NEW YORK LAW SCHOOL

NYLS Law Review

Volume 57
Issue 4 *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*

Article 5

January 2013

Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment

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VOLUME 57 | 2012/13

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57 N.Y.L. Sch. L. Rev. 749 (2012–2013)

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The authors would like to thank law clerks Jerilyn Gardner, Ashley Seales, and Kasey Weiland for tirelessly reading and editing this essay. All views expressed are those of the authors personally and not those of any entity they represent.

I. INTRODUCTION

Almost fifty years ago, Congress passed the Civil Rights Act of 1964. An integral part of that monumental piece of legislation was Title VII,[1] which prohibits discrimination in employment on the basis of race, color, national origin, religion, and sex.[2] In 1991, Congress significantly amended Title VII, providing damage awards and the right to a jury trial for Title VII plaintiffs.[3] In addition to Title VII, federal statutes like the Reconstruction Civil Rights Acts,[4] the Americans with Disabilities Act,[5] and the Age Discrimination in Employment Act[6] also protect particular classes of workers from employment-related discrimination.

As the articles in this issue attest, federal courts are perceived as having become hostile venues for employment discrimination plaintiffs.[7] They tend to chew plaintiffs up and spit them out with rapidity, most often before trial. And federal courts have embraced a well-developed gauntlet of obstacles to knock employment discrimination plaintiffs off their paths.[8]

In this short essay, we briefly examine the federal judiciary's attitude towards employment discrimination plaintiffs and how that perceived hostility is manifested,

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1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006).

2. The statute provides, in relevant part:

> It shall be an unlawful employment practice for an employer—
>
> (1) 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; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

3. Civil Rights Act of 1991, Pub. L. No. 102–166. 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981a (2006)).

4. *See* 42 U.S.C. §§ 1981, 1983 (2006).

5. *See* 42 U.S.C. §§ 12101–13 (2006).

6. *See* 29 U.S.C. §§ 621–34 (2006).

7. *See* 57 N.Y.L. Sch. L. Rev. 653–986 (2012–2013); Symposium, *Trial by Jury or Trial by Motion? Summary Judgment,* Iqbal*, and Employment Discrimination*, 57 N.Y.L. Sch. L. Rev. 653 (2012–2013), *available at* http://www.nylslawreview.com/trial-by-jury-or-trial-by-motion-summary-judgment-iqbal-and-employment-discrimination/.

8. Given the evidentiary burden placed on the plaintiff in employment discrimination cases, these cases often prove unsuccessful and are therefore risky representations for plaintiffs' attorneys. As a result, these plaintiffs have a high pro se rate. Pro se plaintiffs, though, are less likely to obtain an early settlement of their employment discrimination case or avoid a loss on a motion for summary judgment. *See* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. Empirical Legal Stud. 175, 188–89 (2010).

particularly at the summary judgment stage of litigation.[9] Then, we offer a simple (perhaps too simple) prophylaxis: federal courts should liberally construe the Supreme Court's mandate to draw all reasonable inferences in favor of the nonmovant when determining whether a genuine dispute as to a material fact exists. By simply drawing reasonable inferences in favor of plaintiffs, courts would remove many of the hurdles that litter an employment discrimination plaintiff's path to trial, thereby allowing the dispute to be decided on the merits by a jury of the plaintiff's peers.

Part II provides a brief overview of the judiciary's perceived hostility towards employment discrimination plaintiffs by highlighting social science research on case outcomes. Part III gives a short summary of the Title VII and summary judgment frameworks. In Part IV, we discuss several ways in which federal judges manifest their hostility toward employment discrimination plaintiffs, as well as possible biases courts may have against these plaintiffs. Finally, in Part V we offer a proposed solution and examine some of its attributes and defects. We note, though, that this essay is not an in-depth analysis of the topic. Rather, it is an attempt by a federal judge and a former law clerk to (1) add their voices to the rising chorus bemoaning the difficulties employment discrimination plaintiffs face in federal court; and (2) endeavor to ameliorate, to some degree, those difficulties.

II. FEDERAL COURTS ARE PERCEIVED AS HOSTILE TO EMPLOYMENT DISCRIMINATION PLAINTIFFS

This statement is not original, nor is it a recent revelation. Scholars and commentators have been sounding this alarm for years.[10] We believe there is hostility on the part of judges, and social science research confirms our belief. After the "summary judgment trilogy" of 1986,[11] motions for summary judgment are often

9. For simplicity, we address only Title VII.

10. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103 (2009); William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. Rev. 81 (2009); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 Mo. L. Rev. 423 (2010); Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 Notre Dame L. Rev. 109 (2007); Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 315 (2010) ("Plaintiffs have a hard row to hoe in proving unlawful discriminatory bias."); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203 (1993); Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 Mo. L. Rev. 481, 482 (2008) ("These are rough times for employment discrimination plaintiffs in federal court."); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 La. L. Rev. 555 (2001); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 St. Louis U. L.J. 111 (2011).

11. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). These cases are significant because they made it easier for a defendant to prevail on a motion for summary judgment. As Professor McGinley has noted, "[m]any courts . . . have interpreted the trilogy, although ambiguous on the issue of pretrial judicial factfinding, to permit summary judgment in cases where plaintiffs' claims appear weak or unpersuasive." McGinley, *supra* note 10, at 207.

granted in employment discrimination suits.[12] The Federal Judicial Center has noted that "[s]ummary judgment motions by defendants are more common in [employment discrimination] cases, are more likely to be granted, and more likely to terminate the litigation."[13] In the early 2000s, ninety-eight percent of employment discrimination cases disposed of by pretrial motion were decided in favor of defendants, which was higher than the rates for both personal injury and insurance cases.[14] Statistically, employment discrimination plaintiffs lose more often than other federal plaintiffs, and that trend is exacerbated when employment discrimination cases are tried before a judge as opposed to a jury.[15]

Two Cornell University professors have demonstrated this particular hostility by analyzing data on employment discrimination cases in federal district and circuit courts.[16] According to Clermont and Schwab, "[j]obs cases proceed and terminate less favorably for plaintiffs than other kinds of cases. Plaintiffs who appeal their losses or face appeal of their victories again fare remarkably poorly in the circuit courts."[17] While federal plaintiffs bringing non-employment discrimination cases succeed in approximately fifty percent of cases, employment discrimination plaintiffs succeed in only fifteen percent of cases.[18] Further, even when a plaintiff is successful on an employment discrimination claim, a court of appeal is more likely to reverse a judgment for the plaintiff than a judgment for the defendant.[19] Thus, employment discrimination plaintiffs in federal court face long odds of success.

One reason for this hostility is that, while employment discrimination cases take up only a modest portion of the federal docket, they are increasingly time-consuming for district courts to resolve.[20] They likewise clog appellate dockets because, as a class of suits, they are appealed more often than other civil cases, and these appeals are

12. Reeves, *supra* note 10, at 551; Elizabeth M. Schneider, *The Changing Shape of Federal Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517, 548 (2010). *But see* Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 Loy. U. Chi. L.J. 517, 517 n.2 (2012) (challenging the conventional wisdom that "the Trilogy caused a fundamental shift in pretrial practice by leading lawyers to be more aggressive in seeking summary judgment and by leading judges to be more willing to grant it").

13. Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Baylson, 3 (Aug. 13, 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf ("[T]he prominent role of summary judgment in such cases is striking.").

14. Selmi, *supra* note 10, at 560.

15. *See id.* at 560–61.

16. *See* Clermont & Schwab, *supra* note 10.

17. *Id.* at 104.

18. *Id.* at 127.

19. *Id.* at 111.

20. Reeves, *supra* note 10, at 507–09. Of the 294,336 cases filed in U.S. District Courts in 2011, 36,489 were classified as Civil Rights. Within that category, 15,206 were Employment and 1673 were ADA-Employment. Comparatively, there were 82,155 total personal injury cases and 53,323 total prisoner petitions. *See* Admin. Off. of the U.S. Cts., Table C-2: U.S. Dist. Cts.—Civ. Cases Commenced, by Basis of Jurisdiction & Nature of Suit, During the 12-Mo. Periods Ending Mar. 31, 2010

usually subject to de novo review.[21] Reeves has postulated that busier courts are more likely to invoke rules hostile to employment discrimination plaintiffs in order to winnow cases from the docket.[22] Interestingly, employment discrimination cases, as a percentage of federal dockets, have declined since the early 2000s.[23] Clermont and Schwab speculate that this decline could be a natural reaction by plaintiffs and the plaintiff bar to the hostility of federal courts to these types of claims.[24]

Given that statistics indicate that employment discrimination cases fare worse in federal courts than other types of litigation, in large part due to pretrial devices like motions for summary judgment, we must address why this is occurring, how it is occurring, and what can be done about it.

III. A BRIEF WORD ON *MCDONNELL DOUGLAS* AND THE SUMMARY JUDGMENT STANDARD

Before we explore how federal courts manifest their hostility towards employment discrimination plaintiffs, we pause to offer a quick primer on the basic substantive and procedural rules of Title VII and summary judgment, respectively. Employment discrimination cases are generally decided using the well-known *McDonnell Douglas* framework.[25]

A. The McDonnell Douglas *Standard and the Pretext Rules*

Under the *McDonnell Douglas* framework, a plaintiff must first prove a prima facie case of discrimination by showing that (1) she is a member of a protected class; (2) she met the qualifications for the position; (3) the employer did not hire or promote her; and (4) the employer hired someone from a nonprotected class.[26] If the plaintiff satisfies her burden of demonstrating a prima facie case, a rebuttable presumption of discrimination arises.[27] It is then incumbent upon the defendant to produce evidence

& 2011 (2011), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf (last visited Jan. 1, 2013).

21. Reeves, *supra* note 10, at 512.

22. *Id.* at 513, 555.

23. Clermont & Schwab, *supra* note 10, at 104, 131–32 ("The most startling change in the last few years' data is the substantial drop of almost forty percent in the number of employment discrimination cases in the federal district courts.").

24. *See id.* at 119, 121.

25. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This framework only applies to claims that are to be proved based on circumstantial evidence. Claims based on direct evidence and mixed motive claims apply different analytical frameworks. Most employment discrimination cases, though, fall under *McDonnell Douglas*.

26. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981) (citing *McDonnell Douglas*, 411 U.S. at 802).

27. *Id.* at 254 & n.7.

of a legitimate, nondiscriminatory reason for the adverse action.[28] Notably, the defendant's burden is one only of production, not persuasion.[29] Once the defendant produces evidence of a legitimate, nondiscriminatory reason for the employment action, the presumption of discrimination created by the prima facie case evaporates.[30] Finally, if the first two steps are satisfied, which they usually are, the plaintiff must prove that the defendant's proffered reason is merely a pretext for discrimination.[31] Generally, a plaintiff establishes pretext by showing that the employer's legitimate, nondiscriminatory reason for the action is not credible.[32] Pretext is usually the determining factor as to whether a Title VII claim succeeds.[33]

In the wake of *McDonnell Douglas* and its progeny, a circuit split arose among the federal courts of appeal regarding the evidence required to satisfy the pretext prong, resulting in the application of three different rules: "pretext-only," "pretext-may," and "pretext-plus."[34] Under the more plaintiff-friendly "pretext-only" rule, "if the plaintiff can successfully show that the reasons proffered by the employer for her discharge are factually false, then she is automatically entitled to judgment in her favor."[35] In other words, proof that the employer's legitimate, nondiscriminatory reason is untrue is the equivalent of proof that the employer intentionally discriminated.[36] Under the intermediate "pretext-may" rule, a plaintiff must present a prima facie case and evidence of pretext.[37] Unlike the pretext-only rule, the pretext-may rule does not entitle the plaintiff to a favorable judgment as a matter of law; instead, the issue goes to the jury to determine whether the prima facie case and evidence of pretext show unlawful discrimination.[38] Finally, under the defendant-friendly "pretext-plus" rule, the plaintiff must not only prove a prima facie case and pretext, but also provide additional evidence of discrimination;[39] merely establishing that the employer's proffered reason is false is not enough to give rise to an inference of discrimination.[40]

While the Supreme Court has repeatedly attempted to resolve the split among the circuits and to clarify the proper pretext standard, it has not been wholly successful. In

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

29. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

30. *Burdine*, 450 U.S. at 255 n.10.

31. *Id.* at 255–56.

32. *Id.* at 256.

33. Martin, *supra* note 10, at 325.

34. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122–23 (7th Cir. 1994).

35. *Id.* at 1122.

36. *Id.* (citing Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1396 (3d Cir. 1984)).

37. Martin, *supra* note 10, at 326.

38. *Id.*; *Anderson*, 13 F.3d at 1123.

39. *Anderson*, 13 F.3d at 1123.

40. Martin, *supra* note 10, at 326.

St. Mary's Honor Center v. Hicks,[41] the Court specifically rejected the plaintiff-friendly pretext-only standard,[42] but, at the same time, it seemed to leave open the possibility that the defendant-friendly pretext-plus standard was required.[43] In *Reeves v. Sanderson Plumbing Products, Inc.*,[44] the Court appeared to step back from the pretext-plus model and firmly adopt the intermediate pretext-may rule.[45] But by noting that a prima facie case plus some evidence of pretext may not always be adequate to show liability, the majority opinion perhaps created a loophole for pretext-plus to remain viable.[46] As Professor Martin has explained, "[t]his lack of a definitive stance relieves the Court from offering what may result in a more workable standard. It also leaves the field open for lower court manipulation, effectively reinstating, or at least not foreclosing, a viable pretext-plus interpretation."[47]

In sum, the Court has adopted the pretext-may rule and rejected the pretext-only rule, and while the Court has seemingly foreclosed the pretext-plus rule as well, it has not done so in explicit terms and has left open avenues for the rule's continued application. Thus, while many cases should survive summary judgment under pretext-may because there is often evidence of a prima facie case and pretext, it may still be possible for courts to apply a variation of pretext-plus and grant summary judgment for defendants, even in cases where the plaintiff has presented evidence of pretext from which a jury could infer discrimination.

B. The New Standards for Summary Judgment and Implications When Applying the Pretext Rules

The application of the *McDonnell Douglas* framework is complicated by the procedural rules of summary judgment. While summary judgment was once a rarely used vehicle for dismissing a plaintiff's claim, after the summary judgment trilogy of *Celotex*, *Liberty Lobby*, and *Matushita*, the motion became a common element of the

41. 509 U.S. 502 (1993).

42. *Id.* at 514–15 ("We have no authority to impose liability upon an employer for alleged discriminatory practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*. We may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttable presumption . . . which we believe *McDonnell Douglas* represents. But nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable.").

43. *See id.* at 515 ("[A] reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."). Justice Souter, in his dissent, argued as much. *See id.* at 534–35.

44. 530 U.S. 133 (2000).

45. *Id.* at 147.

46. *See id.* at 148.

47. Martin, *supra* note 10, at 335.

litigation process.[48] Courts are increasingly using summary judgment to dispose of employment discrimination cases.[49]

A court must grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[50] In determining whether a genuine dispute as to a material fact exists, courts are instructed not to make credibility determinations and to draw all reasonable inferences in favor of the nonmovant.[51] "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[52] Courts are instructed that "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient" and that the plaintiff's proof must be more than "merely colorable."[53] Summary judgment serves to determine "whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[54]

Although not directly on topic, recent changes with regard to Rule 12 motions to dismiss are also relevant to this discussion.[55] In the wake of *Twombly*[56] and *Iqbal*,[57] motions to dismiss have become higher hurdles for employment discrimination plaintiffs to clear.[58] *Twombly* and *Iqbal* established a plausibility standard for pleading, requiring a plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[59] While this standard does not require "detailed factual allegations," it does necessitate pleading more than "labels and conclusions," "unadorned, the-defendant-unlawfully-harmed-me accusation[s]," "naked assertions," or "a formulaic recitation of the

48. *See* McGinley, *supra* note 10, at 206.

49. Cecil & Cort, *supra* note 13, at 3.

50. Fed. R. Civ. P. 56(a).

51. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) ("[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.").

52. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

53. *Id*. at 249–50, 252. It is unclear how a judge is supposed to determine whether evidence is more than "a scintilla" and "sufficiently colorable" when she cannot weigh the evidence or make credibility determinations. *See id*.; *see also* Schneider, *supra* note 12, at 546. However, that is a topic for another day and another essay.

54. *Liberty Lobby*, 477 U.S. at 250.

55. Fed. R. Civ. P. 12(b)(6).

56. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

57. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

58. *See* Joseph A. Seiner, *After* Iqbal, 45 Wake Forest L. Rev. 179 (2010).

59. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 566).

elements of a cause of action."[60] This new standard "creates an arduous burden for Title VII plaintiffs by mandating that allegations of discriminatory intent cannot be general or conclusory and must be made with proper factual support."[61]

Under *McDonnell Douglas*, an employment discrimination plaintiff must show a prima facie case of discrimination and, if the defendant provides a legitimate, nondiscriminatory reason for its action, that the defendant's reason is a pretext for discrimination. While the pretext-may rule would allow a plaintiff's case to proceed to a jury under *Iqbal*, if she presents a prima facie case and evidence of pretext, the possibility that the pretext-plus rule may still apply could allow a district court to grant summary judgment on the grounds that the plaintiff has not presented evidence of discrimination, which is more than evidence of just a pretext.

The problems with the pretext evidentiary standard are exacerbated by recent changes to the standards for summary judgment and motions to dismiss. Under the summary judgment trilogy and *Iqbal*, employment discrimination plaintiffs may be required to present factual bases and firm proof of their claims at early stages of litigation, and a failure to do so to the satisfaction of the judge could lead to a pre-trial dismissal of the plaintiff's claim.

IV. HOW FEDERAL COURTS ARE HOSTILE TO EMPLOYMENT DISCRIMINATION PLAINTIFFS

The intersection of substantive law on employment discrimination with federal procedural rules provides the common setting for federal courts' assault on employment discrimination plaintiffs. The ways in which federal courts are hostile to employment discrimination plaintiffs are multitudinous. Even in the wake of Supreme Court decisions favoring plaintiffs, circuit courts continue to erect barriers to a plaintiff's claim by invoking judicially made doctrines that draw strong inferences in favor of the defendant. Finally, courts may have implicit biases against employment discrimination plaintiffs that arise from a variety of factors. These conditions combine to create a toxic environment for employment discrimination plaintiffs, especially on motions for summary judgment.[62]

A. Presumptions and Inferences that Favor Defendants

Courts use several defendant-friendly presumptions or "shortcuts" in employment discrimination cases.[63] As Professor Stone has explained, these shortcuts "reveal[] a willingness of the judiciary to proxy monolithic assumptions for the individualized

60. *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

61. Seiner, *supra* note 58, at 228.

62. Heightened standards for showing pretext, *see* Martin, *supra* note 10, and a piecemeal approach to analyzing a plaintiff's evidence, *see* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 La. L. Rev. 577 (2001), are also analytical tools that hinder a plaintiff's ability to prove her employment discrimination case, but we do not address them here.

63. Stone, *supra* note 10, at 111.

reasoned analyses mandated by the relevant antidiscrimination legislation."[64] Below we provide a short overview of two defendant-friendly inferences drawn by federal courts.

1. Same Actor Inference

Imagine that in March of 2011, John Smith hires Mary Adams for a position at Widgets, Inc. Four months later Smith terminates Adams's employment.[65] Under the same actor inference,[66] because Smith both hired and terminated Adams, there is a strong inference that Widgets, Inc.'s stated reason for terminating Adams, whatever it may be, is not pretextual.[67] The reasoning behind this inference is that if the decisionmaker who fires an employee, who is a member of a protected class, is the same decisionmaker who initially hired that employee, it is unlikely that the decisionmaker is biased.[68] With regard to summary judgment, the same actor inference doctrine allows a court to dismiss a plaintiff's claim even when there may be some evidence of pretext. It gives courts the opportunity to weigh the plaintiff's and defendant's respective cases and find for the defendant based on one discrete fact rather than acknowledge factual disputes from the whole of the proof presented.

Many scholars have criticized the reasoning underlying the same actor inference.[69] Professor Martin excoriates the same actor inference, arguing that it improperly presumes that "discrimination emanates only from a single bad actor" and that it "assumes that voluntary association with one who is different in the context of work

64. *Id.*

65. Assume here that Adams could make a prima facie case of discrimination and that Widgets, Inc. can set forth a legitimate nondiscriminatory reason for terminating Adams.

66. The inference originated in the Fourth Circuit in 1991. *See* Proud v. Stone, 945 F.2d 796 (4th Cir. 1991).

67. *Id.* at 797 (noting that the same actor inference "creates a strong inference that the employer's stated reason for acting against the employee is not pretextual").

68. Ross B. Goldman, Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 Va. L. Rev. 1533, 1535 (2007) ("[T]he same actor inference states that where the same person hires an employee and then later fires that employee, it is illogical and irrational to impute a discriminatory motive to the decision to fire."); Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 Conn. L. Rev. 1117, 1121 (2008) ("All too often, courts adopting some variation of this principle assert how nonsensical it is that a decision-maker who hired an individual would engage in discriminatory action in subsequent decisions relating to that same person's terms and conditions of employment.").

69. The proposed solutions, though, are divergent. One advocates complete elimination of the inference. *See* Martin, *supra* note 68, at 1174 ("The bottom line is the same-actor doctrine is an overused legal mechanism unmoored from the realities of the modern workplace. The continued and unreflective application of it threatens workplace equality, in large measure making businesses resistant to the antidote of Title VII."). The other merely discourages the use of the inference at the summary judgment stage, arguing instead it is an inference only the ultimate fact-finder can make. *See* Goldman, *supra* note 68, at 1537 ("This Note seeks to join the debate by contending that the same-actor inference is never proper when applied by the court to award judgment for the defendant-employer. Importantly, however, this Note does not disagree with the intuitive appeal of the inference, and as such, it does not take issue with a defendant's attempt to persuade the factfinder to infer nondiscrimination from same-actor facts."). As noted later in this essay, we agree with the latter solution.

means the decision-maker harbors no such negative feelings, or if he did, he has now resolved them and they are incapable of resurrection."[70] Because workplace structure has evolved towards flatter, collective-based organizations, the inference does not capture the dynamics of discrimination in the modern employment environment.[71] Moreover, it gives employers an incentive to structure their human resources departments in a manner that can take advantage of the inference.[72]

While the same actor inference is used in most federal courts,[73] its application varies by circuit.[74] Some courts find the inference to be permissive rather than required, while others find that the inference is for the jury to make.[75] In any event, the inference is an incredible hurdle for a plaintiff to overcome, particularly when the hiring and firing occur within a short span of time, as in the above example.[76]

2. Stray Comment Doctrine

In many cases, evidence of a discriminatory comment by a decisionmaker will be direct evidence of discrimination that allows the plaintiff to avoid the *McDonnell Douglas* framework. However, even in cases where the plaintiff can provide evidence that a discriminatory comment was made, courts have fashioned a tool to funnel the

70. Martin, *supra* note 68, at 1122.

71. *Id.*

72. *Id.* ("The same-actor doctrine credits employers for hiring minorities by affording them protection in the event they decide to rid the workplace of individuals in protected categories under Title VII . . . . In this way, the same-actor doctrine operates as a subsidy for those employers that make the effort to diversify their workforces, cheapening notions of acceptability and workplace inclusiveness."); Goldman, *supra* note 68, at 1569.

73. *See, e.g.*, Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 572–73 (6th Cir. 2003); Roberts v. Separators, Inc., 172 F.3d 448, 452 (7th Cir. 1999); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1442–43 (11th Cir. 1998); Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997); Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996); Jacques v. Clean-Up Grp., Inc., 96 F.3d 506, 512 (1st Cir. 1996); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996); Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174–75 (8th Cir. 1992); Proud v. Stone, 945 F.2d 796, 797–98 (4th Cir. 1991).

74. *See* Goldman, *supra* note 68, at 1547–48.

75. *See Wexler*, 317 F.3d at 573 ("Our sister circuits are split on the amount of weight that should be given to the same-actor inference. Some have found it quite persuasive . . . . A number of these courts have concluded, however, that the same-actor inference was sufficient to warrant summary judgment only where the plaintiff's evidence of discrimination was otherwise weak, even though sufficient to survive summary judgment but for the fact that the same person both hired and fired the plaintiff . . . . Other circuits have minimized the importance of the same-actor inference, emphasizing that although a court may infer an absence of discrimination where the same individual hired and fired the plaintiff, such an inference is not required."); Goldman, *supra* note 68, at 1547–48 ("Following *Proud*, other circuits have dealt with the same-actor inference in one of two principal ways. Several courts have attached some version of 'strong presumptive value' to the inference and have used it to dismiss plaintiffs' claims. In contrast, other courts have assigned no presumptive value to the inference but instead allow a jury the unimpeded autonomy to weigh the inference as they see fit.").

76. Stone, *supra* note 10, at 128.

analysis into *McDonnell Douglas* and to discount that evidence of bias. Under the stray comment doctrine, a court "arrives at the conclusion that [certain] comments are, as a matter of law, 'stray,' and thus either wholly not relevant or insufficient, without more (or sometimes with more), to propel the plaintiff's case forward."[77] When determining whether a comment is "stray," courts generally consider factors such as who made the comment (decisionmaker or not), whether the comment was isolated or part of a pattern, the temporal nexus of the comment to the adverse employment action, and whether the comment relates to the adverse action at issue.[78] The court will then decide whether the comment is "stray" and, if so, usually exclude it from the calculus for determining whether the plaintiff has presented sufficient proof of pretext.

As with the same actor inference, the stray comment doctrine has been disparaged by academics. It allows the judge (and juries when the doctrine is given to them in the form of jury instructions) to "bypass a reasoned analysis of the totality of the circumstances of a case, in favor of a rotely applied label, 'stray,' that often serves, without justification, to divest the evidence of its probative value."[79] Further, the doctrine eliminates from consideration the possibility that the "stray" comment is indicative of an underlying workplace culture that is discriminatory.[80] Moreover, there is no unanimous definition of "stray." "[C]ourts 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, to permit a plaintiff's case to go forward or to sustain a jury verdict."[81] For these reasons, the stray comment doctrine is "so clumsy that it is without true use or value."[82] Nevertheless, federal courts still routinely use the stray comment doctrine, like the same actor inference, to summarily dispose of employment discrimination cases.

B. Implicit Biases Against Employment Discrimination Plaintiffs

In addition to these external tools for deciding cases, courts may have some internal biases that adversely affect their decisions in employment discrimination cases. While judges strive to apply the law fairly and impartially, they are human and therefore must view things through their own cognitive lenses—judges, like all humans, are not free from biases.[83] And while judges, because of their training, are

77. *Id.* at 131.

78. *Id.* at 132.

79. *Id.* at 133.

80. *Id.* at 134.

81. Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 Mo. L. Rev. 149, 150 (2012).

82. *Id.* at 192–93.

83. Recent research using the Implicit Association Test (IAT) confirms that "judges, like the rest of us, carry implicit biases concerning race." Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1221 (2009); *see also* Hon. Mark W. Bennett, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination to the "Defendant's*

better able to ensure that outcomes are not the product of improper bias, implicit biases nevertheless "strongly influence how courts decide particular cases especially in the discrimination context."[84]

Some scholars suggest that judges have developed an implicit bias against employment discrimination plaintiffs, particularly those alleging race discrimination. This bias reflects both a shift in society's understanding of discrimination and a conclusion that workplace discrimination is no longer the problem that it was when Title VII was enacted.[85] For instance, Professor Selmi posits that courts view claims and analyze evidence "from an anti-affirmative action mindset, one that views both the persistence of discrimination and the merits of the underlying claims with deep skepticism."[86] Similarly, Professor Trina Jones has postulated that the shift away from the highly visible discrimination of the mid-twentieth century and towards the "post-racial" America of today has influenced the way judges view discrimination claims.[87] She points to the acceptance of racial colorblindness as an example of this shift in understanding discrimination:

> Because [employment discrimination] claims are premised on the continuing presence of racism, they are now counter to society's normative beliefs. Thus, it is not surprising that they are met with suspicion and skepticism. If judges believe that discrimination is rare and aberrant, then they will perceive no need to probe deeply an employer's justifications, even when those justifications are specious and proved false. Rather, a burden will be placed on plaintiffs to come forth with additional proof to counter the colorblind, post racial presumption.[88]

Moreover, a recent article suggests that a judge's race and experiences can affect his or her assessment of employment discrimination claims.[89] According to Weinberg and Nielsen, white judges "are far more likely to dispose of any employment discrimination case at the summary judgment phase than are minority judges" and "tend to dismiss cases involving minority plaintiffs at a much higher rate than cases involving white plaintiffs."[90] They posit that judges' experiences influence their

Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective, 57 N.Y.L. Sch. L. Rev. 685, at 706–07 (2012–2013).

84. Selmi, *supra* note 10, at 562.

85. Stone, *supra* note 10, at 162 (noting that "the misapprehension that antidiscrimination law has outlived its usefulness may well have taken hold even among some educated people").

86. Selmi, *supra* note 10, at 562. Professor Selmi also notes that the larger social debate in America may have switched from the persistence and causes of inequality to the justifications and continuing need for affirmative action, which could explain this implicit bias by judges. *Id.* at 572.

87. Jones, *supra* note 10, at 425–34.

88. *Id.* at 433–34.

89. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. Cal. L. Rev. 313, 346 (2012).

90. *Id.*

approach to employment discrimination cases, which explains this difference between white judges and minority judges.[91]

Other scholars have considered judicial biases based on workload-related factors. Professor Stone has noted that judges may be antagonistic towards employment discrimination cases because of the sheer number of those cases; they clog court dockets and "reinforc[e] the incorrect notion that employees tend to file frivolous claims."[92] Mr. Reeves even argues that courts with heavier caseloads erect higher barriers for employment discrimination plaintiffs.[93] Professors Clermont and Schwab suggest that appellate judges may be biased against employment discrimination plaintiffs because they "may perceive trial courts as pro-plaintiff."[94] Such assumptions are problematic because statistics show that trial courts are not in fact favorable to these plaintiffs.[95]

C. Summary

Federal courts can be inhospitable venues for employment discrimination plaintiffs. The same actor inference and stray comment doctrine work against a plaintiff's ability to at least present her case to the jury, even in circumstances where there may be some evidence of discrimination. The effect of these doctrines may be exacerbated by implicit biases held by federal judges, whether due to a shift in the understanding of discrimination, the judge's life experience, or just the impact of case loads.

V. A SIMPLE(R) SOLUTION AT SUMMARY JUDGMENT: LIBERAL INTERPRETATION OF "ALL REASONABLE INFERENCES"

So how do we dismantle the procedural roadblocks and address implicit biases that burden employment discrimination plaintiffs on motions for summary judgment? Some commentators have offered critiques and solutions that would require a near complete dismantling of the current summary judgment framework.[96] We offer a less radical suggestion and one that fits within the current *McDonnell Douglas* framework. Simply put, in deciding a motion for summary judgment, a judge should liberally construe the Supreme Court's instruction to draw all reasonable inferences in favor of the non-

91. *Id.* at 320. Weinberg and Nielsen also note that the difference "may be less influenced by political ideology than some political scientists suggest." *Id.*

92. Stone, *supra* note 10, at 163.

93. Reeves, *supra* note 10, at 555 ("Relative to their less burdened counterparts, judges in busier circuits and circuits with higher numbers of discrimination cases have required plaintiffs to make greater showings to survive pretrial dispositive motions.").

94. Clermont & Schwab, *supra* note 10, at 113.

95. *See id.* ("More likely, district courts process employment discrimination cases with a neutral or even jaundiced eye toward plaintiffs.").

96. *See* Bennett, *supra* note 83.

moving party, usually the plaintiff.[97] If the plaintiff's interpretation of the evidence is plausible, raises a question of fact, and would, if proven, support a jury verdict in the plaintiff's favor, then the motion for summary judgment should be denied.

This is not a radical solution. In fact, you could argue it is already the standard. We are not advocating a new rule or finagling the summary judgment language.[98] Instead, we are asking judges to heed the purpose of summary judgment and use it to weed out only the rare, patently frivolous case; all others should proceed to trial.

A liberal application of reasonable inference-drawing would alleviate, or altogether eliminate, many of the barriers federal courts have placed in the path of employment discrimination plaintiffs.[99] Drawing all reasonable inferences in favor of the nonmovant employs *Reeves*'s instruction to holistically examine the evidence to determine whether an inference is reasonable.[100] A liberal view of reasonable inferences would hamstring the brutal effect of many court-made presumptions. The same actor inference would no longer be a death knell for a discrimination plaintiff. Rather, if, when considering the totality of the plaintiff's evidence, a reasonable inference of potential discrimination can be drawn, then the case would continue to trial regardless of who hired and fired the plaintiff.[101] The result would be more dramatic with regard to the stray comment doctrine. Discriminatory or biased comments should not be distinguished away by judicial pronouncements of their credibility and relevance because they raise perhaps the easiest inference of discrimination, which can create a factual dispute for a jury to decide. Courts do not need to label comments as "stray" and parse the temporal proximity and contextual attachment of the comment and the adverse action. Instead,

97. *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000). By liberally we mean the word, as defined by the Oxford English Dictionary with reference to interpretation, as "loosely, broadly." *Liberally, adv.,* Oxford English Dictionary, http://www.oed.com/view/Entry/107870?redirectedFrom=liberally& (last visited Jan. 28, 2013). While there may be some correlation between this view of the evidence and a politically liberal understanding of employment discrimination, it is not the avenue we are suggesting. Our "liberal" is an interpretive, not a political, tool.

98. That said, we are intrigued by Judge Bennett's suggestion to disband Rule 56 for a period to study what effects its elimination may have. Bennett, *supra* note 83, at 710. If anything, this remedy could solve one problem with summary judgment—the proclivity of certain circuits and judges to grant it over others. If judges treat reasonable inferences like the plausibility standard of *Iqbal v. Ashcroft*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), then eliminating Rule 56 may be the only reasonable solution. Nonetheless, we believe that summary judgment still has a viable role in federal litigation, particularly in non-tort cases where there are likely to be fewer factual disputes.

99. Because many of these barriers are ensconced in published circuit decisions, implementing our suggested solution may require en banc review by the circuits.

100. *Reeves*, 530 U.S. at 150.

101. Scholars are split over whether the same actor inference could be drawn by the jury at the behest of the defendant. We side with the position that the same actor inference would be a permissible inference for the jury to draw. *See* Goldman, *supra* note 68, at 1537. As a jury inference, the burden falls on the defendant to convince the jury to draw that inference based on the totality of the evidence presented. Even then, the inference at that point is nothing more than a determination that discrimination was not the reason for the adverse action, which is the ultimate question of a Title VII case anyway.

whether to discount a comment as stray would be an argument properly made by defense counsel to the jury.[102]

The million-dollar question from our solution is: What inferences are reasonable? Clearly not all possible inferences should be drawn in favor of the plaintiff; otherwise, the word "reasonable" is superfluous. The operative question, then, is: How should a judge determine whether an inference is reasonable? We do not think "reasonableness" needs a firm definition. Rather, judges should consider the entire evidentiary record and determine whether the inference the plaintiff, or nonmovant, seeks is so patently unrealistic that no jury would draw it from the facts presented. If so, the inference should not be drawn; the plaintiff's claim would likely fail, and the defendant would be entitled to summary judgment.

But this solution still leaves an opening for implicit biases to work their way into a judge's determination of "reasonableness." Therefore, it is important for courts to remember that drawing reasonable inferences does not mean substituting their own conclusions about the evidence for those of the factfinder. From our respective experience as a judge and a former law clerk, we concede that it is often difficult to resist the temptation to dismiss out-of-hand the inferences the plaintiff attempts to make because we may think the claim as a whole is meritless. But juries do not interpret facts the same way judges and lawyers do. Reminding judges to liberally interpret the reasonableness of potential inferences provides a buffer, however slight, against the tendency to substitute their judgment for the jury's.[103]

Nor does our solution directly address any implicit bias that judges may have against employment discrimination cases based on the perception that those cases clog federal dockets and/or often involve frivolous claims. If our proposal results in more employment discrimination cases going to trial, federal judges may find their dockets even further burdened by Title VII claims. But this may lead to some peripheral benefits. If more cases are tried by a jury, then fewer cases are likely to be appealed, which would lessen the strain on appellate dockets, even if it does not have an ameliorative effect on district court dockets.[104] Moreover, summary judgment orders can be tedious and time-consuming. Forcing more cases to trial could, in the long run, save judicial resources by freeing time and perhaps causing more cases to settle.[105]

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102. This is not to say that any biased comment will forever damn an employer to a future of lost motions for summary judgment because of that comment. There is a point at which a prior comment is no longer relevant and does not support a reasonable inference of discrimination. In determining where that line is, judges should holistically consider the evidence of discrimination and decide any close case in favor of the plaintiff, at least by denying summary judgment and sending the issue to the jury.

103. Weinberg and Nielsen also make an interesting suggestion by proposing that social science research could help increase judges' (and law clerks') sensitivity towards plaintiffs who are not from the same background as them. *See* Weinberg & Nielsen, *supra* note 89, at 350–51.

104. We agree with Professor Selmi that plaintiffs' attorneys must (1) do a better job selecting cases and weeding out frivolous claims prior to filing suit and (2) ensure that they develop and present the factual record in a manner that makes clear to the court what inferences are reasonable, what evidence the inferences can be drawn from, and how those inference create a fact dispute that precludes granting summary judgment in favor of the defendant. Selmi, *supra* note 10, at 573.

105. *See generally* Bennett, *supra* note 83; *see also* Gensler & Rosenthal, *supra* note 12, at 521.

VI. CONCLUSION

In this essay we have attempted to demonstrate that litigating in federal court is not easy for employment discrimination plaintiffs. They face obstacles that other plaintiffs do not—specifically, judicially made hurdles that limit the inferences that can be drawn from the evidence they present and implicit biases of federal judges. This difficult path leads to early failure for most employment discrimination plaintiffs. But that does not have to be the case. We suggest that federal judges should liberally interpret what reasonable inferences can be drawn from the evidence a plaintiff offers in opposition to a defendant's motion for summary judgment. This would limit the efficacy of doctrines such as the same actor inference and stray comment doctrines, even if it may have a smaller impact on implicit biases within the judiciary. Our solution is not radical; but perhaps a mere tweak of the formula is all that is necessary to ameliorate some of the burden placed on employment discrimination plaintiffs at the summary judgment stage.