Missouri Law Review

Volume 75
Issue 2 *Spring 2010*

Article 2

Spring 2010

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MISSOURI LAW REVIEW

VOLUME 75 SPRING 2010 NUMBER 2

ARTICLES

Pretext in Peril

*Natasha T. Martin**

This Article addresses the connections among substance, procedure, and equality in the American workplace. Exploring the deepening struggle for plaintiffs under Title VII of the Civil Rights Act of 1964, this Article seeks to add clarity to an enduring quandary – why does Title VII fail to combat the prejudicial disparate treatment it was designed to eradicate? This Article offers a critique of the hardships shouldered by plaintiffs in proving contemporary workplace discrimination. Challenging the seemingly unfettered discretion of the courts in evaluating claims of workplace bias, this Article pursues the interplay of procedural and substantive law to expose how courts "chip away" at pretext under Title VII's analytical evidentiary scheme. Specifically, this Article explores various evaluative constructs that have evolved

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from the courts' interpretive rulemaking in the context of the litigation process with particular emphasis on the summary judgment stage. Using one sub-rule – the same-actor principle – as a case study reference, the Article embeds a striking example of how procedure and the substance of Title VII collide to distort the pretext prong. This evidentiary dilution with its procedural reinforcement straightjackets plaintiffs' efforts to prove pretext for discrimination. My premise is that pretext is now the endangered element under the disparate treatment framework – hollow and forceless in evidentiary value.

This Article situates the courts' interpretive rulemaking within the larger problem of establishing the contours of discriminatory workplace behavior and theorizes on the elusive nature of discrimination. Exposing the myths about fairness and justice embedded in the rhetoric of Title VII and interpretive case law, I demonstrate the necessity of redefining discrimination and employing a more workable evaluative framework for circumstantial evidence claims of workplace discrimination. Accordingly, this work can be seen as contributing to a larger movement to redefine what constitutes discrimination, in part, conceptualizing workplace bias as an amalgamation of complex human, cultural, and organizational dimensions. Straddling procedure and substance, this Article highlights the complexity of proving discriminatory bias in the modern employment setting.

I. INTRODUCTION 315
II. SUBSTANCE MEETS PROCEDURE: THE TANGLED WEB OF TITLE VII LAW IN CIRCUMSTANTIAL EVIDENCE CASES 319
  A. *The Substance: The* McDonnell Douglas/Burdine *Framework* 320
  B. *The Quest for Pretext* 325
  C. *The Procedural Framework – The Pre-trial Dilemma of Summary Judgment in the Employment Discrimination Context* 338
III. SUBSTANCE AND PROCEDURE – A DANGEROUS INTERSECTION 343
  A. *The Endangered Element of the* McDonnell Douglas *Framework: "Chipping Away" at Pretext* 344
  B. *Evidence of Pretext – What Remains?* 354
IV. A CASE STUDY: THE SAME-ACTOR DOCTRINE – A LESSON IN PROCEDURAL INJUSTICE 356
  A. *The Same-Actor Doctrine: Origin and Evolution* 357
  B. *A View from the Ground: How the Same-Actor Doctrine Distorts the Pretext Inquiry* 365
  C. *Same-Actor Doctrine and the Consequences for Justice* 377
  D. *Ideas for Addressing the Immunity-for-Hire Problem* 388
V. DEBUNKING THE MYTHS OF DISCRIMINATORY ANIMUS 395
  A. *Exposing the Ugly Truth* 395
  B. *A Call for New Beginnings* 398
VI. CONCLUSION 401

I. INTRODUCTION

Plaintiffs have a hard row to hoe in proving unlawful discriminatory bias. Without the smoking gun document, the blatant biased statement, or other direct evidence, plaintiffs must rely on a variety of factual circumstances to weave a story that convinces the fact-finder that an employer's actions constitute unlawful discrimination. Notwithstanding the best efforts of plaintiffs and their lawyers, claims of workplace bias are met with skepticism.[1] This jaundiced view pervades the courts as well, reflected in the way that judges interpret evidence of unlawful bias.[2] Against this backdrop of antipathy, plaintiffs must prove discriminatory motive – that their employers harbored bias and therefore intended to treat them less favorably because of their differences, notwithstanding their assertions otherwise. This intent requirement severely impedes plaintiffs in their efforts to demonstrate that the employers' reasons are merely *pretext* for unlawful discrimination.[3] It remains largely

1. *See* ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, RUTGERS UNIV. LAW SCH., THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA – 1999 (2002), http://www.eeo1.com/1999_NR (study of intentional discrimination in mid to large sized American businesses).

2. *See, e.g.*, Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555 (2001) (asserting that discrimination plaintiffs struggle due to a combination of judicial bias and manipulation of substantive law) [hereinafter *Hard to Win?*]; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (exploring how courts evaluate cases involving female plaintiffs in civil litigation and arguing that the current summary judgment framework promotes gender discrimination in federal courts); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) [hereinafter *Tortured Trilogy*] (criticizing the rampant use of summary judgment and suggesting its inappropriateness and incompatibility with Title VII law).

3. For quite some time, scholars have devoted considerable energy to solving the "intent problem" – that a Title VII plaintiff must prove that discriminatory animus motivated the employer at the time of the alleged adverse employment action. *See, e.g.*, *Hard to Win?*, *supra* note 2, at 563-64 (discussing judicial biases against finding discrimination "absent compelling evidence"). *See also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279 (1997) (discussing the level of proof required to establish intentional discrimination); Barbara Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995) (arguing that race plaintiffs cannot win under current judicial interpretations of Title VII and calling for a framework that takes into account "transparently white subjective decisionmaking"); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 420 (2000) [hereinafter *¡Viva La Evolución!*] ("analyz[ing] the different proof mechanisms developed under Title VII discriminatory treatment doctrine, [and] demonstrating their inability to identify unconscious, as well as conscious, discriminatory behavior"); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Oppor-*

undisputed that demonstrating motive remains the primary culprit of plaintiffs' failures to prove employment discrimination.[4]

In addition to the substantive aspects of workplace law, several scholars have highlighted various procedural impediments, namely summary judgment, as the silent killers of plaintiffs' efforts to pursue their civil rights.[5] Faced with voluminous dockets, courts search for ways to distinguish the credible claims of discrimination from those less plausible allegations of employer misconduct. In setting the framework for adjudication of workplace bias claims, courts resort to procedural devices such as summary judgment with increasingly regularity.[6] After assessing the evidence of an abbreviated record, for example, judges overwhelmingly grant employers' requests for summary dismissal or other relief.[7] Trials are rare in employment discrimination cases, which signals that courts are left with little or no doubt that the defendants' theories are the believable ones.[8] Accordingly, procedure is the chisel that courts are using to pare down the rights of employees.

This Article examines the interplay of procedure and substance under Title VII law. Specifically, I dissect judicial action at the crossroads of civil rights law and federal civil procedure by analyzing how courts assess the sufficiency of plaintiffs' evidence of disparate treatment and develop interpretive formulations that serve to hamstring plaintiffs' efforts to prove workplace discrimination.

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tunity, 47 STAN. L. REV. 1161, 1164 (1995) (arguing that "subtle, often unconscious forms of bias" are currently more common than "the deliberate discrimination prevalent in an earlier age"); Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 912-15 (2006) (critiquing "the obsession . . . with disparate treatment cases"). *See generally* Symposium, *Employment Discrimination and the Problems of Proof*, 61 LA. L. REV 487 (2001).

4. *¡Viva La Evolución!*, *supra* note 3, at 419-20. *But see* Richard Epstein, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

5. *See* sources cited *supra* note 2. *See also* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004). For an interesting perspective on the unconstitutionality of summary judgment, see Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).

6. *See, e.g.*, Memorandum from Joe Cecil & George Cort to Honorable Michael Baylson 6-10 tbls.3-4 (Apr. 17, 2007) (on file with The Federal Judicial Center), *available at* http://ftp.resource.org/courts.gov/fjc/sujufy06.pdf (reporting that 60% of all summary judgment motions nationwide are granted in whole or in part and that, in workplace discrimination cases, the number rises to 73%).

7. *See* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 936 (2006) (surveying 659 race discrimination cases and observing the lack of success of plaintiffs in racialized groups).

8. *Id.* Professor Wendy Parker believes that the sentiment of the court is much stronger. She asserts that when judges grant summary dismissal in favor of employers they "believe defendants are right as a matter of law; with no ambiguity or deference involved in reaching that conclusion." *Id.* at 936-37.

The courts provide a critical arena in which substantive and procedural law interacts, which has produced a kind of symbiotic relationship between law and employment organizations as courts accord employers great deference in their decision making. Plaintiffs' attempts to convey their stories fall on deaf ears as courts find ways of rationalizing any of the various challenges made to an employers' business justification. Far too often, this junction results in the premature dismissal of a plaintiff's cause of action before she has an opportunity to conduct discovery or has access to a forum to flesh out the essence of her claim. I refer to these maneuvers as "evidentiary-dilution devices" – evaluative constructs that have emerged from the courts' interpretive rulemaking under Title VII.

Pretext is in peril. My premise is that the courts' evidentiary dilution and its procedural reinforcement has become a dangerous force for Title VII plaintiffs to contend against in proving pretext for discrimination. This interplay allows courts to usurp the role of the jury, heighten the burden borne by plaintiffs in proving workplace bias, and thwart efforts to unearth the corrosive effects of workplace bias.

With increased diversity in the American labor force, one may surmise that workers experience inclusive employment settings where they contribute without being inhibited by gender, race, color, national origin, religion, age, disability, sexual orientation, or other differences. While barriers to entry have diminished in many respects, court dockets do not reflect such tranquility. In fact, claims of discrimination are on the rise.[9] In a climate of multiculturalism and "post-racial" discourse,[10] identity differences continue to influence perceptions of alleged employer wrongdoing.[11] One expert identifies an

9. *See* Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 185-86 (2008).

10. *See* ROBERT POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW (2001). This disposition has been seemingly cemented in our psyche by the election of the country's first black President as queries of post-racialism abound. *See, e.g.*, Phillip Morris, *America Begins Its Journey into a Post-Racial Era*, CLEVELAND PLAIN DEALER, Nov. 6, 2008, at A1. A few scholars, however, have begun to push back against the notion of a post-racialism. *See* Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1593 (2009); Reginald T. Shuford, *Why Affirmative Action Remains Essential in the Age of Obama*, 31 CAMPBELL L. REV. 503, 503-06 (2009).

11. The state of affairs for plaintiffs is bleak, to say the least, with their plight exacerbated if they are at the intersection of race and gender. *See* David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 514 (2003) (concluding that women and minorities have a lower success rate when bringing employment discrimination claims because of juror bias); Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 99 (2006) (concluding that plaintiffs in racial harassment litigation are more likely to lose their case than

"anti-race plaintiff ideology" permeating the judiciary and society in general.[12] And this ethos intensifies the hardship experienced by plaintiffs seeking to prove discriminatory motive.[13]

Straddling procedure and substance, this Article highlights the complexity of proving discriminatory bias in the modern employment setting. By exploring discriminatory animus through the lens of procedure, I seek to (i) challenge the judiciary's evaluative function in discrimination cases, particularly at the pre-trial stage; (ii) deepen understanding of the nature of workplace bias; and (iii) underscore what critical legal scholars have contended for years – that law and facts are far from neutral but highly contingent.

I begin, in Part II, chronicling the evolution of the prevailing analytical framework for circumstantial evidence cases under Title VII. This section also discusses relevant procedural standards, focusing primarily on summary judgment, a critical stage of the litigation process for plaintiffs. The goal in this section is to frame the dual bodies of law that affect the ability of plaintiffs to succeed in proving unlawful workplace discrimination. Part III illustrates how substance and procedure interact, resulting in what I term "evidentiary-dilution devices," whose forces are enhanced by the procedural platform upon which they are applied. Thus, this section focuses on plaintiffs' efforts to demonstrate pretext – that the employer's stated reasons mask unlawful discrimination – chronicling the evolution of the law governing the courts' assessment of whether a plaintiff has proved unlawful bias.

This Article seeks to bridge the divide between theory and praxis. By examining how law operates on the ground in the context of the litigation process, I illuminate how procedure and Title VII collide to distort the pretext prong. To further accomplish this task, Part IV engages a particularly striking example of judicial rulemaking – the same-actor principle – as a case study reference to reveal the seeming unfettered discretion of courts in defining what constitutes discrimination under Title VII. In 1991, the Fourth Circuit further impeded plaintiffs' quests to establish pretext when it proclaimed that the nature of the hirer-firer relationship bears significantly on the ultimate question of discrimination.[14] In its most potent form, the same-actor principle

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defendants either in summary judgment proceedings or at trial primarily because of conscious or unconscious judge or juror bias). *See also* Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS & EMP. POL'Y J. 547, 551-52 (2003) (reflecting the prevalent reversal of plaintiffs' wins at the trial level); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE. L. REV. 111 (2007) (observing that settlements amount to nuisance value).

12. Parker, *supra* note 7, at 893 (surveying 659 race discrimination cases and observing the lack of success of plaintiffs in racialized groups). *See also* Oppenheimer, *supra* note 11, at 517-18.

13. Parker, *supra* note 7, at 934-35.

14. Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). *See infra* Part IV.A.1.

provides that, where the same decision maker engages in an alleged adverse employment action within a short period of time after making a positive employment decision, such evidence creates a strong presumption that the decision maker harbored no unlawful discriminatory animus.[15] The same-actor doctrine illuminates the complexity of discrimination and the danger of judges improperly invading the province of the jury by making credibility assessments and drawing inferences from the facts.

This endeavor in Part IV situates the doctrine to the relevant substantive jurisprudence and demonstrates how the principle contravenes standards set forth in both *McDonnell Douglas Corp. v. Green*[16] and *Reeves v. Sanderson Plumbing Products, Inc.*[17] Through analysis of case decisions, Parts III and IV magnify, in practical terms, how these constructs, including the same-actor principle, operate to conceal discrimination. Additionally, these sections offer some empirical and anecdotal information to highlight plaintiffs' precarious position when this interpretive formula is applied. Part IV concludes with some prescriptions for dealing with this distortion of the pretext inquiry.

In Part V, I situate the pretext problem within the larger discussion of debunking the myth of discriminatory animus under Title VII, arguing that pretext is now the endangered element under disparate treatment law. This section discusses the limitations of Title VII disparate treatment law to promote justice effectively without a more workable definition of what constitutes discrimination and, in particular, a pretext for discrimination. Discussing possible reasons for this unfortunate trend and offering consideration for reform, the proposal argues that the various interpretive sub-rules should be abolished or applied with greater care. If courts insist on using such ineffective coping mechanisms in response to ballooning dockets, I encourage not only restraint in summary dismissal but also opportunities for plaintiffs to fairly rebut the faulty underlying assumptions of these constructs in light of the particular workplace dynamics involved. Overall, I call for greater contextualization of workplace circumstances before courts make dismissal decisions based on an abbreviated paper record – context regarding the decision makers involved and the structure and climate of a particular work setting. I conclude with thoughts on solutions for dealing with the necessary entanglement of substance and procedure in employment jurisprudence.

II. SUBSTANCE MEETS PROCEDURE: THE TANGLED WEB OF TITLE VII LAW IN CIRCUMSTANTIAL EVIDENCE CASES

Ferreting out inequality in the contemporary workplace requires courts to navigate substantive and procedural law when evaluating the sufficiency of

15. *Proud*, 945 F.2d at 747.
16. 411 U.S. 792 (1973). *See infra* Part II.A.
17. 530 U.S. 133 (2000). *See infra* Part II.B.3.

plaintiffs' evidence of discrimination. In fact, it is this connection between these dual bodies of law that has deepened the struggle for plaintiffs under Title VII law. Specifically, the problem emanates from how courts use procedure in conjunction with interpretations of Title VII's substantive requirements. The result is evidentiary-dilution devices powered by the procedural platform upon which they are applied. This interplay has endangered the pretext element of *McDonnell Douglas*, often reducing its importance to nearly meaningless in the totality of plaintiffs' proof. Without the use of meaningful filters, deciphering allegations of workplace discrimination remains haphazard, and the meaning of pretext remains in peril.

A. The Substance: The McDonnell Douglas/Burdine *Framework*

In modern American work environments, savvy employers know that blatant statements of bias should be neither memorialized in writing nor uttered by their employees, particularly decision makers. Without such smoking gun evidence, most Title VII plaintiffs attempt to demonstrate *unlawful* disparate treatment using circumstantial evidence.[18] In an effort to assist plaintiffs in proving discrimination in the absence of direct evidence, the Supreme Court devised an analytical scheme, commonly known as the *McDonnell Douglas* framework. Under this rubric, the plaintiff must prove that the employer *intended* to discriminate based on a characteristic protected under Title VII.[19] The Court declared and refined this framework in a string of cases – *McDonnell Douglas v. Green*,[20] *Furnco Construction Corp. v. Waters*,[21]

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18. Direct evidence is evidence requiring no inferential leap if the fact-finder believes it. *See* Wright v. Southland Corp., 187 F.3d 1287, 1293 (11th Cir. 1999). For example, if a plaintiff's supervisor exclaimed, "I don't want to hire another damn woman for this job!" or "I declined to promote you because blacks cannot do this job as well as whites," such statements may constitute direct evidence of discrimination. However, alleged biased comments, alone, are not necessarily sufficient evidence for plaintiffs. Courts scrutinize comments and consider who made the statement – a decision maker, a co-worker, or subordinate – and whether the speaker targeted the plaintiff in the alleged adverse employment action. *See, e.g.*, Taylor v. Va. Union Univ., 193 F.3d 219, 232 (4th Cir. 1999) (en banc) (affirming summary judgment for the defendant because the biased statement did not explicitly refer to the allegedly adverse employment action). The bottom line is that "bigotry, per se, is not actionable" unless a "real link [exists] between the bigotry and [the alleged] adverse employment action." Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 762 (7th Cir. 2001).

19. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-03 (1973).

20. *Id.*

21. 438 U.S. 567, 575-77 (1978) (discussing a prima facie case under the *McDonnell Douglas* framework).

and *Texas Department of Community Affairs v. Burdine.*[22] Proving motive in this fashion has become exceedingly difficult.

1. Prima Facie Case

To prove unlawful disparate treatment under Title VII, a plaintiff maintains the ultimate burden of proving that the employer engaged in an unlawful employment practice – namely, an adverse employment action because of a characteristic protected under Title VII.[23] To begin, the plaintiff has the burden of proving a prima facie case of discrimination.[24] To succeed in doing so, the plaintiff first must show that (i) she belongs to a protected class under Title VII, (ii) she qualifies for the position in question and applied for it, (iii) she was rejected, and (iv) the position remained open or was otherwise filled by another.[25] Once the plaintiff meets this burden by a preponderance of the evidence, a rebuttable presumption arises that the employer engaged in discrimination.[26]

2. Legitimate, Non-Discriminatory Reason

Next, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the alleged adverse employment action – some reasonably specific factual basis for its decision.[27] The respective

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22. 450 U.S. 248, 252-53 (1981) (discussing the *McDonnell Douglas* framework).

23. *McDonnell Douglas*, 411 U.S. at 801-04; *Burdine*, 450 U.S. at 252-56; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 505-07 (1993).

24. *McDonnell Douglas*, 411 U.S. at 802.

25. *Id.* Although *McDonnell Douglas* involved a failure to hire, the Court made clear that it intended the elements of the prima facie case to be malleable such that courts could adjust the elements to fit the particular cause of action. *Id.* at 802 n.13 (reminding the lower courts of the variability of the factual bases for Title VII actions and, thus, that "the specification . . . of the prima facie proof [in a hiring case like *McDonnell Douglas*] is not necessarily applicable in every respect to differing factual situations"). The courts have adapted this proof structure to fit various causes of action. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281-83 (1976) (disciplinary discharge context); Mauro v. S. New England Telecomms., Inc., 208 F.3d 384, 386 (2d Cir. 2000) (promotion context).

26. *Burdine*, 450 U.S. at 254 & n.7. Arguably, the prima facie case requirement creates a low threshold for a plaintiff to raise a presumption of discrimination. *See id.* at 253. It is worth noting, however, that plaintiffs may lose claims due to failure to make out an element of the prima face case. Sometimes nuanced issues arise with respect to these efforts. For example, it becomes difficult to demonstrate that one is "qualified" when the employer applies subjective criteria. *See, e.g.*, Millbrook v. IBP, Inc., 280 F.3d 1169, 1176 (7th Cir. 2002) (subjective race-neutral decisions do not establish pretext).

27. *Burdine*, 450 U.S. at 254-55.

burdens of the parties at this stage of the process are not particularly onerous yet significantly different.[28] The plaintiff must *prove* a prima facie case by a *preponderance of the evidence*, whereas the employer has only the burden of *production* to articulate some reasonable, non-discriminatory basis for its decision.[29] In *Burdine*, the Court explained that the employer "need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[30] Thus, the employer's evidence must be legally sufficient to justify a judgment for the employer and must set forth the reasons for its action against the plaintiff.[31] Per *Burdine*, the employer must articulate a "clear and reasonably specific" explanation for its actions to afford the plaintiff "a full and fair opportunity to" rebut it.[32] The employer accomplishes this by simply explaining what it has done or by "produc[ing] admissible evidence" of a legitimate basis for its decision – evidence that would allow a fact-finder "rationally to conclude that the employment decision" was not the result of discriminatory bias.[33]

Once the employer meets its burden of production, the presumption that arose from the prima facie case disappears. That is, the "legally mandatory

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28. *Id.* at 253. While the respective burdens are not particularly onerous, it is important to note that the plaintiff and employer do carry different burdens.

29. *Id.* at 253-56. The prima facie case requirement set forth in *McDonnell Douglas* and *Burdine* constitutes "an evidentiary standard, not a pleading requirement." *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510-11 (2002) (prima facie case operates as a flexible evidentiary standard). *But see* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007) (anti-trust case requiring a plaintiff to allege facts that "raise a reasonable expectation that discovery will reveal evidence of" allegations). Courts typically apply a notice pleading standard in assessing the sufficiency of a plaintiff's evidence of a prima facie case. That is, as long as the plaintiff provides "a short and plain statement" of the allegations consistent with Rule 8 of the Federal Rules of Civil Procedure, she satisfies the standard. FED. R. CIV. P. 8(a)(2). In this way, the plaintiff gives the employer fair notice of the allegations and can survive a motion to dismiss.

30. *Burdine*, 450 U.S. at 254 (citation omitted).

31. *Id.* at 254-55.

32. *Id.* at 255-56, 258.

33. *Id.* at 252, 257. *See also McDonnell Douglas*, 411 U.S. at 802. Generally, subjective reasons constitute acceptable legitimate, non-discriminatory reasons for taking action that affects a particular individual. Chapman v. AI Transport, 229 F.3d 1012, 1034 (11th Cir. 2000) (en banc). In *Chapman v. AI Transport*, the court explained,

> [I]t might not be sufficient for a defendant employer to say it did not hire the plaintiff applicant simply because "I did not like his appearance" with no further explanation. However, if the defendant employer said, "I did not like his appearance because his hair was uncombed and he had dandruff all over his shoulders" . . . the defendant would have articulated a legally sufficient, albeit, subjective reason.

Id.

inference of discrimination arising from the plaintiff's initial evidence" no longer exists.[34]

3. Plaintiff's Rebuttal – Demonstrating Pretext

After the employer articulates its justification, without the benefit of the presumption, the plaintiff has an opportunity to prove to the finder of fact that the employer's reason is unworthy of credence – a pretext for unlawful discrimination.[35] Most often, this final stage of the analytical framework constitutes the battleground for the parties. Because the burden of persuasion remains at all times with the plaintiff,[36] she must attempt to dissect the mind of the employer and provide the fact-finder with unspoken opinions of decision makers based on a series of relevant events indicative of discriminatory animus.

To show pretext, the plaintiff presents evidence from which one can draw an inference of discriminatory animus.[37] The method of presenting pretextual evidence varies widely, but the most common avenues include the use of comparative data involving similarly situated individuals, statistics reflecting the overall composition of the employer's workforce, inconsistencies or contradictions in the employer's explanation, or other information surrounding the circumstances of the plaintiff's employment that raise an inference of discrimination.[38] Although the presumption of discrimination that attached from the plaintiff's prima facie case disappears, the evidence

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34. *Burdine*, 450 U.S. at 255 & n.10.

35. *Id.* at 255-56. As the Supreme Court has expounded, this rubric serves to organize the evidence to facilitate the court's assessment of the ultimate question of discrimination. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 & n.3, 715-16 (1983); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (cautioning that the disparate treatment analytical framework "was never intended to be rigid, mechanized, or ritualistic" but instead provides for orderly evaluation of the evidence).

36. *Burdine*, 450 U.S. at 255-56.

37. *See McDonnell Douglas*, 411 U.S. at 804-05, where the court describes the kind of evidence that would have been sufficient to constitute pretext. As neither the plaintiff's nor the defendant's burdens are particularly onerous in the first two stages of the *McDonnell Douglas/Burdine* formulation, most circumstantial evidence cases are resolved at the pretext stage. In the context of these decisions, pretext means a false explanation that serves to mask unlawful discrimination. *See Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 805.

38. In *McDonnell Douglas*, for example, the Court acknowledged the relevance of certain types of evidence of pretext, including an employer's general polices and practices with regard to treatment of minority workers and statistical evidence reflecting a general pattern of discrimination against the relevant protected class. 411 U.S. at 804-05.

from which the presumption arose retains evidentiary value in the court's analysis of pretext.[39]

Most courts engage in a totality-of-the-evidence assessment to determine whether, more likely than not, the employer engaged in unlawful discrimination.[40] Despite this seemingly holistic consideration of the evidence, plaintiffs often fail to prove discriminatory motive, even where the employer makes a mistake or relies on a false or pretextual, but nonetheless lawful, reason.[41] This phenomenon is explained by the courts' adoption of an ethos of deference to an employer's business judgment and a hesitation to second-guess its decisions.[42] This judicial stance often provides cover for biased

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39. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) (citing *Burdine*, 450 U.S at 255 n.10). The probative value of the prima-facie-case evidence is debatable, particularly against the backdrop of the employer's legitimate, nondiscriminatory reason. Nonetheless, it remains evidence relevant to the ultimate question of discrimination.

40. As a result of the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, trial courts must make a holistic assessment of the evidence. *See id.* at 147-48; *see also ¡Viva La Evolución!, supra* note 3, at 461. The *Reeves* decision also suggests that courts should exercise caution in granting wholesale motions for summary judgment filed by employers. *See Reeves*, 530 U.S. at 154-55 (Ginsburg, J., concurring); *see also* Ross B. Goldman, Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1556-57 (2007); *¡Viva La Evolución!, supra* note 3, at 459-65 (discussing the implications of *Reeves* at the summary judgment stage).

41. *See* Arnold v. Nursing & Rehab. Ctr. at Good Shepherd, LLC, 471 F.3d 843, 847 (8th Cir. 2006) (noting the fact that the employer was mistaken that a black nurse verbally abused a resident does not matter since the employer reasonably believed the employee had engaged in the action); Maxfield v. Cintas Corp. No. 2, 427 F.3d 544, 550-51 (8th Cir. 2005) (affirming summary judgment where the employer's explanation was false and finding that the plaintiff must show that the reason was false and that discrimination was the real reason); Neal v. Roche, 349 F.3d 1246, 1251-52 (10th Cir. 2003) (finding that the employer's decision to give preference to a white employee over a black employee in order to save the white worker from a layoff did not rise to an inference of discrimination). For a striking example of an employer's success in light of evidence of the employer's disingenuity, see Foster v. Dalton, 71 F.3d 52, 57 (1st Cir. 1995) (rejecting the employer's proffered reason that the selected candidate was more qualified than the plaintiff but finding that cronyism, while distasteful, was the real reason for the employer's decision making and that cronyism was not influenced by racial animus).

42. *See Foster*, 71 F.3d at 57; Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 762 (7th Cir. 2001).; Stewart v. Ashcroft, 352 F.3d 422, 429 (D.C. Cir. 2003) (noting that courts defer to employers' judgment). Courts routinely have disclaimed any notion that they serve as "super-personnel department[s]" that make independent judgments on business decisions. Dale v. Chicago Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986). *See also* Jackson v. Gonzales, 496 F.3d 703, 709 (D.C. Cir. 2007) ("Particularly given the dynamic nature of the hiring process, moreover, we have also stated that we will not second-guess how any employer weighs particular factors in

actions by employers, action that is simply masked as acceptable discrimination because it is not based on criteria prohibited by Title VII.[43]

B. The Quest for Pretext

Most of the plaintiffs' efforts rest in the third stage of the *McDonnell Douglas* framework. It is here in the pretext stage where a plaintiff attempts to amass the quantum and quality of evidence that demonstrates the employer's discriminatory animus. A plaintiff tries to personalize her plot in a fashion that resonates with the finder of fact as bias that is sanctionable under Title VII. Finding this "sweet spot" presents an often insurmountable hurdle for plaintiffs.

As observed below, much of the difficulty for plaintiffs derives not only from how pretext is defined but also from the derivative loopholes left open by the numerous Supreme Court attempts at clarifying parameters for evaluating evidence of pretext for discrimination. The shortcomings of the current law in this regard have severely hampered an already arduous journey for plaintiffs in proving workplace bias and hastened the endangerment of the pretext prong as set forth in Part III.

1. The *Burdine* Loophole

The survival of a plaintiff's claim often hinges on her ability to overcome the legitimate, non-discriminatory reason offered by her employer. In *Burdine*, the Supreme Court explained that a plaintiff can prove pretext "*either* directly by persuading the court that a discriminatory reason more likely motivated the employer *or* indirectly by showing that the employer's proffered explanation is unworthy of credence."[44] Much of the controversy over the meaning of pretext emanates from this particular statement in Justice Powell's opinion.[45] Accordingly, it has served as the root of the divide among the lower courts over the basic quality and legal effect of pretext.

In the wake of *Burdine*, a split developed in the lower courts over what constituted sufficient evidence of pretext. The brief statement by Justice

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the hiring decision."); Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (An "employer can fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.").

43. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (2006) (prohibiting disparate treatment based on race, color, sex, religion, and national origin).

44. 450 U.S. at 256 (emphasis added).

45. This statement has been charged with igniting a judicial policy debate over the meaning and purpose of Title VII. *See, e.g.*, Deborah A. Calloway, St. Mary's Honor Center v. Hicks*: Questioning the Basic Assumption*, 26 CONN. L. REV. 997, 997-98 (1994) (observing the attitude that underlies Supreme Court decisions interpreting the *McDonnell Douglas/Burdine* framework).

Powell resulted in three constructions that became commonly known as the (i) "pretext-only" rule, (ii) "pretext-may" rule, and (iii) "pretext-plus" rule.[46] Those jurisdictions applying the pretext-only rule required that the plaintiff need only show the bare minimum to succeed.[47] Thus, if the plaintiff demonstrated a prima facie case and evidence that the employer's reason was false or not credible, for example, she was entitled to judgment as a matter of law.[48] In the view of these courts, evidence of pretext constituted a finding that the employer acted with intent to discriminate.[49]

Under the intermediate standard of pretext-may, the plaintiff's evidence of a prima facie case and sufficient evidence of pretext resulted in a permissive inference of discrimination.[50] Thus, the plaintiff had a chance to submit the case to a jury but received no automatic entitlement to a favorable judgment.

Under the most restrictive pretext standard – pretext-plus – plaintiffs experienced the greatest disadvantage. Courts adopting the pretext-plus interpretation of *Burdine* demanded that the plaintiff not only prove pretext but also offer additional evidence of discrimination.[51] The courts in this camp reasoned that simply offering evidence to counter the employer's reason did not prove that discrimination was the real reason for the employer's actions.[52] The plaintiff had to answer the question, "Pretext for what?" Unless she demonstrated through *additional* evidence that the employer's actions constituted a *pretext for discrimination*, the plaintiff failed to succeed.[53] For sure,

46. *See* Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122-23 (7th Cir. 1994) (summarizing the three theories of pretext that developed after the Court decided *Burdine*).

47. *See, e.g.*, *id.* at 1122.

48. *Id.*

49. *Id.* Courts adopting this view relied on Justice Powell's "either-or" statement. *See, e.g.*, Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir. 1984), *abrogated by* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Thus, plaintiffs had two avenues to prove pretext. Additionally, as reasoned by the Court in *McDonnell Douglas*, *Furnco*, and *Burdine*, employers unable to advance a legitimate, non-discriminatory reason for their actions more likely than not behaved with a discriminatory motive. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978); Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981).

50. *See, e.g.*, Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 657 (7th Cir. 1991); *Anderson*, 13 F.3d at 1122-23.

51. *See, e.g.*, *Anderson*, 13 F.3d at 1122-23; Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990), *abrogated by Hicks*, 509 U.S. 502 (claim under the Age Discrimination in Employment Act).

52. *See, e.g.*, *Medina-Munoz*, 896 F.2d at 9.

53. *Id.*

the pretext-plus standard granted the most deference to employer business judgment.[54]

Whether Justice Powell's language regarding pretext left the opening for the numerous interpretations that resulted, many years later the meaning of pretext for discrimination remains an elusive concept.[55] As the lower courts evaluate allegations of discrimination and test the sufficiency of the evidence, the pretext requirement continues to have the greatest impact on plaintiffs' attempts to prove discrimination through circumstantial evidence. Since *Burdine*, the Supreme Court has tried to clarify the pretext concept a few times, arguably without much success.[56] As discussed below, it is at least clear that courts today should apply a pretext-may analysis. Notwithstanding this advancement, conflict over pretext has pushed the debate about the underlying policies of Title VII.[57]

2. *St. Mary's Honor Center v. Hicks* – Two Steps Backward?

Prior to *Hicks*, the meaning of pretext remained contested in the lower courts. As they struggled to interpret the Court's prior pronouncements regarding the legal effect of pretext, anti-discrimination law became increasingly convoluted. The variations of the pretext rules set forth above illuminate the extent of the division over what constituted sufficient evidence of pretext.

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54. The courts adopting the pretext-plus standard embodied the attitude that an employer should not be penalized for a poor business decision, arbitrary actions, or lawful discrimination. *See, e.g.*, *id.* (The plaintiff must prove that the employer's actions constitute a pretext for discrimination and that, "[t]o achieve this plateau, a[] . . . plaintiff must do more than simply refute or cast doubt on the company's rationale for the adverse action. The plaintiff must also show a discriminatory animus based on [an illegal reason].").

55. Just what is sufficient to constitute evidence of pretext remains contested and the inquiry of much scholarly engagement. *See, e.g.*, Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539 (2001) (arguing that the current law of pretext creates "ample loopholes" for lower courts and arguing for a definitive rule on pretext) [hereinafter *Secrets and Lies*]. *See also* Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1 (2005) (arguing the disadvantage of plaintiffs in countering employer's explanation).

56. In *United States Postal Service Board of Governors v. Aikens*, the Court addressed the burden-shifting framework of *McDonnell Douglas* and reiterated Powell's statement in *Burdine*. 460 U.S. 711, 714-16, (1983). Arguably, however, *Aikens* did little to resolve the split in the circuits, deeming it the job of the district court to determine whose version "of the employer's motivation it believes." *Id.* at 716. Thereafter, the lower courts remained in flux on the meaning of pretext and whether plaintiffs must affirmatively demonstrate that discriminatory animus motivated the employer if the evidence established that the employer's reason was false or otherwise unworthy of credence.

57. *See Employment Discrimination and the Problems of Proof*, *supra* note 3.

In order to receive an entry of judgment, did the plaintiff need to prove only that the employer's legitimate, non-discriminatory reason was not credible, or, in addition, must the plaintiff prove that discriminatory animus actually motivated the employer in order to receive an entry of judgment?

In 1993, the Court again attempted to resolve the confusion in *St. Mary's Honor Center v. Hicks*.[58] Specifically, the Court addressed whether a plaintiff's proffer of a prima facie case plus evidence of pretext was sufficient to sustain a finding on the ultimate question of discrimination.[59] In a 5-4 decision, the Court rejected the district court's application of the pretext-only interpretation of *Burdine*.[60] Justice Scalia made it clear that there is a distinction between a fact-finder's disbelief of the employer's explanation and a finding that discriminatory animus motivated the employer's behavior.[61] Tediously dissecting *Burdine*, Justice Scalia posited the meaning of the *McDonnell Douglas* framework. In his view, the basic nature of pretext is "pretext for discrimination."[62] The Court held that a mandatory finding for a plaintiff based on evidence of pretext alone is inappropriate.[63]

The hope for some guidance that would foster greater consistency in the application of the pretext standard dissipated quickly in the aftermath of *Hicks*. Expounding on the kind and amount of evidence necessary to allow a fact-finder to reasonably infer unlawful discrimination in the plaintiff's favor, Justice Scalia made two statements that arguably maintained the loophole that allowed lower courts to keep the pretext-plus rule alive. The lower courts claimed difficulty in resolving these two statements from *Hicks*:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the prima facie case, suffice to show intentional discrimination.[64]
>
> But a reason cannot be proved to be "a pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.[65]

It is arguably difficult to harmonize the two statements because the passages permit both the permissive pretext-may interpretation and the pretext-

58. 509 U.S. 502 (1993).
59. *Id.* at 504.
60. *Id.* at 503, 508-09.
61. *Id.* at 513-15 & n.5.
62. *Id.* at 514-15.
63. *Id.* at 518-19.
64. *Id.* at 511 (emphasis added).
65. *Id.* at 515.

plus variation. The dissenting Justices believed that Justice Scalia and the majority defined pretext as pretext-plus.[66]

The divided Court's heated exchange between Justice Scalia for the majority and Justice Souter for the dissent amounts to a debate over the significance of the continuing effects of discrimination thirty years after the enactment of Title VII and twenty years after the Court's formulation of the *McDonnell Douglas/Burdine* framework.[67] Justice Scalia's opinion in *Hicks* represents a view that perhaps the same level of judicial oversight is unnecessary in implementing a policy against workplace discrimination.[68]

Scholars have severely criticized *Hicks*, accusing the Court of regressing workplace anti-discrimination policy by offering nothing to advance the standards. For example, in *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, Professor Lanctot provides a succinct and poignant critique focusing on the law of pretext in general, asserting that it emboldens employers to lie about their true motivations and facilitates their avoidance of liability by relying on secrets and lies.[69] Lanctot highlights the "ample loopholes" that current Supreme Court jurisprudence created, including *Hicks*, and the willingness of lower courts to exploit these openings to the disadvantage of plaintiffs.[70]

Other scholars viewed *Hicks* as promoting form over substance in the quest to define civil rights, applying formalistic rigidity to a complex and elusive phenomenon like workplace discrimination.[71] Still others wrestled

66. *Id.* at 535-36 (Souter, J., dissenting).

67. The divergent views in *Hicks* reflect the stark disagreement on the meaning of *McDonnell Douglas* and its progeny. Certainly, one could debate which view advances the better paradigm, but the practical consequences of the Court's opinion on claims of workplace bias raise the more relevant question for purposes of this exploration.

68. A similar tone continues to be reflected in the Court's pronouncements today. In a recent decision of the Supreme Court addressing the racial makeup in schools, Chief Justice Roberts offers an overly simplified solution to the country's racial woes. *See* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747-48 (2007) (stating that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").

69. *Secrets and Lies*, *supra* note 55, at 546. Describing Justice Scalia's opinion as one filled with "hyperbole, hypotheticals, repetitions, and occasional insults," she characterizes it as a "pretext-maybe" decision. *Id.* at 542-43. The "ill-defined" circumstances under which a plaintiff's proffer of pretext may suffice to prove discrimination essentially allows employers to maintain their playing field advantage. *Id.* at 543.

70. *Id.* at 539, 546. Professor Lanctot states that "[t]he long history of pretext litigation shows that courts will exploit any loopholes provided by the Supreme Court to dismiss what they consider to be unmeritorious discrimination suits." *Id.* at 546.

71. For example, Professor Deborah Calloway deems *Hicks* most significant for the "attitude" represented in the opinion, charging that the Court's analysis is "inconsistent with reality and unduly burdens plaintiffs . . . because it allows judges and

with the heightened burden placed on plaintiffs, effectively sustaining pretext-plus.[72] I agree with the general premise upon which many of these critiques are based. Even if one argues that *Hicks* is substantively sound, in my view, it fails to comport with the spirit of Title VII. A broader question remains in a post-*Hicks* environment: "What is discrimination?" Embedded in *Hicks* is the deferential tone that employers are liable for only actual or blatant discrimination, not the possibility of discrimination. While employers ought not to be liable for the mere suspicion of illegal discrimination, approaching these matters in an overly deferential manner ignores the complexity of bias that may be hidden among various forms of circumstantial evidence.

Additionally, it is important to note that the Court decided *Hicks* in the wake of Congress's 1991 Amendments to the Civil Rights Act of 1964.[73] Prior to these amendments, successful plaintiffs in disparate treatment cases were entitled to only equitable relief. Plaintiffs gained options, including legal damages (albeit capped) and jury trials, with the passage of the Civil Rights Act of 1991.[74] Thus, *Hicks* was decided at a time when courts sought ways to constrain plaintiffs. In my view, through *Hicks*, the Court set up a schema that would facilitate minimal judicial oversight,[75] leaving the lower courts to their own devices in interpreting the law.[76]

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juries to act on their unfounded and inaccurate assumptions about discrimination." Calloway, *supra* note 45, at 997-98, 1008-09. *See also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2301 (1995) (arguing that, in a post-*Hicks* world, the circumstantial evidentiary framework under Title VII "can impoverish courts' understanding of the evidence, and decrease the likelihood that courts will recognize the novel legal issues about the nature of discrimination that are so often presented by the evidence"); Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 220 (1992) (recognizing how procedure reframes the discussion and allows courts to avoid dealing "with the nature of discrimination [including] the historical and sociological complexit[ies] of employment disparities"); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 586-88 (2001) (discussing the procedural manipulation of the *Hicks* decision).

72. *See ¡Viva La Evolución!*, *supra* note 3, at 458; *Secrets and Lies*, *supra* note 55, at 541-43.

73. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C., and 42 U.S.C.).

74. 42 U.S.C. § 1981(a)-(c); *see also* 42 U.S.C. § 703(g).

75. Perhaps the evolution of the law in this regard can be blamed on deliberate framing and interpretation, concerted effort by the courts to constrain plaintiffs, or sloppy draftsmanship. Justice Scalia seems to suggest at least the latter explanation in *Hicks*. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515-20 (1993) (pointing out inconsistencies in the Court's prior decisions regarding the nature of the proof structure).

76. *See Secrets and Lies*, *supra* note 55, at 543 (highlighting that, in the wake of *Hicks*, lower courts overused the pretext-plus construct relying on the loophole

Martin: Martin: Pretext in Peril

3. The *Reeves* Correction?

As projected by several scholars, *Hicks* allowed lower courts to continue the demise of plaintiffs' ability to successfully bring discrimination claims.[77] For example, many courts renewed the pretext-plus standard in evaluating the sufficiency of plaintiffs' evidence.[78] Notwithstanding the acknowledgement by the Court that a prima facie case combined with pretextual evidence *may* constitute proof of unlawful discrimination, some courts became quite particular about the type of evidence that sufficed in order for plaintiffs' claims to survive.[79] While the Court did not address the nature of a plaintiff's burden when confronted with an employer's motion for summary judgment, the lower courts experienced an increase in motions by employers requesting summary dismissal.[80] Employers argued that, as a matter of law, plaintiffs' evidence was insufficient to prove discriminatory animus, and often courts evaluating the evidence agreed. Accordingly, without a resolution regarding the role of pretextual evidence, the pretext stage remained the critical component for plaintiffs in overcoming employers' legitimate, non-discriminatory reasons.

Speaking with one voice, however, the Supreme Court attempted once again to clarify the role of pretext in circumstantial evidence cases in *Reeves v. Sanderson Plumbing Products, Inc.*[81] The Court wrestled with essentially the same issue addressed in *Hicks* seven years earlier, namely, whether a prima facie case plus evidence that the employer's explanation is unworthy of credence (i.e., prima facie case plus pretext) suffices to sustain a finding of liability for intentional discrimination.[82] The Court unanimously answered

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created by Justice Scalia's opinion, which resulted in summary dismissal of the plaintiffs' claims).

77. *Id.* at 543 ("It did not require great prescience to predict the result of Justice Scalia's uncharacteristically permissive language in *Hicks*.").

78. *See generally* Catherine J. Lanctot, *Pretext-Plus After* Hicks*: The Circuit Split Remains*, *in* 1996 WILEY EMPLOYMENT LAW UPDATE 161-99 (H. Perritt, Jr. ed., 1996). *See also* Vaughan v. Metrahealth Cos., 145 F.3d 197, 202 (4th Cir. 1998), *overruled by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (disproving the employer's reason is not enough, as the plaintiff must demonstrate evidence of illegal discrimination to get to a jury).

79. *See, e.g.*, Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990) (Beyond casting doubt on the employer's proffered reason, "[t]he plaintiff must also show a discriminatory animus.").

80. ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 114-15 (7th ed. 2004). *See also* Memorandum from Joe Cecil & George Cort, *supra* note 6, at 2, 9. In fact, summary dismissal became easier for employers to obtain, particularly in those jurisdictions that interpreted *Hicks* to preserve a pretext-plus rule. *Id.*

81. 530 U.S. 133 (2000).

82. *Id.* at 137, 140. Stating the issue another way, the Court sought to determine whether proof of a prima facie case plus pretext entitles the plaintiff employee to

Published by University of Missouri School of Law Scholarship Repository, 2010

Missouri Law Review, Vol. 75, Iss. 2 [2010], Art. 2

the question in the affirmative.[83] Faced with another opportunity to clarify plaintiffs' burden of proof under the *McDonnell Douglas/Burdine* framework, Justice O'Connor, writing for the majority, reiterated that "[a] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated."[84] The court reasoned,

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[85]

The Court's rejection of the pretext-plus rule appears unequivocal. A plaintiff need not always present additional evidence that the employer was in fact motivated by discriminatory animus once she convinces the fact-finder that the employer's explanation ought not be believed. To illustrate the gravity of the lower court's misapplication, the Court engaged in painstaking analysis of the plaintiff's evidence and highlighted the inappropriate manner in which the lower court evaluated it.[86]

The petitioner, Roger Reeves, sued the employer, Sanderson Plumbing, for age discrimination after he was fired for his apparent inadequate supervisory performance, including failure to maintain adequate attendance records for the employees under his supervision.[87] To support its legitimate, non-

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judgment as a matter of law. *Id.* Unanimously, the court answered ambiguously: "maybe." *Id.* at 136, 148. It should be noted here that the pretext issue in *Reeves* arose at a different procedural stage of the case than in *Hicks*. Specifically, in *Reeves* the Court addressed the nature of evidence required to raise a triable issue with respect to a Rule 50 motion for judgment as a matter of law after the case has been tried before a jury or for a pretrial motion for summary judgment. *Id.* at 148-54. Whereas, in *Hicks* the Court was focused on the nature of the evidence required to rule in favor of the plaintiff on the ultimate issue of discrimination after all of the evidence has been presented by the parties. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 505 (1993). Notwithstanding the differences in procedural posture and how the Court stated the issue in each case, the analysis of *Reeves* applies with equal force to cases where employers are seeking summary dismissal.

83. *Reeves*, 530 U.S. at 148.

84. *Id.* (emphasis added).

85. *Id.* at 147 (citations omitted).

86. *Id.* at 138-40, 143-46.

87. *Id.* at 137-38.

discriminatory reason, the employer presented documentation and the testimony of the alleged decision makers.[88] Reeves challenged the employer's explanation with various types of pretextual evidence, including evidence that he had accurately recorded the attendance and hours of the workers for whom he was responsible.[89] To explain any inadvertent time-keeping errors that occurred, Reeves proffered evidence of a malfunctioning time clock, a circumstance corroborated by the testimony of the decision makers.[90] Additionally, Reeves introduced comments evidencing age-based bias made by one of the individuals who participated in the discharge decision.[91] The record also reflected more favorable treatment toward another similarly situated employee.[92]

After hearing the evidence, a jury returned a verdict in favor of the plaintiff awarding him compensatory damages.[93] Upon appeal, the Court of Appeals for the Fifth Circuit engaged in conduct one scholar describes as "among the most egregious examples of [judicial] activism," particularly in light of the strong evidence of pretext in the case.[94] Though acknowledging that Reeves had proffered sufficient evidence that the employer's explanation was pretextual, the court still held that no rational jury could conclude that the age discrimination motivated the employer.[95]

Holding that the respondent-employer was not entitled to judgment as a matter of law, Justice O'Connor explained the standard of review for rendering a judgment as a matter of law under Federal Rule of Civil Procedure 50.[96] Delineating the parade of errors made by the Court of Appeals for the Fifth Circuit, and in no uncertain terms, she reiterated that Rule 50 mandates that,

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88. *Id.* at 143-44 (citing Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 692 (5th Cir. 1999), *rev'd*, 530 U.S. 133 (2000)).

89. *Id.* at 144-45.

90. *Id.* Reeves further cast doubt on the employer's assertion that he failed to discipline employees with regard to attendance issues by demonstrating that it was outside the purview of his job responsibilities to do so. *Id.* at 145. He showed that such discipline rested in the hands of the plaintiff's direct supervisor. The employer admitted that the plaintiff was not responsible for conducting such disciplinary action. *Id.*

91. *Id.* at 151.

92. *Id.* at 151-52.

93. *Id.* at 138-39. The defendant renewed its motion for judgment as a matter of law, which the district court denied again. *Id.* at 139. The Court also awarded liquidated damages based on the jury's finding that the employer acted willfully in discriminating against petitioner. *Id.*

94. *Secrets and Lies*, *supra* note 55, at 543. Reversing the district court's entry of judgment in favor of the petitioner, the appellate court held that Reeves failed to introduce sufficient evidence to sustain the jury's finding of unlawful discrimination. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 693 (5th Cir. 1999), *rev'd*, 530 U.S. 133 (2000).

95. *Reeves*, 197 F.3d. at 693.

96. *Reeves*, 530 U.S. at 149-52.

in reviewing the record as a whole, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."[97] While a holistic review of the record is required, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe."[98] The Court's pronouncement appears to mandate that federal courts should not substitute their judgment for that of the jury. According to *Reeves*, the lower courts should not (i) make credibilty determinations, (ii) weigh the evidence, or (iii) draw inferences from the facts.

a. "Pretext-Plus" Lives On

Despite the precision of the Court's opinion, it left "a cryptic loophole."[99] The Court sustained the "pretext-may" formulation but ambiguously noted that there may be instances where a prima facie case plus pretextual evidence is insufficient to support a finding of discrimination.[100] Justice O'Connor offers two general examples of when this might be the case, entitling the defendant to judgment as a matter of law:

- "[I]f the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision."

- If the plaintiff's evidence creates "only a weak issue of fact" regarding the employer's explanation, and the record contains "abundant and uncontroverted independent evidence that no discrimination had occurred."[101]

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97. *Id.* at 150, 146-53. In chastising the lower court, Justice O'Connor acknowledged the relevance of comparative evidence and information regarding the composition of the employer's workforce but found that the lower court gave too much weight to the evidence in contravention of the *McDonnell Douglas/Burdine* framework. *Id.* at 152-53. Additionally, regarding the age-related biased comments, the Court criticized the Fifth Circuit's discount of these biased comments, despite their "potentially damning nature," due to the fact that they were not made in the context of Reeves's discharge. *Id.* at 152.

98. *Id.* at 151.

99. *See Secrets and Lies*, *supra* note 55, at 544 (observing that "Justice O'Connor carves out a cryptic loophole").

100. Justice O'Connor states,

> This is not to say that such a showing by the plaintiff will always be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory.

Reeves, 530 U.S. at 148 (emphasis omitted).

101. *Id.*

Thus, what Justice O'Connor gives by reassuring plaintiffs that the pretext-may rule remains good law, she takes away with the ambiguous caveat.[102] This lack of a definitive stance relieves the Court from offering what may result in a more workable standard. It also leaves the field open for lower court manipulation, effectively reinstating, or at least not foreclosing, a viable pretext-plus interpretation.[103] Justice Ginsburg recognizes this shortcoming and cautions the Court on the consequences of its failure to "define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law."[104]

b. Post-*Reeves* World

In the wake of the Court's decision, some hailed *Reeves* as a pro-plaintiff decision.[105] Despite its permissive tone, however, it did not set the boundaries squarely enough to suspend the lower courts' dismissive view of plaintiffs' pretextual evidence. In fact, despite the Court's unanimity, many lower courts remain vigilant in their assessment of plaintiffs' pretextual evidence, raising the bar for what constitutes sufficient evidence to overcome employers' legitimate, non-discriminatory reasons.[106] Thus, the pretext stage

102. Accordingly, Professor Lanctot describes *Reeves* as creating a "pretext-minus" rule – any "'conclusively revealed' alternative explanations or 'abundant and uncontroverted' evidence will be subtracted from the weight of" the plaintiff's proof of pretext. *Secrets and Lies*, *supra* note 55, at 545. Justice O'Connor declines to give any further guidance. *Reeves*, 530 U.S. at 148.

103. Some have described the Court's position as "waffling" and creating grounds for confusion. *See, e.g.*, *Secrets and Lies*, *supra* note 55, at 545.

104. *Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring). Justice Ginsburg's concurrence suggests that the two scenarios offered by Justice O'Connor will be the atypical situations. That is, due to the credibility assessments involved and the role of the jury thereto, Justice Ginsburg opines that where a plaintiff has presented a prima facie case and sufficient evidence challenging the trustworthiness of the employer's explanation, it will be rare that the record reveals some other conclusive evidence against a finding of discrimination. *Id.* at 154-55. Accordingly, she reminds us that *Hicks* was clear – the finder of fact decides the ultimate question regarding the employer's discriminatory motive toward a plaintiff. *Id.* at 154. An inference of discrimination arises and remains once the plaintiff has presented a prima facie case along with evidence of pretext, such "that the ultimate question of liability ordinarily should not be taken from the jury" after this showing. *Id.* at 155.

105. *See generally Hard to Win*, *supra* note 2, at 574 (making projections about the impact of *Reeves*).

106. Post-*Reeves* courts continue to blaze a path of destruction over plaintiffs. Post-*Reeves* decisions reflect that courts continue to struggle in evaluating the essence of a plaintiff's claim of unlawful discrimination. *Compare* Evans v. City of Bishop, 238 F.3d 586, 592 (5th Cir. 2000) (noting that "[t]he Supreme Court in *Reeves* emphasized the importance of jury fact finding and reiterated that evidence of the prima facie case plus pretext may, *and usually does*, establish sufficient evidence for a jury

of the *McDonnell Douglas/Burdine* framework remains a nearly insurmountable hurdle for plaintiffs to prove discrimination.[107]

The problem with *Reeves* is its indefiniteness regarding when a prima facie case combined with pretext is sufficient to sustain a plaintiff's cause of action. As Justices O'Connor and Ginsburg acknowledged, *Reeves* presented an easy case due to the "substantial showing [by petitioner] that respondent's explanation was false" and the "additional evidence" of discriminatory animus in the form of biased comments.[108] In making an assessment of the sufficiency of a plaintiff's evidence, Justice O'Connor merely offered that "[w]hether [a defendant is entitled to] judgment as a matter of law . . . in any particular case will depend on [some general] factors," including the "strength of plaintiff's prima facie case, the probative value" of the plaintiff's evidence demonstrating that the employer's explanation is unworthy of credence, and "any other evidence that supports the employer's case and that may be properly considered on a motion for judgment as a matter of law."[109]

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to find discrimination") (emphasis added), *with* Zimmerman v. Assoc's First Capital Corp., 251 F.3d 376 (2d Cir. 2001) (noting that "the Supreme Court has indicated that only occasionally will a *prima facie* case plus pretext fall short of the burden a plaintiff carries to reach a jury on the ultimate question of discrimination" but that "such occasions do exist") (citing Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87 (2d Cir. 2001)).

107. For some recent observations on the *McDonnell Douglas* framework in light of more recent Supreme Court decisions, see Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109 (2007) [hereinafter *Reclaiming* McDonnell Douglas]; Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643 (2008) [hereinafter *Unifying Disparate Treatment*].

108. *Reeves*, 530 U.S. at 144-50. *See id.* at 154-55 (Ginsburg, J., concurring). For example, what if petitioner Reeves had only a prima facie case (e.g., a good employee with significant experience was discharged and replaced with a younger employee) and pretext (e.g., an employer's sloppy record-keeping charge was false)? Justice O'Connor leaves in doubt whether this evidence would be sufficient to survive the employer's motion for judgment as a matter of law. *See id.* at 148-49. *See also* Ryan Vantrease, Note, *The Aftermath of* St. Mary's Honor Center v. Hicks *and* Reeves v. Sanderson Plumbing Products, Inc.*: A Call for Clarification*, 39 BRANDEIS L.J. 747 (2001) (exploring post-*Reeves* interpretations of pretext analysis via a circuit-by-circuit survey).

109. *Reeves*, 530 U.S. at 148-49. Generally, many federal appellate courts interpret *Reeves* quite narrowly and often conclude that plaintiffs fail to establish pretext. Even in those instances where a plaintiff introduces sufficient evidence of pretext, reviewing the record as whole, courts often deem the evidence insufficient to raise a triable issue of fact that the employer engaged in unlawful discriminatory action. A Fifth Circuit case illustrates this predicament well. In *Keelan v. Majesco Software, Inc.*, the court affirmed summary judgment for the employer notwithstanding evidence that the high-ranking officials in the organization admitted to making the company "all Indian." 407 F.3d 332, 344-46 (5th Cir. 2005). *See also* Williams v. Raytheon Co., 220 F.3d 16, 19-20 (1st Cir. 2000) (Despite the plaintiff's evidence that the supervisor stated that the company was run by "old, white men" and pro-

Justice O'Connor did reiterate that "[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."[110]

The upshot is that *Reeves* echoes *Hicks*, in part, and offers no substantial guidance or certainty in resolving disparate treatment cases comprised largely of circumstantial evidence.[111] It arguably creates an "additional evidence" exception and maintains the applicability of a pretext-plus standard.[112] It certainly does not reduce the significance of the effort a plaintiff must put forth to overcome an employer's evidence supporting its business decision.[113] In that regard, *Reeves* preserves the employer's right to obtain summary dismissal of claims.[114] Thus, the essence of plaintiffs' burden in proving unlawful workplace discrimination remains unclear.

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fessed her intention to change the culture to favor hiring women and younger workers, the court determined that the plaintiff failed to establish pretext; there existed no evidence that the employer's reason for discharging the plaintiff was false.); Casamento v. Mass. Bay Transp. Auth., 550 F.3d 163, 165 (1st Cir. 2008) (affirming summary judgment and stating that "[t]o reach a jury, there must be evidence that would permit a jury to [find a forbidden motive]"); Jackson v. Gonzales, 496 F.3d 703, 707 (D.C. Cir. 2007) ("[P]laintiff must prove that a reasonable jury could infer that the employer's given explanation was pretextual *and* that this pretext shielded discriminatory motives." (emphasis added)). Thus, many courts maintain their pre-*Reeves* orientation toward requiring substantial evidence of discrimination and granting or affirming awards of summary judgment in favor of employers.

110. *Reeves*, 530 U.S. at 153.

111. Certainly courts of appeal now must recognize that in the appropriate circumstances a plaintiff can succeed with a prima facie case and evidence of pretext. Post-*Reeves*, the contest is what the appropriate circumstances are; what combination of evidence preserves plaintiffs' chances of obtaining redress for discrimination?

112. *See supra* note 109 and accompanying text.

113. *See* BARRY D. ROSEMAN, EMERGING ISSUES IN EMPLOYMENT LAW AND LITIGATION: *REEVES* UPDATE (2000), *available at* VPB0919 ALI-ABA 495 (observing how lower courts continue to defy the Supreme Court's holding in *Reeves*).

114. *Reeves* and *Hicks* arose under different procedural postures. The Court, in *Reeves*, justified its grant of certiorari by stating the issue rather broadly: "We granted certiorari, to resolve the conflict among the [circuits] as to whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination." 530 U.S. at 140 (citations omitted). In *Hicks*, the question more narrowly addressed the type of evidence needed to sustain a finding for the plaintiff after the parties had presented all their evidence.

C. The Procedural Framework – The Pre-trial Dilemma of Summary Judgment in the Employment Discrimination Context

In the modern litigation environment, a trend has developed toward a more expansive use of summary judgment.[115] For sure, motions for summary judgment are now customary – a routine screening mechanism for the courts, as common a pleading as the initial complaint and answer that initiate the litigation cycle.[116] Three cases decided by the Supreme Court in 1986, referred to as the summary judgment "trilogy"[117] – *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[118] *Anderson v. Liberty Lobby, Inc.*,[119] and *Celotex Corp. v. Catrett*[120] – signaled the acceptance of widespread use of summary judgment.[121] Prior to the Supreme Court's issuance of the trilogy, lower courts tended to approach summary judgment tentatively.[122] However,

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115. *Tortured Trilogy*, *supra* note 2, at 228-33.

116. *Id.* *See also* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 103-04 (2002) (highlighting that nearly three-fourths of summary judgment motions are brought on behalf of defendants and granted most often on their behalf).

117. *Tortured Trilogy*, *supra* note 2, at 206.

118. 475 U.S. 574 (1986).

119. 477 U.S. 242 (1986).

120. 477 U.S. 317 (1986).

121. In the trilogy cases, the Court clarified the standards of Rule 56 and dealt with some attendant issues. *See* Friedenthal & Gardner, *supra* note 116, at 101-03. These cases elevated the importance of summary judgment in the litigation process and required plaintiffs to take notice. *Id.* at 103-04. Thereafter, litigants and judges no longer viewed summary judgment as an extraordinary remedy but instead as a viable strategic option and case-management tool. Summary judgment came to be viewed as integral to an expedient and fair litigation scheme. *Id.* at 101. It is undisputed that the "trilogy" had a profound effect on plaintiffs, as defendants experienced relative ease in convincing courts to grant their motions. *See Tortured Trilogy*, *supra* note 2, at 228-33. For additional commentary on the contribution of the trilogy to the litigation process and the clarification of the standards, see *id.* at 220-28. *See also* Friedenthal & Gardner, *supra* note 116, at 101-04.

122. Friedenthal & Gardner, *supra* note 116, at 98-99. Judges initially exercised their discretion to grant summary judgment rather cautiously and reserved most matters for trial resolution. Because motions for summary judgment arise fairly early in the litigation cycle, judges sought to "preserv[e] parties' rights" and conduct live trials as opposed to "trials by affidavit." *Id.* Complex cases seemed particularly ill suited for summary dismissal, especially "where motive and intent play[ed] leading roles." *Id.* at 99 (quoting Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962)). *See also* William W. Schwartzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 473 (1984), *quoted in* EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE §§ 6.01 to .03, .05 (2d ed. 2000). The complexity of the case seemed to coincide with an imbalance in access to information. *See* Robert M. Bratton, *Summary Judgment Practice in the 1990s: A New Day Has Begun – Hopefully*, 14 AM. J. TRIAL ADVOC.

shortly after the Court's 1986 opinions, federal courts began utilizing the procedural device aggressively, in a fashion that prompted one scholar to describe it as "a potential juggernaut."[123] The field of employment discrimination law did not escape this impact.[124]

Litigants of employment discrimination claims have experienced a surge in the use of motions by employers requesting summary dismissal.[125] The handling of such requests, particularly in favor of employer defendants, suggests the judiciary's openness to this mode of pretrial resolution.[126] The recent trend toward a more liberal use of summary judgment generally, and in employment discrimination cases particularly, suggests that the Supreme Court emboldened lower courts to dismiss claims they deem unmeritorious. Hence, summary judgment has become a powerful tool for litigants and judges alike under Title VII law. Noteworthy is another procedural device that is often analogized to summary judgment – the directed verdict.[127] The

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441, 454 (1991). Additionally, many issues may be left to the testimony of key witnesses. The judiciary's ambivalence persisted until the late 1980s, when the litigation front experienced a revival of interest in the use of summary judgment. *See* Friedenthal & Gardner, *supra* note 116, at 101. That said, not all judges shied away from the power invested in them with the advent of the Federal Rules of Civil Procedure and Rule 56 in particular. There were judges who believed that summary judgment played a valuable role in the efficient management of court dockets. For treatment of the evolution of summary judgment chronicling the initial hesitancy by the courts, see generally Bratton, *supra*; Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

123. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEXAS L. REV. 1897, 1917 (1998) (reflecting on the transformation of summary judgment from a device to ferret out sham cases and frivolous lawsuits "to something more of a gestalt verdict based on an early snapshot of the case").

124. Each of the summary judgment trilogy cases involved a different area of the law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 245 (1986) (libel case); Celotex Corp. v. Catrett, 477 U.S. 317, 319 (1986) (wrongful death case); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 576 (1986) (anti-trust case). Notwithstanding the substantive law applied, motions for summary judgment in nearly every employment discrimination defense brief filed by an employer cited the trilogy in support of its request for relief.

125. *Tortured Trilogy*, *supra* note 2, at 206-09.

126. Courts appear to have little reservation in summarily dismissing employment discrimination cases. *See* Henry L. Chambers, Jr., *Recapturing Summary Adjudication Principles in Disparate Treatment Cases*, 58 SMU L. REV. 103, 135 (2005).

127. The motion for directed verdict is synonymous with judgment notwithstanding the verdict (JMOL). The *Reeves* decision involved the defendant's renewed motion for directed verdict. In fact, Justice O'Connor in *Reeves* opined that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)).

standards for both are quite similar in that a party must present evidence that demonstrates that no rational fact-finder could find against her.[128]

The fact that disparate treatment cases require the plaintiff to prove motive introduces another layer of difficulty into the court's evaluation of the claim. This requirement raises questions about the use of summary judgment dismissal under Title VII, which several scholars have addressed.[129] The most effective way for a plaintiff to counter the movant's professed non-discriminatory state of mind is through cross examination in a formal trial setting. A denial of summary judgment preserves the right of the non-movant to call and examine those responsible for the alleged adverse employment decision. As discussed in Part IV, courts should approach summary dismissal of disparate treatment cases, particularly those based on primarily circumstantial evidence, with caution.

Employment discrimination scholars, including Professors Theresa Beiner and Ann McGinley, have engaged the trilogy and its effect on plaintiffs' attempts to seek redress for workplace discrimination. Focusing on the intersection of procedure and substance, each examines and impugns the use of summary judgment to the detriment of plaintiffs.[130]

In *The Misuse of Summary Judgment in Hostile Environment Cases*, Professor Beiner provides a lucid review of the trilogy, examining each of the three cases and its particular contribution to the disintegration of the jury's role in the employment discrimination realm.[131]

128. *See Reeves*, 530 U.S. at 149-50. There exist notable differences in the procedural postures – largely encompassing the timing of the motions, availability of evidence, and manner in which courts receive the evidence. *Compare* FED. R. CIV. P. 50, *with* FED. R. CIV. P. 56. That is, for motions for directed verdicts, the court receives the evidentiary proof in open court rather than in documentary form as with motions for summary judgment. FED. R. CIV. P. 50; FED. R. CIV. P. 56. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1062 (2003).

129. *See, e.g.*, *¡Viva La Evolución!*, *supra* note 3, at 229-33, 241-42. Certainly, courts must evaluate the evidence proffered by a party moving for summary dismissal. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 9.3 (4th ed. 2005). In reviewing the evidence in favor of the non-moving party, however, a court must not make credibility choices as to conflicting evidence about which reasonable persons might disagree. *See* Curry v. City of Syracuse, 316 F.3d 324, 333 (2d Cir. 2003). If "a reasonable inference can be drawn in favor of the . . . party" opposing the motion, then "summary judgment is improper." *Id.*

130. Beiner and McGinley are two among many champions of justice in workplace scholarship – those who understand that substance cannot be extrapolated from procedure in theorizing on the evolution and shortcomings of employment discrimination jurisprudence.

131. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 86-95. Focusing her exploration on hostile environment cases, Beiner resolves that summary judgment in this context serves as a

Martin: Martin: Pretext in Peril

Professor Beiner's examination of harassment cases under Title VII reveals that often courts grant summary dismissal for "the lack of severity or pervasiveness of the [alleged] harassment."[132] As Biener points out, the severity and pervasiveness of the conduct "is necessarily a fact-specific inquiry based on social norms."[133] I share Beiner's concern regarding the complex nature of discrimination and how, based on documentary evidence supporting a motion for summary judgment, courts often lose sight of the intricacies of an individual's experience in a particular work setting.[134] The manner in which courts deal with summary judgment in hostile environment cases led

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"very potent procedural tool" that deprives plaintiffs of the "opportunity to test their facts before a jury." *Id.* at 72, 75. She believes that summary judgment confines the interpretation and decision to a "single judge on less than a full record." *Id.* at 74-75. Beiner reviews the latest Supreme Court cases on harassment law and summary judgment. *Id.* at 76-97. Beiner impressively amasses statistical as well as anecdotal support that illuminates just how potent summary dismissal is in practice. *Id.* at 86-133. Disturbed by the courts' latitude in evaluating the evidence and drawing inferences that should rest in the hands of a jury, she points out that judicial isolation greatly disadvantages plaintiffs. *Id.* at 75. What Beiner does not say directly, but infers in her exploration, is that judicial isolation combined with unfettered discretion can drive discrimination underground. As summary judgment is a mixture of substantive and procedural requirements, Beiner draws attention to how courts, in her estimation, manipulate these standards.

132. *Id.* at 74-75. To make this determination, the fact-finder must engage in a totality-of-the-circumstances assessment of how a reasonable person would view the conduct. *Id.* at 75.

133. *Id.* at 75. Under Title VII, to constitute harassment, conduct must not only be sufficiently severe and pervasive to alter the victim's workplace conditions but also unwelcome. *Id.* at 77. As reflected in the Court's decision in *Meritor Savings Bank, FSB v. Vinson*, the issue of welcomeness "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact." 477 U.S. 57, 68 (1986), *quoted in* Beiner, *supra* note 131, at 77.

134. *See id.* at 102. In examining the way in which courts decide the appropriateness of summary dismissal in hostile environment cases, Beiner effectively demonstrates how the courts ignore important context in these matters. *See id.* 101-19. In one such decision Beiner reviews, *Saxton v. AT&T Co.*, she criticizes the court for evading the totality-of-the-circumstances standard, employing what she terms a "piecemeal" approach to viewing the alleged incidents of harassment in isolation. *Id.* at 103-06 (discussing 10 F.3d 526 (7th Cir. 1993)). The upshot of the court's approach results in plaintiffs losing because the court deems the incidents "insufficient individually." *Id.* at 105. She deems the court's strategy improper and in contravention of the standard because the court fails to evaluate the evidence of harassment "as part of the whole context in which the harassment took place." *Id.* Beiner's article includes numerous other examples of similar lapses by the courts. In a recent article, I similarly have addressed the troubling nature of the lack of context in the court's assessment of workplace discrimination, particularly in light of modern work environments. *See* Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117 (2008) [hereinafter *Immunity for Hire*].

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Beiner to conclude that "the trilogy . . . made it easier for courts to grant summary judgment."[135]

In her often-cited article, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, Professor McGinley uses a gender-based hypothetical as a case study to explore what she termed the "erosion of the fact finder's role" in employment discrimination cases due to the inappropriate use of summary judgment.[136] She states boldly that the trilogy has resulted in the "perversion of the *McDonnell Douglas/Burdine* formula" by providing the gateway for lower courts "to weigh evidence, draw inferences in favor of the defendant when it moves for summary judgment, assess witness credibility and require plaintiffs to prove their cases at the summary judgment stage."[137] McGinley published this article some seven years before the Supreme Court decided *Reeves*.[138] Notwithstanding the Court's response to the explosion of summary dismissal and liberal factual inquiry, lower courts continue to engage in these inappropriate credibility assessments, depriving plaintiffs of their day in court and an op-

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135. Beiner, *supra* note 131, at 119. Additionally, Beiner attributes the judiciary's destructive use of summary judgment to a mixture of voluminous dockets and a pro-employer disposition of judges, all exacerbated by a "lack of diversity on the bench." *Id.* at 73, 119-21. This makes summary judgment an ineffective "coping strategy." *Id.* at 73, 97-98. Beiner uses several data points from various circuit court task forces tracking gender, race, and ethnic bias within in the American court system. *Id.* at 122-33. The findings reflected in these studies comport with the rise in summary dismissals. For example, a study conducted by the District of Columbia Circuit's Task Force on Gender, Race, and Ethnic Bias reflected perceptions by lawyers that judges treated employment discrimination cases or claims as "unimportant." *Id.* at 122-34 (quoting SPECIAL COMM. ON GENDER, REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS 98 (1995) (on file with the *Georgetown Law Journal*)). I like how Beiner uses this data to explain a deeper ideological disposition embedded in the system. The social justice implications of her findings are undeniable. *See id.* at 133-34.

136. *Tortured Trilogy*, *supra* note 2, at 206, 213. McGinley also provides a lucid examination of Title VII law as it existed at that time and demonstrates effectively how it engages with the trilogy to the detriment of plaintiffs. *Id.* at 209-42.

137. *Id.* at 231, 255-56. Reiterating that the movant possesses the burden of persuasion on the motion for summary judgment, McGinley believes that courts essentially heighten a plaintiff's burden, which "skews the result[s] in favor of [employers]." *Id.* at 232. Like Beiner, she asserts that courts evaluate plaintiffs' circumstantial evidence in a piecemeal fashion that makes it easy to discount aspects of the plaintiffs' evidence and easier to draw conclusions, inappropriately, that undercut the plaintiffs' cases. *Id.* at 233-36. Courts accomplish this transposition by crediting the employer's legitimate, non-discriminatory reasons and inappropriately judging the evidence of pretext offered by plaintiffs. *Id.* at 231.

138. *See id.* at 203 (article written in 1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

portunity to contextualize their circumstances beyond what is possible in a trial by affidavit.[139]

In a post-*Reeves* environment plaintiffs continue to bear the brunt of the courts' suspicion regarding allegations of workplace discrimination. In my estimation, courts today overly scrutinize plaintiffs' evidence of pretext.[140] Particularly damaging are the ways in which courts dilute the evidentiary value of plaintiffs' evidence of pretext. In doing so, employers continue to benefit from procedural devices like summary judgment. As discussed below in Part III, "chipping away" at pretext has resulted in several doctrinal disasters under Title VII.[141] That is, courts have developed bizarre ways of discrediting a plaintiff's evidence and deferring to the employer's judgment. I further demonstrate this distortion below, in Part IV, by exploring the same-actor doctrine as a manifestation of the courts' ingrained attitude against employment discrimination plaintiffs. This case study is just one example of an offspring of the trilogy that confirms that discrimination plaintiffs are subject to the courts' ideological disposition against claims of employment discrimination.

III. Substance and Procedure – A Dangerous Intersection

Similar to other civil litigants, employment discrimination plaintiffs engage in storytelling. During the pre-trial stage, plaintiffs' goals encompass forecasting for the court the wrongdoing by the employer. Amassing as much evidence of the unlawful conduct as possible, plaintiffs seek to address the employers' explanations head on. That is, plaintiffs attempt to cast the circumstances in a light that portrays the employers' non-discriminatory explanations for what they are – "a pretext for discrimination."[142]

The courts provide a critical forum on which substance and procedure interact, producing a kind of symbiotic relationship between the law and employers. Plaintiffs' attempts to narrate their stories fall on deaf ears as courts

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139. *See Tortured Trilogy*, *supra* note 2, at 228-30, 233-36. This violates the trilogy, as McGinley and others have highlighted. *Id.* at 208-09. *See also Hard to Win?*, *supra* note 2.

140. It should be noted that scholars realize this is not just a catastrophe of the courts; legislative and executive efforts have stunted the ability of plaintiffs' claims to thrive in the midst of hostile campaigns to undermine civil rights in this country. The Supreme Court did not decide the trilogy in isolation. For a discussion of the timing of the trilogy and other historical coordinates, see Friedenthal & Gardner, *supra* note 116, at 96-104; Beiner, *supra* note 131, 86-97. Additionally, the Civil Rights Act of 1991 grew out of hostile response to these late-1980s efforts. *See* Pub. L. 102-166, § 2, 105 Stat. 1071 (1991).

141. I should note that this term, "doctrinal disaster," evolved from an online brainstorming session with a colleague, Scott Moss, and the Executive Board of AALS Section on Employment Discrimination (2008).

142. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978).

Missouri Law Review, Vol. 75, Iss. 2 [2010], Art. 2

find ways of rationalizing any of the various challenges made to an employers' business justifications. Accordingly, procedure becomes the chisel courts use to pare down the rights of employees.

It is precisely courts' misuses of procedure in conjunction with their treatment of Title VII's substantive requirements that have endangered the pretext element of *McDonnell Douglas*, reducing it to be nearly meaningless in the totality of plaintiffs' proof. The contemporary workplace consists of various vectors in which bias can flourish – such as horizontal work configurations, collective decision making, and corporate culture.[143] Due to these advancements, discrimination is complex and often elusive. Without the use of meaningful filters, deciphering allegations of workplace discrimination remains haphazard, and the meaning of pretext remains in peril.

Here, I will engage in a brief discussion of how courts' interpretations of pretextual evidence severely undercut plaintiffs' efforts to prove discriminatory bias. Plaintiffs are left baffled as to precisely what kind of evidence is sufficient to oppose a motion for summary judgment or motion for judgment as a matter of law. The following examination shows that courts have instigated an end run around *Reeves* and the summary judgment standards, making pretext an endangered element under Title VII analysis.

A. *The Endangered Element of the* McDonnell Douglas *Framework: "Chipping Away" at Pretext*

The pretext stage constitutes the final element of the evidentiary scheme under the *McDonnell Douglas* framework, the critical phase of a plaintiff's case.[144] As discussed earlier, the jurisprudence on pretext has a checkered past, one that holds less promise for plaintiffs than perhaps the courts originally intended.[145] Plaintiffs have several tools in their toolbox to attempt to demonstrate pretext. Overall, however, none has proved particularly useful for constructing a story worthy enough to persuade courts regarding discrimination. It leaves one to wonder – *What is pretext*? What precisely do courts mean when they say that plaintiffs must provide sufficient evidence of pretext for discrimination? What does it take for courts to believe plaintiffs' versions of the facts?[146]

Plaintiffs undertake the task of demonstrating pretext in numerous ways. The most common involve presenting comparative evidence to show that the employer inconsistently dealt with similar situations involving similarly sit-

143. Technological advances such as social networking, blogs, and text messaging have created additional loci for workplace bias to flourish.

144. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

145. *See supra* Parts II.A.3, II.B.

146. Recently, Rachel Moran has observed the elusive nature of discrimination and the limitations of the various theoretical frameworks to adequately conceptualize modern discrimination. *See* Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2384-2400 (2003).

uated individuals. For example, if a plaintiff is discharged for allegedly violating a company policy, the plaintiff may weave the story by showing that the employer treated others who engaged in similar conduct less harshly.[147] Another avenue requires the employee to portray in tedious detail the circumstances surrounding her tenure that offer any evidence demonstrating the inconsistency or bias of the employer.[148] Statistical data of the composition of the employer's workforce may lend some insight into its tendency toward those in the plaintiff's protected class as well.[149] The point is that employers typically act for a reason, and, thus, if plaintiffs sufficiently undermine that explanation, then the reasonable inference becomes that the employer more likely than not engaged in discrimination.[150]

Notwithstanding the type of pretextual evidence the plaintiff presents, the courts have managed to "chip away" the evidence, leaving the meaning of pretext indeterminate and meaningless. The courts' interpretations of pretext have yielded sub-rules that have taken on a life of their own in the jurisprudence of Title VII. These defenses have become a regular part of every employer defendant's playbook.

1. Comparative Evidence

Using comparative evidence, a plaintiff aims to show that the employer treated a similarly situated employee more favorably. Plaintiffs' success in presenting this type of evidence has waned significantly as courts have sharpened their inquiry of pretext.

To succeed, the plaintiff must compare apples with apples; that is, the comparator(s) must be, for all practical purposes, tantamount to a carbon copy of the plaintiff. The lower courts have varying perspectives about comparability – just how similar must the circumstances involving the comparator be to the plaintiff's facts? Some lower courts require that the alleged similar situation be "nearly identical" to the plaintiff's experiences.[151] This standard

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147. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973) ("[The employer" may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.").

148. *Id.* at 804-05.

149. *Id.*

150. *Furnco*, 438 U.S. 577 (1978) ("And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.").

151. *See, e.g.*, Perez v. Tex. Dep't of Criminal Justice, 395 F.3d 206, 213 (5th Cir. 2004) ("[T]he jury must find the employees' circumstances to have been nearly identical in order to find them similarly situated."); Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997) (stating that, for a plaintiff to make out a prima facie case, the plaintiff must show that "he and the [comparators] are similarly situated in all relevant respects").

requires the plaintiff to demonstrate that the circumstances that led to the employer's action toward her are roughly the same as those of the comparator.[152]

As courts have tightened the standards for what suffices as evidence of pretext, plaintiffs have also experienced growing difficulty in establishing their superior comparative worth such that the employer selected someone less qualified for an employment opportunity. Generally, it is not enough for the plaintiff to show that she is better qualified than the employer's choice.[153] Until fairly recently, the majority of circuits required that the plaintiff prove the substantial superiority of her qualifications such that the distinction is "so apparent as to virtually 'jump off the page and slap you in the face.'"[154] This "jump and slap" standard placed a nearly impossible burden on plaintiffs to show pretext in this way, especially due to the subjective nature of decision making, generally, and the comparative process, particularly.[155]

Despite the dramatic fashion in which the circuit courts have described this approach, the Supreme Court recently deemed this "jump and slap" standard "unhelpful and imprecise."[156] Despite its expressed dismay, the Court declined to provide a more precise definition for pretext claims based on superior qualifications.[157] It is fair to say that courts will continue to keenly

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152. *Holifield*, 115 F.3d at 1562.

153. *See* Taylor v. Runyon, 175 F.3d 861 (11th Cir. 1999) (deeming comparative evidence probative and requiring plaintiff to demonstrate more).

154. *See, e.g.*, Deines v. Tex. Dep't of Protective & Regulatory Servs., 164 F.3d 277, 279 (5th Cir. 1999) (deeming jury instruction appropriate where it reflected that disparity alone is insufficient as evidence of pretext unless the "disparit[y is] so apparent as to virtually 'jump off the page and slap you in the face'"). *But see* Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (9th Cir. 2003) (rejecting the "jump . . . and slap" standard and deeming the plaintiff's superior qualifications compared to the employer's choice sufficient evidence of pretext).

155. This fanciful manner in which the courts described this standard is indicative of the defenses that evolve from employment discrimination jurisprudence. This type of interpretational sideshow has resulted in several doctrines over the years, eroding the force of pretext offerings by plaintiffs. These rules take on a life of their own and become a part of any employer's playbook.

156. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006). The Court's opinion was short but firm. It implored that "[t]he visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications." *Id.* The Court opined that a simple formulation would achieve more consistency in the lower courts. *Id.* at 458.

157. *Id.* at 457-58. The Court seemed to endorse by reference the standard used by the Eleventh Circuit requiring that the distinction "must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question." *Id.* (quoting Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004), *overruled by Ash*, 546 U.S. 454). Despite the language of this standard, the reasonable person standard

review any attempt by the plaintiff to cast herself as a more suitable choice.[158] Courts continue to treat employers quite deferentially.[159]

2. Biased Comments – The Stray Remarks Doctrine

Even where a plaintiff's evidence fails to establish direct evidence of discrimination, it may serve as circumstantial proof that the employer's explanation is merely a pretext for discrimination. Often times, plaintiffs attempt to contextualize their employment settings through biased statements or comments made by others in the workplace. The courts have been similarly measured, however, in their acceptance of biased comments as sufficient circumstantial evidence of discrimination. Notwithstanding the often inflammatory nature of the remarks, their force tends to fall on the deaf ears of the courts.

What accounts for this unfavorable treatment of expressions of bias is what is commonly known as the "stray remarks doctrine." Under this construct, courts reviewing statements of bias often describe them as "stray remarks."[160] While admissible, they are often insufficient to raise a triable issue of fact.[161] Justice O'Connor's concurrence in *Price Waterhouse v. Hopkins*[162] serves as the genesis of this formulation. In *Price Waterhouse*, the Court considered whether stereotyping evidence constituted direct evi-

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envelops the indeterminacy and subjectivity that others have appropriately challenged. *See* Beiner, *supra* note 131, at 101-20.

158. *See, e.g.*, Brooks v. County Comm'n, 446 F.3d 1160, 1163 (11th Cir. 2006) (In offering comparators of proof regarding her qualifications, a plaintiff must demonstrate that "the disparities between the successful applicant's and her own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'" (quoting *Cooper*, 390 F.3d at 732)).

159. Professor McGinley deemed the manner in which courts view plaintiffs' evidence of qualifications to "turn[] *McDonnell Douglas* on its ear" because it requires more from plaintiffs than it should at the summary judgment stage. *Tortured Trilogy*, *supra* note 2, at 230-31 & n.125. That is, by requiring more than objective qualifications as part of the prima facie case, courts force plaintiffs to rebut their employers' defense. This "collapses" the prima facie case into the pretext analysis inappropriately. *Id.* at 230 n.125.

160. *See id.*

161. *See, e.g.*, Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 36 (1st Cir. 2001) (Evidence that a supervisor mockingly imitated a "southern black" accent at meetings was not probative of pretext because there was no evidence that the supervisor used the accent "either during or in relation to the challenged employment action." (emphasis omitted)). *But see* Robinson v. Runyon, 149 F.3d 507, 511-14 (6th Cir. 1998) (A supervisor's knowledge and inaction regarding evidence of a "bogus" "Nigger Employment Application" that was found throughout the workplace and contained racial stereotypes constituted evidence of pretext.).

162. 490 U.S. 228, 261-79 (1989) (O'Connor, J., concurring).

dence of discrimination.[163] The Court determined that such evidence may demonstrate that gender bias played a substantial role in motivating the employer to act and accordingly shift the burden to the employer to demonstrate that, notwithstanding the illegal factors involved, "it would have made the same decision even if it had not allowed" such factors to play a role.[164] In its usual evasive fashion, however, the Court declined to guide on the kind of evidence necessary to meet the plaintiff's burden.[165] Addressing the nature of stereotyping evidence that suffices to meet this burden, Justice O'Connor described, in the negative, the plaintiff's charge:

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring and promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself suffice to satisfy the plaintiff's burden in this regard. . . . Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and may comment on in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to a "lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is . . . direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.[166]

Stating only that "[w]hat is required is . . . direct evidence that the decision makers placed substantial negative reliance on an illegitimate criterion in reaching their decision,"[167] Justice O'Connor's words left an opening for this interpretive manipulation by the lower courts. Courts have applied the "stray remarks" doctrine to a full range of expressive evidence, from biased statements and remarks to epithets, slurs, and the like.

The "stray remarks" doctrine ushers the courts toward detailed examinations of the substance of the comments and statements. Several factors may weaken the probative value of such evidence, including its nature, timing,

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163. *Price Waterhouse*, 490 U.S. at 241.

164. *See id.* at 244-46.

165. *Id.* at 251-52. *Price Waterhouse* was an easy case due to the egregiousness of the stereotyping evidence. The plaintiff was told by decision makers that she needed to act in more womanly ways, such as "dress[ing] more femininely, wear[ing] make-up, hav[ing] her haired styled, and wear[ing] jewelry." *Id.* at 235 (internal quotations omitted).

166. *Id.* at 277 (O'Connor, J., concurring) (citations omitted).

167. *Id.*

speaker, and relationship to the employment decision.[168] More recently, in *Ash v. Tyson Foods, Inc.*, the Supreme Court had occasion to examine plaintiffs' burdens regarding the adequacy of expressions of bias as reflective of pretext of discrimination.[169] This matter arose in the Eleventh Circuit where, at trial, the plaintiffs offered evidence that the plant manager referred to each of them as "boy."[170] Granting the employer's renewed motion for judgment after a jury issued a verdict for the plaintiffs, the Eleventh Circuit held that this reference of "boy" was insufficient as a matter of law to establish discriminatory intent.[171] In a per curium opinion, the Court reversed, deeming it error for the Eleventh Circuit to require, as a matter of law, that an adjective such as "white" or "black" always flank a descriptor like "boy" to constitute sufficient evidence of race discrimination to support a jury's verdict.[172] Guiding on the type of evidence sufficient to support pretext, the Court stated that "it does not follow that the term, standing alone is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."[173]

One would hope that such a range of considerations would spur the lower courts to engage in a more holistic review of the plaintiff's evidence of pretext. But the Eleventh Circuit's unpublished opinion on remand disabuses any such hope. Reinstating its conclusion that the record failed to support an inference of discriminatory intent, the court deemed the "boy" references as "ambiguous stray remarks" that were "conversational and . . . non-racial in

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168. In a frequently cited case, *Brown v. CSC Logic, Inc.*, the Fifth Circuit adopted a four-part test to analyze the probative value of alleged statements of bias and remarks. 82 F.3d 651, 655-56 (5th Cir. 1996). "[F]or comments in the workplace to provide sufficient evidence of discrimination, they must be '1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'" Krystek v. Univ. of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999) (quoting *Brown*, 82 F.3d at 655) (alteration in original). Where "[c]omments . . . are vague and remote in time, [they] are insufficient to establish discrimination. In contrast, specific comments made over a lengthy period of time are sufficient." *Brown*, 82 F.3d at 655-56 (internal quotation marks omitted) (footnotes omitted).

169. 546 U.S. 454, 456 (2006). See, as part of this colloquium, D. Wendy Greene, *Pretext Without Context*, 75 MO. L. REV. 403 (2010), for a further in-depth and critical look at this case and the need for context and subtlety in contemporary race discrimination.

170. *Ash*, 546 U.S. at 455-56. The plaintiffs alleged that the employer's failure to promote them constituted race discrimination. At trial, to counter the employer's legitimate, non-discriminatory reason, they offered evidence that the plant manager and decision maker in this instance referred to each of them, black men, as "boy" on more than one occasion. *Id.* at 456.

171. *Id.* at 455-56.

172. *Id.* at 456.

173. *Id.*

context."[174] Thus, it held that no reasonable jury could find that the employer's failure to promote the plaintiffs was racially motivated.[175] Ignoring the Supreme Court's guidance, the Eleventh Circuit emphasized that, even without the modifier, the term "boy" did not reflect a racial connotation under the circumstances of this case.[176]

Notwithstanding Justice O'Connor's view in *Reeves* that biased remarks constitute relevant and potentially persuasive evidence of discrimination and the Supreme Court's recent effort to provide guidance in *Ash v. Tyson Foods, Inc.*, the "stray remarks" doctrine appears to have survived in practice.[177] Recent cases reveal that the lower courts continue to regard biased comments with skepticism even when they are offered only as circumstantial evidence of discriminatory intent.[178] The lower courts possess substantial discretion to interpret the factual circumstances to assess statements of bias. That power can be misused when the courts do not take the time to consider the circumstances surrounding biased utterances in the manner that the Supreme Court recently prescribed. Statements or comments made by decision makers or others in the workplace contextualize the circumstances for the fact-finder. Even an isolated utterance may reflect bias once the fact-finder unpacks the

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174. Ash v. Tyson Foods, Inc., 190 F. App'x 924, 926 (11th Cir. 2006).

175. *Id.*

176. *Id.* The Eleventh Circuit's vigilance comports with Judge Posner's view that the doctrine represents a "common sense proposition that a slur is not in and of itself proof of actionable discrimination, even if repeated." Shager v. Upjohn Co., 913 F.2d 398, 402 (7th Cir. 1990). Yet how many times does a worker have to endure name-calling based on identity before the court deems it harmful? I believe a single utterance of a slur, particularly those that implicate the social constructions of race, can amount to discriminatory bias. A label such as "boy" harkens back to American slavery when whites oppressed blacks and other marginalized groups, relegating them to harsh living and working conditions. Such comments cannot and should not be separated from their historical context. The use of these comments in workplace settings fails to transcend their social, historical, and cultural meanings. They are damaging precisely because of the historical contingency and the fallacy that we operate in a post-racial society. For a thorough historical exploration of slavery and the modern labor movement, see DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); JACQUELINE JONES, AMERICAN WORK: FOUR CENTURIES OF BLACK AND WHITE LABOR (1998); JONATHAN D. MARTIN, DIVIDED MASTERY: SLAVE HIRING IN THE AMERICAN SOUTH (2004).

177. *See supra* note 97. *See* Laina Rose Reinsmith, Note, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After* Reeves v. Sanderson Plumbing Products, 55 VAND. L. REV. 219 (2002) (commenting on what aspects of the doctrine maintain the force of law in a post-*Reeves* environment).

178. *See, e.g.*, Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400, 405 (5th Cir. 2001) (holding that the stray remarks doctrine survives *Reeves*, "at least where the plaintiff has failed to produce substantial evidence of pretext").

surrounding circumstances.[179] As long as there is room to dismiss such statements as mere "stray remarks," the lower courts will continue to doom plaintiffs' efforts to provide evidence of pretext in this form.

3. "Oops, I Was Mistaken" – The Employer's Business Judgment Rule

If a plaintiff attempts to establish pretext by showing that the employer based its decision on incorrect information about the plaintiff, courts generally uphold the employer's decision. What has become known as the "honest belief" rule excuses an employer if it takes action based on a mistake, a good faith belief, or even poor business judgment.[180] While the courts recognize the tendency of employers to make mistakes, they vary in how much leverage employers have in this regard. For example, some apply the rule and excuse the actions as long as the employer can demonstrate that it held the belief, albeit incorrect or foolish, at the time that it took the adverse employment action. The relevant query becomes "whether the employer made a reasonably informed and considered decision before taking . . . action."[181] Other

179. *Compare* Howley v. Town of Stratford, 217 F.3d 141 (2d Cir. 2000) (comments about plaintiff as a "fucking whining cunt" who received her job because she performed oral sex were enough to send the case to a jury), *with* Heim v. Utah, 8 F.3d 1541, 1546 (10th Cir. 1993) (finding no discrimination where supervisor commented, "Fucking women, I hate having fucking women in the office," because the statement did not evidence the supervisor's discriminatory intent but "only that he unprofessionally offered his private negative view of women during a display of bad temper at work").

180. *See, e.g.*, McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1129 (10th Cir. 1998) (opining that the employer's "reason is not converted into pretext merely because, with the benefit of hindsight, it turned out to be poor business judgment"); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir. 1987) (concluding that a "poorly founded" but honestly held belief does not constitute pretext for discrimination).

181. Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998) ("In deciding whether an employer reasonably relied on the particularized facts then before it, we do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action."); Forrester v. Rauland-Borg Corp., 453 F.3d 416, 419 (7th Cir. 2006) (defining pretext as a "deliberate falsehood" and opining that "[a]n honest mistake, however dumb, is not"); Johnson v. AT&T Corp., 422 F.3d 756, 762 (8th Cir. 2005) (emphasizing that the proper inquiry is whether AT&T "honestly believed that [the plaintiff] made the bomb threats," not whether the company was factually correct in its assessment).

courts have granted the employer immunity even where it offers no factual support to ground its decision.[182]

This "honest belief" rule has been challenged by several scholars, particularly in its most potent applications.[183] This rule evolved as a result of courts' efforts to balance the employer's right to operate with autonomy and the worker's right to be free from discrimination in the workplace. The Sixth Circuit has described this delicate balancing act as resisting the temptation to either "micro-manage the [decision-making] process" of employers or "blindly assume that" the employer's reason is truthful.[184] Again, whether courts engage in such careful analysis is debatable. The "honest belief" rule bears similarities to the other sub-rules discussed above in that it provides a way for employers, as well as courts, to rationalize unfettered employer discretion. *McDonnell Douglas* defined pretext as a false explanation put forward by an employer to cover up discrimination.[185] Yet the falsity of the reason (on whatever grounds) typically does not assist plaintiffs in demonstrating that the employer's reason is unworthy of credence.[186]

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182. *See, e.g.*, *Chrysler Corp.*, 155 F.3d at 806 (The court reviewed the various permutations of the honest belief rule and observed that the Seventh Circuit's application of it requires no showing that the employer's "belief was reasonably grounded on particularized facts that were before it at the time of the employment action. Instead, . . . the employer need only provide an honest reason for firing the employee, even if that reason had no factual support.").

183. Professor Linda Krieger's more recent critique of this rule is included in an article in which she explores behavioral responses, including implicit bias and discrimination. *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006). *See also* Rebecca Michaels, Note, *Legitimate Reasons for Firing: Must They Be Reasonable?*, 71 FORDHAM L. REV. 2643 (2003) (criticizing the Seventh Circuit's liberal version of the honest belief rule as a "'pure' honest view" rule).

184. *Chrysler Corp.*, 155 F.3d at 807.

185. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

186. *See, e.g.*, Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 940 (7th Cir. 2003) (summary judgment affirmed where employer maintained, wrongly, that it fired plaintiff for stealing from a co-worker because plaintiff failed to show that decision maker "did not genuinely believe" that plaintiff had stolen the co-worker's money). *See also* Soto v. Core-Mark Int'l, Inc., 521 F.3d 837 (8th Cir. 2008) (summary judgment for the employer affirmed where it had a "good faith belief" that the plaintiff "was sleeping on the job" – even if he was not, the employer believed he was – notwithstanding the plaintiff's argument that he was merely "stretching his back"). This appears to be akin to a "pretext-plus" standard, especially where the courts require the plaintiff to show that the reason is false and used to cover up discrimination. Whether the reason is a cover up for discrimination or benign should rest in the hands of jury, not the judge.

4. Statistics

To buttress the personal narratives of their experiences, plaintiffs may offer evidence that the general workplace atmosphere is one in which those in their particular category tend to fare poorly. Through statistics, a plaintiff tries to paint a picture of the employer's work environment as unwelcoming to a particular group, and thus the general pattern provides reason to disbelieve the employer's explanation, making it a pretext for discrimination. In *McDonnell Douglas*, the Supreme Court approved the use of statistical evidence in disparate treatment cases, stating that statistical data may prove "helpful" to the individual plaintiff's case.[187] The Court opined that "the racial composition of defendant's labor force is itself reflective of restrictive or exclusionary practices."[188]

For example, if a plaintiff alleging race discrimination offers statistics reflecting a racial imbalance, this evidence carries probative value because such an "imbalance is often the telltale sign of purposeful discrimination."[189] Thus, the employer's workforce should reflect the labor pool from which it hires. If not, the fact-finder can conclude that the unexplained statistical disparity is due to discrimination. Because statistical data does not control in an individual disparate treatment case, however, plaintiffs cannot rely on numerical data to prove individual intentional discrimination.[190] In this manner, statistics serve merely as supplemental information for the fact-finder to consider.[191] As a practical matter, plaintiffs may not have access to the type of

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187. *McDonnell Douglas*, 411 U.S. at 805.

188. *Id.* at 805 n.19 (quoting Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 92 (1972)).

189. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977).

190. In *McDonnell Douglas*, the Court cautioned that statistics "may not be in and of themselves controlling to an individualized hiring decision." 411 U.S. at 805 n.19. It should be noted that in class-based intentional discrimination and disparate impact cases statistical data serves as a critical aspect of plaintiffs' proof. Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 606 (2004). For a discussion of statistical proof under Title VII, see Sullivan, *supra* note 3; Shoben, *supra*; Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977).

191. Generally, a showing of a gross statistical disparity is insufficient to establish a prima facie case of discrimination. Since in a disparate treatment case a plaintiff attempts to prove a particularized harm, courts generally do not accept a prima facie case standing on statistical evidence without evidence of some causal nexus between the numbers and the adverse employment decision. *See, e.g.*, Walls v. City of Petersburg, 895 F.2d 188, 191 (4th Cir. 1990) (holding that the statistical evidence offered by the plaintiff was insufficient because there existed no causal connection between the statistics and her discharge). *See also* Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 363 (7th Cir. 2001) (speculating on the possibility of statistical evidence alone serving as a prima facie case).

data needed to make out a general pattern.[192] Even where statistical data exists, it loses its force as evidence of pretext without some correlation between the numbers and the employer's alleged discriminatory action against the plaintiff. On the one hand, courts' approaches to statistical data as evidence of pretext is understandable due to the malleability of such data; statistics can be easily refined or fashioned to imply results that may not necessarily comport with biased decision making. However, courts should be willing to contextualize statistical evidence. They should entertain and take seriously, for example, a lack of diversity or meager representation in a plaintiff's protected category, which may provide important information regarding the background and climate of a particular workplace; this evidence may very well buttress the other circumstantial evidence offered by a plaintiff. By assessing value of statistical data only where there is a correlation with the particular employment decision at issue, however, courts may neglect important context about the nature of the employer's treatment of those in the plaintiff's protected category (or underrepresented groups in general). This background may shed light on the narrative of discrimination that the plaintiff offers.

B. Evidence of Pretext – What Remains?

Despite the various avenues for plaintiffs to show that the employer's legitimate, non-discriminatory reason is pretextual, these efforts have been severely thwarted by the manner in which courts evaluate the evidence and misapply the *McDonnell Douglas/Burdine* framework. After nearly thirty-five years and several attempts since, no coherent framework exists for analyzing evidence of pretext. Thus, what suffices as acceptable evidence of pretext remains a mystery. Without much guidance on the quantum or type of evidence necessary to defeat a pretrial motion with respect to the issue of pretext, plaintiffs find themselves at the mercy of the courts' capacity to interpret the facts to determine whether the allegations merit the larger stage of a jury trial.

For plaintiffs on the ground, this phenomenon has proved devastating and, in my view, worsened the problem of access to justice. Even where competing reasonable inferences can arise from pretextual evidence, courts often grant summary dismissal of plaintiffs' discrimination claims. Instead of permitting a jury to draw its own conclusions, the courts have become "active player[s] in the construction of arguments or theories."[193] This chain has led

192. Not only do employers possess this information, but the collection, categorization, and substance of the information may also vary across industries, job categories, etc.

193. Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks, *Pretext and the "Personality" Excuse*, 18 BERKLEY J. EMPL. & LAB. L. 183, 209-10 (1997). The courts' interpretive rules, presumptions, and formulations continue to cripple plaintiffs. In addition to those discussed above, another common interpretation of plaintiffs' evi-

to the development of various defenses and loopholes that have become regular aspects of nearly every employer's playbook.

In general, Title VII law embodies a deferential attitude toward the employer. Courts hesitate to pass judgment on the employer's legitimate, nondiscriminatory reasons. Recognizing the inherent subjectivity of employment decision making, the courts deem such explanations to be within the purview of an employer's authority.[194]

In my view, the court's use of procedure in conjunction with their treatment of Title VII's substantive requirements has endangered the pretext element of *McDonnell Douglas*, rendering it nearly meaningless in the totality of plaintiffs' proof. Without the use of meaningful filters, deciphering allegations of workplace discrimination remains haphazard, and the meaning of pretext remains in peril.

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dence is what has become known as the "personality conflicts" rule. *See* Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1180 (2003). Courts apply what one scholar identifies as a "personal animosity presumption" in deeming evidence unrelated to discriminatory bias. *Id.* at 1182. Circumstances that plaintiffs attempt to paint as acrimonious, and thus reflective of discriminatory animus, courts instead view as merely interpersonal conflicts. Two scholars have criticized the courts' interpretation as "bespeak[ing] both a judicial inability, or at least refusal, to attend to unconscious bias and an ideological commitment to employment at will." *Id. See also* Brodin, *supra*, at 209-10. Another defense, termed the "cronyism defense," allows evidence of favoritism by employers, especially where courts decline to connect such favoritism with discriminatory animus. Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1007-11 (1997). Under the "cronyism defense," an employer may legitimately favor someone she identifies with over someone who is more qualified, as long as the reason for the favoritism is not explicitly based on race or some other protected category. *Id.* at 1007-08.

194. Additionally, this issue embodies the larger question of what constitutes discrimination. Undoubtedly, the courts have the arduous task of determining whether an employer has subjected a plaintiff to the destructive force of discrimination based on her identity. In PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTI-DISCRIMINATION LAW, Robert Post describes a phenomenon of the "whiting out" of identity. POST ET AL., *supra* note 10. In a world of multi-culturalism, color blindness, and meritocracy, society engages in what can be described as "bleached out" cultural engagement. Similar phenomena exist in the adjudication of employment discrimination claims as courts evaluate plaintiffs' evidence and find ways to pare down and nullify it – ultimately erasing the significance of identity differences altogether.

IV. A CASE STUDY: THE SAME-ACTOR DOCTRINE – A LESSON IN PROCEDURAL INJUSTICE

As courts interpret the stories offered by both employers and plaintiffs, they make credibility assessments and draw inferences in a manner that has serious ramifications for plaintiffs. As reflected in Part III, this indulgence has produced various loopholes whose effects are particularly acute with respect to plaintiffs' efforts to prove unlawful discrimination or survive the drastic result of pre-trial dismissal or, perhaps even more demoralizing, a post-trial dismissal after a favorable jury verdict.

The same-actor doctrine serves as a striking example of how procedure and Title VII collide to the detriment of plaintiffs' claims. The essence of the same-actor doctrine provides that where the same decision maker engages in an alleged adverse employment action within a short period of time of making a positive employment decision, such evidence creates a strong presumption that the decision maker harbored no unlawful discriminatory animus.

Specifically, this Part entails an exploration of the impact of same-actor evidence on judicial decision making, particularly at the pre-trial stage, which is often the most fatal point in the litigation process for employment discrimination plaintiffs.[195] Here, the same-actor doctrine serves as a case study of the problematic nature of the intent requirement under disparate treatment, particularly in light of the courts' distortion of the pretext prong of the analysis. I demonstrate how the same-actor principle derails the search for discriminatory animus through fixation on the actors involved in the decision-making process.

By critiquing the discriminatory intent requirement through the lens of the same-actor doctrine, I not only reveal the dangers of relying on such short-hand references but also challenge the misuse of the courts' seemingly unfettered discretion to improperly usurp the role of the jury. If the employer asserts that it fired the employee for performance reasons, by applying the same-actor doctrine, the courts respond that it is highly unlikely that the employer lied or otherwise discriminated against the plaintiff. The courts' use of the same-actor doctrine as affirmative proof of non-discrimination by the employer, and without any interrogation of this principle, suggests "an ideology that discounts the possibility of discrimination" regardless of the plaintiff's evidence of pretext.[196] The court speaks and acts as if it is in the mind

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195. *See* Friedenthal & Gardner, *supra* note 116, at 92 (describing the denial of summary judgment as "virtually unappealable").

196. Parker, *supra* note 7, at 937. Wendy Parker made a similar observation about the courts' pretrial dismissal of employment discrimination cases based on race. *Id.* at 896. She states that, in doing so, judges not only grant employers deference with respect to their legitimate, non-discriminatory reasons but also "believe defendants are right as a matter of law, with no ambiguity or deference involved in reaching that conclusion." *Id.* at 936-37. Simply, judges are agreeing with employers on the merits. *Id.* at 934. She concludes "that courts are doing more than deferring to

of a reasonable juror. This inferential leap imposes a credibility assessment that resides within the purview of a jury, not the courts.

My analysis of the same-actor principle illuminates the complexity of discrimination and the need for a multi-faceted approach to determining what constitutes a pretext for discrimination. I am troubled by the courts' continued use of the doctrine and more disturbed by the rampant acceptance of the flawed underlying assumption of the principle. I argue that a lack of discriminatory animus is, in fact, an *unreasonable* inference to draw based on same-actor evidence because bias may very well have been at play. "Workplace discrimination emanates from a complex mosaic of social interactions, perceptions, and dynamics – bearing on the assessment of the worker's worth – creating the climate for bias in decision-making."[197] My concern focuses on the manner in which the courts aggregate the actions, the actors, and the timing, assigning meaning to these circumstances without any context regarding the plaintiff's particular workplace dynamics that may bear on motive.

Therefore, despite the superficial plausibility of the doctrine's underlying assumption, I contend that the same-actor doctrine proves quite problematic, particularly at the pretrial stage. The doctrine allows the judge to usurp the role of the jury, contravenes substantive and procedural law, and damages notions of acceptability and inclusion in the American workplace.

A. The Same-Actor Doctrine: Origin and Evolution

1. How It All Began

The same-actor principle was first recognized by the Fourth Circuit in *Proud v. Stone*, which held that a strong inference exists that discrimination was not a motivating factor in those instances where the same decision maker terminated the employee within a relatively short time after hiring that individual.[198] The rationale of the *Proud* court is based on the assumed irrationality of the "psychological costs" incurred by a decision maker in associating with workers from a group one dislikes, only to take some adverse action against them thereafter.[199] That is, a person predisposed against a particular category of people would not have hired one who belongs to that group from the outset. In pronouncing this principle, the *Proud* court relied on no data

defendants. Instead, they seem particularly hesitant of certain types of claims, including race and national origin ones." *Id.* at 941.

197. *Immunity for Hire*, *supra* note 134, at 1161. In a recent article, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, I explored various facets of the modern workplace in which bias can flourish between the time an individual is hired and fired, whatever the length of time. *See id.* at 1138-61.

198. 945 F.2d 796, 797 (4th Cir. 1991).

199. *Id.* (quoting John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1017 (1991)).

points or other guideposts; instead, it made an incredible leap – one that has spawned a virtual cottage industry for employer successes, including summary dismissals, directed verdicts, and judgments as matters of law.[200] Workplace discrimination is already difficult to uncover. *Proud* further impeded plaintiffs' quest when it proclaimed that the nature of the hirer-firer relationship bears significantly on the ultimate question of discrimination.

Since the formulation of the same-actor principle in 1991, its evolution has been steady and expansive. The principle has received affirmation from most of the courts addressing the issue, with most endorsing the *Proud* court's rationale with, if not resounding approval, at least passive acceptance. The circuits are split on the weight that same-actor evidence should be afforded, and the Supreme Court has yet to enter the dialogue.[201] Generally, courts deem same-actor evidence relevant for consideration on summary judgment and significant to their rulings if plaintiffs fail to rebut it, making it particularly difficult for plaintiffs to prove discrimination. More than fifteen years after its formulation, the doctrine is fully entrenched in employment discrimination jurisprudence.

In my view, the same-actor principle represents well how procedure and substance interact badly to deprive plaintiffs of their chances to take their cases to a jury. Significantly, it provides another stark example of the distortion of the pretext prong under the *McDonnell Douglas/Burdine* framework, further diminishing the critical inquiry of intent. As discussed more fully below, once an employer inserts same-actor evidence into the case, the court deems it so relevant that it essentially elevates a plaintiff's burden. In fact, courts assign same-actor evidence a weight that a jury may deem unwarranted by drawing the inference that the employer could not have been motivated by unlawful discrimination due to the consistency of the actors involved. Accordingly, I argue that the same-actor doctrine constitutes an untenable analytical paradigm that allows judges to improperly usurp the role of the jury

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200. *See id.*

201. One after another, the circuits joined the bandwagon that has resulted in the same-actor principle's formidable presence under Title VII pretext law.

> Every federal circuit has adopted some version of the same-actor [doctrine]. To summarize the continuum, there are largely two camps [–] those that buy, wholesale, the *Proud* principle and rationale, and those that apply some discount to its value. A slight majority of the circuits consider same-actor evidence almost irrebuttable in negating the employer's discriminatory motive. Specifically, the First, Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have applied the doctrine in its most potent forms.

Immunity for Hire, *supra* note 134, at 1128. In these circuits, application of the doctrine amounts to a strong inference against discrimination, creating an ostensibly mandatory finding that the employer harbored no discriminatory motive. For more discussion on the entrenchment of the doctrine and the variation in weight accorded it by the circuits, see *id.* at 1128-30.

and offers far less with respect to human motivation than its rapid evolution suggests.

2. Why This Matters: Evolution of the Same-Actor Doctrine

One may wonder why this doctrine warrants so much attention. In fact, one may argue that dissection of the principle elevates it in the discourse by giving it more consideration than it deserves. I disagree. This doctrine has been largely ignored in the legal academic literature.[202] Despite the dearth of attention, the same-actor principle has been a silent killer of plaintiffs' efforts to sustain claims of discrimination, infesting the substantive law with nonsensical, untheoretically sound assumptions. As its rapid evolution indicates, it has emboldened employers and operated as a straight-jacketing defense against plaintiffs.[203] We should be concerned about how courts activate and misuse their power to manipulate substance through procedure precisely due to the realities of the modern workplace. Additionally, exposing its underlying faulty assumption unearths how discussions of workplace bias are rooted in the hegemonic perspectives upon which much of American anti-discrimination law has evolved.[204] Discrimination has retreated further un-

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202. The writings devoted to exploration of the same-actor doctrine consist primarily of student comments and notes. *See* Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 UTAH L. REV. 255 (providing a thorough analysis of the case law and policies regarding the same-actor inference); Marlinee C. Clark, Note, *Discrimination Claims and "Same-Actor" Facts: Inference or Evidence?*, 28 U. MEM. L. REV. 183 (1997) (analyzing recent employment discrimination cases in each circuit utilizing the same-actor inference); Bethany M. Gilliland, Comment, *Employment Law –* Wexler v. White's Fine Furniture*: The Sixth Circuit Clarifies and Qualifies the Proper Analysis of ADEA Cases*, 34 U. MEM. L. REV. 975 (2004) (reviewing one of the most recent circuit decisions addressing the same-actor inference in the context of age discrimination); Goldman, *supra* note 40 (criticizing the same-actor inference as applied to summary judgment or directed verdicts for employers in employment discrimination cases); Julie S. Northup, Note, *The "Same Actor Inference" in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193 (1998) (discussing the expansion of the same-actor inference and urging restraint in its application); Jennifer R. Taylor, Student Work, *The "Same Actor Inference:" A Mechanism for Employment Discrimination?*, 101 W. VA. L. REV. 565 (1999) (detailing the same-actor inference in Title VII discrimination lawsuits and criticizing its application to summary judgment decisions). I have a recent publication that explores the same-actor doctrine in the context of the complexities of the modern workplace using an interdisciplinary lens including organizational behavior, cognitive social psychology, and management theory. *See Immunity For Hire*, *supra* note 134.

203. A thorough survey of the relevant case law demonstrates the doctrine's entrenchment in Title VII law. For more information regarding my research for this case study, *see infra* note 247.

204. Challenging notions of belonging in society reveals the historical complexity of the relationships between work, race, and class in American society. *See, e.g.*,

derground while its complexity has deepened. As we continue to determine the contours of illegal discrimination in light of social and cultural mores, we cannot allow a "counter evolution" to frame the discussion in an overly simplified and unproductive manner.[205] Thus, it is time to call out the same-actor doctrine for what it is: a sham defense that is subsidized by the judiciary.

Within five years of the Fourth Circuit's declaration in *Proud*, its salience was undeniable. Nearly every circuit had recognized and applied some variation of the principle, most with resounding approval of *Proud*'s underlying theme.[206] A minority of these circuits assign same-actor evidence a supplemental role in relation to all other evidence. The majority, however, grant this evidence a more prominent position in the analytical framework, making it particularly difficult for plaintiffs to prove discrimination.

When the Fourth Circuit established this principle, its formulation delineated seemingly specific parameters for its application. Specifically, in *Proud*, the court stated that "in cases where the hirer and the firer are the *same individual* and the *termination* of employment occurs *within a relatively short time span following the hiring*, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."[207] Notwithstanding the fundamentally flawed nature of the inference, the court seemed to contemplate a fairly narrow set of circumstances from which a fact-finder could assess discriminatory motivation violative of Title VII. In

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RICHARD DELGADO ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993). *See also* Robert S. Chang & Adrienne D. Davis, *The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars*, 39 U.C. DAVIS L. REV. 1189 (2006).

205. Professor Ann McGinley coined the term "counter evolution" in her often-cited article *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*. *¡Viva La Evolución!*, *supra* note 3, at 446.

206. As of 1996, the only circuits that had neither recognized nor issued an opinion on the inference were the Second and the Eleventh Circuits. *See infra* note 247. Every federal circuit now recognizes some variation of the of the same-actor principle. However, the Third and Eleventh circuits have shown some restraint in the weight afforded to same-actor evidence. *See, e.g.*, Waldron v. SL Industries, Inc., 56 F.3d 491, 496 (3d Cir. 1994) (discussing the logic of the same-actor principle and finding that evidence is "simply evidence like any other and should not be accorded any presumptive value"), and Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) (reversing summary judgment in favor of the employer and declining to accord same-actor evidence presumptive value, but stating its belief that such facts may give rise to a permissible inference that no discriminatory animus motivated the employer). *See also*, Johnson v. Zema Sys. Corp., 170 F.3d 734, 745 (7th Cir. 1999) (reversing summary judgment for the employer, noting the circumstances involving race and gender where the same-actor inference may not apply, and stating that the same actor inference "is unlikely to be dispositive in very many cases").

207. Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (emphasis added).

Proud, the same person both hired and fired the plaintiff within a span of only four months.[208]

The following year in *Lowe v. J.B. Hunt Transport, Inc.*, the Eighth Circuit extended the interval to two years in another age discrimination case.[209] According to the court in *Lowe*, the same-actor parameters – "[t]he short time plaintiff worked for the defendant, his age when hired, and the identity of those who hired and fired him" – proved *fatal* to the plaintiff's age discrimination claim.[210] The court stated, "It is simply incredible . . . that the company officials who hired [the plaintiff] at age fifty-one had suddenly developed an aversion to older people less than two years later."[211] Thus, in only a matter of months, courts began expanding the narrow parameters articulated by the Fourth Circuit in *Proud*.

Instead of confining the doctrine to a particularized set of circumstances, *Proud* ignited a phenomenon with far-reaching effects. An overview of some of the most problematic extensions follows.

a. Time Interval

Theoretically, the short time interval between hiring and firing presents the most appealing aspect of the doctrine's rationale. Despite the reasons why an employer hires a candidate initially, any negative action taken against that individual by the same decision maker shortly thereafter raises at least a plausible case that discriminatory motive was absent.[212] In my view, it is this aspect of the doctrine that makes it palatable as a starting point for engagement. The persuasiveness of same-actor evidence loses force, however, as the time interval expands. The longer the interval, the more tenuous the argument becomes. While the application of this inference to a short time frame appears reasonable at first blush, courts determine what constitutes a short time interval; that discretionary authority creates the problem. Such malleability leaves room for expanding the circumstances under which the inference applies.[213] While the original expression of the principle involved a

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208. *Id.* at 796-97.

209. 963 F.2d 173, 175 (8th Cir. 1992) (applying the same-actor doctrine to its analysis of the plaintiff's claim of age discrimination). This Eighth Circuit opinion is often cited as a companion case to the Fourth Circuit's decision in *Proud*.

210. *Id.* (emphasis added).

211. *Id.*

212. *See, e.g.*, Herr v. Airborne Freight Corp., 130 F.3d 359, 360-63 (8th Cir. 1997) (holding that same-actor evidence raised a strong inference against discrimination when the plaintiff's last work assignment occurred *sixteen days* after her first one); Brown v. McDonnell Douglas Corp., 113 F.3d 139, 142 (8th Cir. 1997) (deemed "simply incredible" that same decision maker would engage in discrimination *five months* after hiring the plaintiff).

213. A recent case exemplifies this tension. In *Daub v. Eagle Test Systems, Inc.*, a California federal court declared that "four years is still considered a short time" and "not so long a time as to [weaken] the presumption." No. C-05-01055, 2006 WL

Missouri Law Review, Vol. 75, Iss. 2 [2010], Art. 2

shorter time frame, subsequently, courts expanded it to as much as seven years – well beyond the *Proud* and *Lowe* standards.[214] Moreover, there exists no consistency regarding what constitutes the appropriate time interval between positive and negative employment decisions.[215]

3782877, at *11 (N.D. Cal. Dec. 21, 2006) (quoting Horn v. Cushman & Wakefield Western, Inc., 72 Cal. App. 4th 798, 809 (1999)) (unpublished order granting employer's motion for summary judgment). *See also* Houk v. Peoploungers, Inc., 214 F. App'x 379, 381 (5th Cir. 2007) (claim of age discrimination deemed "tenuous" where the plaintiff "was fired . . . only a year and a half after he was hired" by one of the same managers involved in his hiring); Robinson v. Am. Acryl NA, LLC, No. H-06-570, 2007 WL 471121, at *3 (S.D. Tex. Feb. 8, 2007) (rejecting the plaintiff's argument that the inference was inapplicable because a little less than four years is too long a time interval); Myers v. U.S. Cellular Corp., No. 3:05-CV-511, 2007 WL 230100, at *12 (E.D. Tenn. Jan. 26, 2007) (deeming same-actor inference very strong where, within "a span of . . . eighteen months," one of the decision makers, before firing the plaintiff, promoted her twice and gave her good performance evaluations). *But cf.* Garrett v. Garden City Hotel, Inc., No. 05-CV-0962, 2007 WL 1174891, at *6, *15 n.14 (E.D.N.Y. Apr. 19, 2007) (deeming the "'same[-]actor inference' . . . less compelling where . . . a significant period of time [of four years] elapses between promotion and firing").

214. Adreani v. First Colonial Bankshares Corp., 154 F.3d 389, 392, 399 n.5 (7th Cir. 1998) (same-actor inference relevant when the plaintiff was fired seven years after being hired); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 462, 464 (6th Cir. 1995) (opining that a jury could draw the inference when "the length of time between the hiring and firing" was over seven years because it is possible that an employer "who has nothing against women" when hiring them "ha[s] nothing against women" when firing them, "*regardless of the number of years that pass*") (emphasis added). *But cf.* Carlton v. Mystic Transp., Inc., 202 F.3d 129, 138 (2d Cir. 2000) ("The seven years between [the plaintiff's] hiring and firing significantly weakens the same[-]actor inference.").

215. *See, e.g.*, Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1440 (11th Cir. 1998) (reversing summary judgment in favor of the employer and declining to accord same-actor evidence presumptive value where an eleven-year interval existed between rehiring and second reduction in force); Hansen v. Clark County, No. 2:05-CV-672, 2007 WL 1892127, at *1-3, 8 (D. Nev. June 27, 2007) (after seven years of employment, same-actor evidence creates a strong inference of non-discrimination); Hollingsworth v. Henry County Med. Ctr. EMS, Inc., No. 05-1272, 2007 WL 1695303, at *2, *5 n.3 (W.D. Tenn. June 12, 2007) (six-year interval). *See also* Mitchell v. Superior Court of Cal., San Mateo, Nos. C 04-3135, C 04-3301, 2007 WL 1655626, at *14-15 (N.D. Cal. June 7, 2007) (refusing to extend the time period that same-actor inference applies to thirteen years but agreeing with "the *Coghlan* opinion's logic that evidence that a particular actor has developed a bias during the interval should be regarded as more relevant than the length of that interval in defeating the same-actor inference") (citing Coghlan v. Am. Seafoods Co., LLC, 413 F.3d 1090, 1097 (9th Cir. 2005)).

b. Same Decision Maker

At its inception, *Proud* required consistency in the decision maker, that is, that the hiring and firing be initiated by "the *same* individual."[216] This element has been significantly broadened as well. Many courts have retreated from requiring the existence of a direct relationship between the decision maker and the employee.[217] Thus, the courts have applied the inference to employment decisions involving multiple decision makers, where more than one individual has input into the worker's fate.[218] Many recent cases present

216. Proud v. Stone, 945 F.2d 796, 797-98 (4th Cir. 1991) (emphasis added).

217. As long as the decisions were made by the same organization or division, courts have applied the inference. *See, e.g.*, Amirmokri v. Balt. Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995) (indicating that hirer-firer identity is satisfied if the *same company* is involved in both decisions); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 513 (4th Cir. 1994) (suggesting that a direct relationship between the individual hirer and the plaintiff is not necessary to establish the inference so long as the firing official has hired others in the plaintiff's protected class); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174 (8th Cir. 1992) (considering evidence that the "same people" or "same company officials" hired and fired the plaintiff in less than two years as "compelling . . . in light of the weakness of the plaintiff's evidence otherwise").

218. *See, e.g.*, Houk v. Peoploungers, Inc., 214 F. App'x 379, 381 (5th Cir. 2007) (noting that the plaintiff "was hired . . . by *one* of the same managers [that was] ultimately involved in" firing him (emphasis added)); Keri v. Bd. of Trs., 458 F.3d 620, 648 (7th Cir. 2006) (applying the same-actor inference because *one of the members of the tenure committee* "was instrumental in both hiring and firing the [p]laintiff" and noting that "an inference against discrimination on [that member's] part, even if limited, exist[ed]"); Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (noting that "[m]ost of the same individuals . . . who decided to terminate Antonio for job abandonment had also hired her twice"); Jetter v. Knothe Corp., 324 F.3d 73, 74-75 (2d Cir. 2003) (noting that *four individual defendants*, in addition to the defendant corporation, were involved in the decision to terminate the plaintiff); Wofford v. Middletown Tube Works, Inc., 67 Fed. App'x 312, 318 (6th Cir. 2003) (noting that two individuals "were the sole actors involved in [the plaintiff's] hiring and termination" and that "[u]nder the 'same-actor inference' . . . the fact that the same person *or group of people* did both the hiring and firing over a short time frame is strong evidence that there was no discrimination involved in the later termination" (emphasis added)); Waterhouse v. District of Columbia, 298 F.3d 989, 996 (D.C. Cir. 2002) (finding persuasive the fact that the *same group of management officials* who hired plaintiff also fired her only a short time later, thereby raising a presumption or inference of non-discrimination); Lewis v. 20th-82nd Judicial Dist. Juvenile Prob. Dep't, No. 99-50189, 1999 WL 642898, at *3 n.1 (5th Cir. 1999) (noting that Mr. Ortega terminated the plaintiff but that Mr. Ortega performed the termination at the instruction of Ms. Dillenberger); Sreeram v. La. State Univ. Med. Ctr.-Shreveport, 188 F.3d 314, 317 (5th Cir. 1999) (noting that the plaintiff's expulsion from the medical program was recommended "by the *Residency Review Committee*, . . . composed of members of the . . . medical staff" (emphasis added)); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1442-43 (11th Cir. 1998) (noting that the employer pointed to

multiple decision-maker scenarios, which mirror the prevalence of teamwork and collective processing in contemporary work settings.[219]

Ferreting out discriminatory motive becomes a more difficult task when a decision maker receives input data from others regarding an employee.[220] While some courts have acknowledged the intricacies of bias in layered work settings, their awareness has not spurred them to significantly weaken the doctrine.[221] Allowing one decision maker's lack of bias to serve as a proxy for the non-discriminatory motive of another belies the fact-specific inquiry Title VII mandates. It is the courts' job to discern illegal animus through a holistic evaluation of the evidence.

c. Same Protected Category

In an equally troubling variation of the decision-maker expansion highlighted above, courts have deemed the inference strengthened when the same actor belongs to the same protected class as the plaintiff[222] or hires another in the same protected category as the plaintiff.[223] The rationale is similar to that

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evidence that the same individual was responsible for both positive and negative employment actions toward the plaintiff, while at the same time *identifying other individuals* who were also involved in these decisions).

219. *See, e.g.*, Jean-Baptiste v. K-Z, Inc., 442 F. Supp. 2d. 652, 665 (N.D. Ind. 2006).

220. Moreover, the manner in which the courts have loosened the parameters with regard to the actors involved contradicts other recent developments under Title VII. Specifically, the "cat's paw" theory recognizes, to some degree, the complexities of the decision-making process. *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990). Under this doctrine, courts acknowledge the influence of biased individuals beyond the putative decision maker. *See id.* This doctrine is based on the notion that bias may reside outside the actual decision maker but infect the process nonetheless. *Id.*

221. *See Immunity for Hire*, *supra* note 134, at 1148-61 (mapping the same-actor doctrine to contemporary workplace realities, including work structures, evaluative models, and powerful relational forces that affect decision-making processing and bear on motivation).

222. *See, e.g.*, Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (opining that the inference that discrimination was not the motive for an employer's action is strengthened when the same actor is also in the plaintiff's class); Stover v. Hattiesburg Pub. Sch. Dist., No. 2:05CV388, 2007 WL 465664, at *9 n.25 (S.D. Miss. Feb. 8, 2007) (citing *Brown*, 82 F.3d at 658, for this same proposition); Robinson v. Am. Acryl NA, LLC, No. H-06-570, 2007 WL 471121, at *1, *3 (S.D. Tex. Feb. 8, 2007) (applying presumptive value to same-actor evidence where one decision maker belonged to the same racial category as the plaintiff and another was over forty, like the plaintiff). *Cf.* Feingold v. New York, 366 F.3d 138, 155 (2d Cir. 2004) (rejecting the assertion that "an inference of discrimination cannot be drawn because [the plaintiff] was fired by another Jew").

223. *See, e.g.*, Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 513 (4th Cir. 1994) (suggesting that, as long as the decision maker has hired others in the plaintiff's

of the same-actor inference – that a member of the same protected class is unlikely to harbor bias against one of that class.[224] This seems to be in contravention of Supreme Court authority reflecting that whether the plaintiff and her replacement are in the same protected category is generally irrelevant to the search for intentional motive.[225]

Without a doubt, the same-actor doctrine has experienced quite a transformation in a short period of time. A pithy phrase of one-liner doctrine has swept the circuits, establishing a formidable presence in employment discrimination jurisprudence. Using same-actor evidence as a screening device with respect to claims of unlawful workplace treatment, courts avoid thinking about discrimination in any real sense, reducing this complex inquiry to an insufficient shorthand reference. Through reflexive and unrestrained application of this doctrine, the courts have subverted notions of equality and diversity in the American workplace.

B. A View from the Ground: How the Same-Actor Doctrine Distorts the Pretext Inquiry

1. *McDonnell Douglas* and the Same-Actor Doctrine

Same-actor evidence becomes germane to the analysis during the third prong of the *McDonnell Douglas* framework. There, the plaintiff seeks to convince the court that whatever explanation the employer has offered is not

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protected class, a showing of a direct relationship between the decision maker and the plaintiff is unnecessary); Collins v. Sailormen Inc., 512 F. Supp. 2d 502, 507 (W.D. La. 2007) (holding that no discrimination occurred when five of the six managers who reported to the plaintiff's boss were black). However, in a recent Sixth Circuit decision, the court declined to accept this same-group version of the inference as a mandatory inference. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003). In *Wexler*, the primary decision maker was older than the plaintiff. *Id.* at 571. The court's rejection may well soften the blow of the same-actor inference, but the inference remains viable under the court's view. Willing to accept that brethren could discriminate against one another, the court is less convinced that the same actor could engage in biased behavior. *See id.* The court seems to stretch this logic.

224. *See Robinson*, 2007 WL 471121, at *3.

225. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (unanimous opinion holding that "[t]he fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost because of his [status in the protected class]"). The trend in the lower courts reflects a heeding of the Court's view on this issue. *See, e.g.*, Stella v. Mineta, 284 F.3d 135, 145-46 (D.C. Cir. 2002) (collecting cases). Some courts have recognized exceptions to this rule. *See, e.g.*, Brown v. McLean, 159 F.3d 898, 905-06 (4th Cir. 1998) (denoting some circumstances when it would apply an exception to this rule). Even Judge Posner has recognized the unpersuasiveness of this justification. *See* Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 361 (7th Cir. 2001) (highlighting the relative unimportance of the relative ages of the decision maker and the employee).

worthy of credence because the adverse employment action was motivated by discrimination.[226] The *Proud* court described the applicability of same-actor evidence at the pretext stage as creating a "strong inference that the employer's stated reason for acting against the employee is not pretextual."[227] Thus, an employer typically argues that because the same individual involved in the alleged adverse action also hired or otherwise treated the plaintiff favorably, a reasonable fact-finder could not conclude that the basis for the action was discrimination.

A recent decision exemplifies how the inference operates in the context of the *McDonnell Douglas* rubric. In *Coghlan v. American Seafoods Co.*, the Ninth Circuit addressed the plaintiff's burden in establishing pretext using circumstantial evidence.[228] Reiterating its rationale from when the court adopted the principle almost ten years earlier, it explained "that an employer's initial willingness to hire the employee plaintiff is strong evidence that the employer is not biased against the protected class to which the plaintiff belongs."[229] Thus, in the context of the proof structure, plaintiffs' evidence of pretext is weakened by the presence of same-actor evidence while the employer's explanation is buttressed by the meaning courts assign to the mere circumstance of the consistency of decision makers. It bears mention that the manner in which the courts have expanded the inference in this regard ostensibly credits the employer for its "bottom line." Striking down the "'bottom line' . . . defense" in the disparate impact context, however, the Supreme Court has clarified that a non-discriminatory bottom line "'cannot immunize an employer from liability for specific acts of discrimination.'"[230] Thus, the notion that the same actor's position is bolstered by the manager's willingness to hire, promote, or otherwise associate with others in the plaintiff's class contravenes the essence of disparate treatment cases. Moreover, the fact that an employer hired the plaintiff and others like her does not mean that it treated *this* plaintiff fairly in *this* instance.

The ease with which courts adopt the assumption underlying the same-actor principle stems, in part, from the nature of the *McDonnell Douglas* rubric. The initially required showings for each party are not onerous. A plain-

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226. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

227. Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991).

228. 413 F.3d 1090, 1094-95 (2005).

229. *Id.* (citing Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996)).

230. Connecticut v. Teal, 457 U.S. 440, 442, 454 (1982) (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978)). In short, the employers typically assert that while a specific job criterion may have disproportionate impact on the relevant group, the focus should be on the bottom line of the selection process. In *Connecticut v. Teal*, the Court reiterated the individualized inquiry of intentional discrimination cases. *Id.* Per the Court, "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." *Id.* at 455.

tiff's prima facie case is usually comprised of evidence that is unlikely to convince a fact-finder of the discriminatory animus of the employer. To some extent, this highlights the deficiency of the proof schema itself because the application of the same-actor principle facilitates the heightening of a plaintiff's burden. Even with a solid prima facie case, the plaintiff's evidence of pretext pales in the shadow of an employer's legitimate, non-discriminatory reason.[231] Courts regard same-actor evidence as a conclusive demonstration that discrimination did not motivate the decision maker. Moreover, in those jurisdictions that apply the doctrine in its most potent form, the courts have not articulated precisely what it would take to overcome same-actor evidence, just as they have failed to do so in other areas of pretext law.

A plaintiff can offer evidence to counteract the inference, but, as the *Proud* court surmised fifteen years ago, "in most cases . . . such evidence will not be forthcoming."[232] Very often plaintiffs' efforts to repudiate same-actor evidence prove futile, especially in those jurisdictions that draw a strong inference of non-discrimination. A few recent examples illustrate the entrenchment of the same-actor principle.

In *Antonio v. Sygma Network, Inc.*, the Court of Appeals for the Tenth Circuit stated that "it *makes little sense* to deduce discriminatory motive" from most of the same individuals who hired the plaintiff ten months earlier.[233] Similarly, in *Kassa v. Selland Auto Transport, Inc.*, a federal district court determined that when confronted with same-actor evidence, the plaintiff must produce a sufficient quantity "of evidence to overcome the strong inference" of no bias.[234] It further stated, "Plaintiff's evidence must be persuasive enough to answer the *obvious question* of how the court is to find a racial bias when the person (or persons) who decided to terminate the plaintiff are the same persons who approved the decision to hire . . . ."[235]

Covarrubias v. Brink's, Inc. offers another example of the pervasive, yet flawed, underlying assumption of the same-actor inference.[236] In *Covarrubias*, the supervisor hired the plaintiff and approved his transfer to a different

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231. In fact, some have advocated for the abandonment of the proof schema altogether. *See, e.g.*, Malamud, *supra* note 71, 2238. *Compare Reclaiming* McDonnell Douglas, *supra* note 107 (professing commitment to the proof scheme despite *Desert Palace* and the view that *McDonnell Douglas* is now obsolete), *with Unifying Disparate Treatment*, *supra* note 107.

232. *Proud*, 945 F.2d at 798.

233. 458 F.3d 1177, 1183 (10th Cir. 2006) (emphasis added).

234. No. C05-1304P, 2006 WL 2559865, at *4 (W.D. Wash. Aug. 31, 2006) (internal quotation marks omitted).

235. *Id.* (emphasis added). In *Kassa*, the court found that the evidence supported "a legitimate, non-discriminatory reason" by the employer. *Id.* at *5. However, the court's opinion does not reach the issue of whether the plaintiff's proof is sufficient to overcome the same-actor inference. *Id.*

236. No. C05-5195, 2006 WL 3203733 (W.D. Wash Nov. 3, 2006).

location.[237] The court opined that the supervisor would not have hired the plaintiff and approved the transfer "if he was opposed to working with Mexicans in the first place."[238] For sure, this reasoning has infiltrated the psyche of the judiciary such that same-actor evidence and the attendant inferences are considered "common-sense."[239]

In my view, the same-actor doctrine represents an attitude that discrimination no longer exists due to the willingness of employers to hire women, minorities, and other outsiders. It makes the pretext inquiry subject to the life experiences of the fact-finder and whether she believes that discrimination remains a problem in the contemporary workplace. Overall, the same-actor principle is symptomatic of the courts' skepticism about employment discrimination matters, particularly those involving women and persons of color.[240]

As discussed below, *Proud*'s faulty rationale has provided not only the gateway for the evolution of this doctrine but also an avenue for misuse by the courts, particularly at the pre-trial litigation stage.[241] What has emerged is another loophole for employers charged with unlawful workplace acts. The same-actor principle captures the absurdity and misperception of courts in evaluating issues as complex as employment discrimination. The courts' rampant use and proclamation of this flawed assumption is rather unsophisticated when weighed against the delicacy of human engagement and the multifarious nature of employment decision making. Without a doubt, the same-actor principle has confused and derailed the motive inquiry in a dangerous fashion, taking us on a route far from the remedial purposes of Title VII and leading us no closer to remedying unlawful discrimination under the Act.

2. Litigation Challenges and the Same-Actor Doctrine

The application of the same-actor doctrine disrupts the litigation cycle to the disadvantage of plaintiffs. When same-actor evidence is in play, it poses risks to a plaintiff's efforts to sustain a claim for discrimination or to minimize the damage that results from a defendant employer's suggestion that the

237. *Id.* at *1.

238. *Id.* at *6.

239. *See, e.g.*, Nwanna v. Ashcroft, 66 Fed. App'x 9, 15 (7th Cir. 2002) (same-actor inference based on "common-sense notion that someone who disliked or intended to discriminate against a person would never initially hire that person").

240. Professor Lanctot makes a good effort to construct a new pretext rule. *See Secrets and Lies*, *supra* note 55, at 547-49 (proposing "the 'pretext always' rule"). I am not convinced, however, that even such a rule would prevent the evolution of doctrines like the same-actor inference. Courts formulated the principle whole cloth, relying on no data points, as they sought ways to counter the increase in jury trials in this arena and to encourage plaintiffs not to bring claims of discrimination.

241. *See infra* Part IV.B.2.

principle applies. The examination below captures the essence of these debilitating effects.

Despite the superficial plausibility of the doctrine's underlying assumption and the lack of desire to constrain courts as they attempt to adjudicate matters efficiently, I contend that the same-actor doctrine proves quite problematic at the pretrial stage precisely because there is no holistic assessment of the evidence as mandated by the Court in *Reeves*. As explored more fully below, the same-actor doctrine allows the judge to usurp the role of the jury, contravenes substantive and procedural law by heightening plaintiffs' burden, and damages notions of acceptability and inclusion in the American workplace.

a. Summary Judgment and the Same-Actor Doctrine

The most detrimental consequence of the same-actor doctrine occurs at the summary judgment stage when courts accept an employer's same-actor argument and deny any chance for a plaintiff to challenge alleged discrimination successfully. At summary judgment, the court reviews the entire record to determine whether on "the evidence . . . a reasonable jury could return a verdict for the nonmoving party."[242] After making a holistic assessment of the paper record and drawing all reasonable inferences in favor of the nonmoving party, if a court answers in the negative, then it dismisses the case. Hence, the court draws the conclusion that a jury trial on the merits is unnecessary because, in short, the plaintiff's claims are not believable.

The Supreme Court established several parameters for summary dismissal in three cases in 1986, known as the summary judgment trilogy.[243] In this series, the Court cautioned lower courts to reserve for the jury the roles of making *credibility determinations*, *weighing of the evidence*, and *drawing legitimate inferences*.[244] Yet these guidelines did not foreclose summary dismissal as a remedy for illegitimate claims. In fact, in the last of the series, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the Court effectively deemed it within a court's proper authority to weigh the probative value of the evidence and draw reasonable inferences, particularly in matters involving intent and motive.[245] Hence, the trilogy increased summary dismissals as

242. The Supreme Court interpreted this as the standard in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

243. *See supra* Part II.C. The decisions in the three cases hastened the use of this procedural device by the courts. *See* Friedenthal & Gardner, *supra* note 116, at 101-03.

244. *See supra* Part II.C.

245. 475 U.S. 574, 587 (1986) (Where "the factual context renders [the] claim implausible – if the claim is one that simply makes no economic sense – [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."). For more information on the effect of the trilogy in the employment discrimination realm, see generally *Tortured Trilogy*, *supra* note 2.

courts attempted to manage dockets and as employers sought ways to control litigation costs and to maneuver strategically in defending against claims of discrimination.

As set forth in Part III, the courts' application of the summary judgment standards in the employment discrimination arena produced various unusual interpretations. In the same way, the same-actor doctrine can be viewed as an offspring of the trilogy. Regardless of whether it began as a screening mechanism for controlling growing dockets, it quickly has manifested an ideological foothold on the judiciary's imagination. It is an unfortunate diversion from the quest to unearth discrimination, and it operates quite destructively on the ground for plaintiffs.

In disparate treatment cases comprised primarily of circumstantial evidence, plaintiffs' claims consist of various disaggregate facts. What a plaintiff attempts to do is connect the circumstances in a manner that raises doubt about the veracity of the employer's explanation. In countering what may be a plausible explanation reflecting mediocre performance, tardiness, or interpersonal problems, for example, the plaintiff must proffer a viable response either denying the employer's assertion altogether or demonstrating that her performance was satisfactory, that her attendance record met requirements, or that she did not otherwise violate some employer policy. With same-actor evidence, however, the plaintiff is caught between a rock and a hard place. How is a plaintiff to sufficiently counteract facts that are technically true – that the person who hired her is also the person who discharged her, failed to promote her, or otherwise engaged in adverse employment actions? Raising a genuine issue of material fact as to something so seemingly uncontroversial becomes a near impossibility due to the significance assigned to same-actor evidence by the courts.

At summary judgment, this inference has proved detrimental. It appears that courts heeded *Proud*'s appeal to "promptly dismiss such insubstantial claims in order to prevent the statute from becoming a cure that worsens the malady of . . . discrimination."[246] A thorough review of appellate court and district court opinions reveals the persuasive effect of same-actor evidence.[247]

246. Proud v. Stone, 945 F.2d 796, 798 (1991).

247. For purposes of this case study, I reviewed all appellate court opinions addressing the same-actor doctrine, well over 130 published and unpublished opinions. Additionally, I reviewed all federal district court opinions over the three-year period of 2006-2008, totaling nearly 240 decisions. I also reviewed an additional 40 district court opinions issued in 2009. The case study results are on file with the author.

My purpose in offering the data is to give a bird's eye view of my claim that the pretext inquiry is in peril. This in no way serves as formal empirical support for my propositions in this Article. In reviewing these cases, the goals were to identify various trends, including at what stage of the litigation process same-actor evidence proves most fatal, under what circumstances plaintiffs successfully overcome the inference, and against which protected category courts apply the doctrine most often.

The case study confirms that same-actor evidence influences judicial decision making and, more poignantly, the dangerous interplay of substance and procedure in employment discrimination litigation. Employers benefit overwhelmingly from courts' invocation of this doctrine. For example, my cir-

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As to the latter, the data suggests that plaintiffs in race and gender cases suffer the most from the deployment of the same-actor doctrine.

Published and Unpublished Courts of Appeals Decisions Applying the Same-Actor Inference Since the Decision in *Proud v. Stone* through December 21, 2009*

Circuit	Summary Judgment for Employer Affirmed	Summary Judgment for Employer Reversed
1st	1	1
2d	4	2
3d		1
4th	13	4
5th	23	
6th	7	2
7th	12	4
8th	5	3
9th	11	4
10th	4	
11th		1
TOTALS	80	22

*See Appendix A for a fuller summary of appellate court application of the same-actor principle at various stages of the litigation cycle.

In addition to employment discrimination, the same-actor inference has been mentioned or applied in five circuit court cases outside the Title VII context: the Fair Housing Act (11th Circuit), the Rehabilitation Act (4th Circuit), alleged discrimination in the sale of a motor vehicle (4th Circuit), unfair labor practices (5th Circuit), and the Pregnancy Discrimination Act (4th Circuit). *See* Case Study Results (on file with author).

Summary of District Court Cases Involving the Same-Actor Inference

Year*	Number of cases that mention SAI	SJ granted for Employer	Of total cases, number that are unpublished	Number of unpublished cases with favorable decision for Employer
2006	79	70	64	60
2007	85	61	74	51
2008	68	49	54	39

*Cases available on Westlaw through March 20, 2009, for the years 2006, 2007, and 2008.

cuit-by-circuit survey of same-actor cases reveals that appellate judges overwhelmingly affirm summary dismissal of claims in favor of employers; employers enjoy a nearly 80% success rate in cases where the court invokes the inference in its review of grants of summary judgment.[248] At the district court level, the disparity is just as pronounced, with employers winning 77.5% at the summary judgment stage.[249] What is also striking is the large number of unpublished opinions involving this doctrine, which distorts the pervasive use of the doctrine and its impact.[250]

Significantly, this data demonstrates that the courts' interpretative rule-making not only hardens fact-finders against plaintiffs' attempts to prove discrimination early in the litigation cycle but also serves to cement assumptions that are nearly impossible to overcome later in the litigation cycle – a cycle that is heavily skewed in favor of employers. These sub-rules, like the same-actor doctrine, take on a life of their own.

In my view, the application of the same-actor principle at the summary judgment stage is inappropriate because it (i) heightens plaintiffs' burden – effectively requiring cases to be proved at this early stage – and (ii) results in courts inappropriately assessing the credibility of the evidence and drawing inferences.

i. Heightened Standard

A recent Ninth Circuit decision provides a good example of how courts inappropriately impose themselves in the litigation process in the face of same-actor evidence. In *Coghlan v. American Seafoods Company LLC*, the court applied the same-actor doctrine in a potent fashion – depriving the plaintiff of an opportunity to present the case to the jury.[251] In evaluating that evidence, the court described the plaintiff's burden as "especially steep" in the presence of same-actor evidence.[252] The court rejected the plaintiff's argument that it ought not apply the principle at the summary judgment stage because it constitutes a factor for the jury to consider and is not dispositive.[253] In fact, the court acknowledged that the "*strong* inference" created by same-

248. *Id.* The same-actor doctrine appears to have an effect on juries as well, as reflected by the data.

249. *Id.*

250. Professor Michael Selmi has opined that a relationship exists between unpublished opinions and judicial bias. He points out that "[m]ost cases are not appealed; many opinions are not published and, even when they are, judges are sufficiently adept at concealing their motives. This is one reason the composition of the court matters." *See Hard to Win?*, *supra* note 2, at 571-72.

251. 413 F.3d 1090, 1096 (2005).

252. *Id.*

253. *Id.* at 1096-97 & nn.10-12.

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actor evidence "*must* [be] take[n] into account" with respect to a motion for summary dismissal.[254]

Framing the effect of the same-actor evidence as a strong inference, the court approved the enhancement of the plaintiff's burden due to same-actor evidence. It stated,

> [W]hen the allegedly discriminatory actor is someone who has previously selected the plaintiff for favorable treatment, that is *very strong evidence* that the actor holds no discriminatory animus, and the plaintiff must present correspondingly *stronger* evidence of bias in order to prevail.[255]

What this means for plaintiffs is a heightened burden in overcoming their employers' explanations for their actions.[256] The courts deem the sufficiency of plaintiffs' evidence inadequate in the face of same-actor evidence to show that the employers' legitimate, non-discriminatory reasons constitute pretext for discrimination.

This case illuminates precisely how the same-actor inference serves as a blunt instrument in a plaintiff's quest to prove discriminatory motive. The court's dismissive treatment of the plaintiff's attempts to preserve the chance to tell her story to the jury is a blatant disregard of summary judgment standards, particularly because intent remains the critical issue.[257] *Coghlan* represents a trend in far too many of the lower courts.[258]

Notwithstanding the plaintiff's ultimate burden to prove unlawful discrimination, the employer defendant shoulders the burden upon initiating a

254. *Id.* at 1098 (emphasis added).

255. *Id.* (emphasis added).

256. *See, e.g.*, Hooks v. Lockheed Martin Skunk Works, 14 Fed. App'x 769, 772 (9th Cir. 2001) (acknowledging weakening of a plaintiff's case in the face of same-actor evidence). As Elizabeth M. Schneider has recognized with respect to cases of gender discrimination, "Judges are demanding more evidence at summary judgment than would suffice to support a jury verdict." *See* Schneider, *supra* note 2, at 728.

257. The courts appear to respond with indifference to plaintiffs' efforts to reach a jury. Acknowledging that some circuits view the inference as permissive and, therefore, a consideration for the jury, the Ninth Circuit reiterated that it "is clearly not the law in [this] circuit, since *Bradley* itself used the same-actor inference to affirm a grant of summary judgment, taking the case away from the jury." *Coughlan*, 413 F.3d at 1098 (citing Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 272 (9th Cir. 1996)). *Bradley* is the case that serves as the origin of the doctrine in the jurisdiction. 104 F.3d at 270-71.

258. A few courts have criticized the heightened standard imposed on plaintiffs through the same-actor doctrine. *See, e.g.*, Magee v. DanSources Technical Servs., Inc., 769 A.2d 231, 247 (Md. Ct. Spec. App. 2001) (holding that in a hostile environment claim an employer may not rely on the "same actor inference" to increase the employee's burden of proof in opposing an employer's motion for summary judgment).

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motion for summary judgment. Through the same-actor doctrine, however, courts shift the burden to plaintiffs to disprove the employers' explanations that are bolstered by same-actor evidence, all without the benefit of cross examination.[259] The net effect of this move increases a plaintiff's burden on summary judgment. Overall, the search for a reasonable basis to proceed to trial has morphed into a quest for every possible reason to avoid subjecting an employer to a trial.

ii. Assessing Credibility and Drawing Inferences

In the face of same-actor evidence, the credibility issues are obvious. Why an employer initially hired an individual, for example, may be debatable, especially with respect to whether it was an unbiased decision. Moreover, a great deal can take place between the time an individual is hired and then discharged. In making the credibility assessments between contested evidence, courts treat same-actor evidence as uncontroverted, independent evidence that no discrimination has occurred. Whatever evidence plaintiffs offer to create an issue of fact as to pretext, the courts' application of the same-actor doctrine diminishes its force.[260]

Courts infer that no discriminatory animus operated at the time of the employer's decision. They determine that the plaintiff's theory of discriminatory treatment is implausible based on the underlying assumption of the same-actor doctrine. The courts imposition in this manner is simply inappropriate. This is because there may be numerous reasons why an employer had a change of heart with respect to the plaintiff (including discrimination) between the time she was hired and fired or otherwise adversely affected. Courts take same-actor evidence as an absolute signal of the employer's lack of discriminatory animus. Moreover, by taking this leap in logic, courts fail to make reasonable inferences in favor of the plaintiff (as the non-movant), as summary judgment law mandates. Courts leap without looking – without considering the full measure of possibilities that may result in an adverse employment action by the very same person who hired the plaintiff.[261]

Scholars addressing the intent problem under Title VII have offered prescriptions for leveling the playing field regarding how courts evaluate evidence of pretext for discrimination. To combat courts' tendencies to weigh the evidence and draw inferences unappealing to plaintiffs' positions, Profes-

259. Professor McGinley highlighted and criticized this damaging perversion as it relates to Title VII cases generally and ADEA cases particularly more than fifteen years ago. *Tortured Trilogy*, *supra* note 2, 221-42.

260. *See Secrets and Lies*, *supra* note 55, at 550 (asserting that this process amounts to "standardless review of the evidence").

261. The Fourth Circuit set the stage for the courts' ability to assess the credibility of a party's witnesses in the context of same-actor evidence. *See* Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).

sor McGinley, for example, offered a sliding-scale approach.[262] Under this method, a plaintiff's burden of proof depends on "the quantum and quality of the defendant's evidence."[263] Increasing the defendant's burden of proof on summary judgment, McGinley argues, would "encourage[] the courts to avoid assessing witness credibility and inference-drawing in the movant's favor."[264] In reality, not only is the same-actor doctrine fully entrenched in workplace law, but the courts also increase the quantum and quality of the defendant's proof through same-actor evidence. A decision maker's credibility with regard to the non-discriminatory reason may not be sufficiently tested until trial. Even more troubling is whether a court will unilaterally invoke the inference. Even when an employer does not raise the argument, the court may do so on its own initiative to dismiss a plaintiff's case because these are admissible facts that the records often reflect. Thus, by over valuing same-actor evidence, defendants receive a pass in the courts' quests to decipher pretext, leaving plaintiffs to swim upstream against a furious tide of inferences, credibility calls, and a general bias against discrimination claims.

The Supreme Court has mandated that, on a motion for summary judgment, all reasonable inferences are to be drawn in favor of the non-moving party.[265] Thus, the lower courts misstep by drawing inferences that prove fatal to plaintiffs' efforts. Through application of the same-actor doctrine, the courts conclude that it is reasonable to infer that the same decision maker will engage fairly with the plaintiff because she hired her at the outset. For instance, often courts conclude that the same-actor inference makes a plaintiff's claim "even more tenuous."[266] Additionally, courts draw the inference that the decision maker did, in fact, act fairly toward the plaintiff or at least was not motivated by discriminatory bias. This amounts to an incredible leap unhinged from the realities of workplace relations.

262. *See Tortured Trilogy*, *supra* note 2, at 209.

263. *Id.* McGinley poses four scenarios to explicate the application of her proposed sliding scale approach. One such instance involves a scenario where a defendant offers a legitimate, non-discriminatory reason without any documentation or proof and the plaintiff responds with merely a bare bones prima facie case. McGinley posits that a court would deny the motion for summary judgment under the sliding scale approach. However, it is highly likely that if same-actor evidence were present, the court would just as easily grant the motion without blinking an eye. *Id.* at 245-48.

264. *Id.* at 245.

265. *See* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

266. *See, e.g.*, Houk v. Peoploungers, Inc., 214 Fed. App'x 379, 381 (5th Cir. 2007) (deeming the plaintiff's case "even more tenuous" due to the same-actor inference).

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b. The Same-Actor Doctrine Beyond Summary Judgment

The same-actor doctrine has other ramifications on the litigation process beyond summary judgment. Just as damning on plaintiffs' efforts to prove discrimination is the application of the doctrine on motions for judgments as matters of law. This occurs after the plaintiff has presented her case and arguably presents an equally abhorrent misuse of procedural power as that seen during the pretrial phase. In fact, in *Proud*, the court affirmed the district court's grant of the employer's motion for a directed verdict at the close of the plaintiff's evidence at trial.[267] The standard for judgment as a matter of law under the Federal Rules of Civil Procedure mirrors that of summary judgment.[268]

On a motion for judgment as a matter of law, the defendant challenges the sufficiency of the evidence to support a jury's verdict in favor of the plaintiff.[269] The employer argues that the law precludes a verdict against it because of the same-actor doctrine – that the jury was required to find in its favor, instead of the plaintiff's, due to the same-actor inference and a lack of convincing pretextual evidence offered by the plaintiff.[270]

What is troubling about the argument and the application of the doctrine as justification, in part or in full, for granting judgment as a matter of law is that the jury has heard the evidence and had an opportunity to draw the inferences it deemed appropriate. Same-actor evidence amounts to details that a jury may consider. The jury may, however, find the plaintiff's evidence strong enough to counter the mere circumstance of consistent decision makers.[271] Courts revising the jury's verdict based on the same-actor doctrine reeks of judicial activism.

267. Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). As civil procedure law has evolved, "judgment as a matter of law" has come to encompasses what was formerly referred as "directed verdicts" and "judgment notwithstanding the verdict." In 1986, when the Court issued the summary judgment trilogy, it also addressed the standard for directed verdicts as they were termed at the time. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986). The Court noted that "the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* (citation omitted).

268. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149-51 (2000).

269. FED. R. CIV. P. 50(a)(1).

270. For example, in *Hudson v. Insteel Industries, Inc.*, the court declined the employer's same-actor argument and noted the jury's prerogative by stating, "because . . . we cannot know what went into the jury's decisionmaking, we do not know whether the jury made the inference, but then found it trumped by the weight of [plaintiff's] evidence on the question of pretext." 5 Fed. App'x 378, 384 (6th Cir. 2001).

271. In *Ash v. Tyson Foods, Inc.*, the Supreme Court recently addressed the quantum of evidence necessary to challenge a motion for judgment as a matter of law

The other context in which courts have addressed the same-actor doctrine is in response to an employer's request for jury instructions to explain the essence of the inference. In *Kelley v. Airborne Freight Corp.*, the employer sought an instruction that, since the presence of the same decision maker was undisputed, the jury could infer that the decision was not motivated by the plaintiff's age.[272] While the district court declined to give the instruction, it stated that the employer could make the argument to the jury, and the defendant did so in closing argument.[273] Here, the Court of Appeals for the First Circuit agreed with the district court's decision to not give the instruction.[274] While courts generally decline to give a same-actor inference jury instruction, it does not necessarily mean that they disagree with the rationale of the inference and its underlying assumptions.[275] Simply, it appears that courts deem a jury instruction unnecessary since the employer is not precluded from making the argument altogether.[276] Moreover, it is reasonably possible that a court would deem inclusion of an instruction to be harmless error, particularly where it appears that the employer has a legitimate basis for its decision. In my view, it would be inappropriate for a court to offer such an instruction, not only because the jury is not required to believe the argument but also because it would give same-actor evidence undeserved weight.[277]

C. Same-Actor Doctrine and the Consequences for Justice

The same-actor principle is a broad generalization that allows the court to inappropriately interject itself into the truth-seeking process. Hence, the same-actor doctrine derails the search for motive by injecting into the analysis a relatively benign set of circumstances that has far less probative value than the rapid evolution of the principle indicates. I have shown the entren-

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regarding pretext. 546 U.S. 454, 456-58 (2006). Regarding the nature of pretext and the probative value of biased comments in particular, the Court stated that "[t]he speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage." *Id.* at 456. For additional information on biased comments and the stray remarks doctrine, see the discussion at Part III.A.2.

272. 140 F.3d 335, 351 & n.7 (1st Cir. 1998).

273. *Id.* at 351.

274. *Kelley*, 140 F.3d at 351.

275. *See, e.g.*, Banks v. Travelers, 180 F.3d 358, 366 (1999).

276. *See, e.g.*, Kim v. Dial Serv. Int'l, Inc., No. 97-9142, 1998 WL 514297, at *4 (2d Cir. June 11, 1998) (no same-actor jury instruction warranted).

277. Perhaps when a plaintiff gets to the jury, she should consider requesting a same-actor jury instruction clarifying that the jury is not required to believe it or defining the essence of the weight the jury should accord such evidence, especially where the district court unilaterally invoked the inference in considering a defendant's motion for summary judgment or where a defendant made the argument unsuccessfully on summary judgment. However, such a prophylactic approach may not be welcomed by the court.

Missouri Law Review, Vol. 75, Iss. 2 [2010], Art. 2

chment of this doctrine in workplace jurisprudence. Far more disturbing is its effect on plaintiffs' attempts to adjudicate claims of discrimination in employment. As reflected in the tables and discussion of this Article, the consequences prove damaging, if not fatal, to plaintiffs' employment discrimination lawsuits.[278]

In the doctrine's most potent form, the court deems a trial unnecessary because it has assigned great value to same-actor evidence – its relevance, weight, and significance – with regard to allegations of discrimination. Without inquiring into the credibility of the decision makers, the court concludes that discrimination is an irrational inference to draw since the same person hired and fired the plaintiff. It becomes difficult, if not impossible, for the plaintiff to overcome this evidence once the court deems it particularly significant regarding the employer's intent. The court adds context and passes judgment on the veracity of the employer's proffered reason for its actions. Through their treatment of this kind of evidence, courts become interlopers, blurring the lines between the functions of judges and juries.

Courts should not allow an employer's positive past actions toward a worker to foretell its motive regarding a subsequent employment decision. Theoretically, application of the doctrine could disqualify every claim of discrimination because all plaintiff employees were hired by the same entities that fired them (even if not by the same manager). Same-actor evidence should be given little or no evidentiary value beyond its descriptive and temporal qualities that assist the fact-finder in understanding the chronology of events and identity of the decision makers relevant to the alleged adverse employment action. Beyond these connective features, the doctrine serves only to distract the court. Disarmed by the simplistic nature of the doctrine's underlying assumption, courts retreat from engaging in the complex analysis of the human and organizational dimensions that are at play in any workplace discrimination action. Through the use of the same-actor doctrine, courts inappropriately make credibility assessments and draw unsound inferences. Courts not only accept an employer's view of the facts, but, through the same-actor doctrine, they also have conjured a story and crafted a theory that mirrors the skepticism of the continuing effects of discrimination in the modern workplace setting. Consequently, procedural devices like summary judgment provide the stage upon which this distortion unfolds. The courts' evaluation of plaintiffs' evidence of pretext in light of the same-actor doctrine results in assigning it a degree of materiality that may be misplaced upon consideration of its broader context.

278. See *supra* Part IV and the Appendix for the tables and information regarding the implication of the data. In sum, the case study indicates that employers are more likely to win a pretrial judgment when the same-actor doctrine is utilized. In my view, this suggests something beyond judicial efficiency – an ingrained resistance to accept discrimination in contemporary society generally and a misapprehension of human motivation and organizational forces in the contemporary employment settings in particular.

1. What about *Reeves*? Why the Same-Actor Doctrine Survives *Reeves*

One may ask why the same-actor doctrine has remained a force in the wake of the Supreme Court's decision in *Reeves*.[279] Was not the Court clear that this is precisely the type of inference that must be reserved for the jury? Thus, does the continued destructive use of the same-actor doctrine contravene *Reeves*?

Resolving a split in the circuits about the quantum and quality of pretextual evidence necessary to overcome an employer's legitimate, non-discriminatory reason, the Supreme Court in *Reeves* held that a plaintiff's prima facie case combined with sufficient evidence of pretext "may permit" the fact-finder to conclude that the real reason for the employer's actions was discrimination.[280] That is, under the appropriate circumstances, evidence of a prima facie case and pretext may be enough to survive a motion for summary dismissal.[281] The critical inquiry for a court becomes whether a plaintiff's evidence is sufficient and adequate to raise a triable issue.

Recently, in *Coghlan*, the Ninth Circuit confronted this tension but dismissed the plaintiff's objection and deemed the same-actor principle consistent with *Reeves*.[282] The *Coghlan* court determined that the "pretext-may" standard of *Reeves* and *Proud*'s same-actor inference can peacefully co-exist because the "point of the [principle] is that [plaintiff's evidence of pretext] rarely is 'sufficient . . . to overcome the legitimate, non-discriminatory reason" proffered by the employer where the alleged discriminator has previously treated the plaintiff favorably.[283]

In my view, however, application of the same-actor principle on summary judgment, particularly because it creates a nearly irrebuttable presumption of no discrimination, violates not only the letter but also the spirit of the *Reeves* decision. By drawing the same-actor inference, a court concludes that the employer's explanation is sound (that is, it is not masking an illegal motive); same-actor evidence gives the court a reason to believe the employer. In this way, the court inappropriately constructs arguments and frames the story by weighing the evidence and assessing credibility. A Fifth Circuit opinion decided in the wake of *Reeves* illustrates my point. In *Russell v. McKinney*, affirming denial of an employer's motion for judgment as a matter of law, the court explained that the "jury had both versions" of the same-actor

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279. See the discussion of *Reeves* in the context of disparate treatment cases, *supra* Part II.B.3.

280. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

281. *Id.* at 154.

282. Coughlan v. Am. Seafoods Co. LLC, 413 F.3d 1090, 1097-98 (9th Cir. 2005).

283. *Id.* at 1094, 1097. *Coghlan* represents a dangerous trend that allows a judge to invade the province of the jury by crediting the employer's legitimate, non-discriminatory reason over the plaintiff's evidence of pretext.

story and the "opportunity to take the information into account in whatever fashion it found credible."[284] Similarly, in *Magee v. DanSources Technical Services, Inc.*, the court declined to apply the same-actor inference on summary judgment and considered its decision consistent with *Reeves*.[285] Comparing the use of the same-actor doctrine to the "pretext-plus" construct, the court stated that "[r]equiring an employee to have 'extra' evidence at the summary judgment stage . . . merely because the same person did the employer's hiring and firing effectively resolves inferences" in a manner that a jury may not.[286]

The contravention of *Reeves* in this way also violates the summary judgment standard set forth in the trilogy. Through the same-actor principle, the court resorts to viewing the evidence in a manner most favorable to the *moving* party. This misapplication fails to comport with the Supreme Court's holding that on summary judgment the court "must disregard all evidence [for the movant] that the jury is not required to believe."[287] While who made decisions affecting the plaintiff may be relevant evidence, a fact-finder may decline to draw the conclusion that it reflects a lack of motive on the part of the employer. The underlying assumption that presumes that the hirer would not or could not discriminate thereafter presents the problem.

Courts effectively grant immunity to employers when same actors are involved. The underlying assumption of the doctrine reinforces the courts' suspicion of plaintiffs' allegations of discrimination. Thus, the weight courts afford same-actor evidence regarding the ultimate question of discrimination, whether presumptive or permissive, results in a buttressing of employers' theories of the case. Hence, the courts view plaintiffs' allegations as frivolous and use summary judgment to keep such matters from resolution by a jury. This is evident not only in the sharp language used to describe the inference but also in the manner in which courts proclaim the applicability of the principle to a particular set of circumstances.[288]

In practical terms, the same-actor doctrine revives the "pretext-plus" rule that the Supreme Court denounced in *Reeves*. At the very least, the courts seem to apply a pre-*Reeves* approach when evaluating discrimination claims involving same-actor evidence.[289] A review of post-*Reeves* decisions

284. Russell v. McKinney Hosp. Venture, 235 F.3d 219, 229 (5th Cir. 2000).

285. 769 A.2d 231, 248-49 (2001).

286. *Id.* at 249.

287. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 135 (2000).

288. In *Proud*, the court articulated the same-actor principle in a brief opinion using strong language. Proud v. Stone, 945 F.2d 796 (4th Cir. 1991). For example, the court deems evidence that the same person hired and fired the employee to raise a "*strong inference*" of a "*compelling nature*," therefore creating "a *powerful inference*" relating to the ultimate question of discrimination. *Id.* at 797-98 (emphasis added).

289. *See* ROSEMAN, *supra* note 113 (surveying post-*Reeves* decisions and highlighting that not all courts follow *Reeves*). In this summary, Roseman observes that the same-actor doctrine remains viable in those jurisdictions that have refused or

reveals no more of a cautious stance than before with regard to the same-actor principle.[290] Thus, despite the attempted correction in *Reeves*, courts continue to grant summary judgment at an alarming rate.[291]

Those supporting the use of devices like those premised on the same-actor principle may argue that plaintiffs can easily rebut such arguments. Courts' actual treatment of same-actor evidence does not bear out that theory, however, particularly when applied in its most potent form.[292] Even post-*Reeves*, the problem for plaintiffs in overcoming the inference often stems from having no *additional* evidence, such as comments reflecting discriminatory bias. In fact, overcoming the inference is not even a sure bet for a plaintiff with evidence consisting of bias-related comments.[293]

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failed to follow *Reeves*. *Id.* *See also* Shoppe v. Gucci Am., Inc., 14 P.3d 1049, 1061 n.5 (Haw. 2000) (deeming the consideration of the same-actor inference consistent with *Reeves* because "it would appear to qualify as 'other evidence that supports the employer's case and that properly may be considered on a motion for summary judgment as a matter of law'" (quoting *Reeves*, 530 U.S. at 149)).

290. *See, e.g.*, Jetter v. Knothe Corp., 324 F.3d 73, 70, 77 (2d Cir. 2003) (affirming summary judgment in favor of the employer). *See also generally supra* note 247 (The chart reflects cases decided through 2009, which includes cases decided after the Court issued its decision in *Reeves* in 2000.).

291. *See, e.g.*, Choate v. Transp. Logistics Corp., 234 F. Supp. 2d 125, 128, 134-35 (2002). Lower courts continue to debate the meaning of *Reeves* with varying interpretations and applications emerging in the federal circuits.

292. Several organizations filed amicus curiae briefs before the Court issued its opinion in *Reeves*. Interestingly, the same-actor doctrine garnered attention in this forum. In its amicus brief, the Chamber of Commerce of the United States of America defended the courts' apparent authority to draw such "logical inferences." Brief for U.S. Chamber of Commerce as Amicus Curiae Supporting Respondent, *Reeves*, 530 U.S. 133 (No. 99-536), 2000 WL 140848, at *13 n.12. However, the amicus curiae National Employment Lawyers Association criticized the courts' use of "logically dubious counter-inferences" and highlighted the same-actor doctrine as an example. Brief for National Employment Lawyers Association as Amicus Curiae Supporting Petitioner, *Reeves*, 530 U.S. 133 (No. 99-536), 2000 WL 16664, at *24 (original font style altered). Challenging the notion that it constitutes a "silver bullet" for employers, the Chamber proclaimed that doctrines such as the same-actor principle "[a]re simply logical inferences which, while strong if unrebutted [sic], are easily rebutted with sufficient, relevant evidence. *Plaintiffs* often lack this evidence, not because they cannot obtain it but because it does not exist." Brief of U.S. Chamber of Commerce, *supra*. The Chamber supported a pretext-plus interpretation of the plaintiff's burden to show discrimination and criticized the lessening of the plaintiff's burden to show pretext without having to show discrimination. *Id.* at *4, *17.

293. *See, e.g.*, Scubelek v. Miller Prods., Inc., No. 97-10660, 1998 WL 110079, at *1 (5th Cir. Feb. 20, 1998) (supervisor's "no spring chicken" comments were stray remarks). It is also interesting to note that, even in circumstances where the same-actor doctrine is argued, the record contains other evidence upon which the court can grant or deny the plaintiff's claim. This supports my theory that adoption of this doctrine suggests an ideological and psychological resistance to employment discrimination claims. *See, e.g.*, Drake v. Magnolia Mgmt. Corp., No. 00-31481, 2001 WL

Missouri Law Review, Vol. 75, Iss. 2 [2010], Art. 2

Additionally, one may argue that a defendant who asserts the same-actor doctrine merely is proffering evidence to meet its burden on summary judgment of demonstrating an absence of evidence supporting the plaintiff's position. Yet drawing such a favorable inference on behalf of the employer results in the court "automatic[ally] crediting . . . the defendant's articulation," which "skews the result in favor of the defendant."[294] It is, instead, the employer defendant who is supposed to bear the burden of persuasion under these circumstances. Thus, the courts' decision to draw the same-actor inference in this fashion stifles plaintiffs' attempts to oppose motions for summary judgment.

In a recent case, an intermediate state appellate court chastised the trial court for "seizing" on same-actor evidence and granting the employer's motion for summary judgment. In *Nazir v. United Airlines, Inc.*, a Pakistani-American mechanic alleged discrimination after suffering a series of indignities and termination by the same supervisor who allegedly promoted him earlier.[295] Referring generally to the evolution of the same-actor principle, the court opined that "[j]udicial analysis of the effect of same[-]actor evidence has been clouded by imprecise language."[296] Reversing the grant of summary dismissal for the employer and the trial court's use of the same-actor principle, the court stated,

> Clearly, same actor evidence will often generate an inference of nondiscrimination. *But the effect should not be a priori determination, divorced from its factual context. Nor should such evidence be placed . . . in a special category, or have some undue importance attached to it, for that could threaten to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment.* In any event, any same actor evidence could not avail defendants here, not in light of the *complete picture concerning plaintiff's promotion . . . .*[297]

The court deemed the case and behavior of the employer, United Airlines, to be the "poster child" for what ails the summary dismissal process in

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872866, at *1 (5th Cir. July 11, 2001) (declining to rely on the same-actor doctrine to reach its conclusion of no discrimination because it deemed the plaintiff's evidence of age and gender bias weak altogether).

294. *Tortured Trilogy*, *supra* note 2, at 232 (addressing how courts undermine the jury's role in the summary judgment context).

295. 100 Cal. Rptr. 3d. 296, 303, 321 (Cal. Ct. App. 2009).

296. *Id.* at 321. The court engages in a discussion on the difference between an inference and a presumption. *Id.* at 322.

297. *Id.* at 322 (emphasis added). The court highlighted that the record reflected some doubt as to whether there really was a same actor. *Id.* at 323. It stated that the "deposition testimony calls into question whether Petersen was *even the person who made the decision to offer the promotion to plaintiff.*" *Id.*

Martin: Martin: Pretext in Peril

employment discrimination matters.[298] It also supports the critics' views that courts improperly subvert the procedural framework by invading the province of a jury and sometimes requiring plaintiffs to prove their cases at the summary judgment stage.[299]

Undoubtedly, in evaluating the case before trial, courts must negotiate and delicately maneuver the paper record to assess the evidence and to determine whether it warrants a jury's credibility determination. Courts must do so without weighing the evidence and drawing inferences unfavorable to the non-moving party. My argument here is not that such evidence is wholly irrelevant, circumstantial evidence that a court may not consider. My concern focuses on the manner in which courts substantially overvalue same-actor evidence without critical regard to the particular workplace dynamics that may bear on motive. This inferential leap imposes a credibility assessment that resides within the purview of a jury, not the courts.

I argue that a lack of discriminatory animus is, in fact, an *unreasonable* inference to draw based on same-actor evidence because bias may very well have been at play.[300] In fact, the court in *Nazir* seemed to suggest that, under some circumstances, courts ought to be skeptical about how employers seek to justify application of the inference by establishing the factual predicate necessary to rely on the inference. The record raised doubt about whether the supervisor who terminated the plaintiff was the same person who recommended him for promotion. The court stated that the "nuanced testimony [of the supervisor] is in sharp contrast to the late-filed Petersen declaration where he point-blank testified that 'I made the decision to promote' plaintiff."[301] These kinds of seemingly nefarious tactics reflect the "hazardous" nature of summary judgment decisions based on reliance of same-actor evidence. This

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298. *Id.* at 302-03. In fact, the court criticized the use of this procedural platform in employment discrimination litigation and the judiciary's complicity in these employer strategies. *Id.* The court observed,

> [S]ummary judgment procedure has become the target of criticism on a number of fronts. Some particular criticism is directed to the procedure in employment litigation, including that it is being abused, especially by deep pocket defendants to overwhelm less well-funded litigants. More significantly, it has been said that courts are sometimes making determinations properly reserved for the factfinder, sometimes drawing inferences in the employer's favor, sometimes requiring the employees to essentially prove their case at the summary judgment stage.

Id.

299. *See Tortured Trilogy*, *supra* note 2, at 229.

300. This is precisely the endeavor I undertook in a recent article, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, to expose how the workplace consists of various vectors in which bias can flourish between the time an individual is hired and fired, whatever the length of time. *See Immunity for Hire*, *supra* note 134; *supra* Part IV.

301. *Nazir*, 100 Cal. Rptr. 3d at 323 n.16.

Published by University of Missouri School of Law Scholarship Repository, 2010

decision illuminates precisely my point – that the use of the same-actor principle is inappropriate at the summary judgment stage.

Notwithstanding a desire for an efficient adjudicative process, I contend that the same-actor doctrine proves quite problematic at the pretrial stage. This doctrine allows the judge to usurp the role of the jury, contravenes substantive and procedural law, and damages notions of belonging in the American workplace. Moreover, there is no holistic assessment as mandated by the Court in *Reeves*.

2. Why a Trial Is Necessary in the Presence of Same-Actor Evidence

We ought to be concerned about the normative effect of the courts' use of devices like the same-actor principle because it signals to the public, legal actors, and plaintiffs that discrimination is less prevalent in the modern workplace. Moreover, it is clear that practitioners understand the potency of this tool (and others I have highlighted) and consistently use it in defense of allegations of workplace bias.[302] Today's employment discrimination defense lawyers engage in a heavily motion-centered practice.[303] Most employment discrimination cases are resolved through employer-initiated motions, with summary judgment requests being the most prevalent.[304] Thus, the same-actor doctrine can be outcome determinative, and plaintiffs are likely to experience minimal success on appeal. Moreover, the doctrine could potentially harm plaintiffs' ability to obtain settlements or force them to settle prematurely.

In her article, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, Professor Elizabeth Schneider offers a thorough and provocative study of gender and summary judgment.[305] Schneider asserts that the unfettered discretion of courts "can be the locus of hidden discrimination," particularly in light of the abbreviated record at the heart of a court's pre-trial evaluation.[306] I agree with Schneider's view, and her important insight in the article illustrates the hazards in using shortcuts like the same-actor doctrine. In drawing the same-actor inference, courts "isolate[] aspects of" the record rather than conducting a holistic investigation.[307] This violates

302. At a recent conference, an employment defense lawyer implored employer representatives to involve anyone who has engaged positively with the plaintiff in the past in current decision-making processes, particularly those that involve potential threatened claims. Pacific Coast Conference, Seattle, Washington, 2008. This has been the outlook for years as this doctrine has evolved.

303. This has been the case for a long time. Most motions for summary judgment filed by employers are granted. Most matters are then resolved through formal or informal settlement mechanisms.

304. Memorandum from Joe Cecil & George Cort, *supra* note 6, at 2.

305. Schneider, *supra* note 2.

306. *Id.* at 709.

307. *Id.* at 751.

Reeves and, in my view, expands the bounds of the judiciary's evaluative function under the guise of pre-trial procedure. Notwithstanding evidence that the individuals responsible for one favorable employment decision toward a plaintiff are the same individuals involved in the alleged adverse employment action, there are numerous reasons why a trial is necessary. Below are a few key considerations in this regard.

Employment discrimination cases involve complex, fact-specific scenarios; there is more than meets the eye. Thus, what may appear as a benign remark, behavior, or other action may be tinged with bias that a "trial on paper" cannot reveal.[308] Cross-examination could reveal discriminatory bias or, at the very least, raise doubt about the credibility of the decision maker. For example, the decision maker may appear benevolent and fair toward the plaintiff on paper, but, upon in-person interrogation, other motives may emerge.[309] Pre-trial adjudication precludes the plaintiff from cross-examining the decision maker in a live tribunal. Challenging the decision maker in a live forum may provide persuasive information undetectable through affidavits and other documentary evidence reviewed by a judge.

As the court in *Nazir* so aptly noted, discrepancies in the testimony or inconsistencies in the record "show[] just how hazardous – and how improper – is the deciding of facts based on what is said on paper, *without the benefit of demeanor, not to mention cross-examination*."[310] In those instances where they do exist, the employer's discriminatory motives remain concealed by its earlier actions. Presumably, courts want to be left with some reasonable level of assurance that discrimination occurred before holding an employer responsible under the Act.[311] Yet, in its search for an explanation regarding human behavior (state of mind of the actor), the court cannot extrapolate such detail from the coincidence of the same actors; it constitutes pure guesswork based on false assumptions.

308. Schneider, *supra* note 2, at 716-17. The existence of a paper record magnifies the absence of information at the court's disposal to place the documentary evidence into the proper context. *See generally id.*

309. Even the Supreme Court has acknowledged the intricate nature of employment discrimination issues. For example, in harassment law, courts consider the actions of the decision makers or other actors to formulate standards for the circumstances under which the conduct will be imputed to the employer for purposes of liability. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (acknowledging that the "welcomeness" standard under sexual harassment law "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact").

310. Nazir v. United Airlines, Inc., 100 Cal. Rptr. 3d 296, 323 n.16 (Cal. Ct. App. 2009) (emphasis added).

311. Plaintiffs must prove discrimination by a preponderance of the evidence. Yet courts require plaintiffs to put them at ease with allegations of discrimination by employers through a heightened standard by applying the same-actor doctrine, the stray remarks doctrine, or other hurdles.

Discrimination is difficult to uncover. The modern workplace comprises an amalgamation of complex human and organizational dimensions; it is a far more complex social environment than courts are willing to recognize. In *Immunity for Hire*, I capture the dynamics of contemporary work environments by exploring aspects of modern employment settings, including workplace configurations, evaluative models, and corporate culture, all of which influence decision making in organizations and bear on the underlying motivation for those decisions.[312] This work demonstrates precisely how business tools such as work teams, collective decision making, and collaborative problem solving constitute vectors through which bias can infect the decision-making process well after an individual joins an organization. The point is that "[i]t is [quite] difficult for a court, on papers alone, to determine the atmosphere [and complexity] of the work environment and how it might be perceived by an employee working in that environment"[313] with enough precision to infer that discrimination did not exist.[314] It is simply too difficult for a judge, without the benefit of this context, "to determine what the environment is like . . . without hearing the witnesses describe it live."[315]

Hiring focuses on the employer's self-interest. Same-actor evidence does not possess the predictive power that courts seek in weeding out the claims that lack merit. Hiring is not indicative of acceptance and neither forestalls the possibility of discrimination emanating thereafter nor ensures the

312. *See Immunity for Hire*, *supra* note 134. Engaging interdisciplinary sources, including organizational behavior, management theory, and cognitive psychological literature, I seek the sophisticated insight by which to evaluate the shortcomings of this doctrine. *Id.*

313. Beiner, *supra* note 131, at 102. Here, Beiner reminds us that these types of "judgment calls about human attitudes and behavior are inappropriate . . . on summary judgment." *Id.*

314. Other scholars have explored these complexities and made important contributions. *See, e.g.*, Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1324-25 (asserting the ineffectiveness of Title VII to eradicate racial discrimination in a labor market saturated with the use of race-based proxies invoking negative imaging); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); *¡Viva La Evolución!*, *supra* note 3; Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487 (2000); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139-67 (1989).

315. Beiner, *supra* note 131, at 133-34 (concluding that summary judgment as a docket-management device is problematic in sexual harassment cases).

absence of bias from the outset. In fact, hiring signifies nothing more than an open position that the employer filled, presumably with someone it believed could meet the minimum job requirements. I contend that at the heart of every employment decision, particularly a hiring decision, resides the employer's business goals. In my view, an employer always operates largely from the vantage of self-interest. For example, the employer's considerations span whether this individual will strengthen its assembly line, grow its client base, fit into the organizational culture, and the like.[316] This business-centered focus is rational from both productivity and efficiency perspectives. These preferences represent legitimate reasons that a rational employer would rely upon in making decisions. Yet it yields no degree of certainty regarding the proclivities of the decision makers at either end of the plaintiff's tenure with an organization.[317]

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316. I do not mean to imply that employers never consider non-business-related factors, such as diversity, in hiring. I do believe, however, that such altruistic reasons are secondary in the employer's calculus. This is rational from the perspective that a business cannot thrive if it does not have the right people, in the right jobs, to execute its mission and implement its business goals. Notwithstanding this perspective, business-related reasons often encompass some bias, whether consciously or not. Justice O'Connor recognized the inherent bias in employment decision making almost twenty years ago in the *Price* decision. She stated that "[r]ace and gender *always* 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and . . . may comment [on] in a perfectly neutral and nondiscriminatory fashion." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (emphasis added). The *problem*, however, is that race and gender are hardly benign when employers make decisions based on stereotypical notions, particularly in light of the social constructions of race and gender. Often employers subscribe to the same conventions as the larger society. *See generally* Nicholas D. Kristof, Op-Ed., *Racism Without Racists*, N.Y. TIMES, Oct. 5, 2008, at WK10 (observing that "[f]or decades, experiments have shown that even many whites who earnestly believe in equal rights will recommend hiring a white job candidate more often than a person with identical credentials who is black").

317. In fact, there are numerous reasons why an individual might be hired initially. For instance, an employer may hire due to a diversity mandate, time pressures, or desperation to fill a position. Its decision to hire on a certain day may not necessarily reflect that it selected the best person for the job but that the decision maker acted on impulse or some bizarre idiosyncrasy. While some of these reasons may not be discriminatory on their faces, they do not signify that the employer harbored no discriminatory animus upon making that decision. If one chronicles the function of work relations from the slave trade to the modern American workplace, this employer "self-interest" narrative has persisted. Overall, similar to the industrial slave period, an employer's decision making in today's modern setting is about gaining a return on investment in the worker. The way slave owners structured their operations and utilized slave labor was not premised on plantation harmony alone but also on maximizing productivity. Today, employers' selection and decision making is not about fostering workplace tranquility in the abstract, but, to the extent doing so facilitates enhancement of worker productivity, employers make these seemingly good faith ef-

Eight heads are better than one. Without a trial, a plaintiff is denied an opportunity to have discrimination matters decided by a more diverse group that is more likely, I believe, to understand and identify with the complex phenomena of the contemporary workplace.[318] These individuals can base decisions on their collective life experiences and backgrounds. Instead, the interpretation of workplace bias rests largely in the hands of single judges whose experiences do not typically mirror the complex layers of society.[319]

D. Ideas for Addressing the Immunity-for-Hire Problem

The same-actor doctrine, in conjunction with procedural devices like summary judgment, has severely handicapped plaintiffs in their efforts to prove unlawful discrimination. Courts protect employers from the stigma of discrimination based on past favorable behavior toward the plaintiff. Casting employers as inclusive, benevolent, and fair through the narrative of the same-actor principle, for example, harms notions of acceptability and inclusion. The bottom line is that courts should discontinue use of this unreliable and absurd principle that is based on a miscalculation about discrimination, its functions, and its causes. Moreover, the essence of the doctrine and its underlying assumptions are completely devoid of the context of contemporary workplace settings. I offer ideas below on how this might be accomplished – ideas that consider the evaluative function of the judiciary and remain true to the precepts of equal opportunity under Title VII.

1. Abolish the Same-Actor Doctrine

First, let me be clear, I believe that the same-actor principle should be abolished from an employer's playbook altogether. That is, courts should stop relying on this untenable analytical paradigm in evaluating claims of discrimination. While some may view the use of this doctrine as a proper

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forts. The capacity to harbor discriminatory bias and to act upon it existed then and does now. In an exploration of slave hiring, Douglas Blackmon poignantly describes this orientation: "Even large-scale slave owners who directed their business managers to provide reasonable care for slaves nonetheless advocated harsh measures to maintain the highest level of production." BLACKMON, *supra* note 176.

318. *See* Beiner, *supra* note 131, at 133-34. Beiner opines that judicial hostility toward harassment plaintiffs may be due to a "lack of diversity on the bench." *Id.* at 119. For discussions of the complexities of the modern workplace, see generally *Immunity for Hire*, *supra* note 134, and Green, *supra* note 314.

319. *See* Beiner, *supra* note 131, at 133-34. *See also Hard to Win?*, *supra* note 2, at 561-62 (asserting that discrimination cases are hard to win because judges bring their biases to the analysis of the claims and stating that while "some courts are able to separate themselves from their personal perspectives, most courts are not, and those biases strongly influence how courts decide particular cases especially in the discrimination context").

boundary of the law that judges should set, I wholeheartedly disagree. This obscure doctrine based on flawed assumptions has no place in a fair and equitable administration of justice. The courts' treatment amounts to litigation from the bench, a role that far too often prejudices plaintiffs rather than defendants.[320] Moreover, it has no predictive power and allows courts to be passive discriminators. Understanding the pervasiveness of the doctrine in the substantive and procedural realms of Title VII law, however, I offer suggestions for injecting into the analysis the context so curiously missing in the formulation, evolution, and unrestrained use of the doctrine.

2. The Same-Actor Doctrine Should Not Be Applied at Summary Judgment

At a minimum, courts should refrain from applying this doctrine at summary judgment. Yes, this means that a trial would be warranted, particularly where the court grants the motion, in whole or in part, relying on the doctrine. The court should not speak for the reasonable jury by deciding that the plaintiff's story of discriminatory treatment is implausible because the same decision makers were involved. Instead, the courts should allow the stories of the parties to emerge naturally through the litigation process.

At summary judgment, the facts are insufficiently developed. Thus, the court lacks the proper context to deem same-actor evidence relevant, let alone determinative. The better course for promoting a fuller record is to allow for a trial. It is undisputed that the employee is operating at a disadvantage in employment discrimination cases.[321] The employer possesses the knowledge concerning why it took adverse action against the plaintiff. The most effective way to combat the implication of the inference is through cross-examination of the decision makers and others who can offer the fact-finder a lens through which to view a plaintiff's experience in the work environment.[322] Disparate treatment cases rest entirely on the motive and credibility of those acting on behalf of the employer. Thus, the court should exercise its "equitable power" to deny summary judgment and avoid usurping the role of

320. *See supra* note 247 (tables reflecting the litigation effects of the same-actor doctrine). *See generally* Parker, *supra* note 7; Schneider, *supra* note 2.

321. Justice Souter, in his dissent in *Hicks*, addressed the fear that a plaintiff must engage in guesswork to anticipate what legitimate, non-discriminatory reasons an employer may offer as a defense and then attempt to confront any inconceivable reason that may be "lurking in the record." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 534-35 (1993) (Souter, J., dissenting). Scholars have raised suspicion about this impediment to plaintiffs' ability to build an impenetrable case against employers. *See, e.g.*, *¡ Viva La Evolución!*, *supra* note 3.

322. *See* Nazir v. United Airlines, Inc., 100 Cal. Rptr. 3d 296, 323 n.16 (Cal. Ct. App. 2009).

the jury, particularly in cases involving the complex workplace dynamics and operations as in today's modern employment arena.[323]

3. Pre-trial Evidentiary Hearings to Capture Workplace Context

If courts insist on drawing such a nonsensical inference, they should do so with consideration of workplace dynamics – including power dynamics, organizational structures, evaluative models, and institutional cultures that complicate employment selection and other decisions. As recognized by others, this inquiry can be buttressed through expert testimony on the psychology of groups and social phenomena in our contemporary work settings.[324] Because seemingly objective facts have varying subjective meanings based upon the context of a particular organization, a court could benefit from conducting a hearing on an employer's summary judgment motion to ensure that it obtains a clear and accurate view from which it could infer any lack of bias by the same decision makers.[325] The relationship between a decision maker and a plaintiff may be masked without further interrogation. In fact, I posit that the same-actor principle allows a biased employer to conceal its discriminatory animus – at least shroud its actions in goodness, which may be an inaccurate or a wholly generous characterization. A hearing would afford a judge an opportunity to observe the demeanor, body language, and tone of a decision maker, thus providing broader context for what the paper record

323. Professor Friedenthal's work demonstrates how a denial of summary judgment comports with the Federal Rules of Civil Procedure. Friedenthal & Gardner, *supra* note 116. He argues persuasively that, even where summary judgment is "technically" appropriate, the courts can exercise discretion to deny it when a full trial is believed to be necessary, such as in matters concerning questions of motive, intent, and credibility. *Id.* at 112, 125-30. Workplace discrimination cases seem particularly well suited for this exercise of discretion by the courts, particularly where they rely in whole or in part on same-actor evidence. The same-actor doctrine was born in the Court of Appeals for the Fourth Circuit. *See* Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). Ironically, this circuit falls in the camp that adopts the view that judges can exercise discretion in denying summary judgment. *See, e.g.*, Forest Hills Early Learning Ctr., Inc. v. Lukhard, 728 F.2d 230, 245 (4th Cir. 1984) (A court can reject a motion for summary judgment even where it appears "appropriate on the record."); Williams v. Howard Johnson's, Inc., 323 F.2d 102, 105 (4th Cir. 1963) (A judge may delay consideration of summary judgment until after a trial on the merits if there is some doubt as to whether genuine issues of material fact exist.).

324. *See, e.g.*, Schneider, *supra* note 2, at 753-74; Krieger & Fiske, *supra* note 183, at 1005-07. *See also* Green, *supra* note 314, at 897 n.175.

325. Once the court has this critical context, the employer's motive may be clear or at least raise a genuine issue as to this fact. Justice Thomas cautioned that circumstantial evidence may be quite powerful. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 99-100 (2003). When placed in the proper context of a particular workplace dynamic, it may deliver the powerful punch to counter the employer's motion.

presents.[326] If a judge will inevitably make these types of evaluations, it is better that she do so with more information – data that are nearly impossible to discern from the documents alone.

I recognize that the disadvantage of a hearing in the context of a motion for summary judgment is that it forces courts to conduct "mini trials." The scarce resources of the courts become dedicated to an exercise that yields less than it should. Yet, due to the complexity of the search for motive, particularly amidst the multifarious nature of modern workplace organizations, I argue that it is time well spent. As summary dismissal is essentially outcome determinative, plaintiffs deserve the courts' tedious exploration in light of the same-actor doctrine and other devices used by them to "chip away" at plaintiffs' evidence in disparate treatment cases.

In the context of a cold paper record, no two facts could be more sterile than who hired the plaintiff and who made the alleged adverse employment decision.[327] Thus, as I asserted in *Immunity for Hire*, courts should stop "[p]laying in the [d]ark."[328] The costs to Title VII's purpose and policy are far too great.

4. Employers Should Bear the Burden of Proof Under the Same-Actor Doctrine

Additionally, perhaps a reallocation of the burden of persuasion is in order at the legitimate, non-discriminatory-reason stage of the *McDonnell*

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326. It bears noting that social science testimony in discrimination matters has come under siege. *See* Schneider, *supra* note 2, at 757, 771-72. There are some evolving responses to this assault. *See, e.g.*, TUKUFU ZUBERI & EDUARDO BONILLA-SILVA, WHITE LOGIC, WHITE METHODS: RACISM AND METHODOLOGY (2008); Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009); THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 12-14 (2005) (proposing the use of social science evidence to bridge the divide between judge and jury). It seems apparent that judges are far removed from the social realities of contemporary workplaces. There exists a widening gap between what social scientists tell us about the norms of behavior, group dynamics, and bias and what courts believe. Thus, social science could go a long way in illuminating these complexities for the court and fact-finders generally.

327. It is worth noting that judges could better communicate their reasons for relying on the same-actor principle. As reflected in Part IV, so often the courts assert reliance on the same-actor principle without any explanation, simply drawing the inference by citing *Proud* and its underlying assumption or the controlling opinion of its jurisdiction. Notwithstanding the nonsensical nature of this doctrine, the matter-of-fact way in which courts draw the inference without explanation or without assessing the credibility of the employer's explanation defies logic and offends the purposes of Title VII. Moreover, the fact that judges choose not to publish these opinions makes the manner in which they exercise their broad discretionary authority critical.

328. *See Immunity for Hire*, *supra* note 134, at 1161, 1174.

Douglas/Burdine framework. If employers continue to rely on the same-actor principle and courts continue to accept it, then employers ought to have an affirmative duty and bear the burden of persuasion regarding why the same actor lacks discriminatory motive, beyond mere happenstance that the person was involved in prior positive acts toward the plaintiff. The same-actor inference amounts to a conclusory assertion. The law should encourage a fact-finder to infer that the employer's story is not credible notwithstanding the same-actor evidence. Thus, on a motion for summary judgment, for example, the employer bears the burden of persuasion when asserting that a plaintiff's discrimination claims lack merit. Thus, if an employer supports its motion with reliance on the same-actor principle as a signal that the actions lacked discriminatory motive, the courts ought not accept that premise (as they currently do) merely because the employer says it should. Instead, courts should require substantial support from the employer.[329]

5. Addressing Same-Actor Evidence in the Trial Setting

Even in those instances where a court declines to summarily dismiss a plaintiff's claim before trial, I would contend that plaintiffs must be vigilant against the use of the same-actor inference due to its underlying faulty assumption and potential detrimental effect on evaluation of the evidence of discrimination. Because of the potential harm of the inference to a plaintiff's case, courts should honor motions in limine to exclude the potent interpretation of the evidence. To allow a jury to conclude that no discrimination existed because the same actor could not harbor bias against the plaintiff is extremely prejudicial to the search for discriminatory motive and the administration of justice. Thus, whatever relevance the evidence has to the claim of discrimination is outweighed by the prejudicial impact on the plaintiff's case

329. Recognizing the multidimensional nature of employment decision making and the complexity of human motivation, the court could require an employer to prove that it would have made the same decision anyway when it seeks to rely on the same-actor doctrine. Thus, the court could also justify shifting the burden of proof to employers on the same-actor defense under a mixed motive analysis under Title VII. Under the Civil Rights Act of 1991, where dual motives exist (legitimate and illegitimate ones), the defendant employer bears the burden of proving that it would have made the same decision notwithstanding its discriminatory motive. Pub. L. No. 102-166, § 107(a), 105 Stat. 1071 (1991) (codified at 42 U.S.C. § 2000e-2(m)). This refinement emanated after the Supreme Court's decision in *Price Waterhouse*, where the Court recognized that employers may base decisions on wholly legitimate bases while simultaneously relying on discriminatory bases proscribed under Title VII. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989). *See also* Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 52 (2006) (recognizing "the converging psychological evidence that information such as race and gender often affects decision makers even when they are not aware of it").

due to the meaning courts assign to the existence of the same actors, particularly where courts draw a strong presumption against discrimination.[330]

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330. Such motions in limine could involve assessment under the Federal Rules of Evidence 401 and 403.

Notwithstanding that employment discrimination matters rarely reach a jury, it bears thinking about the same-actor evidence in those matters that clear the pre-trial hurdles. Under the Federal Rules of Evidence, for example, judges have several rules at their disposal to allow the full context of a matter to be considered – rules they can deploy to stop the straight-jacketing effect of the same-actor inference. For example, under Federal Rule of Evidence 403, as a factual matter, judges have room to delineate when evidence can be used for one purpose or another. With respect to same-actor evidence in particular, I argue that judges should not allow employers to bring in same-actor evidence for the purpose of inferring that the employer harbored no discriminatory bias. Under Rule 403, which governs relevance matters, I will concede only that same-actor evidence is at best marginally relevant to the circumstances resulting in adverse action against the plaintiff, and certainly not nearly as pertinent regarding the employer's motive. On the other hand, however, same-actor evidence is extremely prejudicial because, ironically, the very existence of the same-actor presumption demonstrates how natural it is for judges to overvalue it. In fact, the data that I have presented in this case study shows just how often, when faced with same-actor evidence, fact-finders will overvalue it, granting it undue weight in assessing the totality of the circumstances that constitute a plaintiff's allegations of discriminatory treatment. See the summary of case study at note 247. Thus, its marginal relevance is substantially outweighed by its prejudicial and misleading effects. Same-actor evidence distracts the fact-finder from the real issue of discovering workplace discrimination by rewarding the employer for its past good behavior, potentially misleading the jury about an employer's true intent. Therefore, the net effect is a waste of judicial resources and a preoccupation with side issues that could result in trials-within-trials on matters that are not germane to the employer's intent to discriminate against the plaintiff. However, if the courts allow employers to use same-actor evidence for the purpose of inferring no discriminatory animus, then plaintiffs ought to have the right to bring in expert witnesses and other evidence that sheds light on the employment settings they deem to be discriminatory.

Alternatively, plaintiffs could argue that applying the same-actor inference in this way is akin to the admission of character evidence that reflects one's propensity to engage in certain behavior. Thus, the evidence is excludable under Federal Rule of Evidence 404, which rejects evidence of prior acts in order to prove that an action is in conformity with one's character. As a general matter, under Rule 404, courts reject the circumstantial use of character evidence in order to avoid propensity reasoning by a fact-finder who may draw inferences about an actor's propensity to behave in a certain way based on past conduct. For example, in a criminal setting, a court may reject evidence of past assaults to show that the defendant committed the aggressive act in question. Similarly, with regard to the same-actor principle, the employer offers evidence of its positive actions toward plaintiffs to show that it could not have acted discriminatorily in taking the alleged adverse action against the plaintiff. The evidence operates as propensity evidence, however, because the employer argues, for example, that it hired or promoted the African-American plaintiff (or engaged in some other positive action affecting the terms and condition of the plaintiff's employment) and that therefore it possesses an unbiased character with regard to African-American

workers generally and this plaintiff in particular. Once it fires the same African-American worker, it then argues it did so in conformity with its good character (i.e., its decision to fire the plaintiff was not due to discriminatory bias.). Thus, in this context, same-actor evidence serves as propensity evidence. It is precisely this propensity reasoning that the courts seek to avoid and thus to minimize through the use of evidentiary rules such as Rule 404. But the courts have applied Rule 404 inconsistently in employment discrimination cases. For example, when plaintiffs have sought to rely on evidence of other "similarly situated" employees who were also subjected to discriminatory conduct by the employer, commonly known as "me too" evidence, the courts' responses have been mixed. *See, e.g.*, Haskell v. Kaman Corp., 743 F.2d 113, 122 (2d Cir. 1984) (deeming "me too" evidence as irrelevant to plaintiff's own circumstances); Moorhouse v. Boeing Co., 501 F. Supp. 390, 393 n.4 (E.D. Pa. 1980) (focusing on the needless consumption of time and jury confusion with the introduction of "me too" evidence), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980); Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990) (allowing "me too" evidence). *See also* Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1103 (8th Cir. 1988) (recognizing that evidence reflecting a climate of racial bias as potentially "critical for the jury's assessment" of the employer's discriminatory animus); Garvey v. Dickinson Coll., 763 F. Supp. 799, 801 (M.D. Pa. 1991) (exploring Rule 404 in light of plaintiffs' disadvantage in proving employment discrimination). While the Supreme Court recently has held that "me too" evidence is not per se inadmissible, it takes a more cautious stance with regard to the admissibility of character-type evidence. *See* discussion *supra*, note 332. Moreover, as I have demonstrated in this case study, the courts generally characterize same-actor evidence as general propensity evidence. That is, they accept the employer's argument that it is not a bigot because it hired the black plaintiff, thus it is reasonable to infer that the employer would act in conformity with that character in its later dealings with the plaintiff. Therefore, when it fired her, it did so for a legitimate reason and not because it is racist or acted based on racism. This reasoning seems in direct contravention to the boundaries of the rules of evidence.

Because the courts have been very stringent in how they interpret circumstantial evidence of discrimination, particularly evidence concerning the employer's alleged past biased acts, they ought to be receptive to an argument to exclude same-actor evidence because it amounts to pure propensity reasoning in the manner in which the courts apply the principle. Thus, courts can employ Rule 404 as an antidote to this propensity reasoning problem that greatly disadvantages plaintiffs and derails the search for discriminatory motive. For a discussion of such evidentiary-related matters in employment discrimination cases, see Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063 (2005) (highlighting the disadvantage of plaintiffs in proving discrimination, thus, compelling them to defy Rule 404's prohibition of the use of such evidence and calling for reform of the Rule). My point here is that while Rule 404 often precludes plaintiffs' use of prior acts of animus to prove individual disparate treatment, the rule often benefits employers precisely because courts accept and apply the same-actor principle. Perhaps this tension – that the same-actor principle seemingly amounts to a substantive rule under Title VII that violates the Rules of Evidence – warrants fuller discussion beyond the scope of this Article. Ironically, the courts' interpretive rule making that "chips away" at plaintiffs' evidence of pretext under Title VII has resulted in a common-law modification of the Rules of Evidence.

Alternatively, the courts could reserve consideration of this doctrine for motions for judgment as matters of law. At that point in the litigation cycle, a court has context and a jury's view. Notwithstanding this background, a court should proceed with great caution before granting such motions because a jury has heard the intricate details of each party's perspective and made its assessment. In considering whether to grant such a motion, a court might focus on a few key factors, including the composition, structure, and relational dynamics of the department or unit in which a plaintiff works; involvement of others in the decision-making process, including supervisors and non-supervisory employees; and the existence of other incidences of discriminatory treatment (or allegations) against other outsider groups within the organization, to name a few.[331]

V. DEBUNKING THE MYTHS OF DISCRIMINATORY ANIMUS

A. Exposing the Ugly Truth

Title VII disparate treatment law is premised on intentional discriminatory animus. Procedural law, such as federal summary judgment standards, encompasses ideals of judicial efficiency and fairness. The intersection of

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331. One category of information that may provide context where a court deems the same-actor evidence relevant is what has become commonly known as "me too" evidence. Plaintiffs seek to rely on evidence of other "similarly situated" employees who were also subjected to discriminatory conduct by the employer. The admissibility of "me too" evidence is unclear and perhaps in jeopardy in light of a recent decision by the Supreme Court. In *Sprint/United Management Co. v. Mendelsohn*, in an unhelpful and imprecise fashion, the Court held that there is no per se rule against "me too" evidence because the relevance and prejudicial determinations under Federal Rules of Evidence 401 and 403 "are generally not amendable to broad per se rules." 128 S. Ct. 1140, 1147 (2008). Rather, the Court deems these issues fact-intensive, context-driven matters for ad-hoc assessment in each individual case. *Id.* Employers have routinely argued that "me too" evidence constitutes extraneous information, the cumulative effect of which would prejudice their clients in the jury's eyes and compel them to defend themselves against discrimination claims not asserted in the complaint. Although the Court deemed there to be no absolute bar against "me too" evidence, as a general matter, courts are very reluctant to allow in this type of evidence. At a minimum, the Court's opinion reflects the judiciary's general discomfort in admitting any evidence that seems like propensity reasoning, yet the same-actor principle has gained prominence in the jurisprudence precisely due to its relevance with regard to employers' propensity to discriminate. Notwithstanding the seemingly pro-employer nature of the opinion, it supports my call for contextualization in the ways I have offered for consideration. We are in dire need of deeper and more sophisticated understanding of discrimination in society and the workplace specifically. See the previous footnote for discussion of how the courts' stringent interpretation of evidence of other acts by the employer, particularly related to past acts of bias, supports an argument for the exclusion of same-actor evidence. *See supra* note 330.

substance and procedure in employment discrimination cases produces a framework that proves unworkable in practice, unfair to plaintiffs, and unjust in its effects. The two forces poorly serve the goals of antidiscrimination law and potentially leave workplace bias hidden in multifarious organizations based on imprudently court-imposed interpretations of human and organizational behavior. I have sought to demonstrate how courts have manipulated substance and procedure and equipped employers with a playbook full of defenses assisting them in resisting the antidote of Title VII.

The indeterminacy of Title VII law remains clear. Reviewing the law of pretext and its assessment by judges in procedural terms exposes the myth of discriminatory bias.

1. *Reeves* Matters

The Supreme Court gave a clear mandate in *Reeves* – courts should grant summary judgment with great caution and care after a holistic evaluation of the evidence, "disregard[ing] all evidence favorable to the moving party that the jury is not required to believe."[332] The lower courts, however, continue to grant summary dismissal for employers. Moreover, courts continue to disaggregate plaintiffs' evidence, reducing the gravity of alleged discriminatory actions. As a general matter, a plaintiff must do more than cast doubt on the employer's justification; she must present additional evidence that discrimination was the real reason.[333] Thus, as lower courts continue to defy *Reeves* or exploit the loophole left by the Court, it seems that the pronouncements in *Reeves* do not matter much in the quest for uncovering discriminatory animus.

2. "Pretext Plus" Is Dead

The Supreme Court clearly repudiated the pretext-plus interpretation of the pretext standard in its unanimous opinion in *Reeves*.[334] Yet, nearly ten years later, we are still left without a workable definition or framework for the pretext assessment, despite the efforts of many to contribute to this endeavor.[335] As the same-actor principle and other formulations discussed in this Article reveal, "pretext-plus" remains viable. *Reeves* failed to dismantle completely this inappropriate heightening of plaintiffs' burden.[336]

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332. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000).

333. *See, e.g.*, Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1990). The *Medina-Munoz* court declares the nature of a plaintiff's hurdle in the pretext stage as a "plateau," surmountable only by doing more than refuting the employer's justification. *Id.* "The plaintiff must also show a discriminatory animus [on a basis proscribed by Title VII]." *Id.*

334. *See* discussion *supra* Part II.B.3.

335. *See, e.g.*, *Secrets and Lies*, *supra* note 55; *Hard to Win?*, *supra* note 2.

336. *See* discussion *supra* Part II.B.3.

3. Association Connotes Acceptance

Courts remain impressed with an employer's protestations of its bottom lines – that it voluntarily hires, trains, or promotes all types of individuals. The courts credit an employer's willingness to associate with difference, and this continues to jade the courts' perspectives with respect to plaintiffs' claims of discrimination. If an employer hires a black worker, for example, the courts assume inappropriately that the hiring decision connotes acceptance of black persons in general and, by extension, the plaintiff's difference within the workplace in particular. This is illogical and would essentially mean that all an employer must do to protect itself under the Act is to hire a diverse workforce. But a racially diverse workforce does not protect individuals from toxic work experiences or shield employers from their responsibilities under the Act.[337]

Employers select workers in order to meet business needs. Thus, they are driven foremost by self-interest, not benevolence.[338] Thus, equating association with acceptance and a lack of discriminatory motive is wrong headed and unjust.

4. Discrimination Ceases to Exist in Contemporary Work Environments

Discrimination has gone underground. In other ways, it has transformed into unrecognizable subtleties that are easy to conceal and far more difficult to uncover. Employers are quite savvy at concealing even the appearance of impropriety. Since modern discrimination emanates from the intersection of complex systems, it has become virtually unrecognizable, making it extremely difficult to identify its character, form, and origin.[339]

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337. An increase in diversity initiatives did not result in the repeal of antidiscrimination laws. Some have argued that diversity has not had the watershed effect on workplace equality that employers intended and equality advocates desired. *See, e.g.*, Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004).

338. *See* discussion *supra* Part IV.C.1 (*"Hiring focuses on the employer's self-interest."*).

339. Academics devoted to the study of discrimination remain frustrated with the elusive nature of discrimination. Addressing this conundrum after digesting two readers devoted to understanding bias, Professor Rachel Moran expressed that she "was left with a *haunting* question: how could I have read over 800 pages on the subject of discrimination and still not know what discrimination means?" Moran, *supra* note 146, at 2366 (emphasis added).

5. Judges Are Neutral Arbiters and Administrators of Justice

There exists a strongly held perception that judges maintain hostility toward employment discrimination matters, particularly those involving race and gender.[340] This jaundiced view on the part of the courts derives from a conception that discrimination does not exist or deserve policing. It also may reflect the homogenous composition of our federal courts, a lack of diversity that affects the social realities and sensibilities judges bring to the bench.[341] This incapacity to understand the construction of modern day discrimination is reflected in the courts' enforcement of a cabined view of human motivation. Employers are running roughshod over plaintiffs, and judges are assisting them through the manner in which they engage procedure and substance. The resulting scrutiny of pretext produces interpretive rules like the same-actor principle and other evidentiary-dilution devices that even a plaintiff with seemingly strong evidence may not survive.

Whether the judicial attitude reflects deference, hostility, or incapacity to relate to discrimination, this complicity of employers and judges creates an impossible situation for plaintiffs that this Article attempts to unmask.

B. A Call for New Beginnings

Plaintiffs bear the brunt of the courts' perfunctory consideration and uninformed scrutiny of proof in disparate treatment discrimination cases. The illusions of fairness and neutrality persist due to the increasingly large playbook of employer defenses formulated by the courts. Many have theorized about the antipathy of courts with respect to employment discrimination claims. Some scholars contend that the trend represents a coping strategy due to docket pressures – that the courts are attempting to preserve their resources for deserving cases where discrimination is the highly probable explanation.

340. *See, e.g.*, *Hard to Win?*, *supra* note 2, at 574 (claiming that courts see employment discrimination cases as "docket nuisance[s]" in need of careful management "rather than vehicles for justice"); *Secrets and Lies*, *supra* note 55, at 546 (asserting that lower court judges have an "ideological disposition" regarding discrimination cases). As part of this colloquium, Professor Jones argues that this disdain for discrimination pervades not only Title VII and discrimination claims but also all of discrimination law, leading her to suggest that all discrimination law is in peril. Trina Jones, *Anti-Discrimination Law in Peril*, 75 MO. L. REV. 423 (2010).

341. I believe the same-actor doctrine is symptomatic of judicial misunderstanding of the essence of a life lived in the shadows of American privilege. Not all judges are oblivious to such limitations. *See, e.g.*, Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998) (federal judge deeming juries superior to judges as arbiters of American culture, observing that "[w]hatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socioeconomic spectrum, generally lacking the current real-life experience required in interpreting subtle . . . dynamics of the workplace based on nuances, subtle perceptions, and implicit communications").

Perhaps this phenomenon began in that spirit. However, the "counter-evolution" of pretext law hints that something far more ideological is afoot. Certainly, many opinions reflect deference to employer business judgment. But I agree with Professor Wendy Parker, who suggests that this courtesy of consideration has given way to a dangerous alliance.[342] This work supports my view of the grave consequences when isolated judges draw decisive inferences before trial that prove fatal to plaintiffs' discrimination claims.[343]

As this exploration demonstrates, a new definition of discrimination is undeniably crucial to confronting any anti-plaintiff ethos in workplace jurisprudence.[344] Discrimination is not monolithic. Thus, how we define discrimination must embrace a deeper and more sophisticated understanding of bias in contemporary society. Several scholars engage in this important endeavor of framing discrimination as the multifarious, complex phenomenon that it is, and I join them in this arduous task.[345] In my view, a more worka-

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342. *See* Parker, *supra* note 7, at 934-37. Professor Parker's work lends empirical support for what she terms "anti-race plaintiff ideology." *Id.* at 931. Professor Parker provides a well-conceived and thoughtful examination of the lack of success experienced by plaintiffs in race cases. *See id.* An ambitious undertaking for sure, I respect the candor with which she reflects on her findings and draws her conclusions. It is well time that we call the courts' activism out for what it is, especially in light of the high stakes involving the essence of an individual's livelihood. Professor McGinley identified an assault on civil rights, particularly employment claims, more than ten years ago. *See Tortured Trilogy*, *supra* note 2. The sentiment remains an entrenched aspect of our judiciary, as Parker demonstrates. *See* Parker, *supra* note 7, at 893 (highlighting the bleak state of affairs for plaintiffs, asserting that "[c]ourts are doing more than deferring to defendants; they are actually agreeing with [them]").

343. After studying 659 race cases, Professor Parker found that "[t]he bottom line for all the cases studied is simple: plaintiffs almost always lose when courts resolve their claims." Parker, *supra* note 7, at 892, 894. *See also*, Schneider, *supra* note 2. The disturbing trend of summary judgment, and procedural manipulation generally, promotes a passive societal response to bias because we consciously choose to either ignore or rationalize discrimination. *See* Baumann et al., *supra* note 71, at 220 (The article asserts that "[p]rocedure now defines unlawful discrimination and determines the outcome of Title VII cases. Thus, without grappling with the nature of discrimination, theories of equality, or the historical or sociological complexities of employment disparities between African-Americans and whites, the courts have rewritten the law and [defined discrimination] using the language of procedure.").

344. Rational choice theory appears to be embedded in the courts' pro-employer philosophy. That is, judges presume that the employer acted rationally in its alleged adverse employment action. Under the same-actor doctrine, for example, the court anchors that presumption in the employer's initial decision to hire. Ayres has explored the "rational choice theory" in the marketplace. *See, e.g.*, IAN AYRES, PERVASIVE PREJUDICE?: UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 4-6 (2001).

345. *See* Green, *supra* note 314. As part of this colloquium, Professor McGinley argues that the courts have defined discrimination in an ahistorical, acontextual way. As I advocate in this Article, she believes that the context and realities of nuanced,

ble definition of discrimination is one that encompasses relational, organizational, and systemic aspects of employment as indicative of discriminatory intent. Since plaintiffs retain the ultimate burden of proving intentional discrimination, employers ought to bear some responsibility for the intentional use of tools and strategies that cause or facilitate discrimination against workers.[346]

The case study I used in this Article – the same-actor principle – is merely symptomatic of a deeper normative problem in workplace discrimination law. In order to preserve the integrity of our civil rights regime, the ways in which we define, discuss, and analyze discrimination must expand, particularly in workplace settings. In my view, the label is less important than its content and context. I am concerned about the access to justice implications that arise from the intersection of substance and procedure that I have endeavored to demonstrate in this Article. Plaintiffs lose the opportunity to have their stories heard though a trial.[347] Moreover, the advancement of the law suffers as procedure, particularly summary judgment, becomes the vehicle for making law in this area. We must confront the anti-plaintiff ethos that has taken hold in workplace jurisprudence. This is perhaps an invitation to advocate for amendment to Title VII to define discrimination more explicitly or, at a minimum, to recognize its complexity due to the enormous changes in contemporary work environments – demographically, structurally, and relationally. While difficult to achieve, legislative action is often overlooked as a mechanism for law reform. With the state of disparate treatment law, particularly the elusive nature of the pretext inquiry, legislative action with an interdisciplinary focus may be the only way to recapture the promise of Title VII and secure more just results for those victimized by workplace discrimination.

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and possibly even unconscious, discrimination should be considered within the proof construct. *See* Ann C. McGinley, *Discrimination Redefined*, 75 MO. L. REV 443 (2010).

346. Recent work of Tristin Green and others supports my view. *See supra* note 314.

347. Yet access to an audience like a jury is not the entire solution. Fact-finders must have ways to filter and interpret what they hear; thus, without jury instructions or expert testimony from specialists in human behavior, group processing, and other aspects that bear on human motivation in contemporary society, plaintiffs' efforts are curtailed. Thus, procedural and substantive law should accommodate declarations or testimony of expert witnesses who can provide necessary filters for understanding complex human and organizational dimensions of workplace bias claims. Additionally, notwithstanding an informed jury verdict, the courts still have the power to grant motions for judgments not withstanding the verdicts. Risks remain, but I believe we can diminish those risks. Courts should be held to high standards, especially when civil rights are in jeopardy.

VI. CONCLUSION

Pretext is in peril. Claims of workplace discrimination comprised of largely circumstantial evidence suffer from the dangerous interplay of procedural and substantive law under Title VII's analytical scheme. A mix of evidentiary dilution and its procedural reinforcement has become a dangerous force for Title VII plaintiffs in proving pretext for discrimination. Due to the courts "chipping away" at plaintiffs' evidence of discrimination, pretext has become the endangered element under Title VII's disparate treatment framework – hollow and forceless in evidentiary value.

The courts have reified a myth about human motivation and discrimination in the way they evaluate evidence of pretext under Title VII. The various evaluative constructs that have resulted from the courts' attempts to root out discrimination have a stifling effect on plaintiffs' efforts to expose the perniciousness of workplace bias. These evidentiary-dilution devices enhanced by the procedural law platform have padded the employer's playbook of defenses. Further, these interpretive maneuvers fail to advance the law in any constructive manner and reflect the courts' inappropriate usurping of the role of the jury.

The task of honing Title VII law to better address the prejudicial disparate treatment it was designed to eradicate does not fall on the judiciary alone. Practitioners must diligently engage creative means of combating the deadly force of evaluative constructs unmoored from the realities of contemporary work life. Practitioners should continue efforts to reframe and tell the stories of disenfranchised workers throughout the litigation process by, for example, filing anticipatory motions to preclude the use of information that will prejudice the courts' interpretations of pretext. Such efforts will be futile, of course, if courts continue to ignore the complex social realities of contemporary work environments in interpreting circumstantial evidence of discrimination. Without critical perspective, the courts will continue to imperil the endangered element of pretext by deploying oversimplified heuristics that are borne out of its interpretive rulemaking. The judiciary's contribution will further the demise of workers' rights and hinder the antidote of Title VII by sustaining an unworkable and unjust framework.

Appendix A

Published and Unpublished Courts of Appeals Decisions Applying the Same-Actor Inference Since the Decision in *Proud v. Stone* through December 21, 2009

Circuit	SJ Affirmed	SJ Reversed	JMOL Affirmed	JMOL Denied	SAI Jury Instruction Denied	Jury Instruction Found Harmless	Jury Verdict for Employee Affirmed	Jury Verdict for Employer Affirmed	Bench Verdict for Employee Reversed	Dismissal for Failure to State a Claim Reversed
1st*	1	1			1		1			
2d**	4	2		1	2		2			1
3d		1								
4th	13	4	2				1		1	
5th	23		2	1			2	2		
6th***	7	2		1		1	5	1		
7th	12	4								
8th	5	3	1				1			
9th	11	4	1							
10th	4									
11th		1								
DDC							1			
Totals****	80	22	6	3	3	1	13	3	1	1

*One case in the 1st Circuit both denied an SAI jury instruction and affirmed a jury verdict for the employee.

**One case in the 2d Circuit denied a JMOL, denied an SAI jury instruction, and affirmed the jury verdict for the employee; another 2d Circuit case both denied an SAI jury instruction and affirmed a jury verdict for the employee.

***One case in the 6th Circuit both affirmed a jury verdict for the employer and found that an SAI jury instruction was harmless error.

****Although the totals column adds up to 133, there are actually 128 appellate cases that have applied the Same-Actor Inference to employment discrimination; one case in the 2d Circuit is listed three times in this table, another 2d Circuit case is listed twice, and one case in the 6th Circuit is listed twice in this table. This includes decisions through December 21, 2009.