activity is sufficient to 'satisf[y] the less onerous burden of making a prima facie case of causa[tion]' ").

that the plaintiff's burden is relatively light and easily met.[26] This pro-plaintiff approach has been adopted by the First, Second, Fourth, Sixth, Ninth, Tenth, and Eleventh, D.C. Circuits.[27]

There has been very little consensus among these circuit courts regarding the specific period of time between the EEOC complaint and the adverse action that is too remote for temporal proximity to infer causation.[28] The employer's notification of an EEOC complaint and an employee's suspension within the same month was deemed adequate evidence by the Second Circuit.[29] The Ninth Circuit has held that an employee laid off fifty-nine days after attending an EEOC fact-finding hearings established causation.[30] Circuits that rely solely on temporal proximity tend to lack consistency and can result in ambiguous standards due to the use of varying time modes. The Sixth Circuit is included in this approach but there is an inter-circuit split regarding the weight of temporal proximity evidence that isn't "very close."[31]

The Third, Fifth, Seventh, and Eighth Circuits have rejected this approach.[32] These circuit courts consider temporal proximity, but it must be paired with additional evidence to satisfy the causal connection element and survive summary judgment.[33] Providing additional evidence of a causal connection is often challenging to plaintiffs.[34] For example, employers can freely rely on the historically bad

---

26. Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir.1998) (citing Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir.1989)) ("[E]vidence that the alleged adverse action occurred shortly after the employer became aware of the protected activity is sufficient to 'satisf[y] the less onerous burden of making a prima facie case of causa[tion]' "); *see also* DeCaire v. Mukasey, 530 F.3d 1, 18 (1st Cir.2008) ("temporal proximity alone can suffice to meet the relatively light burden of establishing a prima facie case of retaliation."). Simmons v. Camden Cty. Bd. of Educ., 757 F.2d 1187, 1189 (11th Cir. 1985)) ("[W]e construe the 'causal link' element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated.").

27. *See e.g.* DeCaire v. Mukasey, 530 F.3d 1, 18 (1st Cir.2008); Lovejoy–Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 224 (2d Cir.2001); Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir.1989); Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 523 (6th Cir. 2008); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir. 2002); Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007); Woodruff v. Peters, 482 F.3d 521, 529 (D.C.Cir.2007).

28. Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2007) (Temporal proximity must very "very close" but three to four months is not close enough); Woodruff v. Peters, 482 F.3d 521, 529 (D.C.Cir.2007) ("[T]emporal proximity can indeed support an inference of causation, but only where the two events are very close in time." Also noting, surviving summary judgment requires "positive evidence beyond mere temporal proximity.").

29. Lovejoy–Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 224 (2d Cir.2001); *see also* Gorman–Bakos v. Cornell Coop. Extension of Schenectady County, 252 F.3d 545, 554 (2d Cir.2001) ("[The Second Circuit has] not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship. . . .").

30. Miller v. Fairchild Indus., 885 F.2d 498, 505 (9th Cir. 1989).

31. *See* Troy B. Daniels & Richard A. Bales, Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII Retaliation Cases, 44 Gonz. L. Rev. 493, 517 (2008); Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 523 (6th Cir. 2008).

32. Lichtenstein v. University of Pittsburgh Medical Center, 691 F.3d 294, 307 (3d Cir. 2012) (Only "unduly suggestive" temporal proximity is sufficient standing alone can survive summary judgment. In all other cases, the court will consider a broad array of evidence.); Strong v. Univ. Healthcare Sys., L.L.C., 482 F.3d 802, 807–08 (5th Cir. 2007); Culver v. Gorman & Co., 416 F.3d 540, 546 (7th Cir.2005) ("suspicious timing may permit a plaintiff to survive summary judgment if there is other evidence that supports the inference of a causal link."); Kipp v. Mo. Highway & Transp. Comm'n, 280 F.3d 893, 897 (8th Cir. 2002).

33. *Lichtenstein*, 691 F.3d at 307; *Strong*, 482 F.3d at 807–08; *Culver*, 416 F.3d at 546; *Kipp*, 280 F.3d at 897.

34. *See generally* Sandra F. Sperino, *Evidentiary Inequality*, 101 B.U. L. REV. 2105, 2123–33 (2021).

performance of an employee, but courts have limited employees from demonstrating historically good performance.[35]

Many of these circuit courts have stated that there is not a high burden for the causal connection evidence and is not onerous and easily met similarly to the other circuits.[36] Courts not only require a causal link for a prima facie case, but they also preclude plaintiffs from withstanding summary judgment if the temporal proximity is excessively remote.

ii. Temporal Proximity Barring Plaintiffs

Frequently, courts will dismiss temporal proximity evidence provided by the plaintiff, as they deem the time lapse between the two events to be excessively long to establish an implication of discrimination or retaliation.[37] When a plaintiff solely depends on temporal proximity as evidence, courts generally demand that the plaintiff establish a causal relationship between the protected activity and the negative outcome by demonstrating that the latter occurred shortly after the former.[38] Despite the presence of supplementary evidence, plaintiffs are frequently precluded from relying on temporal proximity that exceeds several months, as courts tend to discount the probative value of such evidence.[39]

Courts have also stated that temporal proximity inferences dissipate after three months or even shorter time frames.[40] Certain courts have established peculiar distinctions pertaining to the outer limits of temporal proximity. For example, the Fifth Circuit has clarified that when a plaintiff solely depends on temporal proximity as evidence, a temporal gap of four months may suffice to demonstrate a causal link, whereas a temporal gap of five months lacks probative value.[41]

Furthermore, the circuits vary in their application of temporal proximity limitations. According to the Eleventh Circuit, the presence of a four-month gap between a protected activity and an adverse action, in isolation, is inadequate to establish causation.[42] This appears to contradict the four-month line drawn by the Fifth Circuit. The Eleventh Circuit dismissed a three-month temporal proximity argument[43] and in one case only 58 days.[44] The Eleventh Circuit has even hinted that a temporal gap as short as two weeks may lack probative value.[45] The differences between the circuit courts persist and appear entirely random.

Judges significantly constrain the temporal scope in which they are willing to deduce a causal link between a plaintiff's safeguarded activity and an unfavorable

35. Sandra F. Sperino, *Evidentiary Inequality*, 101 B.U. L. REV. 2105, 2128–33 (2021).

36. Carvalho-Grevious v. Del. State Univ., 851 F.3d 249, 257 (3d Cir. 2017) (Causal link is not onerous and a burden is easily met).

37. Sklyarsky v. Means–Knaus Partners, L.P., 777 F.3d 892, 898 (7th Cir. 2015) (six-months); Musolf v. J.C. Penney Co., Inc., 773 F.3d 916, 919 (8th Cir. 2014) (seven-months).

38. Bentley v. AutoZoners, LLC, 935 F.3d 76, 90 (2d Cir. 2019) (one-month).

39. Moody v. Atlantic City Bd. of Educ., 870 F.3d 206, 221 (3d Cir. 2017) (holding inferences that can be drawn from temporal proximity dissipate after three-months).

40. *Moody*, 870 F.3d at 221 (3d Cir. 2017); Kilby-Robb v. Devos, 247 F. Supp. 3d 115, 129 (D.D.C. 2017) (temporal proximity must be less than three-months); Greer v. Bd. of Trustees of Univ. of D.C., 113 F. Supp. 3d 297, 311 (D.D.C. 2015) (noting that three-months is perceived as the outer limit).

41. Aguillard v. La. Coll., 824 F. App'x 248, 251 (5th Cir. 2020).

42. McConico v. City of Tampa, 823 F. App'x 763, 768 (11th Cir. 2020).

43. Gilliam v. U.S. Dep't of Veterans Affs., 822 F. App'x 985, 990 (11th Cir. 2020).

44. Johnson v. Mia.-Dade Cty., 948 F.3d 1318, 1327 (11th Cir. 2020).

45. *Id.*

action. Likewise, courts restrict the conclusions they are willing to draw from the employer's awareness of a plaintiff's safeguarded class and adverse action. Simultaneously, judges frequently deduce that employees are "bad employees" by relying on evidence that is significantly distanced in time from the disputed action.

Curiously, courts have not explicated the rationale behind their demarcation of temporal proximity thresholds. The restrictions do not seem to be grounded in any empirical investigation of jury verdicts or other evidence concerning the probable effect of engaging in safeguarded activity or disclosing a safeguarded status.[46] Neither the employment discrimination statutes nor the Federal Rules of Civil Procedure impose any limitations on a plaintiff's capacity to depend on temporal proximity.[47] At summary judgment, the court's inquiry pertains only to whether a reasonable jury could ascertain discrimination or retaliation on the grounds of the evidence presented.[48]

D. Summary Judgment

Summary judgment is a legal procedure used to resolve cases where there is no genuine issue of material fact in dispute. This procedure is provided for under Rule 56 of the Federal Rules of Civil Procedure, which states that a party may move for summary judgment on all or part of a claim or defense.[49] "The primary purpose of summary judgment is to dispose of claims that have no factual support, and therefore, the nonmovant must respond with affidavits or otherwise, 'setting forth specific facts showing that there is a genuine issue for trial.'"[50]

Summary judgment is granted when the court determines that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.[51] In *Celotex Corp. v. Catrett*, the Supreme Court ruled that nonmoving parties bear the burden of coming forward with evidence to rebut the motion for summary judgment.[52] The nonmoving party does not need to produce admissible evidence to avoid summary judgment.[53] In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor.[54]

Following *Celotex*, the centerpiece of pretrial litigation became summary judgment. The significance of summary judgment has been reinforced by recent Supreme Court opinions, which have emphasized that it is the primary means of eliminating groundless claims in litigation, rather than Rule 12 motions.[55]

---

46. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 77 (2005).
47. Sandra F. Sperino, *Evidentiary Inequality*, 101 B.U. L. REV. 2128 (2021).
48. FED. R. CIV. P. 56(a).
49. *Id.*
50. Vukadinovich v. Bd. of Sch. Trs. of N. Newton Sch. Corp., 278 F.3d 693, 699 (7th Cir.2002) (citing Albiero v. City of Kankakee, 246 F.3d 927, 928 (7th Cir.2001) (quoting FED. R. CIV. P. 56(e)).
51. FED. R. CIV. P. 56(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 (1986).
52. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).
53. *Id.*
54. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).
55. Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 531 (2008) (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168-69 (1993)).

Under certain circumstances, litigants possess the right to have their cases heard by a jury under the federal discrimination statutes.[56] A claim can be dismissed at the summary judgment stage on the condition that no reasonable jury could potentially reach a verdict in favor of the nonmoving party.[57] Typically, in the majority of employment discrimination cases, it is the employer who initiates the motion for summary judgment.[58] In the majority of instances wherein judges make determinations on motions for summary judgment, such judgments are based solely on the evidentiary record submitted in writing, without any firsthand observation or testimony of witnesses provided by the parties involved.[59]

As a result, judges may not have a complete understanding of the facts of the case, which can lead to unjust outcomes for employees.[60] Employment discrimination claims are routinely dismissed at summary judgment.[61] According to an estimation in 2008, approximately 90% of motions for summary judgment in employment discrimination cases were filed by employers.[62] This high percentage is indicative that employers are often benefited from summary judgment rulings.

The Supreme Court attempted to curb this seemingly disproportionate treatment favoring employers in *Reeves v. Sanderson Plumbing Products, Inc*.[63] In light of the plaintiff having presented evidence of pretext as well as supplementary evidence concerning age-based comments, the Court held the appellate court had erred in reversing the jury's verdict.[64] In this case, the Court rejected, as one scholar describes it, the "slice and dice" approach for summary judgments as a matter of law.[65] Slicing and dicing refers to the complex phenomenon of discrimination that is deconstructed into distinct components, with each element being assessed in isolation from the holistic, practical context of the actual employment setting.[66] *Reeves* subsequently demonstrates that courts might be hinting that judges should holistically view all circumstantial evidence instead of piece-by-piece.[67]

E. Judicial Inequality

The employer's unlawful actions were generally difficult to prove through direct evidence presented by the plaintiff.[68] If there is no clear and direct evidence,

56. 42 U.S.C. § 1981a(c) (describing the right to a jury trial for complainants seeking compensatory or punitive damages for discrimination claims).

57. Scott v. Harris, 550 U.S. 372, 386 (2007).

58. Sperino, *supra* note 47.

59. *Id.*

60. *See generally* Sperino, *supra* note 47.

61. *See* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709-10 (2007) (noting 73% of motions for summary judgment in cases related to employment discrimination were approved, and a vast majority of such rulings favored the defendants).

62. *See* Joe Cecil & George Cort, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules*, FEDERAL JUDICIAL CENTER (2008) (submitted to the Advisory Committee on Civil Rules on May 30, 2008).

63. Reeves v. Sanderson Plumbing Products, Inc, 530 U.S. 133, 153 (2000).

64. *Id.*

65. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 577 (2001).

66. *See generally id.*

67. Zimmer, *supra* note 65.

68. Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 527 (2008).

the plaintiff must establish discrimination through the inferential proof framework described in *McDonnell Douglas*.[69] The framework mentioned can present a challenge for plaintiffs in mixed-motive cases, which are frequently encountered in retaliation lawsuits. A mixed-motive case in employment discrimination refers to a situation where an employer's decision to take an adverse employment action against an employee was motivated by both discriminatory and non-discriminatory factors.[70]

Prior to 1991, if a defendant could demonstrate they would have taken the same action regardless of discriminatory intent, they could entirely evade any legal responsibility.[71] To counter this, Congress passed the 1991 Civil Rights Act, which mandated that proof of an employer's lawful adverse action be presented only during the remedy phase.[72] This gave the plaintiff more control in settlement negotiations.[73] However, this did not address evidentiary obstacles for the plaintiffs.

As has been stated by others, it is widely acknowledged that certain judges tend to consider anti-discrimination claims (particularly those related to employment) as highly unlikely to have merit.[74] Despite the plaintiffs' evidence containing relevant details about their work performance or that of other employees, courts frequently label it as vague, conclusory, or unreliable.[75] Judges impose a more stringent relevance standard on the plaintiff's evidence, demanding a stronger link between discriminatory comments and actions and the disputed decision than what the relevance standard typically entails.[76] Courts frequently dismiss evidence presented by plaintiffs regarding their good performance from previous supervisors or coworkers, categorizing it as merely "irrelevant." [77] Over time, it appears that courts have increasingly favored employers since the inception of Title VII.

According to some scholars, the decreasing acceptance of employment discrimination claims in courts can be largely or wholly attributed to the judiciary's increasing ideological conservatism.[78] Advocates of this viewpoint point out that since the establishment of Title VII, the Republican Party has won three more presidential elections, leading them to infer that the recent judicial wariness towards

69. *Id.*

70. *See generally* Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 541–42 (2008).

71. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 n.12 (1989).

72. Pub. L. No. 102-166, 105 Stat. 1071; *see also* Reeves, *supra* note 68.

73. Reeves, *supra* note 68

74. *See* e.g. Reeves, *supra* note 68; Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1707 (December 2021).

75. Sperino, *supra* note 47.

76. Sperino, *supra* note 47; *see also* Gamble v. Aramark Unif. Servs., 132 F. App'x 263, 266 (11th Cir. 2005) (holding the plaintiff's evidence, which included coworker opinions, failed to meet the burden of proving pretext).

77. Davis v. Nissan N. Am., Inc., 693 F. App'x 182, 184 (4th Cir. 2017) (finding that the evidence of opinions of former supervisor and coworkers was "close to irrelevant").

78. *See*, *e.g.* Linda Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1, 3, 59 (1990) (it was observed that a "controlling conservative coalition" had formed in the Supreme Court in the late 1980s, and the 1988 Term was labeled as a tragedy and "an unfortunate step backward" in achieving equal employment.); Michael Ashley Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 630 (2002) (claiming that "a very strong case has been (convincingly) made that the current conservative majority is hostile to antidiscrimination provisions and is engaged in an agenda to roll back civil rights"); Reeves, *supra* note 68 ("[T]he judiciary's decreasing receptivity to employment discrimination claims is attributable either entirely or predominantly to the fact that the judiciary has become more ideologically conservative").

employment discrimination claims can be attributed to the federal bench being increasingly populated with individuals who, as a group, are prone to holding unfavorable opinions towards such claims.[79] According to another scholar, the disposition of these cases is not influenced by political ideology but rather by the workload of each judge and the number of employment discrimination filings per year.[80]

III. COMMENT

Addressing the complex issue of how much significance a court should assign to the timeframe necessitates modifying the well-known *McDonnell Douglas* framework. Although it is a significant request, this article's proposal involves merely tweaking the framework rather than completely dismantling it, which circuit courts may accommodate without issue.

This modification has two components: (1) eliminating the requirement for temporal proximity in conjunction with other evidence and (2) instituting less stringent barriers to proving causality. By implementing these modifications, the current *McDonnell Douglas* framework can be retained, while also preventing plaintiffs from unjustly barring their constitutional right to present their case to a jury.

A. Eliminating Additional Evidence

The Supreme Court must streamline the confusing causal connection distinction among the circuit courts. The primary issue to tackle this problem is clarifying the language used in *Clark County School Dist. v. Breeden*. In that case, the Court affirmed the use of temporal proximity alone can satisfy the plaintiff's causal connection burden.[81] The Court could have ended its ruling there and left the determination of an appropriate time frame to the circuit courts for their respective states. Had that been the ruling, the circuit courts may reach varying conclusions on an appropriate time frame, but they would probably concur that requiring plaintiffs to present additional evidence of causation prior to summary judgment is improper. Unfortunately for plaintiffs, it was not the ruling.

However, the Court did not stop there and went on to declare that the use of temporal proximity alone must be within a "very close" time frame.[82] Regarding the duration between filing an EEOC complaint and termination, what exactly qualifies as "very close"? Is six months very close? What about three months? Or even only one month? Certain circuits have ruled that in particular cases where additional causal evidence is required, the time periods provided are insufficient to withstand summary judgment.

The Circuit Courts have been very adamant about their disdain for circuit splits. The Tenth Circuit held that "[F]irst and foremost, the circuits have historically been loath to create a split where none exists."[83] Several circuits have asserted that creating a circuit split is only justified in the presence of a "compelling" or "strong"

79. Reeves, *supra* note 68, at 482–83.
80. *Id.* at 483.
81. Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001).
82. *Id.*
83. United States v. Games-Perez, 695 F.3d 1104, 1115 (10th Cir. 2012) (Murphy, J., concurring in denial of rehearing en banc).

reason.[84] This serves as further evidence of the disarray among the circuits. The requirement that using temporal proximity alone must be "very close" is far too opaque and must be reconsidered.[85]

To reexamine this arbitrary standard, the Supreme Court would have to take up another case and clarify the language. According to numerous scholars, the trend toward ruling against plaintiffs in employment discrimination cases can be attributed largely to a conservative shift in the judiciary.[86] It is probable these scholars do not anticipate the current composition of the Court to alleviate the difficulties faced by plaintiffs. However, the ideological makeup may not be the driving force.

In *Ash v. Tyson Foods, Inc*., the Supreme Court issued a per curiam opinion overturning a circuit court's decision that had determined the racially discriminatory meaning of the term "boy".[87] The Court held that conclusions about a speaker's intention depend on a variety of factors, including "context, inflection, tone of voice, local custom, and historical usage."[88] Considering that the Court at that time included several conservative stalwarts such as Justices Thomas, Alito, Roberts, and Scalia, one may question if ideology is truly the primary factor behind these rulings. This also raises doubts about whether the current conservative supermajority on the Supreme Court would dismiss plaintiffs' evidentiary arguments.

Reducing the number of cases dismissed due to temporal proximity will likely result in an increased number of cases presented to juries. The argument of this article is not that employees who have been subjected to discrimination for a specific time are more entitled to compensation. Rather, the contention is that a greater proportion of these cases should be presented to juries for consideration. The fact that more cases are presented to juries does not ensure better outcomes for any individual case. American citizens who serve on juries are typically employed and possess practical knowledge about commonly accepted work practices. These individuals can attentively consider the presented facts and make informed decisions based on the information at hand.

Judges who make decisions regarding these cases during summary judgment, might not have worked a non-legal job in a considerable amount of time, or perhaps never at all. This begs the question, why is the least experienced individual in the room making decisions regarding these matters? Another possible avenue through which the Court could aid plaintiffs is by reducing their burden during summary judgment.

---

84. *See* Padilla-Ramirez v. Bible, 882 F.3d 826, 836 (9th Cir. 2017) ("As a general rule, we decline to create a circuit split unless there is a compelling reason to do so." (internal quotation marks omitted) (*quoting Kelton Arms Condo. Owners Ass'n, Inc. v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003)); Mayer v. Spanel Int'l Ltd., 51 F.3d 670, 675 (7th Cir. 1995) ("We do not create conflicts among the circuits without strong cause.").

85. *See, e.g.*, Sklyarsky v. Means–Knaus Partners, L.P., 777 F.3d 892, 898 (7th Cir. 2015) (six-months); Kilby-Robb v. Devos, 247 F. Supp. 3d 115, 129 (D.D.C. 2017) (temporal proximity must be less than three-months); Bentley v. AutoZoners, LLC, 935 F.3d 76, 90 (2d Cir. 2019) (one-month).

86. *See, e.g.*, Linda Holdeman, *Civil Rights in Employment: The New Generation*, 67 DENV. U. L. REV. 1, 3, 59 (1990); Michael Ashley Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 630–31 (2002).

87. Ash v. Tyson Foods, Inc., 546 U.S. 454, 455–456 (2006).

88. *Id.* at 456.

B. Lighter Causality Burden on Plaintiffs

Prior to *Celotex*, grants of summary judgment were infrequent, particularly in cases involving employment discrimination. Subsequently, summary judgment has become much more prevalent across various areas, including cases related to employment discrimination.[89] The majority of discrimination cases hinged on contested issues regarding intent - specifically, the reasons behind why the employer made the decision it did. As factual determinations that are appropriate within the purview of the factfinder, many analysts have criticized the growing utilization of summary judgment by judges in the context of discrimination cases.[90]

In *St. Mary's Honor Ctr. v. Hicks*, the Supreme Court implicitly suggests that once the employee has raised doubts regarding the employer's stated justifications for the termination, the question of whether the employer engaged in discrimination against the plaintiff must be resolved by the jury, not the court.[91] Post *Hicks*, circuit courts impose a "less onerous burden" on the non-moving party.[92]

The Fourth Circuit has used a "less onerous burden" standard when examining the causal connection at summary judgment.[93] The First Circuit also applies a pro-plaintiff causal connection standard, which requires only a "relatively light burden of establishing a prima facie case of retaliation."[94] The circuits should take on the relatively light or less burdensome task, and the other circuits should emulate their example.

The challenges faced by plaintiffs in employment discrimination cases have been extensively documented by scholars.[95] In these cases, employees usually have a limited range of evidence at their disposal.[96] Courts, for instance, restrict the plaintiffs' capacity to showcase their reliable and good job performance.[97] If employers can utilize a previous record of poor performance to defend themselves in such cases, it appears only fair that workers should be able to use a record of commendable performance in their favor.

---

89. *See generally* Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1265 (2005) (civil cases are generally being handled at earlier stages of litigation).

90. *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA L. REV. 577 (2001) (both criticizing the use of summary judgment for employment discrimination generally).

91. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."); *see also* Weisbrot v. Med. Coll. of Wisconsin, 79 F.3d 677, 681–82 (7th Cir.1996) ("once the employee has cast doubt upon the employer's proffered reasons for the termination, the issue of whether the employer discriminated against the plaintiff is to be determined by the jury—not the court.").

92. Weisbrot v. Med. Coll. of Wis., 79 F.3d 677, 682 (7th Cir.1996); Tunis v. City of Newark, 184 Fed. App'x. 140, 141 (3d Cir. 2006).

93. *See* Buchhagen v. ICF Int'l, Inc., 545 F. App'x 217, 221 (4th Cir. 2013); Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989).

94. DeCaire v. Mukasey, 530 F.3d 1, 19 (1st Cir. 2008).

95. *See generally* Sperino, *supra* note 47; Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1707 (Dec. 2021).

96. *See generally* Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 11 MO. L. REV. 149, 149 (2012) (noting the doctrine either undermines or diminishes the probative value of evidence); Sperino, *supra* note 47.

97. Sperino, *supra* note 47.

The odds might appear to be against the plaintiffs in cases of employment discrimination. Temporal proximity evidence is no exception. Obtaining evidence of individual discrimination is frequently challenging for the plaintiffs. It can be arduous to locate evidence of causation that extends beyond the brief period between the complaint and the alleged incident. Consider what evidence you could gather today that would be admissible in court if you were to be terminated from your job.

The Supreme Court showed a willingness to reduce some of the imbalanced evidentiary treatment in cases of employment discrimination.[98] The Court recognized the mistreatment of plaintiffs in these cases and made a statement by lessening the steep burden imposed upon them. The inability to present their case before a jury poses a problem and contradicts the lawmakers' intentions behind enacting Title VII. It may be necessary for Congress to adjust federal employment discrimination laws if the courts choose to remain inactive. The present political composition could present an advantageous moment to address this issue. President Biden recently nominated Kalpana Kotagal giving Democrats a 3-2 advantage on the EEOC.[99] Kotagal has vowed to addressing pregnancy discrimination in the workplace is of "central importance". [100]

IV. CONCLUSION

Depending on the Circuit in which an employment discrimination case is brought, plaintiffs may be treated in markedly distinct ways. Temporal proximity is an area that can be perplexingly disparate. Circuits have created arbitrary rules which are unnecessarily barring plaintiffs from surviving summary judgment. These can be remedied by eliminating the need for plaintiffs to provide evidence beyond temporal proximity and as well as reducing the burden of proof for establishing a causal connection. The capricious standards may necessitate a reevaluation by lawmakers or judges.

As a result of lowering the causality obstacles, more cases will likely be presented to a jury. Having more employment discrimination cases go to a jury is not a negative development since juries typically consist of employed individuals whose experiences are often more akin to those of the plaintiff, as opposed to a judge making a summary judgment decision.

98. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000); Ash v. Tyson Foods, Inc., 546 U.S. 454 456–457 (2006); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993).

99. Stephen Neukam, *Democrats Look to Retake Control of Equal Employment Opportunity Commission*, THE HILL (May 10, 2022, 4:32 PM ET) https://thehill.com/homenews/3483545-dems-look-to-retake-control-of-equal-employment-opportunity-commission.

100. *Id*.