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HON. DENNY CHIN

Summary Judgment in Employment Discrimination Cases: A Judge's Perspective

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SUMMARY JUDGMENT IN EMPLOYMENT DISCRIMINATION CASES: A JUDGE'S PERSPECTIVE

Is summary judgment being unfairly granted in employment discrimination cases? Scholars and practitioners have put forth this proposition, as they have written about the apparent high failure rates of plaintiffs in opposing dispositive pretrial motions in employment discrimination cases.¹ They have contended that: summary judgment is being granted more often in employment cases than in other kinds of cases;² summary judgment is being unfairly granted in employment discrimination cases because federal judges are hostile to these cases;³ federal judges are trying to drive plaintiffs in employment cases to state court;⁴ and, indeed, summary judgment is unconstitutional.⁵

In this essay, I will offer my thoughts on these issues, as I consider summary judgment in employment cases from my perspective as both a trial judge (for almost sixteen years) and now as an appellate judge (for more than two years).⁶

As an initial matter, I do not quarrel with the statistics suggesting that summary judgment is granted more often in employment cases.⁷ A Federal Judicial Center

1. See, e.g., Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 285–86 (2012); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 525–26 (2010).
2. See Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 112 (2011) (“Research confirms everyday observations of how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs to survive pre-trial motions to dismiss their cases and to win at trial or on appeal.”).
3. See *id.* at 112 (“[R]ecent studies confirm that judicial hostility toward Title VII cases is on the rise.”); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 95 (2010) (“Recent studies indicate that judicial hostility to Title VII claims in particular continues.”).
4. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 104 (2009) (“[R]esults in the federal courts disfavor employment discrimination plaintiffs, who are now foreswearing use of those courts.”); *id.* at 104–05 (“The fear of judicial bias at both the lower and the appellate court levels may be discouraging potential employment discrimination plaintiffs from seeking relief in the federal courts.”); Schneider, *supra* note 1, at 564 (“[M]any federal judges appointed over the last several years appear to be deeply skeptical of civil rights and employment cases.”).
5. See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007); see also Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).
6. In addition, before taking the bench, I practiced in employment law, primarily on the plaintiffs’ side.
7. The fact is that very few civil cases are actually tried. For the twelve-month period ending September 30, 2011, only 1.1% of civil cases—all civil cases in the country—reached trial, both jury and nonjury. ADMIN. OFF. OF THE U.S. CT., TABLE C-4: CIVIL CASES TERMINATED, BY NATURE OF SUIT & ACTION TAKEN (2011), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C04Sep11.pdf> (last visited Dec. 28, 2012). There were only 2254 jury trials in 2011—in the entire country. *Id.* There were 940 nonjury trials for a total of 3194 trials. *Id.* A disproportionate number of those were employment cases—more than sixteen percent. *Id.* This Table breaks out “United States Cases” from “Federal Question” (or private) cases. I have included here the statistics from the following categories for United States Cases: “Civil Rights-ADA-Employment” (0), “Civil Rights-Employment” (34), and “Fair Labor Standards Act” (1); and for Federal Question cases, under “ADA Employment” (23), “Employment” (267), and “Fair Labor Standards Act” (43). *Id.* The total of 368 is sixteen percent of the total number of jury trials. More employment cases reach trial than other kinds of civil cases,

study showed that summary judgment was granted, in whole or in part, in employment discrimination cases approximately seventy-seven percent of the time, in tort cases approximately sixty-one percent of the time, and in contract cases approximately fifty-nine percent of the time.⁸ Other research shows that on appeal plaintiffs' victories (both before trial and at trial) are much more likely to be reversed than defense victories.⁹

Why is summary judgment apparently being granted more often in employment discrimination cases? Why do plaintiffs in employment cases seem to fare so poorly?

Perhaps, as others have suggested, some federal judges operate on the baseline assumption that unlawful discrimination is rare.¹⁰ In an era of diversity programs, affinity groups, sensitivity training, codes of conduct, and antidiscrimination and antiharassment policies, perhaps the notion that an employer would intentionally discriminate against someone because of his or her race or gender has become, in the minds of some judges, less plausible. We have been instructed in *Ashcroft v. Iqbal* to use our judicial common sense in considering motions to dismiss,¹¹ and, for some on the bench, perhaps judicial common sense generates skepticism in this respect.¹²

On the other hand, would it be naive to think that in this day and age, there is in fact less discrimination in the workplace? After all, we have an African American President in the White House, a Latina American Justice on the Supreme Court, and now an Asian American—and former member of the National Employment Lawyers Association¹³—on the Second Circuit. We have all heard speeches where someone has said that someday we will no longer need the civil rights laws, as we

except perhaps personal injury cases. *Id.* If both federal question and diversity cases are included, significantly more “Tort Actions” were tried than employment cases.

8. See Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Baylson, (Aug. 13, 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/\\$file/sujulrs2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf) (last visited Dec. 28, 2012). The study examined the impact of local rules requiring statements of undisputed and disputed facts. The statistics given are for districts where such statements were required for both moving and responding parties. The statistics for districts where only the moving party was required to submit such a statement or where no such requirement existed were substantially the same. *Id.*; see also Schneider, *supra* note 1, at 524–25 (citing Clermont & Schwab, *supra* note 4), 550 (citing FJC Study).
9. Clermont & Schwab, *supra* note 4, at 109. Plaintiffs' wins pretrial and at trial were reversed approximately thirty percent and forty-one percent of the time, respectively, while defendants' wins pretrial and at trial were reversed approximately eleven percent and nine percent of the time, respectively. *Id.*
10. See Schneider, *supra* note 1, at 564 (“Many judges apparently tend to view these cases as petty, involving whining plaintiffs complaining about legitimate employment or institutional matters, rather than important civil rights issues.”).
11. 556 U.S. 662, 679 (2009) (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”).
12. See Brescia, *supra* note 1, at 286 (“To the extent that [*Iqbal*] impacts important federal rights by giving judges the freedom to dismiss cases that may seem inconsistent with what judges feel ‘in their gut,’ there is grave cause for concern.”).
13. I was a member of the National Employment Lawyers Association of New York and a partner at a highly respected plaintiffs' side employment firm, Vladeck, Waldman, Elias & Engelhard, P.C., before I took the bench in 1994.

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will have achieved racial peace and harmony.¹⁴ Is it possible that because of all the good work of many—lawyers, plaintiffs, and fair-minded employers alike—discrimination in the workplace has been eradicated?

In my view, neither scenario is correct. First, although much progress has been made, discrimination in the workplace still exists, and vigorous enforcement of the civil rights laws is still very much a necessity.¹⁵ Even at the most vigilant of companies, there may be instances of discrimination or individual supervisors who let their personal biases affect their decisionmaking.

Second, I simply do not accept the proposition that there is widespread judicial hostility toward employment cases, and I reject the notion that federal judges are trying to drive plaintiffs to state court.¹⁶ I do not believe that federal judges are less fair in employment cases because of “judicial hostility” or skepticism toward claims of discrimination. Employment cases have been—and still are—an important part of the federal docket,¹⁷ and the federal courts have a long tradition of dealing with civil rights and employment cases.¹⁸ These cases are part of what we do. Moreover, as a general

14. See Denny Chin, *Why Race Matters*, N.Y.L.J., Dec. 17, 2007, at 2 (“If justice is blind, why does the race of the judge matter? Well, race does matter. In a perfect world, race would be irrelevant in the administration of justice, and someday we may get there. But we will never get there if the bench is dominated by individuals of one background or persuasion.”).

15. See Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 196 (2010) (“[E]mployment discrimination continues to thrive in our society . . .”). Professor Seiner points to the following to support his conclusion: (1) summary judgment is denied in whole or in part in 37.4% of employment discrimination cases (referring also to the Federal Judicial Center study); (2) jury verdict research shows plaintiffs winning in more than 60% of employment discrimination cases going to trial; and (3) recent studies showing, for example, discrimination against African Americans and older employees in hiring. *Id.* at 196–202.

16. On the other hand, there has been a drop in the number of employment discrimination cases in the federal courts.

By 2001, employment discrimination cases constituted nearly ten percent of federal civil terminations. But this category has seen a startling drop as a percentage of terminations every year since then, so that in 2006 it accounted for fewer than six percent of federal civil terminations. While the overall caseload is at least holding its own currently, the employment discrimination category has dropped in absolute number of terminations after 1998.

Clermont & Schwab, *supra* note 4, at 117.

17. Nationwide, for the twelve months ending September 30, 2011, employment cases accounted for more than eight percent of all civil cases filed. ADMIN. OFF. OF THE U.S. CT., TABLE C-2A: CIVIL CASES COMMENCED, BY NATURE OF SUIT 2011, available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C02ASep11.pdf> (last visited Dec. 28, 2012). I include as employment cases here the statistics for the categories Employment (15,141 cases), ADA-Employment (1788), and Fair Labor Standards Act (6335), for a total of 23,244 cases out of the total civil cases of 289,252 commenced during the twelve-month period ending September 30, 2011. I have not included Employee Retirement Income Security Act (ERISA) cases.

18. See Judith Resnik, *Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823, 870 (2012) (“In the 1940s, the Civil Rights movement turned to the federal courts and, under the leadership of Earl Warren in the 1960s, judicial interpretations of the Constitution, statutes, and federal rules looked favorably upon court-based processes to enable

matter we like to keep our cases.¹⁹ We value our jurisdiction, and from time to time, when Congress passes statutes seeking to narrow our jurisdiction, we tend to resist.²⁰

Are there judges who do not like employment cases? I have no doubt there are. Employment cases can be difficult. They often require a great deal of attention. There are many discovery disputes. Many of these cases are pro se, and pro se cases are difficult to manage. Moreover, the lawyering can sometimes be uneven. There was a period of time, for example, when the personal injury bar was trying to bring these cases, not realizing how complicated, time-consuming, and challenging the cases can be. And finally, of course, employment cases often generate complicated, burdensome, time-consuming summary judgment motions with extensive records.

Of course, a judge may not be enthusiastic about every case she hears.²¹ A lack of enthusiasm about a particular case, however, does not mean that she will treat the case with less care. Sometimes, a judge will say something in the context of settlement negotiations, pointing to a weakness in a case to encourage a resolution. This does not mean the judge is hostile to employment cases or that she will render an unfair decision if the merits are reached. The judge is simply trying to help the plaintiff

racial equality and to enhance human dignity.”); *see also* Schneider, *supra* note 1, at 522 (“[F]ederal courts were viewed as the bulwark of civil rights protection.”).

19. For example, when the New York State Supreme Court opened its commercial division, there was some concern among my colleagues about losing commercial cases to the state court system. *See* Jed Rakoff, *Are Federal Judges Competent? Dilettantes in an Age of Economic Expertise*, 17 *FORDHAM J. CORP. & FIN. L.* 4 (2012) (noting that states have been creating specialized courts with expertise in business law, including New York, which has created a Commercial Part in its Supreme Court); Robert L. Haig, *Can New York’s New Commercial Division Resolve Business Disputes as Well as Anyone?*, 13 *TOURO L. REV.* 191 (1996).
20. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 736 (2008) (overturning § 7 of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e), which purported to deny federal courts jurisdiction to hear habeas petitions filed by aliens detained by United States as enemy combatants); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (rejecting, on statutory grounds, the government’s argument that the Detainee Treatment Act of 2005 stripped federal courts of jurisdiction to hear habeas petitions filed by detainees at Guantanamo Bay); *Felkin v. Turpin*, 518 U.S. 651, 660–62 (1996) (holding that the Antiterrorism and Effective Death Penalty Act did not strip Supreme Court of jurisdiction to entertain original habeas petitions).
21. For example, I once tried a patent case that involved trigonometry. Not only did I have to learn patent law, I had to understand complex trigonometric formulas. *See* *Scanner Techs. Corp. v. ICOS Vision Sys. Corp.*, N.V., 486 F. Supp. 2d 330 (S.D.N.Y. 2007), *aff’d in part, rev’d in part, and vacated in part*, 528 F.3d 1365 (Fed. Cir. 2008). My post-trial opinion included the following discussion:

The Patents teach a three-dimensional inspection apparatus for BGAs [ball grid arrays], where a BGA is positioned in a fixed optical system, using (a) one or more illumination devices positioned to illuminate the BGA, (b) a first camera in a fixed focus position relative to the BGA for taking a first image to obtain a characteristic circular doughnut shape image from at least one ball, (c) a second camera in a fixed focus position relative to the BGA taking a second image to obtain a side view (not a 90-degree angle, nor a top view angle, nor an angle identical to the one created by the first camera, and not limited to a low angle) of the ball, (d) a processor that receives both points of perspective, using trigonometric principles) on related measurement of the first and second images to calculate a three-dimensional position of at least one ball (the X, Y, and Z values for the top of at least one ball in the BGA) with reference to a pre-calculated calibration plane (the X and Y world-coordinates and the Z=0 world plane).

486 F. Supp. 2d at 343.

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understand the risks of going forward. In the settlement context, the judge is likely to make similar comments to the employer as well.²²

There are some likely explanations for the apparent lower success rates in employment cases. First, the meritorious cases are often settled, and thus the statistics may be skewed. Second, employment cases can be particularly personal, and as a consequence employment cases are usually litigated hard. When employers are accused of racism, bias, and sexism, they will defend themselves vigorously, and often they will spend more to defend a case than it would cost to settle it.²³ On the employee side, there may be bruised egos, shattered self-esteem, and a need for vindication. Third, as discussed further below, it has always been the case that intentional discrimination is difficult to prove.²⁴

Summary judgment is an important, useful tool.²⁵ It is not unconstitutional. We need a mechanism for screening out meritless cases.²⁶ While summary judgment motions are time-consuming, they are still a more efficient way of addressing a meritless claim than a full trial. We could not administer justice if every case that did not settle went to trial.

Trial judges, of course, must not let these motions become a means for wearing down a plaintiff. Too often litigation has become more about resources and expense than about reaching the merits and doing justice.²⁷

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22. While some judges have expressed the view that addressing the merits is not effective in trying to settle a case, at times, I found it helpful to point out strengths and weaknesses. I would try to persuade one side that there was a risk of losing by highlighting its weaknesses and the other side's strengths. Of course, other important considerations were the uncertainty, expense, delay, and distraction of continued litigation.
 23. See *Adorno v. Port Auth. of N.Y. & N.J.*, 685 F. Supp. 2d 507, 515 (S.D.N.Y. 2010) ("The Port Authority defended the case tenaciously."); *Alvarez v. City of New York*, 31 F. Supp. 2d 334, 344 (S.D.N.Y. 1998) ("All too often . . . employers react negatively to the assertion of a claim and consequently turn a weak discrimination case into a strong retaliation case."); *Malarkey v. Texaco, Inc.*, 794 F. Supp. 1237, 1245 (S.D.N.Y. 1992) (referring to "defense counsel's scorched earth litigation technique").
 24. The "factual question of intentional discrimination" is "elusive." *Tex. Dep't Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981). Because an employer's "intent and state of mind are implicated[,] *Meiri v. Dacon*, 759 F.2d 989, 998 (2d Cir. 1985), rarely is there "direct, smoking gun, evidence of discrimination." *Richards v. New York City Bd. of Educ.*, 668 F. Supp. 259, 265 (S.D.N.Y. 1987), *aff'd*, 842 F.2d 1288 (2d Cir. 1988).
 25. *Meiri*, 759 F.2d at 998 ("[T]he salutary purpose of summary judgment—avoiding protracted, expensive and harassing trials—apply no less to discrimination cases than to . . . other areas of litigation.").
 26. Of course, I have granted many summary judgment and dismissal motions over the years. See, e.g., *Jones v. City Sch. Dist. of New Rochelle*, 695 F. Supp. 2d 136 (S.D.N.Y. 2010); *Sharpe v. MCI Commc'ns Servs., Inc.*, 684 F. Supp. 2d 394 (S.D.N.Y. 2010); *Forde v. Beth Israel Med. Ctr.*, 546 F. Supp. 2d 142 (S.D.N.Y. 2008). Cf., e.g., employment cases where I denied summary judgment at least in part: *Borrero v. Am. Express Bank*, 533 F. Supp. 2d 429 (S.D.N.Y. 2008); *Silver v. N. Shore Univ. Hosp.*, 490 F. Supp. 2d 354, 363 (S.D.N.Y. 2007); *Wright v. Stern*, 450 F. Supp. 335 (S.D.N.Y. 2006); *Miles v. N. Gen. Hosp.*, 998 F. Supp. 377 (S.D.N.Y. 1998). I have also been on panels of the Second Circuit that affirmed summary dismissals as well. See, e.g., *Jowers v. Family Dollar Stores, Inc.*, 455 F. App'x 100 (2d Cir. 2012) (summary order); *Tepperwein v. Entergy Nuclear Ops., Inc.*, 663 F.3d 556 (2d Cir. 2011); *Vargas v. Morgan Stanley*, 438 F. App'x 7 (2d Cir. 2011) (summary order).
 27. See, e.g., Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982,

In many courts, trial judges require a pre-motion conference. I did. Most judges in the Southern District of New York do. This was a way to make litigation more efficient.²⁸ I could try to talk a defendant out of making a motion, or I could try to persuade a plaintiff to drop a claim. I always thought partial motions to dismiss or for summary judgment were particularly inefficient, and they would just delay a case. Unless a partial motion could substantially narrow discovery, I usually tried hard to talk a defendant out of making such a motion. I would not prohibit a party from making a motion—*that* might be unconstitutional.²⁹ If a party insisted on making a motion permitted by the Federal Rules, I would not prohibit the party from doing so, but there were occasions when I would tell a plaintiff she did not need to respond in the first instance. I would look at the motion papers first, and only if I thought there was a chance I might grant the motion would I then ask for opposition papers.

In opposing summary judgment motions and in seeking to prove employment claims generally, plaintiffs' lawyers often do not, in my view, focus sufficiently on the issue of discrimination—on intent. In part, this is because of the *McDonnell Douglas* test.³⁰ I advocated some years ago for eliminating *McDonnell Douglas* in favor of a more simplified, more focused approach to assessing these cases, particularly on summary judgment.³¹ The *McDonnell Douglas* rule has been criticized as a “yo-yo rule”³² or a “ping pong-like match”³³ with its back-and-forth approach. It purports to be a three-prong test: the plaintiff must make out a prima facie case;³⁴ the employer must then articulate a business justification;³⁵ and the burden then shifts back to the plaintiff to show pretext.³⁶

985–87 (2003); D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 875 (2006) (“The primary justification for summary judgment has always been efficiency.”).

28. Richardson Greenshields Sec., Inc. v. Lau, 825 F.2d 647, 653 (2d Cir. 1987) (“This practice [of requiring a conference prior to the filing of motions] may serve the useful purpose of narrowing and resolving conflicts between the parties and preventing the filing of unnecessary papers. Litigants and the courts profit when this occurs.”).
29. *Id.* at 652 (“Absent extraordinary circumstances, such as a demonstrated history of frivolous and vexatious litigation, or a failure to comply with sanctions imposed for such conduct, a court has no power to prevent a party from filing pleadings, motions, or appeals authorized by the Federal Rules of Civil Procedure.”) (citations omitted).
30. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1972).
31. Denny Chin & Jodi Golinsky, *Moving Beyond McDonnell Douglas: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659 (1998).
32. *Bickerstaff v. Vassar Coll.*, 992 F. Supp. 372, 373 (S.D.N.Y. 1998).
33. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998).
34. *McDonnell Douglas*, 411 U.S. at 802. As articulated in *McDonnell Douglas*, the plaintiff's prima facie case consisted of showing: (1) he belonged to a “racial minority”; (2) he applied for a job for which he was qualified and the employer was seeking applicants; (3) he was rejected; and (4) the position remained open and the employer continued to look for applicants with plaintiff's qualifications. *Id.*
35. *Id.* at 802–03. The employer's burden is not onerous, as it “need only articulate—but need not prove” a discriminatory reason for its action. *Fisher v. Vassar Coll.*, 70 F.3d 1420, 1433 (2d Cir. 1995), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 851 (1998).
36. *McDonnell Douglas*, 411 U.S. at 804.

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In fact, as the law has evolved, it is now an eight-part test: the four prongs of the prima facie case; the employer's articulation of a business justification; whether there is pretext; whether the pretext is a cover-up for discrimination;³⁷ and, finally, whether the plaintiff has carried her overall burden of proving intentional discrimination.³⁸

The fourth step of the prima facie case has evolved so that now the plaintiff must show circumstances giving rise to an inference of discrimination.³⁹ But that showing is similar to the ones the plaintiff must make later in the analysis: the pretext is to cover-up discrimination and she has carried her overall burden of proving intentional discrimination. The result is that the parties and the court review the evidence several times.

In a case where a plaintiff asserts multiple claims—for example, a promotion claim, a salary claim, and a termination claim—the parties and the court would have to go through the eight steps for each claim.⁴⁰ This is an extremely inefficient way of addressing the issues. Moreover, the Second Circuit has held that trial judges should not instruct juries on *McDonnell Douglas*.⁴¹ Why should the law for the judge be different from the law for the jury?

When I considered summary judgment motions in employment cases as a district judge, I usually took a simplified approach:⁴² I assumed the plaintiff made out a

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37. A finding of pretext does “not necessarily mean that the true motive was the illegal one argued by the plaintiff.” *Fisher*, 114 F.3d at 1338 (citation omitted). The plaintiff must show not only that the “proffered reasons by the employer were false,” but that “more likely than not discrimination was the real reason for the discharge.” *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 714 (2d Cir. 1996). *See also* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510–11 (1993) (proof of pretext alone does not compel a finding in favor of plaintiff).
 38. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (“Although intermediate evidentiary burdens shift back and forth under this framework, [t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”) (quoting *Tex. Dep't Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).
 39. *See, e.g.*, *Brown v. City of Syracuse*, 673 F.3d 141, 150 (2d Cir. 2012); *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004); *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 63 (2d Cir. 1997). *See* *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (“[W]e concede that the case law on this particular point—whether a discrimination plaintiff *may* or *must* show disparate treatment—is confusing. Courts, including ours, have struggled with this fourth element of the *prima facie* case, as the language of the element itself has ‘gone through various iterations in the years since *McDonnell Douglas* was decided.’”) (quoting *Chin & Golinsky, supra* note 31, at 663–64 & n.26).
 40. *See, e.g.*, *Lapsley v. Columbia Univ.*, 999 F. Supp. 506, 514 (S.D.N.Y. 1998).
 41. *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53 (2d Cir. 1998) (holding that only courts, not juries, “should determine whether the initial *McDonnell Douglas* burdens of production have been met,” as “requiring the jury to play the ping-pong-like match of shifting burdens is confusing and entirely unnecessary”); *accord* *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979) (“[T]o read [the *McDonnell Douglas* test's] technical aspects to a jury . . . will add little to the juror's understanding of the case and, even worse, may lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination.”).
 42. *See, e.g.*, *Jones v. City Sch. Dist. of New Rochelle*, 695 F. Supp. 2d 136, 143–44 (S.D.N.Y. 2010); *Peterson v. City Coll.*, 32 F. Supp. 2d 675, 683–84 (S.D.N.Y. 1999); *Lapsley*, 999 F. Supp. at 513–16. Other district courts have also taken a more focused approach. *See* *Chin & Golinsky, supra* note 31, at 668 & n.53, 671–72 & nn.68, 69 (citing cases).

prima facie case; employers always articulated a business reason for its decision—I never had a case where the employer failed to articulate a business reason for its decision; and I would go right to the “ultimate issue”:⁴³ whether the plaintiff presented evidence from which a reasonable jury could find that, more likely than not, the employer’s decision was motivated at least in part by discrimination.⁴⁴

I would first examine the plaintiff’s proof. Was it admissible? Relevant? Material? Was it sufficient to support a verdict in her favor? What is the proof of discrimination? There may be comments,⁴⁵ statistics, disproportionate treatment,⁴⁶ irrational treatment,⁴⁷ and unfairness.⁴⁸ I would then examine defendant’s proof that it did not discriminate. Finally, I would consider the record as a whole.

43. *Fields v. N.Y. St. Off. of Mental Retardation & Dev. Disabilities*, 115 F.3d 116, 119 (2d Cir. 1997); *see also Reeves*, 530 U.S. at 146 (“The ultimate question is whether the employer intentionally discriminated . . .”).

44. *See, e.g., Borrero v. Am. Express Bank*, 533 F. Supp. 2d 429, 436 (S.D.N.Y. 2008) (“The ‘ultimate issue’ in any employment discrimination case is whether the plaintiff has met her burden of proving that the adverse action was motivated at least in part by an ‘impermissible reason,’ i.e., that there was discriminatory intent.”) (citing *Reeves*, 530 U.S. at 146).

45. *Silver v. No. Shore Univ. Hosp.*, 490 F. Supp. 2d 354, 363 (S.D.N.Y. 2007) (discussing factors to consider in determining whether a comment is “a probative statement that evidences an intent to discriminate or whether it is a non-probative ‘stray remark’”); *Goldschmidt v. N.Y. St. Affordable Hous. Corp.*, 380 F. Supp. 2d 303, 316 (S.D.N.Y. 2005) (jury could reasonably find that defendants’ statements about plaintiff reflected religious bias).

46. *See, e.g., Borrero*, 533 F. Supp. 2d at 438 (denying summary judgment in part because supervisor refused to allow female employee to attend meeting, commenting “this is not a social club,” while permitting male co-worker to attend a baseball game the same day).

47. *See, e.g., Stratton v. Dep’t for the Aging*, 132 F.3d 869, 879–80 (2d Cir. 1997) (in upholding jury’s verdict for plaintiff in employment discrimination case, noting that plaintiff with a strong record was “inexplicably treated in a negative fashion” as soon as new and substantially younger supervisor took over); *Fischbach v. D.C. Dep’t of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (where an employer has “made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so”); *Lewis v. Sears, Roebuck & Co.*, 845 F.2d 624, 633 (6th Cir. 1988) (employer’s decision to fire plaintiff “may have been so unusual or idiosyncratic as to shed light upon [its] motivation in firing her”).

48. *See, e.g., Miles v. N. Gen. Hosp.*, 998 F. Supp. 377 (S.D.N.Y. 1998) (“A reasonable jury could also conclude that termination of a 25-year career was unreasonably and inexplicably harsh.”); *Shafrir v. Assoc. of Reform Zionists of Am.*, 998 F. Supp. 355, 362 (S.D.N.Y. 1998) (“A reasonable jury could find that defendants’ decision to fire plaintiff was irrational, because she had otherwise been an excellent employee and was seeking only a few weeks of additional leave. A reasonable jury could construe defendants’ illogical or unduly harsh actions as evidence of discrimination.”); *Nembhard v. Mem’l Sloan-Kettering Cancer Ctr.*, 918 F. Supp. 784 (S.D.N.Y. 1996).

The jury could have concluded that Memorial acted disproportionately by dismissing an employee who had performed well for more than 17 years for returning late from vacation for reasons beyond her control, who could not then immediately return to work because of illness, who gave notice that she would be late in returning, and whose lateness in returning did not cause Memorial any significant problems. . . . The jury could have reasonably concluded that Memorial’s decision to discharge plaintiff in these circumstances rather than simply dock her salary or charge her vacation time or reprimand her was discriminatorily motivated.

Id. at 789.

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Certain concepts must be kept in mind. Any conflicts in the evidence, of course, must be resolved in favor of the plaintiff. The evidence has to be construed in the light most favorable to the plaintiff as the party opposing summary judgment. The evidence has to be considered as a whole—seemingly innocuous or innocent pieces of evidence may take on a different meaning when placed in context.⁴⁹

Yes, unfairness is not unlawful, in and of itself.⁵⁰ But the question is: *Why* is there unfairness? Unfairness is unlawful if it is motivated by race or gender or some other protected category. Inexplicable unfairness and irrationally severe treatment are strong indications of a discriminatory motive. Plaintiffs' lawyers should remember the old nuggets: clever men discriminate in clever ways,⁵¹ and where there is smoke there is fire.⁵²

Why would the employer act in this unfair, irrationally harsh way? Based on all the evidence, based on these five or six pieces of seemingly innocent evidence that together paint a mosaic of discrimination, is it more likely than not that discrimination was the motivating factor? A lawyer at trial or in opposing a summary judgment motion should tick off the five or six facts that show that more likely than not the employer was acting in an intentionally discriminating manner.⁵³

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49. See *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) (“Creating a mosaic with the bits and pieces of available evidence, a reasonable juror might picture either a malign employer using his position to pressure a subordinate for sexual favors or a benign boss trying—however ineptly—to express concern for his secretary in a non-erotic manner that she mistakenly viewed as sexually aggressive.”); see also *Robin v. Espo Engineering Corp.*, 200 F.3d 1081, 1089 (7th Cir. 2000) (“[A] combination of direct and circumstantial evidence, ‘none conclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff,’ may allow a plaintiff to surpass the summary judgment hurdle.”) (quoting *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). But see *Gorence v. Eagle Food Ctrs., Inc.*, 242 F.3d 759, 763 (7th Cir. 2001) (“And it is simply not true, we want to emphasize, that if a litigant presents an overload of irrelevant or nonprobative facts, somehow the irrelevance will add up to relevant evidence of discriminatory intent. They do not; zero plus zero is zero.”).
50. *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 300 (1983) (“[W]here an employment is for an indefinite term it is presumed to be a hiring at will which may be freely terminated by either party at any time for any reason or even for no reason.”).
51. See *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979) (“[C]lever men may easily conceal their motivations”) (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974)); accord *Ramseur v. Chase Manhattan Bank*, 865 F.2d 460, 464–65 (2d Cir. 1989) (“In assessing the inferences to be drawn from the circumstances of the termination, the court must be alert to the fact that ‘[e]mployers are rarely so cooperative as to include a notation in the personnel file’ that the firing is for a reason expressly prohibited by law.”) (quoting *Thornbrough v. Columbia & Greenville R.R. Co.*, 760 F.2d 633, 638 (5th Cir. 1985)).
52. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 266 (1989) (O’Connor, J., concurring) (Where a plaintiff has shown that an illegitimate consideration was a “substantial factor” in an employment decision, “the employer may be required to convince the factfinder that, despite the smoke, there is no fire.”); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1187 (2d Cir. 1992) (Even without a “smoking gun,” where “there is at the very least a thick cloud of smoke,” the employer must “convince the factfinder that, despite the smoke, there is no fire.”) (quoting *Price Waterhouse*, 490 U.S. at 266 (O’Connor, J., concurring)).
53. See e.g., *Stratton v. Dep’t for the Aging*, 132 F.3d 869, 879–80 (2d Cir. 1997) (listing facts supporting verdict in favor of plaintiff in age discrimination case).

In many cases I heard, lawyers simply did not focus on the proof, the circumstantial proof, of discrimination. They did not tackle the issue of intent head on, but instead relied on the more defensive, more diffuse approach of *McDonnell Douglas*.

Now, I appreciate that *McDonnell Douglas* was crafted to help plaintiffs in situations where there was a lack of direct evidence of discrimination.⁵⁴ But given how employment law has evolved, I do not think it is helpful to anyone anymore.

A more simplified, more focused approach would, I believe, help plaintiffs who have been aggrieved by discrimination to build a stronger case. It would also help defendants who have been wrongly accused obtain vindication. And it would help the courts adjudicate these difficult cases in a more efficient manner.

The law has evolved. And yes, it may be more challenging now for plaintiffs to bring employment cases. I do not think the answer is for plaintiffs' lawyers to bash the judges. On the other hand, judges must avoid the temptation to engage in fact-finding when they are skeptical about a case. The task of the lawyers is to educate the judges, and to do a better job of telling a compelling story. Lawyers must help the judge care, for a judge who cares is more likely to get it right.⁵⁵ A lawyer helps the judge care by telling a compelling story, using some passion, but relying primarily on logic. Judges do not always get it right, but judges—at least the vast majority of judges—*try* to get it right.

Plaintiffs' lawyers must also choose wisely when taking on a case; they cannot take a case just because the client believes in her heart that she has been subjected to discrimination. There has to be something concrete—something plausible—to suggest discrimination. Cases brought purely on bruised ego and speculation trivialize our important civil rights laws.⁵⁶

Has my perspective about summary judgment in employment cases changed since I became a circuit judge? In some respects it has changed, and in some respects it has not. Employment cases are still difficult and challenging—but enjoyable—cases. They are still an important part of the docket.

My perspective has changed, however, in the sense that now as a circuit judge I review the decisions of other judges, rather than decide cases in the first instance. And I do so in panels of three. Even after I make up my mind, the decisionmaking process continues as the three members of the panel must confer to reach a final decision. Most of the time there is unanimity and often the cases are relatively easy. But I am surprised at how often there is disagreement. In an appeal from the grant

54. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–01 (1972) (discussing Congress's intent in passing Title VII as "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

55. "[M]uch of the scholarship [on the role of emotion in the law] posits that it is not only impossible but also undesirable to factor emotion out of the reasoning process: by this account, emotion leads to truer perception and, ultimately, to better (more accurate, more moral, more just) decisions." Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 368 (1996).

56. "Title VII . . . does not set forth 'a general civility code for the American workplace.'" *Burlington N. & Sante Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

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of summary judgment in an employment case, the fact of disagreement would suggest, perhaps, that summary judgment should not have been granted. If three judges cannot agree, then surely, one would think, there must be a genuine issue of fact for trial. But sometimes, of course, there is disagreement about what a reasonable jury could or could not find.⁵⁷

One study examined grant and deny rates for summary judgment motions in employment cases based on the race of the judge.⁵⁸ The study found that “white judges” granted summary judgment motions in employment cases sixty-one percent of the time.⁵⁹ “Minority judges” granted these motions only thirty-eight percent of the time.⁶⁰ Could it be that “minority judges” find it more plausible that an employer would discriminate?⁶¹

Justice cannot, of course, be dispensed differently based on the race, gender, or background of the judge or that of the litigants. At the same time, we would all benefit from greater diversity on the bench. This is particularly so in employment cases where we must confront the thorny and personal issues generated by claims of racism, sexism, bigotry, and intentional discrimination. With an exchange of views drawn from a spectrum of backgrounds, experiences, and perspectives, we can be more confident that we are reaching a just and true result.⁶²

57. See *Tepperwein v. Entergy Nuclear Ops., Inc.*, 663 F.3d 556, 576–80 (2d Cir. 2011).

58. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313 (2012).

59. *Id.* at 338 & tbl.3. These were full grants dismissing the entire case.

60. *Id.* Similarly, these were full grants dismissing the entire case. The authors concluded: “Overall, white judges are far more likely to grant a motion for summary judgment for the defendant (61% of cases), than are their counterpart minority judges (38% of the time, or some 23% less than white judges).” *Id.* at 338–39.

61. The authors

contend that this variation [in summary judgment grant rates] is the result of the different attitudes, opinions, and experiences that stem from being white or a person of color. White judges are far more likely to dispose of any employment discrimination case at the summary judgment phase than are minority judges.

Id. at 346; see also Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1117, 1119–20 (2003); Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1156 (2009); Harry T. Edwards, *Race and the Judiciary*, 20 YALE L. & POL'Y REV. 325, 327–29 (2002).

62. See Denny Chin, *supra* note 14, at 2 (“A broader mix of judges, a bench that more fairly reflects the rich diversity of our society, will improve the overall quality of justice.”); see also Theresa M. Beiner, *The Elusive (but Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C. DAVIS L. REV. 597, 598, 601–17 (2003); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405 (2000).