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Kerri Lynn Stone

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# Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law

*Kerri Lynn Stone\**

## I. INTRODUCTION

A decision maker repeatedly used the word “boy” when addressing two African-American employees, who then did not receive a promotion for which they had applied.<sup>1</sup> A Puerto Rican doctor whose employer did not renew her contract proffered testimony that her employer’s Director of Clinical Services said, “‘Dominican doctors were better’ than ‘the other physicians who were there, who were Puerto Rican.’”<sup>2</sup> In each case, despite the fact that a jury rendered a verdict for the plaintiff, the court held that the comments were insufficient as a matter of law to evince employment discrimination.<sup>3</sup>

Significantly, in each of these cases, the court used an increasingly amorphous and insidious doctrine called the “stray comments” or “stray remarks” doctrine to wholly or partially devalue what was alleged to be probative evidence.<sup>4</sup> The United States Supreme Court looks to have unwittingly created this doctrine in a decision over twenty years ago,<sup>5</sup> and it has operated since then, unchecked and hardly discussed, to aid courts in holding that a revealing or indicative comment that an employment discrimination plaintiff proffers is insufficient as a matter of law (as opposed to merely a matter of

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\* Associate Professor, Florida International University College of Law. The ideas for this Article have been presented at the Fifth Annual Seton Hall Employment and Labor Law Scholars’ Forum. The author would like to thank the participants of that forum for their helpful comments and suggestions, especially Matthew Dimick, William Corbett, Steven Willborn, Henry Chambers, Charles Sullivan, Nancy Modesitt, Richard Moberly, Tim Glynn, Wendy Greene, Ann McGinley, Tristin Green, Jessica Roberts, Michael Stein, and Michael Zimmer. I would like to thank my colleagues M.C. Mirow, Howard Wasserman, and Joelle Moreno as well. Many thanks are also due to my research assistants, Chelsea Moore, Alejandro Sola, and Carlos Rodriguez-Cabarrocas.

1. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 455-56 (2006).

2. *Alvarado-Santos v. Dep’t of Health of P.R.*, 619 F.3d 126, 128 (1st Cir. 2010), *cert. denied*, No. 10-1556, 2011 WL 4530476 (U.S. Oct. 3, 2011).

3. *Ash*, 546 U.S. at 456; *Alvarado-Santos*, 619 F.3d at 133.

4. *Alvarado-Santos*, 619 F.3d at 133; *see Ash v. Tyson Foods, Inc.*, 129 Fed. App’x 529, 533 (11th Cir. 2005), *vacated and remanded by Ash*, 546 U.S. 454.

5. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76, *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

fact) to prove the discrimination alleged.<sup>6</sup> Moreover, courts have interpreted the word “stray” to mean different things, including, but not limited to, too far removed in time, too out of context, and too isolated, *as a matter of law*,<sup>7</sup> to permit a plaintiff’s case to go forward or to sustain a jury verdict.

Indeed, the dictionary defines the word “stray” as:

1: having strayed or escaped from a proper or intended place <a *stray* dog> <hit by a *stray* bullet> <fixed a few *stray* hairs>

2: occurring at random or sporadically <a few *stray* thoughts>

3: not serving any useful purpose : unwanted <*stray* light><sup>8</sup>

The mere fact that a discriminatory comment is contextually or temporally removed from an adverse employment action should not serve automatically to divest that comment of all or most of its evidentiary value. Further, the fact that a remark is isolated or sporadic, rather than part of a pattern of comments, may mean that it belies, rather than disproves an undisclosed mindset of bias.

To be sure, various facets of how, by whom, and when a comment is made might tend to attenuate evidence. While some evidence, upon a full and proper examination of all the surrounding circumstances, might be insufficient, irrelevant, or unpersuasive as a matter of law, judges too often substitute their personal assessments of evidence for the assessments of reasonable jurors. This behavior leads to the premature foreclosure of plaintiffs’ employment discrimination cases and to the granting of judgments as a matter of law for defendants after some plaintiffs have procured jury verdicts in their favor. Courts also arrive at “stray” determinations in a wide variety of circumstances and often do so without much analysis.

The so-called “stray comments” or “stray remarks” doctrine finds its origins in a United States Supreme Court concurrence penned by Justice Sandra Day O’Connor.<sup>9</sup> However, promulgated and proliferated by lower courts at a great rate, the “doctrine” may have been mistaken, misplaced, and misapplied

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6. *See, e.g.*, *Johnson v. Grays Harbor Cmty. Hosp.*, 385 F. App’x 647, 648-49 (9th Cir. 2010) (“These kinds of ‘stray remarks’ are insufficient as a matter of law to demonstrate discriminatory animus . . . .” (citing *Merrick v. Farmers Ins. Grp.*, 892 F.2d 1434, 1438 (9th Cir. 1990))); *Am. Real Estate Corp. v. Doré*, No. 99-41201, 2000 WL 729067, at \*2 (5th Cir. May 8, 2000) (“The record indicates that the statement was made during the one conversation Ritter had with Doré and was at best, a stray remark and can not establish discrimination as a matter of law.” (citing *Smith v. Berry Co.*, 165 F.3d 390, 395 (5th Cir. 1999))).

7. *See infra* Part II.B.

8. MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/stray%5B3%5D> (last visited Jan. 13, 2012).

9. *See Price Waterhouse*, 490 U.S. at 261-79 (O’Connor, J., concurring).

from the outset. Likely, the “doctrine,” taken out of its context by these courts, was not intended to be set forth as such by Justice O’Connor. Justice O’Connor looked to be making a very specific delineation in her concurrence, not aiming to cordon off whole categories of potentially probative evidence as worthless in the context of adjudicating a motion for summary judgment.<sup>10</sup>

The doctrine’s proliferation at a near exponential rate, however, is undeniable. By way of illustration, a Westlaw search for the term “Title VII” and the word “stray” within three words of the words “comment,” “comments,” “remark,” or “remarks” yields no results for cases decided prior to 1989 – the year that the United States Supreme Court issued *Price Waterhouse v. Hopkins* – in Westlaw’s “allfeds” database. For the year 1989, however, six hits come up, and for the years from then until 2010, the hits increase as shown below:

Year	No. of Hits	Year	No. of Hits
1989	6	2000	126
1990	12	2001	115
1991	10	2002	117
1992	22	2003	102
1993	29	2004	113
1994	48	2005	146
1995	65	2006	180
1996	80	2007	207
1997	105	2008	181
1998	113	2009	186
1999	114	2010	204

This Article traces the genesis of this misguided doctrine, its proliferation, and its many flaws.<sup>11</sup> It explains what the doctrine has come to mean and which facets of a comment can render it “stray” as a matter of law. Part II evaluates this unwieldy and untenable doctrine and its haphazard and misguided application over the past two decades. Specifically, it was never intended to be a formal doctrine. As employed by courts, the term “stray” means too many things and is too ambiguous for the doctrine to be coherent or effective. Moreover, courts ascribe varying degrees of significance to the designation “stray,” with some courts using it to deem evidence to be circum-

10. *See id.* at 277-78.

11. For a discussion on the “shortcuts” used by judges in employment discrimination law, including the stray remarks doctrine, see Kerri Lynn Stone, *Shortcuts to Summary Judgment in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111 (2011).

stantial rather than direct (and thus invariably insufficient), and other courts using it to deem potentially viable evidence worthless as a matter of law.

This Article argues that the stray comments “doctrine” does more harm than good and that those courts wishing to grant a defendant summary judgment on a claim should have to do so by looking at the totality of the circumstances, rather than summarily using a single facet of a comment to dismiss it from consideration. It points out that the doctrine and its premises fail to comport with even a basic understanding of social science and how people foment, act upon, and reveal discriminatory bias. Interestingly, another judge-made doctrine built into employment discrimination law – the same actor inference – stands in stark asymmetry with the stray comments doctrine. The former presumes that attitudes evinced inhere within people for years at a time while the latter declares that no plausible nexus exists between expressed animus or other type of bias and an action taken mere days or weeks later.

This Article draws attention to a phenomenon that, used unsparingly over two decades ago, has grown unfettered into a grave problem for employment discrimination plaintiffs. It calls for a much-needed return to an adjudication of employment discrimination cases that comports with the summary judgment standard and factors in all potentially relevant evidence, construing all facts in the light most favorable to the non-movant, who usually is the plaintiff.

## II. BACKGROUND: THE STRAY COMMENT DOCTRINE

Although the so-called stray comments or stray remarks doctrine maps out onto a case at several potential junctures – for example, when a court decides a motion in limine asking that evidence be excluded from a trial or when it decides a post-trial motion<sup>12</sup> – this Article focuses on the doctrine as it operates at the summary judgment stage, usually to foreclose a plaintiff’s case.

### A. Title VII and Frameworks

Federal antidiscrimination law was passed in this country against the backdrop of a compelling need for certain historically discriminated-against groups to be afforded access, entrée, and inclusion into public life, including employment. The two primary statutes whose jurisprudence this Article ex-

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12. See, e.g., *Hinson v. UMB Bank, N.A.*, No. 08-4049-SAC, 2010 WL 2519987 (D. Kan. June 15, 2010); *Jones v. United Parcel Serv., Inc.*, No. 06-2143-KHV, 2008 WL 833480, at \*1 (D. Kan. Mar. 27, 2008); *Saffa v. Okla. Oncology, Inc.*, 405 F. Supp. 2d 1280, 1288-90 (N.D. Okla. 2005).

amines are Title VII of the Civil Rights Act of 1964<sup>13</sup> and the Age Discrimination in Employment Act of 1967 (ADEA).<sup>14</sup>

Title VII makes it:

[A]n unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .<sup>15</sup>

If a plaintiff brings a disparate treatment claim under Title VII, she may proceed by demonstrating either that discrimination was the sole motivating factor behind an employment decision, or, pursuant to the 1991 amendments to the Act, that it was a "motivating factor."<sup>16</sup> In the latter case, however, the plaintiff's remedies may be limited.<sup>17</sup>

*McDonnell Douglas Corp. v. Green* laid out the burden-shifting framework for discrimination claims under Title VII.<sup>18</sup> Under this framework, a plaintiff seeking to establish that she has been discriminated against with respect to the terms or conditions of her employment based on her protected class status must first make out a prima facie case, which will create an initial inference that she experienced unlawful discrimination.<sup>19</sup> The precise form that a prima facie case will take will vary with the case, but most prima facie cases essentially allege: (1) that the plaintiff is a member of a protected class; (2) that she was qualified for and (where applicable) applied for the position or promotion at issue; (3) that she suffered an adverse action, such as a termination, non-selection, or demotion; and (4) that this adverse action occurred under circumstances giving rise to a legitimate inference of protected class-based discrimination.<sup>20</sup> Such circumstances may include the position going

13. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

14. 29 U.S.C. §§ 621-634 (2006).

15. 42 U.S.C. § 2000e-2(a).

16. *Id.* § 2000e-2(m) ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

17. *Id.* § 2000e-5(g)(2)(B) ("On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court . . . shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . .").

18. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973).

19. *See id.*

20. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000); *see also, e.g., Roeben v. BG Excelsior Ltd. P'ship*, 545 F.3d 639, 642 (8th Cir. 2008) ("[A] plaintiff can establish a prima facie case of age discrimination if he can show

to a non-class member.<sup>21</sup> This prima facie case sets up a rebuttable presumption in favor of the plaintiff's claim.<sup>22</sup> At that point, the burden shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for the adverse action.<sup>23</sup> Finally, the burden shifts back to the plaintiff, who carries the ultimate burden of persuasion, to show that the reason proffered by the defendant is a mere pretext for discrimination.<sup>24</sup>

In 1989, the Supreme Court held that an employee may show that an employment decision was made based on both legitimate and illegitimate reasons;<sup>25</sup> Congress codified this "mixed-motive" theory in the Civil Rights Act of 1991.<sup>26</sup> In the absence of clear Supreme Court guidance as to the pre-

that (1) he was at least forty years old; (2) he was terminated; (3) he was meeting his employer's reasonable expectations at the time of his termination; and (4) he was replaced by someone substantially younger."); *Bryan v. McKinsey & Co.*, 375 F.3d 358, 360 (5th Cir. 2004); *Venter v. Potter*, 694 F. Supp. 2d 412, 422 (W.D. Pa. 2010) ("In order to establish a prima facie case of discrimination, the plaintiff need only show that: (1) he or she was a member of a statutorily-protected class; (2) he or she was qualified for the position; (3) he or she was aggrieved by an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of illegal discrimination."), *aff'd*, No. 10-2062, 2011 WL 2134368 (3d Cir. May 27, 2011).

21. *See, e.g., Mitchell v. N. Westchester Hosp.*, 171 F. Supp. 2d 274, 278 (S.D.N.Y. 2001) ("The final element of the prima facie case is establishing circumstances giving rise to an inference of discrimination. This inference can be established if the Plaintiff shows that the position sought went to a person outside his protected class." (citing *Bloomfield v. Vizcaya*, No. 94 CIV. 0056(DAB), 1999 WL 675966, at \*4 (S.D.N.Y. Aug. 31, 1999))); *Bloomfield*, 1999 WL 675966, at \*4 ("An inference of discrimination may arise if . . . the position was filled by someone not a member of plaintiff's protected class." (quoting *Gomez v. Pellicone*, 986 F. Supp. 220, 228 (S.D.N.Y. 1997))); *see also Terrell v. City of Harrisburg Police Dep't*, 549 F. Supp. 2d 671, 681 (M.D. Pa. 2008) ("A plaintiff may establish the final element of the prima facie case by proffering evidence that 'similarly situated employees outside the protected class received more favorable treatment.'" (quoting *Horton v. Nicholson*, 435 F. Supp. 2d 429, 434 (E.D. Pa. 2006))).

22. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

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

24. *Reeves*, 530 U.S. at 143; *McDonnell Douglas*, 411 U.S. at 804.

25. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-41 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76, *as recognized in Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

26. *See Civil Rights Act of 1991*, § 107, 105 Stat. at 1075 (codified as amended at 42 U.S.C. § 2000e-2(m) (2006)).

Impermissible consideration of race, color, religion, sex, or national origin in employment practices[:] Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

cise definition of “direct evidence,” and despite the term’s frequent use by litigants and courts in employment discrimination cases, some courts have held that *McDonnell Douglas* is the proper framework to use only when adjudicating cases that lack “direct evidence” of discriminatory intent.<sup>27</sup> Courts evaluating comments alleged to be indicative of class-based disparate treatment have continued to carve out separate paths to a plaintiff’s proving her case, distinguishing between direct and indirect evidence.<sup>28</sup> Without an official definition of direct evidence by the Supreme Court, however, courts have noted that “[t]he Supreme Court has defined direct evidence in the negative by stating that it excludes ‘stray remarks in the workplace,’ ‘statements by nondecisionmakers,’ and ‘statements by decisionmakers unrelated to the decisional process itself.’”<sup>29</sup>

In the 2003 Supreme Court case of *Desert Palace, Inc. v. Costa*,<sup>30</sup> the Court held that in order to establish a jury question as to a section 2000e-2(m) “mixed motive” violation, “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”<sup>31</sup> The Court thus eliminated the distinction between circumstantial and direct evidence, finding the latter unnecessary to procure a

42 U.S.C. § 2000e-2(m).

27. See, e.g., *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1017 (4th Cir. 1996) (“If the employee cannot provide direct evidence, she can utilize a burden-shifting scheme similar to the one the Supreme Court articulated in *McDonnell Douglas Corp. v. Green* to develop an inferential case.” (internal citation omitted)).

28. See, e.g., *Weightman v. Bank of N.Y. Mellon Corp.*, 772 F. Supp. 2d 693, 702 (W.D. Pa. 2011) (“Derogatory comments or stray remarks in the workplace that are unrelated to employment decisions, even when uttered by decision-makers, do not constitute direct evidence of discrimination.”); see also Catherine Albiston et al., *Ten Lessons for Practitioners About Family Responsibilities Discrimination and Stereotyping Evidence*, 59 HASTINGS L.J. 1285, 1293 (2008) (“In many employment discrimination cases in which plaintiffs produce evidence of one or more overtly biased remarks, courts often exclude such evidence, dismissively referring to the comments as mere ‘stray remarks,’ which implies that they are entitled to no evidentiary weight whatsoever.”); 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, 1234 (2003) (“Often courts engage in a ‘piecemeal analysis of the alleged incidents,’ in which comments that do not on the surface reflect a discriminatory bias are isolated from more explicit comments. Comments of the former variety are typically characterized as reflecting personal animosity while the latter tend to be characterized as stray remarks.” (quoting Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 105 (1999))).

29. *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) (quoting *Price Waterhouse*, 490 U.S. at 227); see also Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1913 (2004).

30. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

31. *Id.* at 100-01.



so-called “mixed motive” jury instruction.<sup>32</sup> After *Desert Palace*, however, lower courts persisted in their confusion over the type and strength of evidence needed in a Title VII claim.<sup>33</sup>

With a lack of guidance from the Supreme Court has come widespread disagreement and confusion among courts as to how to adjudicate intentional discrimination claims.<sup>34</sup> Most courts, however, have reached a consensus that post-*Desert Palace*, a plaintiff trying to establish intentional discrimination may proceed “either (1) directly by persuading the court that a discriminatory reason more likely motivated the employer or (2) indirectly by showing that the employer’s proffered explanation is unworthy of credence,” and with respect to the “direct method,” the plaintiff “may present either direct or circumstantial evidence of discrimination, so long as it is sufficient to satisfy his ultimate burden.”<sup>35</sup> Courts have varied in their interpretations of what constitutes “direct evidence” and what is required to sustain a discrimination case.<sup>36</sup>

32. *Id.* at 98-99; see also Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1252-53 (2008) [hereinafter *A Chain of Inferences*].

33. See, e.g., *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1115 (9th Cir. 2006) (en banc) (“It is not entirely clear exactly what this evidence must be, but nothing in *Price Waterhouse* suggests that a certain type or quantity of evidence is required to prove a prima facie case of discrimination.”). The interrelationship among *McDonnell Douglas*, *Hopkins*, and *Desert Palace* has been the source of much confusion; it is outside the scope of this Article. See, e.g., *A Chain of Inferences*, *supra* note 32, at 1249-52.

34. Compare *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (“[W]e conclude that *Desert Palace* had no impact on prior Eighth Circuit summary judgment decisions.”), with *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352 (5th Cir. 2005) (“[W]e altered our ADEA jurisprudence in response to the Supreme Court’s decision in *Desert Palace v. Costa* by holding that direct evidence of discrimination is not necessary in order for a plaintiff to receive a mixed-motive analysis for an ADEA claim.”). See also Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 210 n.81 (2009) (citing Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83, 102-03 (2004); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1576-77 (2005); William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 212-13 (2003); Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 861 (2004)).

35. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1137 (9th Cir. 2004) (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)) (internal quotations and brackets omitted).

36. Some courts persist in classifying evidence as direct or indirect and allowing this classification to determine the appropriate analytical framework for adjudicating a summary judgment motion while others do not consider such evidentiary classifications. Compare *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046, 1055 (8th Cir. 2007) (“*Desert Palace* is entirely consistent with our precedent under which

One court aptly has referred to the “*Desert Palace, Inc./ McDonnell Douglas* quagmire that [past decisions] admittedly left wet and boggy” but noted that despite the quagmire, on a motion for summary judgment in an employment discrimination case, a court “need only inquire whether [the plaintiff] presents ‘enough evidence to permit a finding that there was differential treatment in an employment action and that the adverse employment decision was caused at least in part by a forbidden type of bias.’”<sup>37</sup>

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a plaintiff survives summary judgment either by providing direct evidence of discrimination or by creating an inference of discrimination through the *McDonnell Douglas* framework.”), and *Debose v. Fla., Dep’t of Children & Families*, No. 1:05-cv-00167-MP-AK, 2008 WL 3926858, at \*4 (N.D. Fla. Aug. 20, 2008) (“[The plaintiff] may satisfy [her] burden in one of two ways. First, under the traditional framework, she may proffer direct evidence of discrimination. . . . If direct evidence is unavailable, [she] may establish a prima facie case of discrimination under the framework of *McDonnell-Douglas*.” (internal citation omitted)), and *Orth v. Retail Acquisition & Dev., Inc.*, No. 4:04-cv-40187-JEG, 2005 WL 3040587, at \*7 (S.D. Iowa Sept. 19, 2005) (“Because *Desert Palace* does not alter the Court’s analysis of the *Price Waterhouse* factors on a motion for summary judgment, we need only determine whether Orth has adduced direct evidence sufficient to proceed under that analytical framework, or whether the *McDonnell Douglas* indirect burden-shifting framework should apply.”), with *Burton v. Town of Littleton*, 426 F.3d 9, 19-20 (1st Cir. 2005) (“This court, however, following the Supreme Court’s command in *Desert Palace*, has rejected the requirement that there be direct evidence in mixed-motive cases; any evidence, whether direct or circumstantial, may be amassed to show, by preponderance, discriminatory motive.” (internal citation omitted)), and *McGinest*, 360 F.3d at 1122 (allowing a mixed-motive plaintiff to “proceed by using the *McDonnell Douglas* framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated” the employment decision), and *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 990-93 (D. Minn. 2003) (stating that *Desert Palace* abrogated the direct/indirect evidence distinction). Other courts have recognized that requiring a so-called “smoking gun” comment in order to sustain a discrimination case would run counter to *Desert Palace*’s announcement that even in the context of a mixed-motive case, circumstantial evidence can be just as compelling as so-called direct evidence. See, e.g., *Merritt v. Old Dominion Freight Line, Inc.*, 601 F.3d 289, 299-300 (4th Cir. 2010) (“A plaintiff does not need a ‘smoking gun’ to prove invidious intent, and few plaintiffs will have one.”); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 46 (1st Cir. 2009) (“We reject the district court’s requirement that Miller’s words explicitly indicate that Chadwick’s sex was the basis for Miller’s assumption about Chadwick’s inability to balance work and home. To require such an explicit reference (presumably use of the phrase ‘because you are a woman,’ or something similar) to survive summary judgment would undermine the concept of proof by circumstantial evidence, and would make it exceedingly difficult to prove most sex discrimination cases today.” (footnote omitted)).

37. *Casella v. MBNA Mktg. Sys. Inc.*, Civil No. 8-176-B-W, 2009 WL 1621411, at \*22 (D. Me. June 9, 2009); accord *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402 (6th Cir. 2008) (“The ultimate question for the court in making a summary judgment determination in such a case is not whether the plaintiff has produced sufficient evidence to survive the *McDonnell Douglas/Burdine* shifting burdens, but rather

The ADEA prohibits an employer from discriminating against an employee “because of such individual’s age.”<sup>38</sup> In 2009, in *Gross v. FBL Financial Services, Inc.*,<sup>39</sup> the Supreme Court held that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove by a preponderance of the evidence that age was not merely one, but rather the “but-for” cause of the adverse employment action at issue.<sup>40</sup> The Court declined to permit any kind of mixed motive analyses of ADEA cases, observing that:

Unlike Title VII, the ADEA’s text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways.<sup>41</sup>

Prior to *Gross*, some lower courts had been amenable to a construction of the ADEA that permitted so-called mixed motive claims.<sup>42</sup> Numerous courts and scholars have posited that *Gross* has made it harder for ADEA plaintiffs to prove age discrimination under the statute.<sup>43</sup>

### *B. The Stray Comment Doctrine: Description and Examples*

Courts often will dismiss a remark offered as evidence of discriminatory intent as “stray” before going on to hold, as a matter of law, that no reasonable juror could find for the plaintiff in a case and thus summary judgment is

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whether there are any genuine issues of material fact concerning the defendant’s motivation for its adverse employment decision, and, if none are present, whether the law – 42 U.S.C. § 2000e-2(m) – supports a judgment in favor of the moving party on the basis of the undisputed facts.”)

38. 29 U.S.C. § 623(a) (2006).

39. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343 (2009).

40. *Id.* at 2351.

41. *Id.* at 2349 (citation omitted).

42. *See, e.g.*, *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 362 (8th Cir. 2008) (“We thus conclude that the *Price Waterhouse* rule continues to govern mixed motive instructions in an ADEA case.”), *vacated and remanded by* 129 S. Ct. 2343; *Guerra v. Ne. Indep. Sch. Dist.*, 496 F.3d 415, 418 (5th Cir. 2007) (“In a mixed-motive [ADEA] case, the proper causation standard is whether the improper characteristic was a ‘motivating factor’ of the employer’s decision.”).

43. *See, e.g.*, Michael Foreman, *Gross v. FBL Financial Services – Oh So Gross!*, 40 U. MEM. L. REV. 681, 691 (2010); Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69, 106-07 (2010).

warranted.<sup>44</sup> The “stray remarks” or “stray comments” doctrine, however, is a series of loosely-bound doctrines and casual labels that different courts assign to proffered evidence of discrimination that they plan to discount or ignore.<sup>45</sup> In essence, a comment or remark an employment discrimination plaintiff proffers to help show that she was discriminated against because of her protected class status may, under various iterations of the doctrine, be deemed “stray” and deemed insufficient or otherwise ignored for one or more of the following reasons: (1) the remark(s) were made by one too removed from the decision making process at issue;<sup>46</sup> (2) the remark(s) were isolated, as opposed to part of a broader pattern of comments tending to evince bias;<sup>47</sup> (3) the remark(s) were not made with sufficient temporal proximity to the adverse action at issue in the suit;<sup>48</sup> (4) the remark(s) were too ambiguous to be clearly probative of discriminatory bias;<sup>49</sup> or (5) the remark(s) were too contextually attenuated from the adverse action at issue in the suit to be re-

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44. See Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 791 (2010) (stating that “the stray remarks doctrine may be too expansive, causing courts to limit the types of evidence that plaintiffs can marshal on behalf of their claims of individual discrimination”); Stone, *supra* note 11, at 131 (“Another so-called shortcut that courts have used to foreclose a plaintiff’s case at the summary judgment stage is the stray comment or stray remark doctrine . . .”).

45. Cf. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1222 (1995) (“One court’s ‘stray remarks in the workplace’ are another court’s ‘evidence directly reflecting’ discriminatory animus. Reasonable people can differ far too easily on whether a particular piece of circumstantial evidence reflects discriminatory attitudes with a directness sufficient to trigger mixed-motives analysis.” (footnote omitted)).

46. See, e.g., *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 29 (1st Cir. 2007) (finding that a non-decision maker’s comments “constitute nothing more than stray remarks”); *McKay v. U.S. Dep’t of Transp.*, 340 F.3d 695, 699 (8th Cir. 2003).

47. Compare *Hunter v. Sec’y of U.S. Army*, 565 F.3d 986, 997 (6th Cir. 2009) (“[The] single, isolated remark, insulting as it may be, simply does not rise to the level of a materially adverse employment action.”), with *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1050 (7th Cir. 2000) (“The remark is only but a part of a pattern of falsehoods, contradictions and discriminatory statements by [the decision maker] that, as a whole, convincingly demonstrate intentional discrimination.”).

48. See, e.g., *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 721 (7th Cir. 2008) (concluding that the decision maker’s comment about “acting like a man” was insufficient to raise an inference of discriminatory intent because it was made a year before the plaintiff’s termination); *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 724 (7th Cir. 1998) (finding that a comment made five months prior to termination was insufficient to raise a triable issue of fact).

49. See, e.g., *Douglas v. J.C. Penney Co.*, 474 F.3d 10, 15 (1st Cir. 2007) (finding that a few “ambiguous comments” alone were insufficient to raise a triable issue of fact).

flective of discriminatory bias.<sup>50</sup> Moreover, recent jurisprudence appears to be making it easier for judges to call a proffered comment stray. Indeed, the Seventh Circuit recently reiterated that “a particular remark can provide an inference of discrimination when the remark was (1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action.”<sup>51</sup>

A look at what courts have meant when they have ascribed one of these reasons to a comment in order to deem it stray reveals some of the flaws in allowing one or more of these reasons to discount evidence as legally incapable of evincing discriminatory intent.<sup>52</sup>

### 1. The Remark(s) Were Made by One Too Removed from the Decision Making Process at Issue

At first blush, it seems to make sense to say that if a comment did not come from a decision maker, it should not be used to demonstrate the decision maker’s discriminatory bias. Numerous courts have held that where an alleged discriminatory comment does not originate with a decision maker, the comment should be given little to no weight based on that fact alone.<sup>53</sup>

However, the surface appeal of this argument wears thin when one considers the influence that another person who is not a decision maker may have upon a decision maker or upon the process.<sup>54</sup> The recently judicially-

50. *Fjelsta v. Zogg Dermatology, PLC*, 488 F.3d 804, 809-10 (8th Cir. 2007) (finding that the comment that the plaintiff had “better take precautions so both you girls don’t end up pregnant” was a “stray remark in the workplace” because there was “no other evidence linking [the] comment to the job performance actions taken”); *Shahriary v. Teledesic LLC*, 60 F. App’x 157, 161 (9th Cir. 2003) (finding that the plaintiff had “produced no evidence showing a causal connection between those statements and his termination,” and that “[w]ithout such a connection, the statements can only be interpreted as stray remarks, insufficient to save a claim from summary judgment”).

51. *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007) (citing *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 694 (7th Cir. 2006)).

52. *Cf. Stacy E. Seicshnaydre, Is the Road to Disparate Impact Paved with Good Intentions?: Stuck on State of Mind in Antidiscrimination Law*, 42 WAKE FOREST L. REV. 1141, 1194 (2007) (“[I]t is certainly true that some courts have gone out of their way to disregard direct, relevant evidence of intent under the ‘stray remark’ doctrine.”).

53. *See, e.g., Dellapenna v. Tredyffrin/Easttown Sch. Dist.*, No. 09-6110, 2011 WL 130156, at \*8 (E.D. Pa. Jan. 13, 2011) (“Even if Azzara’s comment did exhibit a discriminatory animus, stray remarks made by ‘non-decision makers or by decisionmakers unrelated to the decision process are rarely given great weight.’ Azzara had no decision making authority with respect to Dellapenna’s termination. Indeed, the evidence shows that she was fired by the School Board after declining a hearing.” (internal citations omitted)).

54. *See infra* Part IV.

acknowledged “cat’s paw” doctrine, under which courts recognize that the discriminatory bias of an individual not formally involved with the adverse action decision can infiltrate or otherwise taint a decision-making process so as to render it biased, demonstrates this consideration.<sup>55</sup> The strength of the judicial recognition of this taint is so strong that it has been recognized where the decision maker did not know the protected class of the employee she was discriminating against, but was found to have violated Title VII nonetheless after she relied on the evaluations of a biased non-decision maker.<sup>56</sup>

Further, even if an employee’s voiced bias does not taint a decision maker, it may reflect a workplace environment that is rife with or permeated by discrimination that may affect a decision maker’s own bias and/or his tolerance for or even encouragement of others’ discriminatory animus.<sup>57</sup> While each case is unique, and while a court may find a non-decision maker’s comment, considered in context, to be legally incapable of demonstrating the requisite discriminatory intent, numerous courts have discounted proffered comments and granted summary judgment to defendants relying solely on the fact that decision makers did not make the comments.

For example, in 2000, a district court examined proffered evidence of alleged age discrimination at a workplace, including a drawing from a corporate presentation, depicting:

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Th[e “cat’s paw”] theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee. In such a case, the recommender is using the decisionmaker as a mere conduit, or “cat’s paw” to give effect to the recommender’s discriminatory animus.

*Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999); *accord Crawford v. Carroll*, 529 F.3d 961, 979 n.21 (11th Cir. 2008); *Sun v. Bd. of Trs. of Univ. of Ill.*, 473 F.3d 799, 813 (7th Cir. 2007) (“[S]tatements of a person who lacks the final decision-making authority may be probative of intentional discrimination if that individual exercised a significant degree of influence over the contested decision.”); *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484 (10th Cir. 2006); *Natasha T. Martin, Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1163 (2008) (“[U]nder a theory known as the ‘cat’s paw’ doctrine, courts have declared that a collective can serve as a ‘conduit of [the supervisor’s or even subordinate’s [sic]] prejudice-his cat’s paw.’” (alteration in original) (citing *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990))).

56. *BCI Coca-Cola Bottling Co.*, 450 F.3d at 482, 492-93.

57. *See Sperino, supra* note 44, at 791 (arguing that “[r]emarks being made by coworkers and others within the workplace may influence the decision ultimately made, as a decisionmaker may . . . take these remarks into consideration when making an employment decision”).

a balding man who has one hand to his mouth and furrowed eyebrows, as though he is concerned. The caption reads “EMPLOYEE CHOICE.” His thoughts appear in two bubbles over his head. One is “STAY (ASSESSMENT)” and the other is “GO (RATIONALIZATION).” Plaintiffs argue[d] that the drawing “depicts a flustered, almost pathetic fellow who is more to be laughed at than depended on” and puts into visual form the company’s stigmatizing stereotypes about middle age.<sup>58</sup>

The court found that the plaintiffs had not produced proof that the proffered evidence was germane to the “decisional process itself” because “[e]ven if the evidence demonstrated that those voluntary programs were designed to reduce the number of Conrail employees age 40 and over, it certainly does not necessarily follow that the involuntary RIF . . . was age discriminatory,” and because “[t]he statements of nondecisionmakers are not sufficient to establish a direct evidence case.”<sup>59</sup>

In a 2011 district court case, the plaintiff alleged that his coworkers and supervisors made frequent race-based comments about African-Americans: for example, that they were “lazy, worthless, and just here to get paid.”<sup>60</sup> The court, however, declined to find “a causal link between racial comments and the adverse employment decision,” noting that “[u]nder the *McDonnell Douglas* analysis, ‘stray remarks, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process are insufficient to establish a prima facie case,’” and that the plaintiff had proffered nothing to refute the notion that the “comments were anything more than stray remarks.”<sup>61</sup>

Recently, numerous courts have found that because a proffered comment was not uttered by someone authorized to make the employment decision at issue, the comment was “stray.” Thus, the court could not consider it, and no triable issue of fact remained that would preclude a grant of summary judgment.<sup>62</sup> On one hand, evidence that the maker of a biased comment was not a decision maker should operate to strengthen the evidence proffered to show discrimination “because of” protected class status. However, such evidence ought not be disregarded automatically until the trier has ascertained that the speaker did not influence the decision making process in any meaningful way, that the comment does not reflect attitudes that pervade the work-

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58. *Anderson v. Consol. Rail Corp.*, No. Civ.A. 98-6043, 2000 WL 1201534, at \*2 (E.D. Pa. Aug. 9, 2000) (internal citations omitted).

59. *Id.* at \*3.

60. *Chappell v. Bilco Co.*, No. 3:09CV00016 JLH, 2011 WL 9037, at \*9 (E.D. Ark. Jan. 3, 2011) (internal quotation marks omitted).

61. *Id.*

62. *See, e.g., Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 29 (1st Cir. 2007) (finding that a non-decision maker’s comments “constitute nothing more than stray remarks”); *McKay v. U.S. Dep’t of Transp.*, 340 F.3d 695, 699 (8th Cir. 2003).

place culture so as to have possibly influenced a decision, and that the comment does not reflect values and judgments set forth by decision makers.

## 2. The Remark(s) Were Isolated, as Opposed to Part of a Broader Pattern of Comments Tending to Evince Bias

A second factor that may lead to a determination that a comment is not ample evidence of a discriminatory mindset, but is merely a stray comment, is whether the comment stands alone as an isolated utterance instead of being part of a “pattern of biased comments.”<sup>63</sup> Courts have found that even comments like one that the employer is a “Christian organization” and that “all Arabs [are] terrorists,” are stray comments where they appear unconnected to other expressions of exclusion or animus.<sup>64</sup>

However, this theory also does not appear to be a valid reason to preclude the consideration of evidence at the summary judgment stage, because a lone comment may be indicative of the bias or animus that one harbors.<sup>65</sup> Even the courts that seem to concede this logic, however, employ an exacting standard with respect to the rest of the context in which the remark was made. For example, in 2009, the Seventh Circuit reiterated that “[a]n isolated comment . . . is typically insufficient to create an inference of discrimination, but it may suffice if it (1) was made by the decision-maker, (2) around the time of the decision, and (3) referred to the challenged employment action.”<sup>66</sup>

Typically, courts will note that a comment is “isolated” in order to corroborate a determination of “strayness” that has already been premised on another factor, such as the comment’s having been made too long ago or uttered by a non-decision maker. Some courts, however, place more emphasis

63. *Ahmed v. L & W Eng’g*, No. 08-13358, 2009 WL 2777002, at \*4 (E.D. Mich. Aug. 27, 2009) (finding that a remark was removed by some months from the evaluation and, therefore, the comments were stray remarks “not related to the decision-making process”); *accord* *Witt v. Cable Ad Concepts, Inc.*, No. 8:08-3778-HFF-WMC, 2010 WL 2165366, at \*8 (D.S.C. Apr. 29, 2010) (“Thus, to prove discriminatory animus, the derogatory remark cannot be stray or isolated and ‘unless the remarks upon which plaintiff relies were related to the employment decision in question, they cannot be evidence of [discrimination].’” (alteration in original) (quoting *Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 608 (4th Cir. 1999))).

64. *Levine v. TERROS, Inc.*, No. CV 08-1458-PHX-MHM, 2010 WL 864498, at \*16 (D. Ariz. Mar. 9, 2010) (alteration in original) (finding that these statements were “stray” because the comment that the employer is a “‘Christian organization’ is clearly a stray remark, and is, without more, insufficient on its own to establish an inference of discrimination,” and that the comment that “all Arabs [are] terrorists” does not “connect[] to [the] case [because the] claim is predicated on [the plaintiff] being Jewish”).

65. *See infra* Part IV.

66. *Mach v. Will Cnty. Sheriff*, 580 F.3d 495, 499 (7th Cir. 2009) (citing *Hemsworth v. Quotesmith.Com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007); *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 694 (7th Cir. 2006)).



upon this factor than other courts do. For example, in 2009, a district court noted that while the terminated plaintiff in that case had not alleged it in his pleadings, there was evidence of record that the plaintiff's supervisor

made a comment to Plaintiff of a racial nature. Specifically, in January 2006, [Supervisor] allegedly made remarks to Plaintiff to the effect that black men know how to post-up in the low post, but do not know the medical packaging business. . . . At his deposition, Plaintiff testified only that the statement "could be" interpreted as discriminatory.<sup>67</sup>

The court noted that "such comments are insufficient to demonstrate pretext," and after noting that the supervisor initially had hired the plaintiff, further "temper[ing]" the remark,<sup>68</sup> it found the remark "to be simply a stray remark, which no reasonable jury could find Defendant's proffered reasons to be pretextual upon."<sup>69</sup>

### 3. The Remark(s) Were Not Made with Sufficient Temporal Proximity to the Adverse Action at Issue in the Suit

Due to the presence of an arbitrarily-chosen cutoff time with respect to how much time may elapse between a comment alleged to evince bias and an adverse employment action in the given jurisdiction, judges often decline to attach significance to the comment.<sup>70</sup> In 2010, a district court in the Second

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67. *Taylor v. Amcor Flexibles Inc.*, 669 F. Supp. 2d 501, 511 (D.N.J. 2009).

68. "The comment is also tempered by the fact that Heezen was the one who initially hired Plaintiff." *Id.* (citing *Salkovitz v. Pioneer Elecs. (USA) Inc.*, 188 F. App'x 90, 94 (3d Cir. 2006); *Armbruster v. Unisys Corp.*, 32 F.3d 768, 779 (3d Cir. 1994)).

69. *Id.* (citing *Perry v. Prudential-Bache Secs., Inc.*, 738 F. Supp. 843, 853 n.5 (D.N.J. 1989) ("[O]ff-hand comments of a joking nature are rarely considered to create sufficient doubt so as to raise an inference of intentional discrimination."); *Robinson v. Montgomery Ward & Co.*, 823 F.2d 793, 795-96 (4th Cir. 1987) (finding that the comment that "blacks could not succeed at anything but sports" was not enough to demonstrate discriminatory animus or pretext)).

70. *See, e.g.*, *Stone v. Parish of E. Baton Rouge*, 329 F. App'x 542, 546 (5th Cir. 2009) ("We do not condone insensitive and boorish remarks such as those alleged . . . here. However, the evidence presented does not show either sufficient temporal proximity or any relationship between the remarks and the challenged conduct. Accordingly, these remarks do not mandate reversal of the district court's [grant of summary judgment.]; *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1026 (6th Cir.1993) (holding comments "made . . . nearly a year before" a termination "were made too long before the layoff to have influenced the termination decision"); *Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 541-42 (8th Cir. 1991); *Home Repair, Inc. v. Paul W. Davis Sys., Inc.*, No. 98 C 4074, 2000 WL 126905, at \*6 (N.D. Ill. Feb. 1, 2000) ("Such a long time period between racially-offensive actions and the adverse action serves to

Circuit held that the very direct comment, “men here don’t get promoted,” failed to “give rise to an inference of discrimination because it was made a year prior to plaintiff’s termination.”<sup>71</sup>

In another case, the Seventh Circuit found that where the decision maker made several comments that might evince age bias, including saying that “while young employees are willing to work 100 hours per week, ‘more mature people aren’t willing to do that,’” five months prior to the plaintiff’s termination, the district court correctly deemed the comments stray.<sup>72</sup> As the Seventh Circuit recited, “[b]ecause of the temporal distance between the comments and the termination decision, as well as the lack of any connection to that decision, the district court properly viewed them as ‘stray’ workplace remarks, rather than evidence of the thought process behind [the plaintiff’s] termination.”<sup>73</sup>

While attitudes can change over time and while temporal distance between a comment and an act may weaken any inference that the attitudes expressed by the comment undergirded the act, rote and rigid temporal cut-offs are not helpful, especially on a summary judgment posture. Such strict cutoffs serve to provide absolute insulation for certain pieces of evidence that may be relevant and probative, especially when considered alongside other evidence.

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defeat the inference of a causal nexus between the racially-offensive actions and the adverse action.”); *see also* Stone, *supra* note 11, at 136-37 (“[C]ourts adjudicating claims of employment discrimination brought under federal statutes have routinely excluded evidence at trial or refused to accord evidence of biased comments enough weight to stave off a grant of summary judgment for the employer, without any thought as to what probative value or insight they might have provided [–] simply because an arbitrary time limit had been exceeded.”). *But see* Johnson v. Kroger Co., 319 F.3d 858, 868-69 (6th Cir. 2003).

Newman’s statement must also be viewed in connection with the evidence concerning racial jokes and slurs prior to Johnson’s arrival at the Wheelersburg store. Kroger emphasizes that Newman did not listen to racial jokes, but instead told the department heads not to tell them, and that he never heard the racial slurs that other employees reportedly heard. A reasonable juror, however, could infer that Newman’s awareness of racial jokes prior to Johnson’s arrival at the store indicates that he harbored racially discriminatory views.

*Id.*

71. Gilmore v. Lancer Ins. Co., No. 08-CV-0628 (JFB)(WDW), 2010 WL 87587, at \*10 (E.D.N.Y. Jan. 7, 2010).

72. Schuster v. Lucent Techs., Inc., 327 F.3d 569, 575-76 (7th Cir. 2003).

73. *Id.* at 576.

#### 4. The Remark(s) Are Too Ambiguous to Be Clearly Probative of Discriminatory Bias

Sometimes a court will conclude, as a matter of law, that a comment alleged to be indicative of protected class animus or some other discriminatory mindset, is a mere misspeak, tending to demonstrate nothing in the way of the speaker's mindset.<sup>74</sup> The court will dismiss the comment as "stray," meaning that while it might have been made by a decision maker and could be interpreted as evincing animus or some other bias based upon protected class membership, in context (and as a matter of law), no reasonable juror could so find in the case at bar.<sup>75</sup>

In some cases, the courts themselves are apt to see the comments as innocuous or purely descriptive, whereas a reasonable juror could see them as evincing any level of bias. The Third Circuit, for example, held that a decision maker, the plaintiff's direct supervisor, who referred to the plaintiff as the "old man" of the operation ten months before the plaintiff was fired, had merely made a stray comment incapable of sustaining an inference of age discrimination so as to support a prima facie case of age discrimination based on direct evidence.<sup>76</sup> According to the court, it was "a single remark that might reflect the declarant's recognition of an employee's age in a context unrelated to the employee's termination."<sup>77</sup> "After all," the court reasoned:

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74. See, e.g., *Ortiz-Rivera v. Astra Zeneca LP*, 363 F. App'x 45, 48 (1st Cir. 2010) (finding "ambiguous" comments insufficient to evince discrimination); *Rivera-Aponte v. Rest. Metropol # 3, Inc.*, 338 F.3d 9, 12 (1st Cir. 2003) ("The lack of a direct connection between the words and the employment action significantly weakens their probative value."); see also *Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 334-35 (D. Mass. 2011) (discussing various reasons that a court could find a comment "stray"); Miriam A. Cherry, *How to Succeed in Business Without Really Trying (Cases): Gender Stereotypes and Sexual Harassment Since the Passage of Title VII*, 22 HOFSTRA LAB. & EMP. L.J. 533, 539-40 (2005) ("Even though a complaint may include a statement clearly indicative of gender bias, the court, by labeling the statement as a 'stray remark,' categorically excludes it from evidence."); Kerri Lynn Stone, *Clarifying Stereotyping*, 59 U. KAN. L. REV. 591, 646 (2011) (refusing to consider the comment direct evidence of discrimination, dismissing it instead as "an uninformed and insensitive statement regarding Plaintiff's ethnicity or national origin, but not an intentionally discriminatory statement," and thus "[a]t most, . . . a stray remark that, although probative of discrimination, cannot serve as direct evidence of discrimination" (alteration in original) (citing *Valles-Hall v. Ctr. for Nonprofit Advancement*, 481 F. Supp. 2d 118, 141 (D.D.C. 2007))).

75. Courts have observed that stray comments may be "too abstract, in addition to being irrelevant and prejudicial, to support a finding of . . . discrimination." *Phelps*, 986 F.2d at 1025 (internal quotation marks omitted).

76. *Hyland v. Am. Int'l Grp.*, 360 F. App'x 365, 367-68 (3d Cir. 2010).

77. *Id.*

[W]hether or not a supervisor makes reference to an employee's age it is likely that he will have some concept of it. In any event, it would be unfortunate if the courts forced the adoption of an employment culture that required everyone in the structure to be careful so that every remark made every day passes the employment equivalent of being politically correct lest it be used later against the employer in litigation.<sup>78</sup>

In another recent district court case, a city university employee made a comment three years prior to becoming the African American plaintiff's direct supervisor.<sup>79</sup> The court held that the remark that she did not want to give certain equipment to "those people," while referring to a predominantly African American college in the university, was "stray," and thus valueless to the plaintiff's case.<sup>80</sup>

The dangers of divorcing potentially probative statements from their spoken and social contexts and summarily denying a jury the chance to consider them would seem to be apparent. Here, a court is substituting its take on what a term or phrase could or could not mean without inquiring whether there is a plausible insight into or read on the phrase that could render it probative. It is problematic, however, to call such remarks "stray" because they might be susceptible to more than one interpretation. To the extent that a judge fails to consider all reasonable interpretations of a phrase, the term "stray" serves to obfuscate whatever analysis the judge has done.

##### 5. The Remark is Too Contextually Attenuated from the Adverse Action at Issue in the Suit to Be Reflective of Discriminatory Bias

Numerous cases have discounted or dismissed as worthless comments that might otherwise be probative simply because they were not directed toward the plaintiff, they were not said in the context of the adverse action at issue, or both. Such cases ignore the potentially probative value of comments that reveal an individual's bias, or even animus, despite the fact that they were not uttered in the context of the precise action at issue. In one case, the Fourth Circuit, evaluating an ADEA claim, found that a decision maker's statement to the plaintiff two weeks prior to the plaintiff's termination that "you are too damn old for this kind of work" did not show discriminatory intent absent evidence that the statement was made in the context of the plaintiff's termination.<sup>81</sup>

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78. *Id.*

79. *Westbrook v. City Univ. of N.Y.*, 591 F. Supp. 2d 207, 228 (E.D.N.Y. 2008).

80. *Id.*

81. *O'Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 549 (4th Cir. 1995) (internal quotation marks omitted), *rev'd on other grounds*, 517 U.S. 308 (1996).

In a 2006 Eighth Circuit case,<sup>82</sup> the plaintiff, claiming racial discrimination, alleged supervisory comments that she was not ““Midwest nice,” did not know her place, and that at her workplace, “‘intelligence and outspokenness in black employees [were] not welcomed’ and that ‘qualities that would make a Caucasian a golden child, being aggressive and intelligent and outspoken and a go-getter, would do exactly the reverse to a person of color.’”<sup>83</sup> The plaintiff also alleged that she was advised “to develop a deferential persona, as ‘a good black’ that ‘would be accepted by the Caucasians at Wells Fargo,’” and that when she followed up by “asking if she should ‘act[ ] like an Uncle Tom[,]’ [her supervisor] replied in the affirmative.”<sup>84</sup> Finally, she alleged that in the context of discussing the recruitment of minority home mortgage consultants in California, she was told, “We can’t send white guys into east L.A. to sell mortgages to these people. You’ve got to send one of their own kind.”<sup>85</sup>

The court, however, found that despite the plaintiff’s request that the court “extrapolate racial animus from statements such as ‘you don’t know your place’ and ‘Midwest nice,’ without providing any factual support or context for such speculation,”<sup>86</sup> making “all reasonable inferences in favor of the nonmoving party” did not compel it to “resort to speculation,” and that these comments were “race-neutral” and thus devoid of probative value to evince racial animus on the speaker’s part.<sup>87</sup> The court also found that some of the comments were “stray comments” because while the speakers

were involved in the decision to terminate [the plaintiff], none of the statements . . . were related to the decisional process itself. Hall’s alleged “Uncle Tom” statements, while racially offensive and misguided, were apparently made in the context of attempting to preserve and promote [the plaintiff’s] career at Wells Fargo, not in relation to deciding to terminate [her]. Similarly, none of the statements . . . were made during the decisional process accompanying Wells Fargo’s termination of [the plaintiff]. These remarks were stray comments, despite the fact that they were made by decisionmakers.<sup>88</sup>

There is a great danger in courts’ persistence in examining statements in a vacuum without heed to context or possible understandings of what they might mean or what they might signify about the speakers of these comments.

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82. *Twymon v. Wells Fargo & Co.*, 462 F.3d 925 (8th Cir. 2006).

83. *Id.* at 931.

84. *Id.* (first alteration in original).

85. *Id.* (internal quotation marks omitted).

86. *Id.* at 934.

87. *Id.*

88. *Id.*

This is especially so when courts are disposing of cases on summary judgment.

### C. Genesis of the Doctrine

In *Price Waterhouse v. Hopkins*,<sup>89</sup> the Court held that an employment discrimination plaintiff may succeed on her Title VII claim by demonstrating merely that the forbidden consideration of her protected class status played a “motivating part” in the conferral of an adverse action.<sup>90</sup> The majority noted that while in any event, an employment discrimination plaintiff “must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part.”<sup>91</sup> It concluded, however, that comments about how the plaintiff, a candidate for partnership, would be better served by acting and appearing more stereotypically feminine, “did not simply consist of stray remarks.”<sup>92</sup>

The concept of a “stray remark” also finds its genesis in Justice O’Connor’s concurrence in *Price Waterhouse*, in which she noted that

stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nonddecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff’s burden in this regard.<sup>93</sup>

The stray remark doctrine arose from this almost offhanded passage. While not often examined, this doctrine effectively has functioned to foreclose numerous employment discrimination suits in which the plaintiff was able to point to one or more comments made in the workplace and allege that they exhibited bias.<sup>94</sup> A close look, however, at this genesis and courts’ subsequent proliferation of the doctrine is most revealing.

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89. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

90. *Id.* at 258.

91. *Id.* at 251.

92. *Id.*

93. *Id.* at 277 (O’Connor, J., concurring) (citation omitted).

94. See Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 348 (2010) [hereinafter *Pretext in Peril*] (“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.”).

It should be noted that while the focus of this Article is the stray comment doctrine as it is used in the context of adjudicating a disparate treatment cause of action – in other words, an allegation of intentional discrimination – comments also are dismissed as “stray” in the course of courts adjudicating cases of racial and other types of harassment.<sup>95</sup> An actionable hostile work environment claim due to sexual, racial, or other types of harassment under Title VII occurs when one’s working conditions are permeated by ridicule or abuse that is so severe or pervasive that the behavior is seen to interfere unlawfully with the terms and conditions of one’s employment.<sup>96</sup> On one hand, courts are supposed to be evaluating whether the alleged harassment is rife in the workplace and whether comments appear to be more isolated or more a part of the workplace culture,<sup>97</sup> as opposed to whether a comment reveals or belies a discriminatory mindset that was then acted upon. On the other hand, courts are often too quick to dismiss comments as stray in harassment analyses without giving consideration to the potency of the comment’s substance itself and without giving thought to whether less frequent but more offensive comments also can transform the workplace and amount to severe or pervasive abuse.<sup>98</sup> In any event, the extension of the term “stray” into courts’ harassment jurisprudence is another example of how unwieldy and imprecise the doctrine has become and how it operates to slap a label on evidence and enable a court to bypass a thorough analysis according to established frameworks and standards.

#### D. *Promulgation of the Doctrine Pre-Reeves*

Immediately after the issuance of the Supreme Court’s opinion in *Price Waterhouse*, the so-called stray comments doctrine looks to have taken hold and had a groundswell of usage, building in popularity year after year.<sup>99</sup>

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95. See, e.g., *EEOC v. E&H Elec. Serv., Inc.*, No. 3:05CV269, 2007 WL 841942, at \*4-5 (W.D.N.C. Mar. 19, 2007).

96. See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (“When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult,’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.” (internal citations omitted) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986))).

97. See Albiston et al., *supra* note 28, at 1293.

98. See, e.g., *Pierce v. Ill. Dep’t of Human Servs.*, 355 F. App’x 28, 31-32 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 1897 (2010); *E&H Elec. Serv., Inc.*, 2007 WL 841942, at \*3; see also James C. Chow, Comment, *Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-Cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims*, 33 LOY. L.A. L. REV. 133, 139-51 (1999) (discussing how courts undervalue “stray remarks” with regard to sexual harassment claims).

99. See *Pretext in Peril*, *supra* note 94, at 348; *supra* Part I (tabling the increasing use of the word “stray” since *Price Waterhouse*); cf. Laina Rose Reinsmith, Note,

Commonly, courts held that absent one or more factors present to establish a proper nexus between a proffered comment and an adverse action, the comment would be valueless in aiding a plaintiff to stave off a grant of summary judgment to her employer.<sup>100</sup> Courts often held that “[stray] comments cannot defeat summary judgment in favor of an employer unless they are both proximate and related to the employment decision in question.”<sup>101</sup>

### *E. Reeves v. Sanderson Plumbing Products*

In a 2000 ADEA opinion, the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*<sup>102</sup> issued an admonition regarding courts’ resort to the stray comments doctrine when it found that the court of appeals improperly held that the record before it contained insufficient evidence to sustain the jury’s verdict for the plaintiff in an age discrimination suit.<sup>103</sup> According to the Court, the court of appeals “disregarded critical evidence favorable to petitioner – namely, the evidence supporting petitioner’s prima facie case and undermining respondent’s nondiscriminatory explanation,” and “failed to draw all reasonable inferences.”<sup>104</sup> The Court explained that, “while acknowledging ‘the potentially damning nature’ of [the] age-related comments, the court discounted them on the ground that they ‘were not made in the direct context of Reeves’s termination.’”<sup>105</sup> Thus, the Court concluded, the Court of Appeals had “impermissibly substituted its judgment concerning the weight of the evidence for the jury’s.”<sup>106</sup>

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*Proving an Employer’s Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products*, 55 VAND. L. REV. 219, 244-45 (2002) (discussing the lower courts’ expansion of the stray remarks doctrine since *Price Waterhouse*).

100. See *supra* Part II.B.

101. *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1293 (7th Cir. 1997) (citing *Rush v. McDonald’s Corp.*, 966 F.2d 1104, 1116 (7th Cir. 1992); *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 686-87 (7th Cir. 1991)); *accord Morris v. N.Y.C. Dep’t of Sanitation*, No. 99 CV 4376(WK), 2003 WL 1739009, at \*6 (S.D.N.Y. Apr. 2, 2003); *Flebotte v. Dow Jones & Co.*, 51 F. Supp. 2d 36, 43 (D. Mass. 1999); *Mansour v. Formcraft, Inc.*, No. H-97-233, 1998 WL 908960, at \*12 (S.D. Tex. July 13, 1998).

102. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

103. *Id.* at 146.

104. *Id.* at 152.

105. *Id.*

106. *Id.* at 153.



### F. Promulgation of the Doctrine Post-Reeves

In the wake of *Reeves*, some courts purported to revisit their pre-*Reeves* stray comments jurisprudence.<sup>107</sup> Indeed, the Fifth Circuit held that “[a]ge-related remarks are appropriately taken into account when analyzing the evidence supporting the jury’s verdict (even if not in the direct context of the decision and even if uttered by one other than the formal decisionmaker, provided that the individual is in a position to influence the decision).”<sup>108</sup> Subsequent cases in that circuit, however, caused the court to clarify that they

stand[] only for the proposition that an overwhelming case that the adverse employment actions at issue were attributable to a legitimate, nondiscriminatory reason will not be defeated by remarks that have no link whatsoever to any potentially relevant time frame. Were we to read more into [our caselaw] in this regard, it would be in direct conflict with *Reeves*.<sup>109</sup>

In 2000, Judge Posner of the Seventh Circuit tried to clarify and place into perspective the stray comments cases that he had seen:

All that these [“stray-remarks”] cases hold – [and] all that they could hold and still make any sense – is that the fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the decision had a discriminatory motivation. That is simple common sense. It is different when . . . it may be possible to infer that the decision makers were influenced by [the discriminatory] feelings in making their decision. . . . Emanating from a source that influenced the personnel action (or nonaction) of which these plaintiffs complain, the derogatory comments became evidence of discrimination . . . .<sup>110</sup>

The doctrine, however, remains intact, despite courts’ occasional claims that they are looking at comments alongside factors such as the proffered rationale for the adverse action at issue.<sup>111</sup> In fact, the Fifth Circuit’s post-

107. See, e.g., *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000) (“In light of the Supreme Court’s admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called ‘stray remarks’ must be viewed cautiously.”).

108. *Id.* (footnote omitted).

109. *Id.* at 229 n.19.

110. *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 652-53 (7th Cir. 2000).

111. See, e.g., *Palasota v. Hagggar Clothing Co.*, 342 F.3d 569, 578 (5th Cir. 2003) (stating that since *Reeves*, courts have taken a more cautious view of the stray remarks doctrine, and that “[a]longside *Palasota*’s establishment of a *prima facie* case and a

*Reeves* jurisprudence shows that even when other factors were considered and even in the light of strong evidence of bias, defendants continued to receive grants of summary judgment. In 2001, the Fifth Circuit held that while the plaintiff had presented what was considered to be

some direct evidence of discrimination: the comments by [the decision maker] to the effect that the school had “a problem . . . with past black coaches, and if there was another problem, no matter what it was, that he would do his best to get rid of me, from day one.” Given the overwhelming evidence supporting the school board’s legitimate justification [for the plaintiff’s termination], however, [the decision maker’s] comments can be viewed as no more than stray remarks, which are insufficient to survive summary judgment.<sup>112</sup>

The Fifth Circuit announced in 2010 that comments are evidence of discrimination, and thus not “stray remarks” *only* when they are all of the following: “1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the complained-of adverse employment decision; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.”<sup>113</sup> The court noted that “this circuit’s stray remarks doctrine survived the Supreme Court’s decision in *Reeves*.”<sup>114</sup> Recently, other circuits have confirmed that the doctrine is alive and well within their jurisdictions.<sup>115</sup>

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fact issue as to the veracity of Haggar’s stated grounds for termination, Bracken’s and Burks’s remarks were probative of discriminatory intent”).

112. *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 404 (5th Cir. 2001) (footnote omitted).

113. *Jackson v. Cal-W. Packaging Corp.*, 602 F.3d 374, 380 (5th Cir. 2010) (internal quotation marks omitted).

114. *Id.* at 380 n.27.

115. *See, e.g., Mieczkowski v. York City Sch. Dist.*, 414 F. App’x 441, 448 (3d Cir. 2011) (“We have generally held that comments by those individuals outside of the decisionmaking chain are stray remarks, which, standing alone, are inadequate to support an inference of discrimination.” (quoting *Walden v. Ga.-Pac. Corp.*, 126 F.3d 506, 521 (3d Cir. 1997))); *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 149 (2d Cir. 2010) (discussing “the approach district courts should take when considering whether isolated ‘stray remarks’ are probative of discriminatory intent”), *cert. denied*, 131 S. Ct. 1602 (2011); *Johnson v. Grays Harbor Cmty. Hosp.*, 385 F. App’x 647, 648-49 (9th Cir. 2010) (“These kinds of ‘stray remarks’ are insufficient as a matter of law to demonstrate discriminatory animus . . . .”); *Ramirez v. Gencorp, Inc.*, 196 F. App’x 438, 441 (8th Cir. 2006) (*per curiam*) (“We have incorporated this so-called ‘stray remarks doctrine’ into our analysis of pretext in the *McDonnell Douglas* burden-shifting framework.”).

### III. CRITIQUING AND EVALUATING THE DOCTRINE

Looking at court decisions in the twenty-plus years since the issuance of *Price Waterhouse v. Hopkins*,<sup>116</sup> it becomes clear that most courts have, over time, misapprehended the majority and Justice O'Connor's use of the word "stray," and have perpetuated an unwieldy, untenable doctrine in a misguided manner.<sup>117</sup> This mal-formed, misplaced doctrine has caused systemic harm to employment discrimination plaintiffs.

Indeed, it is likely that no member of the Supreme Court, including Justice O'Connor, intended to coin a term of art when using the word "stray;" rather, the word looks to have served a descriptive function in the larger context of the jurisprudence and the analysis of the case at bar. Nonetheless, the proliferation of this concept into a doctrine that has such a preclusive effect on cases has only gained momentum with time. Despite the willingness of a few courts to challenge the doctrine and return to the basic precepts of proper summary judgment analysis in employment discrimination cases, most courts remain ignorant of and perhaps indifferent to the ramifications of their approach.<sup>118</sup>

#### *A. The Doctrine Was Never Intended to Be a Formal Doctrine*

Justice O'Connor does not seem to have been trying to coin a term of art when she alluded to a "stray remark;" a closer look at the context of the comment reveals that it was descriptive.<sup>119</sup> Scholars have, in any event, questioned the clarity and intent of the statement.<sup>120</sup> Justice O'Connor does not

116. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075-76, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

117. *See* Krieger, *supra* note 45, at 1184 ("Since *Price Waterhouse*, the federal courts' delineation of precisely where the realm of 'stray remarks' ends and the 'decisionmaking process' begins has reached a level of absurdity . . .").

118. *See* *Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319, 323 (D. Mass. 2011) ("[T]he Doctrine has been distorted beyond recognition in the subsequent case law.").

119. *See* *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring) ("Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria." (internal citation omitted)).

120. *See, e.g.,* Derum & Engle, *supra* note 28, at 1233-34 & n.277; Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 476 (2000) [hereinafter *!Viva La Evolución!*] ("Many of the courts have enforced the Stray Remarks Doctrine with vigor, holding that a remark evidencing a race or gender stereotype must be made by the decisionmaker at or close to the time of the adverse employment decision so that the employee can prove that there is a causal connection between the remark and the employment decision. Moreover, once the courts find that the circumstances do not meet

appear, to the extent that she was describing comments that would be deemed “stray,” to have been trying to deem them void of evidentiary value or otherwise incapable of helping a plaintiff survive a motion for summary judgment.<sup>121</sup>

Justice O’Connor’s concurrence stated her accord with the majority’s holding that in the liability phase of adjudicating a case like *Price Waterhouse*, the burden should “shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning [plaintiff] Ann Hopkins’ candidacy absent consideration of her gender.”<sup>122</sup> However, she maintained, the Court’s prescription of a departure from the *McDonnell Douglas* framework and to a “motivating factor” analysis should occur only in cases in which “the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion.”<sup>123</sup> Without defining the term “direct evidence,” Justice O’Connor noted that in *McDonnell Douglas*, there was no direct evidence that the defendant had used an impermissible consideration in arriving at its employment decision.<sup>124</sup> She contrasted such a scenario with one in which the “motivating factor” framework would best be used, proclaiming that she “d[id] not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.”<sup>125</sup> As numerous courts and scholars have noted, though, Justice O’Connor never defined the term “direct

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these requirements of direct proof, some courts refuse to consider the remarks as circumstantial evidence combined with other circumstantial evidence to prove pretext. This interpretation distorts Justice O’Connor’s statement in *Price Waterhouse* that applies only to the creation of a direct inference of discrimination.” (footnotes omitted); Benjamin C. Mizer, Note, *Toward A Motivating Factor Test for Individual Disparate Treatment Claims*, 100 MICH. L. REV. 234, 247 (2001) (“Few can decipher precisely what Justice O’Connor meant by ‘direct evidence,’ and a handful are not certain that such a requirement should exist at all.”); Reinsmith, *supra* note 99, at 254 (“[T]he [stray remarks] Doctrine was thus meant to apply only to discrimination cases in which a plaintiff attempts to prove his or her case by presenting *direct* evidence of an employer’s discriminatory motive. Justice O’Connor never indicated that workplace remarks not made by a decisionmaker in the context of a decision cannot be presented to a jury as circumstantial evidence.”).

121. See *Price Waterhouse*, 490 U.S. at 277 (O’Connor, J., concurring).

122. *Id.* at 261.

123. *Id.* at 261-62.

124. *Id.* at 270 (“*McDonnell Douglas* itself dealt with a situation where the plaintiff presented no direct evidence that the employer had relied on a forbidden factor under Title VII in making an employment decision. The prima facie case established there was not difficult to prove, and was based only on the statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision.”).

125. *Id.* at 271.

evidence,” and courts’ delineations of what qualifies as such have been scattered and inconsistent.<sup>126</sup>

The context in which Justice O’Connor discussed “stray remarks” in the workplace, however, largely has been ignored by those courts that have gone on to espouse the stray comments or stray remarks doctrine. In fact, just before Justice O’Connor made her famous “stray remarks” statement, she provided a discussion that is in conflict with the doctrine’s subsequent promulgation.<sup>127</sup> She believed that cases in which the plaintiff could present direct evidence that her employer had factored in the impermissible consideration of her protected class status to such an extent that it rose to the level of a substantial motivating factor in the decision warranted the creation of a presumption “that the employer’s discriminatory animus made a difference to the outcome, absent proof to the contrary from the employer.”<sup>128</sup> At that juncture, she explained, in her view, the burden would then reside with the defendant “to convince the trier of fact that it is more likely than not that the decision would have been the same absent consideration of the illegitimate factor.”<sup>129</sup>

Embedded within this context, Justice O’Connor’s words indicate that she was not saying that so-called “stray” comments cannot ever be used in tandem with other evidence or other considerations to help a plaintiff carry her ultimate burden of persuasion within, for example, the *McDonnell Douglas* framework. To the contrary, Justice O’Connor appears to be explaining that certain remarks do not suffice to warrant shifting the burden of proof to a defendant to persuade the trier that it did not act in contravention of Title VII:

Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to

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126. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2357 n.7 (2009) (“Justice O’Connor did not define precisely what she meant by ‘direct evidence’ [in *Price Waterhouse*.]”); *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1113 (3d Cir. 1997); *McClurg v. Santa Rosa Golf & Beach Club, Inc.*, 46 F. Supp. 2d 1244, 1248 (N.D. Fla. 1999) (“As a result of Justice O’Connor’s concurrence (specifically, her use of the term ‘direct evidence’), significant confusion developed among the circuit courts in the years following the *Price Waterhouse* decision.”) (citing Steven M. Tindall, Note, *Do As She Does, Not As She Says: The Shortcomings of Justice O’Connor’s Direct Evidence Requirement in Price Waterhouse v. Hopkins*, 17 *BERKELEY J. EMP. & LAB. L.* 332 (1996)); Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 *ALB. L. REV.* 1, 84 (1995); Krieger, *supra* note 45, at 1220-21; Mizer, *supra* note 120, at 258.

127. *Price Waterhouse*, 490 U.S. at 275-76 (O’Connor, J., concurring).

128. *Id.* at 276.

129. *Id.*

satisfy the plaintiff's burden in this regard. In addition, in my view testimony such as Dr. Fiske's in this case, standing alone, would not justify shifting the burden of persuasion to the employer.<sup>130</sup>

Moreover, Justice O'Connor acknowledged that protected class cognizance does not equate to unlawful discrimination, noting 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 about which they may comment in a perfectly neutral and nondiscriminatory fashion."<sup>131</sup> Thus, she posited:

[I]n 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 what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.<sup>132</sup>

One cannot read Justice O'Connor's statements as dismissing so-called stray comments or comments by decision makers that are not directly related to the process as inherently worthless. If one were to read her comments in that manner, she would be "requiring" Ann Hopkins to have direct evidence of discrimination in order to prevail, and not merely in order to have her case shunted into one adjudicatory framework versus another.

Indeed, stray remarks can prove to be invaluable insights into biases at every level of consciousness that may be rife but invisible within the workplace. Even if uttered by a non-decision maker or having ostensibly no impact upon the decision-making process, stray remarks may bespeak a workplace culture in which certain language or sentiments are tolerated and perhaps encouraged or rewarded.<sup>133</sup>

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130. *Id.* at 277 (citation omitted).

131. *Id.*

132. *Id.*

133. *See, e.g.,* Albiston et al., *supra* note 28, at 1293 ("Social science research has debunked the notion that such remarks have no real meaning or value in deciphering employment decisions or workplace culture." (citing Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1005-06 (2006)); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 665 (2005) ("[D]iscriminatory work cultures are too complex and too intertwined with valuable social relations to be easily regulated through judicial pronouncements and direct regulation of relational behavior . . . .").

### B. *Ambiguity and Inconsistency Abound*

The term “stray” is too ambiguous for the doctrine to be coherent or effective. Courts too easily can ascribe the condition of “stray-ness” to evidence on which it may have more than one thought.<sup>134</sup> A judge, for example, may believe that a comment is so remote in time or context so as to have no legal relevance to the case at bar, such that no reasonable finder of fact could possibly permit the comment to enter consideration. A second judge may believe that in a vacuum, the comment could have import to a reasonable factfinder, but that against the specific backdrop and factual record of a given case, the comment is offset such that it is rendered “stray” and incapable of serving to preclude a grant of summary judgment.<sup>135</sup>

Another judge might bypass incorrectly a proper summary judgment analysis and deem a comment stray because she, herself, is convinced that a plaintiff’s case has no merit and is not persuaded otherwise by the proffer of the comment. Each of these judges likely will apply the term “stray” to the evidence in the course of running through the plaintiff’s arguments against summary judgment. As one circuit court recently noted:

In some instances we have found . . . evidence legally insufficient notwithstanding the incidence of discriminatory remarks. To explain why the evidence was nonetheless insufficient, we noted that the remarks were “stray.” That locution represented an attempt – perhaps by oversimplified generalization – to explain that the more remote and oblique the remarks are in relation to the employer’s adverse action, the less they prove that the action was motivated by discrimination.<sup>136</sup>

In the course of promulgating this oversimplified shorthand, courts have indeed taken viable principles, such as the notion that the passage of time may

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134. Cf. Stephen J. Gorski & Rod M. Fliegel, *Silence Is Golden: Guidelines for Evaluating the Admissibility and Legal Sufficiency of “Age-Related” Statements in Age Discrimination Cases*, 11 LAB. LAW. 189, 190 (1995) (“Conflicting decisions in this area, however, make it difficult to draw a clear line between offensive age-related statements and so-called ‘stray remarks’ – age-related statements which are either inadmissible or of no legal significance. There is, as one court recently observed, ‘no bright-line test.’” (footnote omitted)).

135. Cf. *A Chain of Inferences*, *supra* note 32, at 1276-77 (“A persistent problem has been the identification by some courts of some testimony as ‘stray remarks.’ These remarks are called ‘stray’ or, as used here, ‘direct-lite,’ rather than ‘direct,’ because they are not clearly focused on the employment action that the plaintiff challenges. Evidence of such statements, if believed, is not an admission that the defendant discriminated. But, that does not mean that they lack all probative value as to the issue of discrimination.”).

136. *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115 (2d Cir. 2007).

tend to attenuate the probative strength of comment evidence generally, and warped them into labels like “stray” that eviscerate the perceived probative strength of a comment simply because it was uttered any amount of time prior to the adverse action at issue.

While some cases have stated that an otherwise “stray comment” may have some probative force against the backdrop of evidence like the weakness of an employer’s proffered legitimate nondiscriminatory reason for an adverse action,<sup>137</sup> many cases have found that a “stray comment,” by virtue of its timing, specific context, or both, lacked the strength to constitute direct evidence of discrimination or to help a plaintiff survive summary judgment on the issue of pretext.<sup>138</sup>

To further complicate matters, not only do courts utilize the word stray to convey different meanings, they imbue the word with such varying degrees of significance that they do radically different things with a case once they have labeled a comment “stray.” On one hand, some courts, upon finding a comment to be stray, will proceed to treat it as though it has no evidentiary worth and may not be considered with the plaintiff’s evidence in opposition to summary judgment. These courts thus take potentially probative evidence and render it worthless and irrelevant as a matter of law.<sup>139</sup>

137. See, e.g., *Hawkins v. Potter*, No. 4:07-cv-647, 2008 WL 8051100, at \*10 (S.D. Tex. Oct. 27, 2008).

138. See, e.g., *McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals*, 140 F.3d 288, 301 (1st Cir. 1998) (“[E]ven if [stray] remarks are relevant for the pretext inquiry, their probativeness is circumscribed if they were made in a situation temporally remote from the date of the employment decision . . . .”); *Simms v. U.S. Gov’t Printing Office*, 87 F. Supp. 2d 7, 8-9 & n.2 (D.D.C. 2000) (finding “stray remarks” like a “joking gesture” and a single derogatory comment insufficient to support claim of discrimination when remarks were unrelated to employment decision).

139. See, e.g., *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 934-37 (8th Cir. 2006) (dismissing comments including “Midwestern nice” and “you don’t know your place” as stray remarks, then employing the *McDonnell Douglas* analysis and concluding that the defendant had a legitimate nondiscriminatory reason and the plaintiff could not demonstrate pretext); *Adam v. Glen Cove Sch.*, No. 06-CV-1200 (JFB)(MLO), 2008 WL 508689, at \*9 (E.D.N.Y. Feb. 21, 2008) (“[A]lthough the Court recognizes that these alleged isolated remarks are highly offensive, the remarks, viewed in the context[]of the case as a whole (including the overwhelming evidence that defendant had legitimate, nondiscriminatory reasons to discharge plaintiff discussed *infra*), do not support a reasonable inference that plaintiff’s discharge was the product of discrimination.”); *Ulmer v. Midwest Fitness Sys., Inc.*, No. 8:06CV372, 2007 WL 2003402, at \*4-6 (D. Neb. July 5, 2007) (finding that personal questions asked of the plaintiff, including asking about her marital status and family, were not enough to establish direct evidence; then, when conducting the *McDonnell Douglas* analysis, failing to discuss the questions again); *Brockie v. Ameripath, Inc.*, No. 3:06-CV-0185-G, 2007 WL 1187984, at \*7-17 (N.D. Tex. Apr. 23, 2007), *aff’d*, 273 F. App’x 375 (5th Cir. 2008); *Day v. Dep’t of Veterans Affairs*, No. CIV 04-4054



On the other hand, other courts will use the “stray” designation to declare proffered evidence not to be “direct evidence” of discrimination.<sup>140</sup> It is unclear why these courts remain so focused on deeming evidence to be direct in light of the Supreme Court’s holding that a plaintiff does not need direct evidence in order to warrant a “mixed motive” jury instruction.<sup>141</sup> Nonetheless, once these courts deem a comment to be stray, they persist in eschewing a dual motive analysis in favor of running the case through the *McDonnell Douglas* burden-shifting framework to adjudicate single motive/pretext claims.<sup>142</sup> It is rare, if ever, though, that the comment at issue, once deemed stray and thus not direct evidence, will enable a plaintiff to prevail within the confines of the *McDonnell Douglas* framework.

*C. Courts Frequently Use the Doctrine to Declare a Piece of Evidence Worthless or Effectively Worthless Absent a Holistic Assessment of the Appropriate Summary Judgment Framework and Analysis*

Whereas courts presented with stray comments ought to be employing the proper summary judgment standard<sup>143</sup> when adjudicating summary judgment motions in employment discrimination cases, in actuality they often bypass those mandates and substitute their personal judgments for those of reasonable factfinders, “progressively . . . eliminat[ing] plaintiff’s evidence by slicing and dicing it into discrete parts and then rejecting the probative

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JNE/SRN, 2006 WL 2670151, at \*3-5 (D. Minn. Sept. 18, 2006), *aff’d*, 272 F. App’x 531 (8th Cir. 2008).

140. *See, e.g.*, *Askari v. L.A. Fitness Int’l, LLC*, No. 09-2789 ADM/JSM, 2010 WL 3938320, at \*3-5 (D. Minn. Oct. 5, 2010); *LaBeach v. Wal-Mart Stores, Inc.*, No. 5:07-CV-12(HL), 2009 WL 902030, at \*4, \*7-10 (M.D. Ga. Mar. 27, 2009) (dismissing, for purposes of showing direct evidence, a store manager’s comments as “stray;” these comments included telling the plaintiff to “fire all the black people” in one department because “they were n[\*]ggers, lazy, and too stupid to do their job,” “discussing with Plaintiff and another employee the theft of radios from the [s]tore when [the employer] stated that the ‘radios were stolen by n[\*]ggers,’” and when the “Plaintiff complained to [the store manager] that the cleaning crew was not cleaning her office, [he] responded by saying ‘what’s the rush, isn’t [sic] your people used to dirt’”; then finding that these comments were not enough to show pretext for purposes of the *McDonnell Douglas* analysis); *Dukes v. Specialty Staff, Inc.*, No. 07-2587 ADM/JSM, 2008 WL 4205363, \*4 (D. Minn. Sept. 8, 2008); *cf.* *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1229 (11th Cir. 2002) (“Although a comment unrelated to a termination decision may contribute to a circumstantial case for pretext, it will usually not be sufficient absent some additional evidence supporting a finding of pretext.” (citation omitted)).

141. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100-02 (2003).

142. *See, e.g.*, *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 270 (3d Cir. 2010) (stating that “[i]n the absence of direct evidence of discrimination, we consider a plaintiff’s claims under *McDonnell Douglas*”).

143. *See* FED. R. CIV. P. 56.

value of each part because, by itself, that part did not prove intent to discriminate.”<sup>144</sup>

Recently, the Second Circuit, however, has shown a mindfulness of courts’ obligations when deciding summary judgment motions.<sup>145</sup> It has recognized that a court must consider holistically four factors when evaluating the probative value of a remark alleged to evince discrimination:

(1) who made the remark (i.e., a decision-maker, a supervisor, or a low-level co-worker); (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory); and (4) the context in which the remark was made . . . .<sup>146</sup>

In 2007, the Second Circuit admonished the district court whose opinion it was reviewing, noting that district courts presented with stray comments proffered as evincing discriminatory intent should abide by their obligations under the Federal Rules of Civil Procedure:

In ruling that [the] remarks lacked evidentiary significance because they were “stray,” the court failed to apply the correct standard. Instead of disregarding some of the evidence because of such a classification, the court should have considered all the evidence in the light most favorable to the plaintiff to determine whether it could support a reasonable finding in the plaintiff’s favor.

. . . Where we described remarks as “stray,” the purpose of doing so was to recognize that all comments pertaining to a protected class are not equally probative of discrimination and to explain in generalized terms why the evidence in the particular case was not sufficient. We did not mean to suggest that remarks should first be categorized either as stray or not stray and then disregarded if they fall into the stray category.<sup>147</sup>

Many courts, however, have not taken heed. All too often, courts persist in using one factor in isolation, like the fact that a decision maker did not

144. Michael J. Zimmer, *Leading by Example: An Holistic Approach to Individual Disparate Treatment Law*, 11 KAN. J.L. & PUB. POL’Y 177, 177 (2001).

145. See *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 149-50 (2d Cir. 2010), cert. denied, 131 S. Ct. 1602 (2011).

146. *Id.* (citing *Adam v. Glen Cove Sch.*, No. 06-CV-1200 (JFB)(MLO), 2008 WL 508689, at \*7 n.8 (E.D.N.Y. Feb. 21, 2008); *McInnis v. Town of Weston*, 375 F. Supp. 2d 70, 83 (D. Conn. 2005)).

147. *Tomassi v. Insignia Fin. Grp., Inc.*, 478 F.3d 111, 115-16 (2d Cir. 2007).

utter a comment,<sup>148</sup> or the fact that it was said a number of weeks prior to the relevant adverse action,<sup>149</sup> to deem the comment stray and prematurely foreclose a plaintiff's case without regard for what should be compelling factors like the substance or context of the comment itself.<sup>150</sup> This isolation of one factor to the exclusion of a holistic assessment of the totality of the circumstances and context contravenes the mandate of the summary judgment mechanism: to perform the "gatekeeping function" of "screen[ing] doomed claims"<sup>151</sup> while simultaneously "ensuring that a jury decides reasonably disputed facts."<sup>152</sup>

#### IV. CRITIQUING AND EVALUATING THE DOCTRINE: THE UNDERPINNINGS OF THE CONSIDERATIONS THAT CAN RENDER A REMARK "STRAY" FAIL TO COMPORT WITH SOCIAL SCIENCE/MODERN PSYCHOLOGY

The stray comments doctrine, then, on a posture of summary judgment, essentially says that because one or more facets of a remark render it too far removed from the adverse action at issue contextually, temporally, or otherwise, the comment is devalued as evidence, sometimes to the point of being rendered wholly worthless. Whereas in theory, any number of factors can and should attenuate the strength of evidence proffered to create a nexus between an unlawful motivation and a discrete act, the doctrine operates to summarily foreclose cases because judges deciding as a matter of law whether a case should proceed are using it to disregard evidence.

For example, where courts have used rote or arbitrary temporal cutoffs to declare a piece of evidence too remote in time from an adverse action, and thus "stray" and unsuitable for consideration, the underlying logic appears to be that due to the passage of a certain amount of time, the comment is inca-

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148. See, e.g., *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1316 (8th Cir. 1996).

149. See, e.g., *Jones v. Cont'l Cuisine, Inc.*, 353 F. Supp. 2d 716, 721 (E.D. La. 2004).

150. See Stone, *supra* note 11, at 125 ("This is despite the fact that [judges] are 'shortcutting' around a fuller analysis" and they may very well be dismissing cases that, were they not permitted to summarily foreclose, but rather were forced to evaluate based on a totality of their circumstances, they might feel compelled to turn over to a trier of fact. (citing Ann C. McGinley, *Credulous Courts and the Tortured Trilogist: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993))).

151. Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1667 (1995).

152. Ryan A. Mitchell, Comment, *Is the Sham Affidavit Rule Itself a Sham, Designed to Give the Trial Court More Discretion at the Summary Judgment Level?*, 37 U. BALT. L. REV. 255, 275 (2008).

pable of evincing to any reasonable trier a bias that might have been underlying the action.<sup>153</sup> Even if the comment is declared stray, and the court takes that to mean that the comment is barred from serving as “direct evidence,” the doctrine operates to render the comment incapable as a matter of law of “showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion motivated the adverse employment action.”<sup>154</sup> This logic, however, fails to comport with an informed understanding of how human beings cultivate, harbor, and express bias against others.<sup>155</sup>

In fact, where social science is permitted to inform an analysis of the underlying premises of the stray comment doctrine and the factors that could cause a judge to ascribe the dooming moniker “stray” to evidence, it becomes clear that these premises are flawed and fail to comport with the way in which people interact, react, and form impressions or biases.<sup>156</sup> The mere fact that an otherwise revealing comment was made outside of a particularized timeframe or context does not necessarily weaken its probative value, and even if it does, it ought not necessarily cause the evidence to be wholly discounted and prevented – along with the case – from ever reaching a jury.<sup>157</sup>

Moreover, this flawed logic regarding temporal proximity stands in stark contrast with another judicially-crafted doctrine embedded in employment discrimination jurisprudence: the same actor inference.<sup>158</sup> According to the same actor inference, absent evidence to the contrary, it is presumed that one who hires and retains an employee does not act with discriminatory intent when he fires that same individual within a certain period of time, usually up to a few years later.<sup>159</sup> The psychology underlying the same actor inference is

153. *See, e.g.,* *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 721 (7th Cir. 2008); *Read v. BT Alex Brown Inc.*, 72 F. App’x 112, 120 (5th Cir. 2003).

154. *Gallagher v. Magner*, 619 F.3d 823, 831 (8th Cir. 2010) (internal quotation marks omitted).

155. *See Sperino, supra* note 44, at 791.

156. *See infra* Part VI.

157. *See Sperino, supra* note 44, at 791 (arguing that “a comment that was made several years away from the final decision may demonstrate that the decisionmaker had biased viewpoints that led either directly or indirectly to faulty or even false assessments of the employee’s performance”).

158. *Stone, supra* note 11, at 150 (arguing that the underlying logic behind the same actor inference and that behind the stray remarks doctrine appear inconsistent).

159. *See, e.g., Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997) (“[W]hen the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire.”); *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996) (“[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive.”); *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991); *see also Martin, supra* note 55, at 1117-74.

hollow and one-dimensional.<sup>160</sup> Biases may be suppressed, fomented, or otherwise cultivated over any period of time despite the stark fact that an employee was hired and physically present at the workplace. The access, proximity to mentoring or powerful circles, and quantity and quality of interpersonal interactions that members of protected classes have may be compromised by conscious or less than conscious stereotyping or bias.

An informed understanding of human nature and psychology should lay to rest the belief that one who engages in the simple act of hiring, or the acts of hiring and mentoring an employee, does not harbor any bias on any level of consciousness with respect to that employee's protected class status, be it race, sex, national origin, or any other.<sup>161</sup> Moreover, in the absence of discriminatory animus, or sub- or unconscious bias at the outset of the employment relationship, the decision maker may have cultivated a bias over a period of time or come to rely on stereotyped beliefs that resulted in the application of different standards to members of different classes.<sup>162</sup>

There are numerous reasons as to why a decision maker with animus, or with a bias that is less than conscious toward a protected class, nonetheless might hire a class member.<sup>163</sup> The decision maker may be trying to deny or hide his feelings.<sup>164</sup> He may be forced to hire someone due to the diversity, affirmative action, or other equal opportunity policies of his employer, all the while ruing having to do so.<sup>165</sup> He may be harboring subconscious (or conscious) biases or stereotypes about the *type* of protected class member that the person he is hiring is.<sup>166</sup> Later, after he has held the employee to a disparate set of standards from those standards to which non-class-members are held, the decision maker may find that the employee at issue did not measure up, or was more similar to a "typical" class member than the decision maker originally had anticipated (or wanted).<sup>167</sup>

The asymmetry between the same actor inference on the one hand, and the stray comment doctrine and the temporal nexus requirement between protected activity and an adverse action in retaliation cases on the other hand,

160. See generally Martin, *supra* note 55.

161. See *id.*, at 1163; *Pretext in Peril*, *supra* note 94, at 390.

162. See *Pretext in Peril*, *supra* note 94, at 374.

163. See Martin, *supra* note 55, at 1138-61, 1163; *Pretext in Peril*, *supra* note 94, at 374; Julie S. Northup, Note, *The "Same Actor Inference" in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193, 221 (1998) (concluding that the doctrine allows valid claims to be dismissed).

164. See Martin, *supra* note 55, at 1161-62.

165. *Id.* at 1166-67.

166. See Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1316 (1998) (noting a study that "suggest[s] that stereotypes function not as consistent ex ante decision rules, but as dormant expectancies, which become activated when people hear about or observe the actions of a stereotyped other").

167. See *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir. 1999).

is striking. The same actor inference persists in the assumption that one who hires an individual subsequently cannot discriminate against that person because of his or her protected class status should inhere over a period as long as several years.<sup>168</sup> At the same time, judge-made employment discrimination law adheres to the belief that a comment capable of evincing protected class bias, or even animus, may be rendered irrelevant because a decision maker uttered it outside of the precise time frame or context of the adverse action at issue.<sup>169</sup> Because time has passed, what might, especially when compounded with the totality of the allegations and the relationships at issue, be considered highly probative and an open window into the undisclosed bias of a decision maker, is rendered without value to a plaintiff who often will be unable to proceed past the summary judgment stage.<sup>170</sup>

There is an extreme asymmetry between the large amount of time that courts will allow between the hiring of a plaintiff and an adverse action where the court permits the same actor inference to take hold and create the assumption that the decision maker in question could not have discriminated, on the one hand; and, on the other hand, the relatively short amount of time that some jurisdictions will permit to elapse before courts divest what might be probative comments of their evidentiary value. For example, while the same actor inference has taken hold and facilitated a grant of summary judgment

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168. *See, e.g.,* *Keri v. Bd. of Trs. of Purdue Univ.*, 458 F.3d 620, 648 (7th Cir. 2006) (applying the same-actor inference because one of the members of the committee was instrumental in the hiring and firing of the plaintiff); Ross B. Goldman, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1546-51 (2007); *Pretext in Peril*, *supra* note 94, at 366; Northup, *supra* note 163, at 221 (concluding that the defense allows valid claims to be dismissed); *see also supra* Part III.A (discussing the same-actor inference and its origins in detail); *cf. Johnson*, 170 F.3d at 745 (finding that the same actor rule is an inference that a trier of fact may draw or decline to draw as it sees fit, basing this conclusion, in part, on insights from social cognition theory, observing that “an employer might be unaware of his own stereotypical views of African-Americans at the time of hiring”).

169. *See, e.g.,* *Browning v. President Riverboat Casino-Mo., Inc.*, 139 F.3d 631, 635 (8th Cir. 1998) (“‘[D]irect evidence’ does not include ‘stray remarks in the workplace,’ ‘statements by nondecisionmakers,’ or ‘statements by decisionmakers unrelated to the decisional process itself.’”); *Lawrence v. Syms Corp.*, 969 F. Supp. 1014, 1017-18 (E.D. Mich. 1997) (finding that a supervisor’s comment “that the defendant was ‘out to get’ the oldest store managers who were well paid, and replace them with younger, more energetic people” did not raise an issue of material fact showing the employer’s discriminatory motivation because it was isolated, remote in time, vague, and unrelated to the discharge decision); *see also supra* Part III.

170. *See, e.g.,* *Opoku-Acheampong v. Depository Trust Co., No. 99CIV0774-GBD*, 2005 WL 1902847, at \*3 (S.D.N.Y. Aug. 9, 2005) (“[S]tray comments are not evidence of discrimination if they are not temporally linked to an adverse employment action or if they are made by individuals without decision-making authority.”); *see also* Part III.B.

when years have elapsed between the decision maker's prior "good" act of hiring or promoting a protected class member and the subsequent adverse action,<sup>171</sup> courts have held that periods of months or even weeks having elapsed between a decision maker's potentially revealing, but ultimately "stray comment" and the subsequent adverse action at issue are unacceptable.<sup>172</sup> Indeed, as the Tenth Circuit Court of Appeals announced, "[t]he temporal separation between hiring and firing has varied widely in cases applying the same actor inference."<sup>173</sup>

This flawed logic seems to evince an underlying societally held and judicially subscribed-to belief that people alleged to have intentionally discriminated are either wholly "good," meaning that they harbor no bias of any kind, or "bad," meaning that they harbor and employ bias when making decisions. According to this simplistic model of human nature and behavior, things that people do that seem to comport with this notion, like hiring or promoting a member of the same protected class they are accused of bias towards, only solidify this notion. On the other hand, words that they speak that may otherwise demonstrate bias in their mindset or beliefs, to the extent that they do not coalesce with the precise timeframe or context at issue, easily are dismissed as misunderstood, wholly irrelevant, or otherwise "stray." This phenomenon occurs despite the fact that there is often every reason to believe that one who voices a discriminatory belief likely adheres to that belief in other contexts.

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171. *Houk v. Peoploungers, Inc.*, 214 F. App'x 379, 381 (5th Cir. 2007) (year and a half); *Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 392, 398 n.5 (7th Cir. 1998) (age discrimination suit noting that "[a]lso relevant is the fact that Mr. Adreani was hired by the same management team that fired him and that those decisionmakers were 45, 53 and 58 when they hired him"); *Robinson v. Am. Acryl NA, LLC*, No. H-06-570, 2007 WL 471121, at \*3 (S.D. Tex. Feb. 8, 2007) (a little less than four years too long an interval); *Myers v. U.S. Cellular Corp.*, No. 3:05-CV-511, 2007 WL 230100, at \*12 (E.D. Tenn. Jan. 26, 2007) (eighteen months), *aff'd*, 257 F. App'x 947 (6th Cir. 2007); *Daub v. Eagle Test Sys., Inc.*, No. C-05-01055 RMW, 2006 WL 3782877, at \*11 (N.D. Cal. Dec. 21, 2006) (four years).

172. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1112 (3d Cir. 1997) (remark in that case was not temporally proximate when it had been made four or five months prior to the adverse employment action); *Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025-26 (6th Cir. 1993) (finding that a manager's statements nearly a year before the layoffs "were made too long before the layoff to have influenced the termination decision and, therefore, were insufficient to establish the necessary inference of discrimination"); *Lawrence*, 969 F. Supp. at 1017-18 (two years).

173. *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 n.4 (10th Cir. 2006) (citing *Roberts v. Separators, Inc.*, 172 F.3d 448, 452 (7th Cir. 1999) (one year); *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 561 (2d Cir. 1997) (eight days); *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 269 (9th Cir. 1996) (eleven months); *Jacques v. Clean-Up Grp., Inc.*, 96 F.3d 506, 509 (1st Cir. 1996) (three months); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996) (four years); *Proud v. Stone*, 945 F.2d 796, 798 (4th Cir. 1991) (six months)).

As mentioned, courts also will find comments made to or about a plaintiff insufficient to buttress the claim as a matter of law where the speaker was not a decision maker.<sup>174</sup> This situation occurs despite the fact that such comments made by peers can be indicative of a workplace environment that, while not so rife with abuse that it rises to the level of severity or pervasiveness necessary to make out a hostile work environment claim,<sup>175</sup> may nonetheless nurture and encourage a workplace culture of prejudice and discrimination. The notion that a single decision maker, or even a discrete group of decision makers, is separable from the environment in which he, she, or it operates, works, and forms opinions, is simplistic and one-dimensional.<sup>176</sup> To

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174. See, e.g., *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 29 (1st Cir. 2007) (holding that because the person making the comments “had no part in the adverse employment decision, his comments, even if made, would constitute nothing more than stray remarks,” and therefore were “insufficient to block summary judgment”); *Davis v. Con-Way Transp. Cent. Express, Inc.*, 368 F.3d 776, 788 (7th Cir. 2004); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992) (reversing a trial judge’s finding of discrimination as clearly erroneous because the law firm department chair’s comments were temporally remote, and because he was no longer with the firm when plaintiff was denied partnership and was not a final decision maker, his statements could not support finding in plaintiff’s favor); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992) (describing remarks as “stray” when made “in the workplace by persons who are not involved in the pertinent decisionmaking process”). But see *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (discriminatory comments of plaintiff’s supervisor, who did not have formal firing authority but “who had enormous influence in the decision-making process,” constituted direct evidence of discrimination); *Brewer v. Quaker State Oil Ref. Corp.*, 72 F.3d 326, 333 (3d Cir. 1995) (“We have held that a supervisor’s statement about the employer’s employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decision, and may be used to build a circumstantial case of discrimination.”); *Rosa v. Jewish Home of Cent. N.Y.*, No. 5:04-CV-581, 2006 WL 2714332, at \*8 (N.D.N.Y. Sept. 22, 2006) (“[The] defendant has not ruled out the possibility that a fact-finder could conclude that Dixon’s alleged bias should be imputed to defendant on the ground that her report played a substantial role in the decision to terminate plaintiff.”).

175. In order to be actionable, a hostile work environment claim must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 67 (1986) (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

176. See, e.g., *Martin*, *supra* note 55, at 1163-64 (“[A] committee does not serve as a buffer to preserve the integrity and fairness of the decision-making process where bias may penetrate due to the proclivities of those on the work team . . . . Doctrines such as cat’s paw demonstrate that courts are not totally oblivious to these phenomena either.” (footnote omitted)); *McGinley*, *supra* 150, at 219 n.63 (1993) (“[C]ourts often hold that racist or sexist statements are not probative of discriminatory intent unless they are made by the decisionmaker . . . . These cases ignore the power an employer has in eliminating racism from its workforce by not permitting racist remarks or incidents to take place.”); Susan Sturm, *Race, Gender, and the Law in the Twenty-First*



disregard comments made by one's peers or even by higher ups who are, nonetheless, not the final decision makers, is to ignore the possibility that either the environment and incidents described may suffice as evidence indicative of the culture in a given workplace, or that the environment helped to engender or impel discrimination by the decision maker.<sup>177</sup> Indeed, a workplace culture that tolerates bigotry, abuse, or prejudice may foster discrimination.<sup>178</sup>

Rendering a comment stray because it was not uttered in the precise context of the decision to take an adverse action against an employee makes no sense.<sup>179</sup> Comments in any context that bespeak or belie a speaker's discriminatory animus should be relevant to a query into the existence of a link between an adverse action and a discriminatory motive.<sup>180</sup> This is especially true where the operative discrimination that engenders a finding that something befell a plaintiff "because of" her protected class status may be subconscious or unconscious discrimination, and the utterance of a comment in another context lends credence to the theory that the decision maker's bias carried over from her life outside of work into her professional life. Thus, where a decision maker says something that reveals or belies his initial mindset toward a protected class of people, a moderate or even longer than moderate lapse in time and/or context likely will not erode the strength of the sentiment

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*Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 659-63 (1998) (stating that courts' analyses "assume[] that the power to make decisions affecting employment status correlates with the level of formal power in the organization"); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 496-98 (2001) (noting that the single decision maker model does not work because often, the decision of an employer is influenced by many sources, including subordinate employees).

177. See Sperino, *supra* note 44, at 791 (observing that remarks made by nondecisionmakers within the workplace "may influence the decision ultimately made"); Stone, *supra* note 11, at 163-65 (arguing that it ought to be possible to find that a triable issue of fact is engendered by a discriminatory comment made by one other than the decision maker, especially if the comment is probative of the workplace culture or ethos, or the atmosphere).

178. See, e.g., Brookins, *supra* note 126, at 116-17 ("The amount of influence that nondecisionmakers could exert on decisionmaking processes is positively related to the strength and scope of their influence with decisionmakers.").

179. See, e.g., Fjelsta v. Zogg Dermatology, PLC, 488 F.3d 804, 809-10 (8th Cir. 2007).

180. See Stone, *supra* note 11, at 156 ("To the extent that a plaintiff . . . is, in fact, able to proffer a corresponding comment made by the decision maker, whether or not it was uttered in the context of the specific adverse employment action at issue, there is a fairly sizable chance that that comment may in fact belie the true, but undisclosed mindset or beliefs that motivate that individual in numerous contexts." (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 340 (1987))).

as it exists at a future point in time or in a different context. Indeed, “the manner in which perceivers initially categorize others can have a lasting influence on their implicit impressions, even when explicit beliefs about category membership change.”<sup>181</sup>

Additionally, negative impressions seem to have a stronghold that positive impressions do not have on the human psyche.<sup>182</sup> Research has indicated that study participants questioned a week after they formed a negative impression had more confidence in that impression than did participants who initially formed a positive impression.<sup>183</sup> In light of the fact that people tend to give greater weight to negative information about others than they do to positive information, and the fact that an impression’s initial basis will influence heavily how an individual takes in new information, it does not seem that absent evidence to the contrary, there is any reason to discount potentially revealing biased comments made mere months or even weeks prior to an adverse action.

People develop their impressions of other people by processing information discerned from their social environments and from interacting with other people.<sup>184</sup> Moreover, these patterns tend to be self-fuelling and reinforcing, with repeated close exposure to certain other people engendering a delineation between ingroup members and outgroup members, with people perceiving those in an outgroup as, for example, less honest, less deserving of trust, or less easy to work with than ingroup members.<sup>185</sup> The ability of discriminatory attitudes to become more ingrained in people over time means that there is less reason to wholly disregard a potentially compelling piece of evidence because it does not line up perfectly with the precise moment, context, and circumstances at issue in a case.

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181. Natalie A. Wyer, *You Never Get a Second Chance to Make a First (Implicit) Impression: The Role of Elaboration in the Formation and Revision of Implicit Impressions*, 28 *SOCIAL COGNITION* 1, 15 (2010). Generally, studies show that while explicit impressions about others are fairly malleable and readily changed, implicit impressions remain more fixed. *Id.* at 3. In studies, it was only when people were given large amounts of counter-attitudinal information to process that their implicit beliefs seemed to “catch up” with their explicit attitudes. *Id.*

182. *Id.* at 2-3; Oscar Ybarra, *When First Impressions Don’t Last: The Role Of Isolation And Adaptation Processes in the Revision of Evaluative Impressions*, 19 *SOCIAL COGNITION* 491, 492 (2001).

183. See Ybarra, *supra* note 182, at 495.

184. Francis J. Flynn et al., *Getting to Know You: The Influence of Personality on Impressions and Performance of Demographically Different People in Organizations*, 46 *ADMIN. SCI. Q.* 414, 416 (2001).

185. *Id.* at 417.

## V. RECENT JUDICIAL BACKLASH AGAINST THE DOCTRINE IS NOT LOUD OR FORCEFUL ENOUGH

There is hope that courts may be working to erode this doctrine and its misguided application. Some courts recently have retrenched the doctrine in recognition of its overgrowth, but there have been far too few cases that have done so. In *Merritt v. Old Dominion Freight Line, Inc.*,<sup>186</sup> for example, the defendant employer moved to exclude evidence of non-decision maker comments that displayed bias against women.<sup>187</sup> The court acknowledged that while the argument for the comments' exclusion had some surface appeal in light of the fact that "[i]t is the decision maker's intent that remains crucial, and in the absence of a clear nexus with the employment decision in question, the materiality of stray or isolated remarks is substantially reduced."<sup>188</sup> The court then noted

that nexus existed here. It is not unfair to observe that the corporate culture evinced a very specific yet pervasive aversion to the idea of female Pickup and Delivery drivers. . . . [E]mployees, of all ranks, seemed to share a view that women were unfit for that position. . . .

While the views of others are no proof of the [decision maker's] views . . . at some point the corporate environment in which he worked places [his actions toward the plaintiff] . . . in a less neutral context.<sup>189</sup>

In another 2011 case,<sup>190</sup> the plaintiff proffered proof that the "key decisionmaker" referred to African-American employees as "monkeys," and made several other comments alleged to evince bias.<sup>191</sup> Although the court noted that the record before it was missing "important details concerning the context and timing of these remarks, so this direct evidence may be insufficient to show pretext by itself," it conceded that the evidence was "germane to the pretext inquiry nonetheless."<sup>192</sup> Further, it rejected what it termed "defendant's attempt to spin the 'monkey' remark into an innocuous variant of the well-traveled 'monkey-on-the-back' idiom," calling it "dubious at best," and noting that it was "difficult to fathom that a white plant manager calling

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186. *Merritt v. Old Dominion Freight Line, Inc.*, No. 6:07-CV-27, 2011 WL 322885 (W.D. Va. Feb. 2, 2011).

187. *Id.* at \*10-11.

188. *Id.*

189. *Id.* at \*11.

190. *Sharpe v. Global Sec. Int'l*, 766 F. Supp. 2d 1272 (S.D. Ala. 2011).

191. *Id.* at 1298.

192. *Id.* at 1298-99.

black subordinates ‘monkeys’ (without the ‘on-the-back’ modifier) in the workplace could ever reasonably be viewed as anything other than a racial slur, given the highly charged and inflammatory nature of that term.”<sup>193</sup>

Perhaps the best recent example of judicial backlash against the stray comments doctrine is a 2011 district court case in which the court wrote a virtual treatise as to the misapplication of the stray comments doctrine.<sup>194</sup> The court, noting that “discrimination is a complex phenomenon,” and that it is primarily “about concepts like bias and motivation, precisely the kinds of concepts least suited for resolution by a judge,” observed that

evidence that bears on bias and motivation is rarely direct; few decisionmakers will say, for example: I am firing you because you are old (or a woman, or a minority). Rather, discrimination must be inferred not only from the statements of the relevant actors, but also from the context in which they were made, including the relationships between the various actors, the speaker and those around him.<sup>195</sup>

The court continued:

In effect, what the defendant would have this Court do [by deeming a comment “stray”] is to – as one scholar describes it – “slice and dice” the complex phenomenon of discrimination into pieces, and evaluate each piece out of the context of the whole, the real, lived employment environment. The approach is not unusual; it is easier to point the finger at the “rogue” actor than to the unconscious and not so unconscious workplace bias that his actions may reflect and encourage.<sup>196</sup>

Noting that it was no “surprise that the ‘Stray Remarks Doctrine’ originally came out of the weakest discrimination cases, those cases in which some employee made a single remark that a judge deemed insufficient to show bias or pretext on the part of the employer,” the court concluded that while

[b]ad cases, as they say, often make bad law[, s]urely, there must come a point . . . when there are enough remarks, all along the same lines, that they can no longer be considered “stray” and ana-

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193. *Id.* at 1298 n.31.

194. *See Diaz v. Jiten Hotel Mgmt., Inc.*, 762 F. Supp. 2d 319 (D. Mass. 2011).

195. *Id.* at 322.

196. *Id.* at 322-23 (citing Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709 (2007); Michael Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001)).

lyzed in isolation, when they plainly offer a window into the way the decisionmaker or decisionmakers think.<sup>197</sup>

These holdings aside, numerous recent cases have only reaffirmed the contrary principle that virtually any words spoken by non-decision makers are to be given little to no weight.<sup>198</sup>

Indeed, while some courts recently have found in the context of post- and pre-trial motions that even when a comment was made outside of a particular challenged context, it retained some probative value and properly informed consideration of the allegations,<sup>199</sup> many recent cases decided on summary judgment have continued to permit a misapplication of this misguided doctrine to prematurely dispose of plaintiffs' cases.<sup>200</sup>

## VI. PROPOSALS/SUGGESTIONS

So what should a court do when adjudicating a defendant's motion for summary judgment where the defendant alleges that the plaintiff's evidence consists of stray comments? The stray comment doctrine is so clumsy that it

197. *Id.* at 336-37.

198. *See, e.g.*, *Gyamfi v. Wendy's Int'l*, No. 09-cv-05672, 2011 WL 308652, at \*6 (E.D. Pa. Jan. 31, 2011) ("We reject outright any argument by Plaintiff that the two racial slurs constitute evidence of Defendant's discriminatory animus from which we can infer that any disciplinary action taken against him was racially motivated."); *cf.* *Giunta v. Accenture, LLP*, Civ. No. 08-3776 (DRD), 2011 WL 322634, at \*11 (D.N.J. Jan. 31, 2011) ("As Mr. Giunta's career counselor, Bruce Dodd lacked decisionmaking authority over Mr. Giunta's employment status at Accenture. Therefore, any comments he may have made toward Mr. Giunta cannot by themselves show that Accenture's company-wide reorganization was a pretext for discrimination.")

199. *Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 149-50 (2d Cir. 2010) ("Wardrop allegedly made two race-based remarks . . . . Wardrop was Henry's direct supervisor and a decision-maker in some of the events at issue and is a defendant in this case. While he allegedly made the 'voodoo' remark years before Wardrop participated in any challenged employment decision, he made the other around the time of the Organizational Cascade. The content of each remark could have been reasonably construed to be discriminatory by a juror. Thus, although the comments were not uttered in a decision-making context, they could have had probative value. Though the jury might have found the evidence of the comments unpersuasive or, even if believed, their significance limited, they were relevant."), *cert. denied*, 131 S. Ct. 1602 (2011). This court, however, found that even if the district court had erred in excluding the comments at issue, it was a harmless error in light of "the overwhelming evidence" that the decision maker was not motivated by discriminatory animus. *See id.* at 151.

200. For a discussion of why shortcuts to summary judgment have been created by judges in employment discrimination cases, see Stone, *supra* note 11.

is without true use or value.<sup>201</sup> Moreover, it is not needed in light of courts' ability, and indeed, obligation, to ensure that they come to a reasoned conclusion as to whether summary judgment is appropriate in a given case.<sup>202</sup> To be sure, when a court gives reasoned consideration to the arguments buttressed by the proffered evidence and rejects them based upon the evidence of record, summary judgment is proper, even where discriminatory remarks are proffered.

For example, in a 2011 district court case,<sup>203</sup> the plaintiffs, Caucasians who alleged racial discrimination in their termination, proffered remarks made by a manager that "Asians work better," and faster, that "[t]hey don't complain," and that they were "great workers," in an attempt to show a "corporate policy of creating a workforce of Asians."<sup>204</sup> The court, however, refused to let the remarks preclude a grant of summary judgment for the defendant in the case, observing that the plaintiffs could not substantiate this theory by adverting "to evidence of record disputing that during Defendant's reductions in force it fired both Asians and whites" or that it hired and rehired terminated white employees during the time at which the policy was alleged to have been in place.<sup>205</sup> Moreover, the decision-making process at issue revolved around the compilation of data to evaluate performance, and as the court noted, the integrity of this process had not been called into question.<sup>206</sup> Thus, after reasoned consideration of the plausibility of the plaintiffs' theory in light of the totality of the circumstances and viewing the facts in the light most favorable to the plaintiffs, the court was able to hold that "no reasonable jury could find that Defendant's legitimate nondiscriminatory reasons are post hoc fabrications or otherwise did not actually motivate the adverse employment action."<sup>207</sup>

Other courts have come to the reasoned conclusion that summary judgment for a defendant was warranted despite a plaintiff's proffer of allegedly discriminatory remarks. This has happened when, for example, substantial evidence outside of the remarks furnished an unassailably business-related

201. *See, e.g.,* Derum & Engle, *supra* note 28, at 1234 (discussing how the "stray remarks" doctrine has led to confusion and giving examples).

202. *See* FED. R. CIV. P. 56 (providing that summary judgment can only be granted if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"); *see also* Schneider, *supra* note 196, at 709 ("Summary judgment decision making at the trial level, and appellate review of grants of summary judgment, involves subtle assessment of the strength of the plaintiff's case based on what may be a very abbreviated record – assessment of the plaintiff's legal case in the context of discovery.").

203. *Stites v. Alan Ritchey, Inc.*, Civil Action No. 09-392, 2011 WL 81076 (E.D. Pa. Jan. 10, 2011).

204. *Id.* at \*7-8 (alteration in original).

205. *Id.* at \*8.

206. *See id.* at \*9.

207. *Id.*

and legitimate rationale for the adverse action,<sup>208</sup> or like *Stites* discussed above, altogether refuted the theory of discriminatory taint or a discriminatory policy that the remarks were proffered to establish. However, pursuant to Title VII, when a decision is made for lawful and unlawful reasons, liability still will be conferred upon a defendant, although the remedy afforded will be affected.<sup>209</sup> Thus, even in cases in which courts refuse to deem comments stray and summarily foreclose a case, courts should be certain that the offered comments are, *themselves*, legally incapable of evincing a bias that could have propelled the adverse action at issue, even in part.

Courts must reject the view that a comment that is potentially probative of class-based bias on any level of consciousness<sup>210</sup> can be written off as “stray” for any number of undisclosed reasons and thus wholly or effectively removed from consideration of a plaintiff’s case.<sup>211</sup> It is too simple to say,

208. See, e.g., *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 338-39 (5th Cir. 2005).

209. 42 U.S.C. § 2000e-2(m) (2006) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”); *id.* § 2000e-5(g)(2)(B) (“On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court – (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).”).

210. Bias can occur at a conscious or unconscious level. See, e.g., *La Montagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984) (“Age discrimination may be subtle and even unconscious.”); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95-99 (2003); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (2005) (“There is little doubt that unconscious discrimination plays a significant role in decisions about hiring, promoting, firing, and the other benefits and tribulations of the workplace.”); Krieger & Fiske, *supra* note 133, at 1004; *!Viva La Evolución!*, *supra* note 120, at 418 (“Social Science research demonstrates beyond debate that discriminatory attitudes and behavior still exist today and a large percentage of bias and prejudice and the resultant discriminatory behavior is due to unconscious factors.”).

211. *Cf.* Albiston, et al., *supra* note 28, at 1293 (“Some courts have elevated the status of this evidentiary exclusion, labeling it the ‘stray remarks doctrine.’ Social science research has debunked the notion that such remarks have no real meaning or value in deciphering employment decisions or workplace culture.” (footnote omitted)).

without looking at the substance or entire context of a comment, that because of one discrete factor, it may be rejected as irrelevant.<sup>212</sup>

For example, it is egregious, but commonplace, for a court to ignore the strength and substance of a comment because the court is preoccupied with establishing that the comment is temporally or contextually out of synch with the adverse action at hand. In a recent district court case, a Title VII plaintiff alleged that an individual whom he was accusing of racial discrimination distinctly had pronounced Arnold Schwarzenegger's name as "Schwarzen[\*]gger."<sup>213</sup> The court, however, inexplicably held that "there is no evidence whatsoever that Fey's isolated, tasteless 'Schwarzen[\*]gger' comment was directed at Plaintiff, close in time to the adverse employment decision or made while [the decision maker] was considering Plaintiff for the position."<sup>214</sup>

Such a simplistic view of human nature, bias, and the interplay between the two may stem from the very human desire to believe the best about oneself despite the things that one says or feels in contexts deemed not relevant.<sup>215</sup> The problem, however, is that comments that evince bias invariably

212. Cf. D. Wendy Greene, *Pretext Without Context*, 75 MO. L. REV. 403, 421 (2010) ("At pre-trial phases, courts should not sua sponte advance race-neutral, acontextual explanations to legitimize the employer's behavior; where there are alternative meanings of words and behaviors in the workplace, courts should submit the case to the jury.").

213. *Harris v. City of Fresno*, 625 F. Supp. 2d 983, 1003-04 (E.D. Cal. 2009).

214. *Id.* at 1003.

215. See William G. Graziano & Meara M. Habashi, *Motivational Processes Underlying Both Prejudice and Helping*, 14 PERSONALITY & SOC. PSYCH. REV. 313, 315 (2010).

[S]ome persons feel shame in recognition of their own prejudices. [L]ink[ing] this compunction to the psychological conflict between American social norms favoring equality and recognized biases against out-group members[, t]his [study] suggests that prejudice may be more pervasive than it seems from looking at simple self-reported attitudes. At least some people will monitor and selectively suppress the expression of certain prejudice because expressing such prejudices would be normatively inappropriate and undermine harmonious relations with others. For these people, lower prejudice may reflect social motives and suppression of socially undesirable prejudices. That is, some people may report a positive bias toward others, and fewer prejudices toward out-group members, because they actively suppress negative evaluations. Others may be biased toward a negative view of people. This second group might be seen as less prejudiced than misanthropic.

*Id.* (citations omitted); accord KRISTIN J. ANDERSON, BENIGN BIGOTRY: THE PSYCHOLOGY OF SUBTLE PREJUDICE 9 (2010) (Subtle prejudice comes from "an internal conflict in people who want to comply with their non-prejudiced ideals, but who are still affected by the stereotypes about groups in the culture that surrounds them."); John F. Dovidio & Michelle R. Hebl, *Discrimination at the Level of the Individual: Cognitive and Affective Factors*, in DISCRIMINATION AT WORK: THE PSYCHOLOGICAL



tend to belie bias, or, at the very least, a propensity to filter or mediate one's experiences with members of a group through a lens of sub or unconscious bias that may have been learned passively over time.

So what should a court tempted to label a proffered comment as "stray" do – especially in a high-stakes summary judgment determination? A plaintiff proffering such a comment is entitled to a holistic analysis of the comment, its substance, context, and timing, in tandem with other factors, prior to the imposition of summary judgment, rather than an automatic imposition predicated only on the fact that the comment was not made contemporaneously with the adverse action.

These other factors may include the circumstances surrounding the adverse action at issue and the interpersonal dynamics at issue. In many cases, summary judgment likely will prove inappropriate because reasonable jurors, aware of the comment and the mindset, belief systems, or biases that it may evince will be able to look at the totality of the circumstances and permissibly conclude that the plaintiff should prevail on her claim. In some cases, a court may come to the conclusion that while the comment in a vacuum potentially could prove troubling, an analysis of all relevant factors, as described above, nonetheless yields the conclusion that no reasonable trier of fact could find that the plaintiff has a cognizable case on the evidence of record.<sup>216</sup>

In any event, the term "stray," which has served only to bring opacity and obfuscation to what is already a thorny analysis of individuals' mindsets, is not useful. Moreover, the summary judgment standard, which asks whether a triable issue of fact remains in dispute after all facts are construed in the light most favorable to the non-moving party (usually the plaintiff in an employment discrimination case), governs the disposition of the case.

## VII. CONCLUSION

A plaintiff alleging that employment discrimination motivated the adverse employment action that befell her rarely will have the kind of "smoking gun" evidence that she needs to easily win her case, at the summary judgment stage and before a jury. With civil rights law having taken hold and having permeated workplace cultures over the past few decades, attitudes of racial, sex, and other protected class-based animus have become more repressed and

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AND ORGANIZATIONAL BASES 11, 23 (Robert L. Dipboye & Adrienne Colella eds., 2005) ("People who perceive or anticipate discrimination may engage in a range of compensatory behaviors. In the short run, they may be especially motivated to make a good impression.").

216. Cf. Robert A. Kearney, *The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination*, 5 U. PA. J. LAB. & EMP. L. 303, 327 (2003) ("Insensitive workplace utterances are probably common, which means either workplace discrimination is rampant or the remarks are capable of being over read. However, the solution is not an accumulation of bright-line rules, which often prevent the remarks from being adequately assessed.").

less explicitly expressed – even when they unlawfully motivate adverse employment decisions.<sup>217</sup>

It is a fortunate employment discrimination plaintiff, then, that is able to come to court with any evidence that a decision maker or someone whose mindset might reflect that of a decision maker made a comment capable of evincing protected class bias. All too often, though, such a comment will be withheld from a trier of fact because a judge has labeled it “stray” and thus divested it of most or any of its potential evidentiary value.

Thus, so-called “stray comments” are, for any number of reasons, convenient vehicles by which judges can disregard evidence that, even though potentially attenuated for one reason or another, might tend to indicate a discriminatory mindset. By deeming a probative comment to be “stray” because it may not have been made in the precise context of the adverse action at hand, courts deprive triers of fact of the opportunity to weigh evidence and plaintiffs of the chance to keep their cases alive when they are able to capture what might seem to be a “smoking gun” in the form of comments, drawings, or records that belie a company’s claim that it is untouched by discrimination in its decisions and operations.<sup>218</sup>

A close look at the doctrine reveals that it fails to comport with any modern understanding of how bias is formed and expressed. It is also irreconcilable with another judge-made doctrine that courts employ when adjudicating employment discrimination cases – the same actor inference, and with its premise that the mindset evinced by an act at one point in time is presumed to remain in place over lengthy periods of time.

Courts ought to be forced to revert back to a more formal summary judgment analysis where a plaintiff proffers what is alleged to be a stray comment. This practice means that no single facet of the comment ought to render it irrelevant or insufficient without an express and holistic analysis of all of the facts and circumstances surrounding it – not the least of which is its substance. It is about time that one word, used so casually by an unwitting Supreme Court in 1989, and then intoned repeatedly by many other courts – was deprived of its ability to prematurely and summarily foreclose many viable employment discrimination cases.

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217. See, e.g., Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895-96 & nn.2-3 (2009) (reviewing social psychology research suggesting that racial and gender bias is “invisible, deep, and pervasive” and that implicit or unconscious bias is connected to discrimination); Krieger, *supra* note 45, at 1164 (arguing that “subtle, often unconscious forms of bias” are more common than “the deliberate discrimination prevalent in an earlier age”).

218. See *Pretext in Peril*, *supra* note 94, at 315 (“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.”).

