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## Inferences in Employment Law Compared to Other Areas of the Law: Turning the Rules Upside Down

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DAVID L. LEE AND JENNIFER C. WEISS

## Inferences in Employment Law Compared to Other Areas of the Law: Turning the Rules Upside Down

57 N.Y.L. SCH. L. REV. 781 (2012–2013)

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## INFERENCES IN EMPLOYMENT LAW COMPARED TO OTHER AREAS OF THE LAW

### I. JUDGES AND INFERENCES IN EMPLOYMENT LAWSUITS: A CASE STUDY

The date: December 6, 2011.

The setting: The ceremonial courtroom of the Seventh Circuit, on the twenty-seventh floor of the Dirksen Federal Building, in Chicago, Illinois.

The players: Plaintiff's attorney Alex Caffarelli, name partner of Caffarelli & Siegel Ltd., a plaintiffs' side employment law boutique in Chicago, and at that time, the President of NELA/Illinois, the Illinois affiliate of the National Lawyers Employment Association (NELA).

The Seventh Circuit panel: Judges Richard Posner, Joel Flaum, and Diane Sykes.

The case: *Nicholson v. Pulte Homes*, a Family and Medical Leave Act (FMLA) case brought by Donna Nicholson, an employee with an excellent record whose elderly father had developed leukemia and whose elderly mother had developed chronic kidney disease. Ms. Nicholson took a day off to take her father to the oncologist, and the next day the employer put her on a Performance Improvement Plan. Two months later, Ms. Nicholson's mother needed to be taken to the emergency room. Ms. Nicholson called into work, explained the situation, and said she would miss that day of work. Later that day, the employer fired Ms. Nicholson. Ms. Nicholson sued under the FMLA for alleged interference with her rights under that Act and for alleged retaliation for having fired her for having asserted her rights under that Act.<sup>1</sup> The district court granted summary judgment in favor of the defendant, and plaintiff appealed.<sup>2</sup>

The law on inferences:

[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 . . . . "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." . . . Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."<sup>3</sup>

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1. *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819, 822 (7th Cir. 2012).

2. *Nicholson v. Pulte Homes Corp.*, No. 10-cv-833, 2011 WL 1691999 at \*7–12 (N.D. Ill. 2011); Brief of Plaintiff-Appellant at 14–15, *Nicholson*, 690 F.3d 819 (No. 11-2238).

3. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).

Drawing  
inferences?:

We take up the oral argument as Mr. Caffarelli has gone through the above evidence and presents an additional piece of evidence from which, he argues, the jury could infer the employer's prohibited intent:<sup>4</sup>

Mr. Caffarelli: We also have the testimony of Juan Chiadez, an impartial co-worker—the only impartial witness that we had in this case whose deposition was taken. He specifically asked Maria Wilhelm, the decision-maker, why Donna Nicholson had been terminated after Donna Nicholson's termination, and she told him that, "Well, I can't say, but Donna's dealing with personal family issues that she needs to attend to" so she . . . .

Judge Posner: Well, what would you expect her to say?

Mr. Caffarelli: She could say nothing for example, but if Donna Nicholson's . . . .

Judge Posner: But it's natural to say, yeah "personal reasons." That's more polite than saying, "Well, she was fired for incompetence," or "Not doing her job," right? I wouldn't attach any weight to that.

Mr. Caffarelli: Well, she didn't say "personal reasons" though, Your Honor; she said "family matters" and she did talk about her father being sick. And so I think a reasonable jury can infer that if the decision-maker is talking in the context of why Donna Nicholson was terminated about Donna Nicholson's father being sick . . . .

Judge Posner: That is very unrealistic. The point is you say something, which is designed to be polite to the person who's left, right? It's much nicer to say, "Well, she left, she had to leave because of family, she couldn't hold the job because of family reasons," is a lot nicer than saying, "Well, she's rude to customers and she doesn't work hard enough and so on and we're going down the drain, this company." So, no. And I . . . .

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4. The following excerpt of the oral argument in *Nicholson*, 690 F.3d at 819, was transcribed by the co-authors from the oral argument recording. See Oral Argument at 7:30 to 9:35, *Nicholson*, 690 F.3d 819 (No. 11-2238), available at [www.ca7.uscourts.gov](http://www.ca7.uscourts.gov).

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Mr. Caffarelli: Granted. And she didn't say, "Well, she's rude to customers," but she could have said, "Look, it's for personal reasons we're not . . ."

Judge Posner: That's not how people react. Come on.

Mr. Caffarelli Well, finally . . .

Judge Posner: It's not planning. What if someone asks me why Maria isn't here? What shall be my formula for protecting the company and protecting her feelings and this and that? No, I don't think that's realistic.

Mr. Caffarelli: Well, finally, Your Honor, the last piece of evidence. And again, this is a summary judgment case. If a jury decides that, we're prepared to live with it.

This testimony by a non-party witness was mentioned in the fact section of the opinion as follows:

Sometime later, Nicholson's former sales partner Juan Chaidez asked Wilhelm about Nicholson's termination. Wilhelm told him she could not discuss the reasons for the termination. At some point during this conversation, Wilhelm mentioned that Nicholson had "some personal family matters to attend to." She did not say, however, that Nicholson's parents' medical conditions played any role in the termination decision.<sup>5</sup>

This testimony by a non-party witness did not make it into the opinion's analysis at all.<sup>6</sup>

### II. DO JUDGES PERMIT JURIES IN OTHER AREAS OF THE LAW TO DRAW INFERENCES THAT THEY DO NOT PERMIT JURIES TO DRAW IN EMPLOYMENT CASES?

The laws of inference should be the same in employment cases as they are in other civil cases and even in criminal cases. For example, in *Desert Palace, Inc. v. Costa*,<sup>7</sup> the Supreme Court unanimously and expressly analogized between the adequacy of circumstantial evidence in employment cases and in criminal ones:

[W]e should not depart from the "conventional rule of civil litigation [that] generally applies in Title VII cases." That rule requires a plaintiff to prove his case "by a preponderance of the evidence," using "direct or circumstantial evidence[.]" . . . The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required. And juries are routinely instructed that "[t]he

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5. *Nicholson*, 690 F.3d at 824.

6. *Id.* at 824–29.

7. 539 U.S. 90 (2003).

law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.”<sup>8</sup>

Despite such observations from the Supreme Court, decades of experiences, like Alex Caffarelli’s in the *Nicholson v. Pulte Homes* oral argument, and exposure to decisions from other areas of the law have led plaintiffs’ employment lawyers to believe that the inferences judges would not permit juries to draw in employment cases would be commonplace inferences that judges permit in other areas of the law. And, occasionally, plaintiffs’ employment lawyers let their suspicions leak into print. For example, *Shorter v. ICG Holdings, Inc.* was a race-discrimination firing case in which the defendant won summary judgment.<sup>9</sup> The Tenth Circuit summarized some of the evidence as follows:

Once, while eating lunch with Shorter, Dughman [Shorter’s supervisor] asked Shorter [a black female] about black men’s sex organs. On another occasion, Dughman told another ICG employee that Shorter talked like people of her culture, race, or color. During a confrontation with Shorter about Shorter’s job performance, Dughman told her, “You are just on the defensive because you are black. . . .” One or two days after firing Shorter, Dughman, apparently in a fit of anger at not being able to locate an important document in Shorter’s office, referred to Shorter as an “incompetent nigger.”<sup>10</sup>

The Tenth Circuit discounted this evidence in affirming summary judgment because, “[a]lthough some of the remarks were directed at Shorter, there is nothing in the statements that link them to Dughman’s decision to terminate her. . . . The fact that Dughman was Shorter’s supervisor does not automatically establish the requisite nexus.”<sup>11</sup>

Richard T. Seymour, an eminent plaintiffs’ attorney, commented as follows on the Tenth Circuit’s discounting of that evidence:

There are none so blind as those who refuse to see. . . . Decisions like *Shorter*, which presume that proven bigots always act nondiscriminatorily unless they either link their bigoted statements at the time to specific future job actions they intend to take against their victims, or announce their bigotry while their feet are figuratively planted on the chests of their victims, violate . . . elementary common sense. . . . *Nor do such decisions recognize the stark divide they create between civil rights cases and the rest of the law.* In a criminal prosecution for murder, for example, the majority here would doubtless find it bizarre if a lower court granted a defense motion *in limine* barring from evidence repeated statements of the defendant a short time before the murder, to the effect that he hated the decedent and lay awake nights thinking of painful things to do to him, simply because the defendant did not at the time say that he would therefore murder the deceased, or did not repeat these

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8. *Id.* at 99–100 (citations omitted).

9. 188 F.3d 1204 (10th Cir. 1999), *overruled in part by* *Fye v. Okla. Corp. Comm’n*, 516 F.3d 1217 (10th Cir. 2008).

10. *Shorter*, 188 F.3d at 1206.

11. *Id.* at 1210.

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statements at the very moment of the murder . . . . A jury should have had the opportunity to evaluate all the evidence.<sup>12</sup>

Thomas A. Newkirk of Des Moines, Iowa, another eminent plaintiffs' attorney, explicitly compared the types of inferences that judges permit juries to draw in criminal cases to how judges cabin juries in employment cases:<sup>13</sup>

What is it about purchasing an insurance policy for example that would provide a basis to assign motive to kill to that simple act? The fact at issue is purchasing the insurance coverage, or being jealous of your wife's affair, but the *requested inference* is resulting motive to kill. A court will assign *motive for murder* from the very innocent and common event of purchasing an insurance policy on the deceased. The Court simply trusts a jury to wend its way through actions that are on their face legitimate or actions that are entirely within the right of a person to choose to engage in or not engage in and to place weight on those actions where appropriate. The Court is not going to second guess the jury on whether they felt that "purchasing an insurance policy on your wife over one million dollars is a *good* idea." In short, there is no logical reason to allow an employer more freedom from scrutiny than a Court would give a criminal defendant.<sup>14</sup>

### III. BARRIERS TO DRAWING INFERENCES IN EMPLOYMENT CASES

#### A. *Anti-Inference Doctrines*

One barrier to drawing inferences in employment cases is the continual and continuous proliferation in employment law of "anti-inference" doctrines that do not exist in other areas of the law. For example, in 2010, the National Employment Lawyers Association surveyed its membership and ranked the following doctrines, among others, that hinder the drawing of inferences on summary judgment in employment cases:

1. Testimony is characterized as "undisputed" even if it espoused only by employer witnesses.
2. Potentially damning evidence is discounted as a "stray remark."
3. Comparator must be virtually identical to the plaintiff.
4. "Severe or pervasive" is treated as a matter of law, not as a matter of fact.

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12. Richard T. Seymour, *Appellate Cases from March 1, 1999 through March 1, 2001*, in RICHARD T. SEYMOUR & JOHN ASLIN, *EQUAL EMPLOYMENT LAW UPDATE* 17-672 (2003) (emphasis added).

13. Thomas A. Newkirk, *Modern Discrimination Cases—Identifying the Problem and . . . Finding the Solution*, in 2 NAT'L EMP'T LAWYERS ASS'N ANN. CONVENTION 1340, 1346-47 (2006).

14. *Id.*

5. Suspicious timing does not give rise to an inference of discrimination nor to an inference of retaliation.
6. Alleged “business judgment” is deferred to—courts are not “super-personnel departments.”
7. Plaintiff’s testimony is disregarded as irrelevant or “self-serving.”
8. Employer’s statement that it would have made the same decision even without discrimination or retaliation is treated as dispositive.
9. Employer’s belief was wrong, foolish, etc., but was “honest.”<sup>15</sup>

Let us examine in detail just one of these anti-inference doctrines, the last one listed above: “honest belief.” Many courts follow this “honest belief” doctrine and require employees to disprove an employer’s alleged “honest belief” to survive an employer’s motion for summary judgment.<sup>16</sup> Perhaps the paradigm “honest belief”

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15. See Nat’l Emp’t Lawyers Ass’n, *Survey of Problem Doctrines* (2010) (on file at the National Employment Lawyers Association and used with the permission of the National Employment Lawyers Association). The ranking of the problem doctrines varied depending on various metrics used. Other problem doctrines receiving votes included same-actor inference (a pro-movant inference in the typical employment-case motion for summary judgment), equating “pretext” with “a lie,” “must bowl a strike” (i.e., employee must disprove each and every employer-alleged legitimate reason in a long litany of reasons), narrow definition of “direct evidence,” excluding “me, too” evidence, “cat’s paw” as a defense rather than as a doctrine that can expand liability as per the Supreme Court’s decision in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011). See *infra* notes 53–63 and accompanying text.

16. See, e.g., *Woodruff v. Peters*, 482 F.3d 521, 531 (D.C. Cir. 2007) (“[W]e review not ‘the correctness or desirability’ of the reasons offered but whether the employer honestly believes in the reasons it offers.”) (quoting *Fischbacj v. D.C. Dep’t of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996)); *Piercy v. Maketa*, 480 F.3d 1192, 1200–01 (10th Cir. 2007) (stating that the relevant issue is the employer’s good faith beliefs regarding the employee’s performance, not what the employee believes about his own performance) (citations omitted); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (“[I]n judging whether . . . proffered justifications were ‘false,’ it is not important whether they were *objectively* false . . . [r]ather, courts ‘only require that an employer honestly believed its reasons for its actions . . . .’”) (quoting *Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 733 (7th Cir. 2001)); *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1005–06 (7th Cir. 2001) (“[E]ven if [the employer’s] reasons . . . were ‘mistaken, ill considered or foolish,’ so long as [the employer] honestly believed those reasons, pretext has not been shown.”) (citation omitted); *Crim v. Bd. of Educ.*, 147 F.3d 535, 541 (7th Cir. 1998) (even if the reasons were mistaken, ill-considered, or foolish, as long as the employer honestly believed in those reasons then pretext has not been proven); *Wolf v. Buss (Am.), Inc.*, 77 F.3d 914, 919 (7th Cir. 1996) (stating that an employer acting incorrectly does not demonstrate pretext; the employee must show that the employer did not honestly believe in the reason for the termination) (citation omitted); *Walker v. Reith-Riley Constr. Co.*, No. 2:03-CV-507 PS, 2006 U.S. Dist. LEXIS 9608, at \*14 (N.D. Ind. 2006) (“A reason might be ‘mistaken, ill considered or foolish,’ but as so long as it reflects the honest belief of the employer, it is legitimate.”); *Bacchus v. Tubular Textile LLC*, No. 1:01CV00621, 2003 U.S. Dist. LEXIS 7308, at \*18 (M.D.N.C. Mar. 19, 2003) (stating that employer’s decision need not be “objectively correct in all its particulars”; the decision only needs to be “made in good faith and without discriminatory animus”); *Bituin v. Supervalu Holdings, Inc.*, 274 F. Supp. 2d 977 (N.D. Ill. 2003) (“In other words, there is no Title VII [of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.] violation ‘if [an employer] honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.’”) (citing *Jackson v. E.J. Branch Corp.*, 176 F.3d 971, 984 (7th Cir. 1999));

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case is *Kariotis v. Navistar International Transportation Corp.*<sup>17</sup> Ms. Kariotis, who was fifty-seven years old at the time, underwent knee-replacement surgery and, after the surgery, took longer to return to work than the ten weeks her physician had anticipated.<sup>18</sup> While Ms. Kariotis was off from work recovering from her knee-replacement surgery, she received extended disability benefits. The company claimed to have been suspicious of Ms. Kariotis's extended leave because, two years earlier, Ms. Kariotis had been accused of unethical conduct and because her disability was allegedly "inconsistent with observations made by some [] employees."<sup>19</sup> The human resources manager and his boss claimed that they had decided to investigate Ms. Kariotis based on those suspicions.<sup>20</sup> Rather than approaching Ms. Kariotis or her doctor, however, they hired investigators who put Ms. Kariotis under surveillance and videotaped her while she was off duty.<sup>21</sup> The investigators, who were not medical experts, reported that Ms. Kariotis did not appear physically impaired and had engaged in "walking, driving, sitting, bending, and shopping (pushing a grocery cart)."<sup>22</sup> Rejecting suggestions from other managers as to how to handle the situation (such as asking Ms. Kariotis's physician about the activities depicted in the videotape), the human resources manager met with Ms. Kariotis and handed her a letter stating that Ms. Kariotis was being fired because she had dishonestly claimed disability benefits and had been absent from work for five days without a good reason.<sup>23</sup> The company gave Ms. Kariotis two weeks to seek reinstatement in writing.<sup>24</sup> In response, Ms. Kariotis provided, among other things, a letter from her physician stating that, given Ms. Kariotis's physical condition, the company's charges of disability fraud were "preposterous."<sup>25</sup> Nevertheless, the company informed Ms. Kariotis that the decision

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*Winding v. Pier Mgmt. Serv.*, No. 96 C 7461, 1998 U.S. Dist. LEXIS 13770, at \*11–12 (N.D. Ill. 1998) ("Title VII [of the Civil Rights Act of 1964] does not vest a federal court with the authority to 'sit as a super-personnel department that reexamines an entity's business decisions.' 'The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers. Therefore [a former employee] must lose if the company honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless."); *Ragland v. Rock-Tenn Co.*, 955 F. Supp. 1009 (N.D. Ill. 1997) ("However, unlike *Wohl*, [plaintiff] has produced no affirmative, objective evidence to refute the defendants' honest belief in the reasons for her termination."); see also Noam Glick, *Towards an "Honest Belief Plus" Standard in California Employment Discrimination Cases*, 39 LOY. L.A. L. REV. 1369 (2006); Rebecca Michaels, *Legitimate Reasons for Firing: Must They Honestly Be Reasonable?*, 71 FORDHAM L. REV. 2643, 2658 n.101 (2003) (listing cases).

17. 131 F.3d 672 (7th Cir. 1997).

18. *Id.* at 674–75.

19. *Id.* at 674.

20. *Id.* at 675.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

to terminate her employment was final. Eventually, the company replaced the fifty-seven-year-old Ms. Kariotis with a thirty-two-year-old.<sup>26</sup>

Ms. Kariotis sued under many statutes, including the Americans with Disabilities Act of 1990 (ADA), the Age Discrimination in Employment Act of 1967 (ADEA), the Employee Retirement Income Security Act of 1974 (ERISA), the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), the FMLA, and the Illinois Health Insurance Claim Filing Act.<sup>27</sup> The company moved for summary judgment, contending that, while it may have erred in believing that Ms. Kariotis's receipt of disability benefits after her knee replacement surgery had been fraudulent, its belief was honest.<sup>28</sup> The district court granted summary judgment for the company on all counts.<sup>29</sup>

On appeal, the company conceded that the plaintiff had established a prima facie case of discrimination.<sup>30</sup> Hence, the Seventh Circuit viewed the only issue as being whether Ms. Kariotis "successfully called into question [the company]'s reasons for firing her."<sup>31</sup> The Seventh Circuit said that Ms. Kariotis could not meet her burden by simply criticizing the company's evaluation process or its judgment regarding her job performance.<sup>32</sup> Instead, Ms. Kariotis had to adduce evidence showing that the company's alleged reasons for its decision were false, "thereby implying (if not actually showing) that the real reason [was] illegal discrimination."<sup>33</sup> The key issue was "not whether the employer's reasons for a decision [were] 'right but whether the employer's description of its reasons [was] honest."<sup>34</sup>

The Seventh Circuit acknowledged that the company neither discussed the matter with Ms. Kariotis's physician—even though one of its own managers had suggested that course of action—nor showed the videotape to the company doctor.<sup>35</sup> The Seventh Circuit acknowledged that the company's investigation could be considered "imprudent, ill-informed, and inaccurate," that the investigation "hardly look[ed] world class," and that there were "better ways" to investigate Ms. Kariotis than to put her under surveillance and secretly videotape her.<sup>36</sup> Nonetheless, the Seventh Circuit reasoned that federal law did not "require[] just cause for discharges" and that a "poorly founded" but an "honestly described" reason for discharge was not

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26. *Id.*

27. *Id.*

28. *Id.* at 674.

29. *Id.*

30. *Id.* at 676.

31. *Id.*

32. *Id.* at 677.

33. *Id.*

34. *Id.* (italics omitted) (quoting *Gustovich v. AT&T Commc'ns, Inc.*, 927 F.2d 845, 848 (7th Cir. 1992)).

35. *Id.*

36. *Id.*

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an illegal pretext for discrimination.<sup>37</sup> According to the Seventh Circuit, Ms. Kariotis had not provided any evidence that the company investigated other (younger or non-disabled) employees in a different manner.<sup>38</sup> The Seventh Circuit saw no evidence that the company had made the termination decision because of Ms. Kariotis's age or because Ms. Kariotis had physical problems that could have financially burdened the company.<sup>39</sup> The Seventh Circuit, therefore, affirmed the district court's grant of summary judgment for the company.<sup>40</sup>

As noted, the Seventh Circuit framed the issue in *Kariotis* as “not whether the employer's reasons for a decision [were] ‘right but whether the employer's description of its reasons [was] honest.’”<sup>41</sup> Implicit in the Seventh Circuit's affirmance of summary judgment was that a reasonable jury would have had to accept that the company “honestly believed” its “imprudent, ill-informed and inaccurate” investigation. Notably lacking from the Seventh Circuit's analysis was whether a jury, as a matter of law, would have had to accept the company's own testimony as to the company's own motives. Equally lacking from the Seventh Circuit analysis was whether the company's having conducted such an “imprudent, ill-informed and inaccurate” investigation could in itself be evidence of the company's illegal motive, on the theory that the company conducted such an obviously shoddy investigation because it was not looking for the truth but, rather, because it was looking to fire Ms. Kariotis. Such an inference would be reasonable: the theory that the company conducted an obviously shoddy investigation because it was not looking for the truth but, rather, because it was looking to fire Ms. Kariotis, would explain why the company rejected internal advice that it talk to Ms. Kariotis's physician; it would also explain why the company refused to rescind the firing even after Ms. Kariotis's physician wrote the company saying that its charges of disability fraud were “preposterous.”

Over fifteen years before *Kariotis*, the Supreme Court had noted that “[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, *although this may be probative of whether the employer's reasons are pretexts for discrimination.*”<sup>42</sup> If “misjudging qualifications” is “probative of whether the employer's reasons are pretexts,” why would not conducting an “imprudent, ill-informed, and inaccurate” investigation be similarly probative evidence of pretext? Finally, surveillance has been held to be evidence of a search for a pretext to fire.<sup>43</sup> In short, in *Kariotis*, a reasonable jury

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37. *Id.*

38. *Id.*

39. *See id.* at 676, 678.

40. *Id.* at 674. The Seventh Circuit reversed summary judgment on the COBRA claim because that claim did not require proof of the company's intent. *Id.* at 681.

41. *Id.* at 674 (emphasis omitted) (quoting *Gustovich v. AT&T Commc'ns Inc.*, 972 F.2d 845, 848 (7th Cir. 1992)).

42. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (emphasis added).

43. “[S]urveillance ‘strongly suggests the possibility of a search for a pretextual basis for discipline, which in turn suggests that subsequent discipline was for purposes of retaliation.’” *Hairston v. Gainesville Sun*

would have had a choice between deciding whether the company had been “imprudent, ill-informed, and inaccurate” or whether the company had been evil. The Seventh Circuit, without any analysis why “evil” was not a valid choice based on the evidence and the reasonable inferences from that evidence, firmly—but non-analytically—put its judicial thumb on the scales on the side of “imprudent, ill-informed, and inaccurate” and thereby deprived Ms. Kariotis of her day in court.

*B. “Inference Blindness”<sup>44</sup>*

Cases like *Kariotis* with their doctrines like “honest belief” are clear barriers to drawing inferences in employment cases. But just as often the federal courts decide cases that do not explicitly rely on any such anti-inference doctrine. Rather, what seems to be involved in these cases is “inference blindness” on the part of the judges: a simple refusal to see what is plainly there or to permit a jury to draw an inference that is waiting there to be drawn. As Richard Seymour stated in discussing *Shorter*,<sup>45</sup> “[t]here are none so blind as those who refuse to see.”<sup>46</sup> These cases often result in federal appellate judges saying astonishing things about what inferences cannot be drawn or—even more contrary to the law of summary judgment—what inference must be drawn in favor of the movant-employer. For example, here are five cases from the home circuit of the co-authors of this article (the Seventh Circuit):

1. *Nagle v. Village of Calumet Park*<sup>47</sup>

*Nagle* was a discrimination and retaliation case. The plaintiff was a police officer, and part of plaintiff’s retaliation case was that shortly after he had filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC), the police chief took an adverse action against him. In upholding summary judgment for the employer, the Seventh Circuit stated:

The EEOC charge was mailed to the department on January 27, 2005, and the correspondence indicated that it should be given to “Chief David” rather than Chief Davis. Additionally, the envelope was addressed to “Personnel Manager, Human Resources Department, Village of Calumet Park.” The district court surmised from this evidence that *no jury could reasonably conclude*

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Publ’g Co., 9 F.3d 913, 921 (11th Cir. 1993) (quoting BARBARA LINDERMANN SCHLEI & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 554 (2d ed. 1983 & Supp. 1987)).

44. As far as the authors of this paper know, Tom Newkirk coined the term “inference blindness” in his paper at the 2006 NELA annual convention. *See supra* note 13.

45. *See supra* notes 12–14 and accompanying text. In this, the firing supervisor had asked Shorter [a black female] about black men’s sex organs and had told Shorter, “You are just on the defensive because you are black,” and, one or two days after firing Shorter, referred to her as an “incompetent nigger.” *See supra* note 10 and accompanying text.

46. *See Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1206 (10th Cir. 1999).

47. 554 F.3d 1106 (7th Cir. 2009).

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that Chief Davis was aware of the EEOC charge at the time of the February 2005 suspension. *We agree*.<sup>48</sup>

Another part of Nagle's case was that he had been retaliated against by being assigned to less favorable duties. The Seventh Circuit analyzed as follows the evidence for that claim:

While one can imagine situations in which reassignment to less desirable details or positions would dissuade a reasonable worker from making a charge of discrimination, here the senior liaison position was posted for other officers to apply, and after no one applied, Nagle was assigned to the position. *This fact arguably cuts both ways*: the senior liaison position had to be filled by someone and an employer is entitled to fill the position. In the alternative, an employer is not entitled to be punitive in his assignments—he cannot assign an employee to a less favored position because that employee has exercised his statutory rights.<sup>49</sup>

Despite observing that “[t]his fact arguably cuts both ways,” the Seventh Circuit affirmed summary judgment for the employer.<sup>50</sup>

### 2. Staub v. Proctor Hospital<sup>51</sup>

*Staub* was a case under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) in which the employee, an Army reservist who had been fired, won a jury trial against his former employer.<sup>52</sup> The evidence showed that the second-in-command of the hospital department for which the employee worked had “called military duties ‘bullshit’” and said she had assigned the employee extra shifts as a “way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.”<sup>53</sup> The head of the hospital department for which the employee worked had “characterized drill weekends as ‘Army Reserve bullshit’ and ‘a b[u]nch of smoking and joking and [a] waste of taxpayers['] money.’”<sup>54</sup>

Upon the employee's return from a tour of duty in 2003, the head of the department said that the second-in-command of the department was “out to get” the employee, and the second-in-command of the department told one of the employee's co-workers that the employee's “military duty had been a strain on the [] department”

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48. *Id.* at 1122 (emphasis added).

49. *Id.* at 1120 (emphasis added).

50. *Id.*

51. 560 F.3d 647 (7th Cir. 2009), *rev'd*, 131 S. Ct. 1186 (2011).

52. *See generally id.*

53. *Id.* at 652.

54. *Id.*

and that “she did not like him as an employee,” whereupon the second-in-command asked the co-worker “to help her get rid of [the employee].”<sup>55</sup>

In January 2004, the employee received another order to report for active duty and deployment.<sup>56</sup> In response, the second-in-command of the hospital department called the employee’s commanding officer and asked if the employee could be excused from some of his military duties.<sup>57</sup> Summing up this evidence, the Seventh Circuit stated, “After all this, there can be little dispute that [the second-in-command of the department] didn’t like [the employee] and that part of this animus flowed from [the employee’s] membership in the military.”<sup>58</sup>

Despite this evidence and despite concluding that the jury had been properly instructed,<sup>59</sup> the Seventh Circuit reversed the jury verdict in favor of the employee<sup>60</sup> and ordered that judgment be entered for the hospital, because “[t]he story told by the evidence is really quite plain”:

Apart from the friction caused by his military service, the evidence suggests that [the employee], although technically competent, was prone to attitude problems . . . . So, when [the employee] ran into trouble in the winter and spring of 2004, he didn’t have the safety net of a good reputation. Even if [the employee] behaved reasonably on the day of his discharge and the January 27 write-up was exaggerated by [the second-in-command of the department], his track record nonetheless supported [the alleged decisionmaker]’s action. . . . We admit that [the alleged decisionmaker]’s investigation could have been more robust, *e.g.*, she failed to pursue [the employee]’s theory that [the second-in-command of the department] fabricated the write-up; had [the alleged decisionmaker] done this, she may have discovered that [the second-in-command of the department] indeed bore a great deal of anti-military animus . . . . Viewing the evidence reasonably, it simply cannot be said that [the alleged decisionmaker] did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that [the employee] was not a team player. We do not mean to suggest by all this that we agree with [the alleged decisionmaker]’s decision—it seems a bit harsh given [the employee]’s upsides and tenure—but that is not the issue. The question for us is whether a reasonable jury could have concluded that [the employee] was fired because he was a member of the military. To that question, the answer is no.<sup>61</sup>

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55. *Id.*

56. *Id.*

57. *Id.* at 653.

58. *Id.*

59. *Id.* at 657.

60. *Id.* at 659. The legal standard for reversing a jury verdict, that a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, is the same as the legal standard for granting summary judgment. *See* FED. R. CIV. P. 50(a); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149–50 (2000).

61. *Staub*, 560 F.3d at 659.

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### 3. *Hemsworth v. Quotesmith.com, Inc.*<sup>62</sup>

*Hemsworth* was an age-discrimination case in which one of the plaintiff's pieces of evidence was that defendant's human resources (HR) director, who had been given a list containing the ages of the employees being laid off in a reduction-in-force (RIF) action, told defendant's general counsel that the RIF's eliminating a large percentage of the employees over age forty "was a problem."<sup>63</sup> The Seventh Circuit noted this conversation in its recitation of the facts<sup>64</sup> and stated that "all justifiable inferences must be drawn in the nonmovant's favor,"<sup>65</sup> but later in the opinion analyzed as follows the significance of this conversation:

[T]he comment by the Quotesmith employee about laying off a large number of employees over forty years old was not made by a Quotesmith decision maker (*and also demonstrates that Quotesmith was aware of its legal obligation under the ADEA*) . . . .<sup>66</sup>

Thus, despite the defendant's HR director having opined that the RIF having eliminated a large percentage of employees over age forty "was a problem," the Seventh Circuit affirmed summary judgment.

### 4. *Townsend-Taylor v. Ameritech Services, Inc.*<sup>67</sup>

*Townsend-Taylor* was an FMLA case in which the defendant employer had fired the plaintiff because the employer allegedly did not receive the FMLA certification forms for the illness of the plaintiff's child in a timely manner.<sup>68</sup> The pediatrician testified that he had "filled out FMLA papers for this occurrence on at least 3 separate occasions and either faxed them to the [employer's] office or gave them directly to the parents."<sup>69</sup> In stating the facts, the Seventh Circuit noted:

Although the doctor said not that he had faxed the form but that he had either faxed it or given it to Mr. Taylor, it is hardly likely that he handed the same form to the parents three times. So why was a copy of the completed form never found in FPU's [the third-party FMLA administrator] files? And did the doctor really fax the same form three times? Why would he do that? Was his fax machine broken? Was the fax line at FPU continuously busy? No explanation is suggested for the miscommunication. It is a great mystery; but Taylor does not contend that he complied with Ameritech's procedures for applying for FMLA leave within the 15-day period. For he gave the doctor

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62. 476 F.3d 487 (7th Cir. 2007).

63. *Id.* at 489.

64. *Id.*

65. *Id.* at 490.

66. *Id.* at 491 (emphasis added).

67. 523 F.3d 815 (7th Cir. 2008).

68. *Id.* at 815.

69. *Id.* at 816-17.

the wrong form, and the doctor's "three faxes" letter did not explain or justify the delay.<sup>70</sup>

Thus, despite observing that the facts were "a great mystery," the Seventh Circuit affirmed summary judgment.

##### 5. *Coolidge v. Consolidated City of Indianapolis*<sup>71</sup>

*Coolidge* was a sexual-harassment and retaliation case in which the plaintiff, a crime-lab employee, had won a prior sexual-harassment case against her employer.<sup>72</sup> After that prior trial victory, plaintiff continued to work at the crime lab, where one of her job duties was cataloging materials as possible evidence.<sup>73</sup> Among the materials left for her to catalog was a videotape that "depicted necrophilia as well as other violent and disturbing images."<sup>74</sup> Plaintiff started viewing the video, became nauseous, turned the video off, and reported what she had seen.<sup>75</sup> In a subsequent lawsuit, plaintiff alleged that this videotape had been deliberately left for her to catalog as retaliation and as further sexual harassment. In upholding summary judgment for the employer, the Seventh Circuit stated that "Crime Lab employees frequently worked with corpses, so pornography depicting necrophilia might not have the same shocking overtones there as it would in another setting."<sup>76</sup>

Now, let's review this: in *Nagle*, the court held, as a matter of law, that a jury could not infer that an addressee had received an official government notice from the EEOC when the address contained a minor typo in the last letter of the recipient's last name.<sup>77</sup> The court in *Nagle* also affirmed summary judgment despite observing that "[t]his fact arguably cuts both ways."<sup>78</sup> In *Staub*, the court overturned the jury's verdict, even though the jury was properly instructed on how to weigh the evidence of anti-military bias against the self-serving statements of the defendant, and how much of the biased subordinates' information was taken into account in the decision to fire the plaintiff.<sup>79</sup> In *Hemsworth*, the company's general counsel gave the company's HR director a list of the ages of the employees the company was laying off in its RIF, the HR director reported back that there was "a problem," and the company ignored it—apparently showing (as a matter of law) that the company "was

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70. *Id.* at 817 (citation omitted).

71. 505 F.3d 731 (7th Cir. 2007).

72. *Id.* at 732–33.

73. *Id.* at 733.

74. *Id.*

75. *Id.*

76. *Id.* at 734 (citation omitted).

77. *Nagle v. Village of Calumet Park*, 554 F.3d 1106, 1122 (7th Cir. 2009).

78. *Id.* at 1120.

79. *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009).

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aware of its legal obligation under the ADEA.”<sup>80</sup> In *Townsend-Taylor*, the doctor’s testimony that he had faxed the FMLA form three times did not create an issue of fact.<sup>81</sup> Why? Because there were questions (such as, “was the fax line at FPU continuously busy?”) that posed “a great mystery.”<sup>82</sup> So, of course, if the facts are a “mystery,” then summary judgment is affirmed. In *Coolidge*, the plaintiff had to catalog a videotape that “depicted necrophilia as well as other violent and disturbing images” and, upon viewing it, became nauseous.<sup>83</sup> According to the court, this established nothing because—also apparently as a matter of law—“Crime Lab employees frequently worked with corpses.”<sup>84</sup>

These cases do not reflect examples of poor argumentation or legal representation for the plaintiff(s) in each matter, for these cases were argued by well-respected, seasoned plaintiffs’ attorneys. These cases, however, do reflect what is unfortunately all too typical: judges apparently being blind to reasonable inferences and deciding that various pieces of evidence simply are not evidence of knowledge or intent.

### C. Hypothetical Reasons

A similar problem to inference blindness is the hypothetical reasons that some judges may dream up to excuse the employer’s actions. Unfortunately, there is an entire jurisprudence devoted to hypothetical reasons as a defense.<sup>85</sup> As the Seventh Circuit explained this “hypothetical-reason” jurisprudence:

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80. *See* *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007).

81. *See* *Townsend-Taylor v. Ameritech Servs.*, 523 F.3d 815, 817–18 (7th Cir. 2008).

82. *Id.* at 817.

83. *Coolidge v. Consolidated City of Indianapolis*, 505 F.3d 731, 733 (7th Cir. 2007).

84. *Id.* at 734.

85. This “hypothetical reason” jurisprudence is well established in the Seventh Circuit. *See, e.g.*, *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) (“Showing that the employer dissembled is not necessarily the same as showing ‘pretext for discrimination’ . . . [I]t may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement.”); *Benzies v. Ill. Dep’t of Mental Health*, 810 F.2d 146, 148 (7th Cir. 1987) (“The judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer’s explanation accounts for the decision . . . . A public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that ‘we were just following the rules.’ The trier of fact may find, however, that some less seemly reason—personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules—actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute.”). Other circuits have also discussed hypothetical reasons as a defense. *See, e.g.*, *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 69 (1st Cir. 2002) (affirming summary judgment against plaintiff who was terminated as part of a RIF while on maternity leave and rejecting the timing of plaintiff’s firing as showing pretext on the hypothetical ground that defendant “might easily have wished to avoid the awkward situation of informing [the subordinate who was retained] of the decision to lay [plaintiff] off before [plaintiff] herself found out”); *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1337–38 (2d Cir. 1997) (en banc); *Foster v. Dalton*, 71 F.3d 52 (1st Cir. 1995) (affirming judgment for the defendant, whose articulated reason that the best-qualified applicant had been selected was rejected as false, and the real reason was found to be hypothetical cronyism); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 264 n.3

The defendant's failure to persuade the jury that its proffered reason was its real reason . . . does not compel [an inference of discrimination]. The true reason for the action of which the plaintiff is complaining might be something embarrassing to the employer, such as nepotism, personal friendship, the plaintiff's being a perceived threat to his superior, a mistaken evaluation, the plaintiff's being a whistle-blower, the employer's antipathy to irrelevant but not statutorily protected personal characteristics, a superior officer's desire to shift blame to a hapless subordinate—conceivably a factor here—or even an invidious factor but not one outlawed by the statute under which the plaintiff is suing; or the true reason might be unknown to the employer; or there might be no reason.<sup>86</sup>

*D. Requiring the Jury to Believe Those Whom It Could Find to Be Interested or Lying*

One problem that seems to escape judges who create hypothetical reasons on which to grant summary judgment, or who create hypothetical excuses to explain away potentially incriminating evidence, is that the judge's creation of such hypothetical reasons and excuses typically turns the defendant's witnesses into liars. Take, for example, the excerpt from the *Nicholson v. Pulte Homes* oral argument.<sup>87</sup> Judge Posner's willingness to turn the decisionmaker's response that Donna Nicholson had been "dealing with personal family issues" into "something which is designed to be polite to the person who's left"<sup>88</sup> made the decisionmaker a liar. She may have been telling a small lie, not a large lie, but the type of lying a crucial witness engages in is typically an issue for the jury.

Plaintiffs' employment lawyers have long been dismayed at the courts' protection in employment cases of company witnesses whom a reasonable jury could find to have lied. As Richard Seymour said in commenting on the Second Circuit's decision in *Schnabel v. Abramson*,<sup>89</sup>

the court adhered to its longstanding but incomprehensible view that liars should be protected by finding that a jury would be entitled to believe that [defendant] lied with respect to the reasons for plaintiff's termination while simultaneously making the implicit determination that a reasonable jury would still be *required* to believe the same persons as to the plaintiff's . . . comparative performance.<sup>90</sup>

In addition, grants of summary judgment in employment cases typically ignore the jury's right to weigh the credibility issues presented by the interests the company's witnesses have in the outcome of the case: financial interests (the witness's income

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(1st Cir. 1994) (discussing a hypothetical case in which employer claimed to have fired employee for lack of skills but that alleged reason was a lie to cover up employer's own embezzlement).

86. *Wallace*, 103 F.3d at 1399.

87. *See supra* note 4 and accompanying text.

88. *Id.*

89. 232 F.3d 83 (2d Cir. 2000).

90. RICHARD T. SEYMOUR, EQUAL EMPLOYMENT LAW UPDATE 14–428 (Spring 2005) (emphasis added).

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typically depends on being paid by the company), reputational interests (the witness is often personally accused of discriminating or retaliating), occupational interests (things might not go well for the witness's career if he or she is found to have testified contrary to the company), etc. Crediting on summary judgment the testimony of witnesses with such interests is contrary to the black letter law that, on summary judgment, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe."<sup>91</sup> Juries are routinely instructed that they can disregard the testimony of interested witnesses.<sup>92</sup> Finally, at trial "[t]here is no presumption that witnesses are truthful."<sup>93</sup> But, at summary judgment, the courts assume that the employer's witnesses are truthful absent specific evidence to the

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

92. *See, e.g.*, JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CIVIL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 3.03 EXPLANATORY: CREDIBILITY OF WITNESSES (2013), *available at* [http://www.juryinstructions.ca8.uscourts.gov/civil\\_manual\\_2013.pdf](http://www.juryinstructions.ca8.uscourts.gov/civil_manual_2013.pdf); JUDICIAL COMM. ON MODEL JURY INSTRUCTIONS FOR THE EIGHTH CIRCUIT, MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT §§ 1.05, 3.04 CREDIBILITY OF WITNESSES (2013), *available at* [http://www.juryinstructions.ca8.uscourts.gov/crim\\_packet\\_2013.pdf](http://www.juryinstructions.ca8.uscourts.gov/crim_packet_2013.pdf); COMM. ON MODEL CIVIL JURY INSTRUCTIONS WITHIN THE THIRD CIRCUIT, GENERAL INSTRUCTIONS FOR CIVIL CASES § 1.7 PRELIMINARY INSTRUCTIONS—CREDIBILITY OF WITNESSES (2012), *available at* [http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/december2012/1\\_Chaps\\_1\\_2\\_3\\_2012\\_December.pdf](http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/december2012/1_Chaps_1_2_3_2012_December.pdf); THE COMM. ON FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 3.01 CREDIBILITY OF WITNESSES (2012), *available at* [http://www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/7th\\_criminal\\_jury\\_instr.pdf](http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf); COMM. ON PATTERN CRIMINAL JURY INSTRUCTIONS DISTRICT JUDGES ASSOCIATION SIXTH CIRCUIT, PATTERN CRIMINAL JURY INSTRUCTIONS § 1.07 CREDIBILITY OF WITNESSES (2011), *available at* [http://www.ca6.uscourts.gov/internet/crim\\_jury\\_insts/pdf/crmpattjur\\_full.pdf](http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/crmpattjur_full.pdf); CRIMINAL PATTERN JURY INSTRUCTION COMM. OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, CRIMINAL PATTERN JURY INSTRUCTIONS § 1.08 CREDIBILITY OF WITNESSES (2011), *available at* <http://www.ca10.uscourts.gov/downloads/pj110-cir-crim.pdf>; JURY INSTRUCTIONS COMM., NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 1.7 CREDIBILITY OF WITNESSES (2010), *available at* <http://www3.ce9.uscourts.gov/web/sdocuments.nsf/ddfcae883f401d45882576f100661bbb/100f496e7c553bf4882576f10068383e?OpenDocument>; COMM. ON PATTERN JURY INSTRUCTIONS OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT, ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL CASES) § 5 CREDIBILITY OF WITNESSES (2010), *available at* <http://www.ca11.uscourts.gov/documents/jury/CriminalJury2010.pdf>; THE COMM. ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 1.13 TESTIMONY OF WITNESSES (DECIDING WHAT TO BELIEVE) (2009), *available at* [www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/7th\\_civ\\_instruc\\_2009.pdf](http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf); JURY INSTRUCTIONS COMM., NINTH CIRCUIT MODEL CIVIL JURY INSTRUCTIONS § 1.11 CREDIBILITY OF WITNESSES (2007), *available at* <http://www3.ce9.uscourts.gov/web/sdocuments.nsf/18d8322df5fb351c8825728200016dd0/73349ddc1068085c88257289007b179c?OpenDocument>; COMM. ON PATTERN JURY INSTRUCTIONS OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT, ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CIVIL CASES) § 3 CREDIBILITY OF WITNESSES (2005), *available at* <http://www.ca11.uscourts.gov/documents/pdfs/civjury.pdf>.

93. *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) ("Sealy's contention that 'the jury cannot be permitted to simply choose to disbelieve the evidence offered by Sealy' is a misleading half-truth. It is true that a plaintiff cannot prevail without offering any evidence of his own, simply by parading the defendant's witnesses before the jury and asking it to disbelieve them. That would be 'a no-evidence case, and [in] such a case a plaintiff must lose, because he has the burden of proof.' But if the plaintiff offers evidence of her own, as she did here, the jury is free to disbelieve the defendant's contrary evidence. There is no presumption that witnesses are truthful.") (citations omitted).

contrary, which, contrary to the black-letter law of summary judgment, puts the movant in a more advantageous evidentiary posture at summary judgment than it would be at trial.

#### IV. THE HIDDEN ASSUMPTION OF EMPLOYER GOOD FAITH—PLAYING “WHAC-A-MOLE”<sup>94</sup>

Employee advocates debate the importance of the various “problem doctrines”:<sup>95</sup> Are those problem doctrines a cause of the current summary-judgment crisis in employment cases or are they a symptom of a deeper problem? In the authors’ view, the type of basic reasoning and jurisprudential errors that populate these summary judgment decisions are strong evidence that the problem doctrines are just a symptom of something deeper.

Further evidencing that the problem doctrines are just a symptom of something deeper is the startling candor occasionally displayed by the courts about how heavily they weigh preserving summary judgment as a weapon in the employer’s arsenal. For example, in *Traylor v. Brown*,<sup>96</sup> the employee had alleged that she was kept from performing certain desirable job duties because of her race and her sex.<sup>97</sup> The employer’s witnesses claimed that only the persons assigned to perform those duties were able to do them.<sup>98</sup> Summary judgment was granted against the employee, and the employee appealed on the grounds, among others, that the employees witnesses should not have been credited for purposes of granting summary judgment because those witnesses all worked for the employer and were, thus, “interested” witnesses.<sup>99</sup> In so arguing, the employee relied on the statement in the then-recent, unanimous Supreme Court decision in *Reeves* that

although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that “evidence supporting the moving party that is

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94. The connotation of “Whac-a-mole” (or “Whack-a-mole”) in colloquial usage is that of a repetitious and futile task: each time the attacker is ‘whacked’ or kicked off a service, he only pops up again from another direction. [The term has been] used in the computer and networking industry to describe the phenomenon of fending off recurring spammers, vandals, or miscreants. [It is also used in the military] to refer to opposing troops who keep re-appearing. This use has been common in the Iraq War in reference to the difficulty of defeating the Iraqi insurgency. Nuclear scientist Edwin Lyman compared the multiple simultaneous crises at Fukushima I to a game of “whack-a-mole.”

Entry on Colloquial Usage of the Term *Whac-A-Mole*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Whac-A-Mole#Colloquial\\_usage](http://en.wikipedia.org/wiki/Whac-A-Mole#Colloquial_usage) (citations omitted) (last visited Feb. 23, 2013).

95. See *supra* notes 15–16 and accompanying text.

96. 295 F.3d 783 (7th Cir. 2002).

97. *Id.* at 786–87.

98. *Id.*

99. *Id.* at 790–91.

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uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.”<sup>100</sup>

In response, the Seventh Circuit stated:

We do not interpret the quoted language so broadly as to require a court to ignore the uncontroverted testimony of company employees or to conclude, where a proffered reason is established through such testimony, that it is necessarily pretextual. *To so hold would essentially prevent any employer from prevailing at the summary judgment stage because an employer will almost always have to rely on the testimony of one of its agents to explain why the agent took the disputed action.*<sup>101</sup>

The Seventh Circuit thus expressly stated that a rule recently announced by the unanimous Supreme Court had to be narrowly construed because applying the rule as the Supreme Court actually wrote it “would essentially prevent any employer from prevailing at the summary judgment stage.”<sup>102</sup> Why the *Reeves* rule’s statistical effect on summary judgment as a pro-employer weapon should have any consideration in deciding how broadly or narrowly to interpret that rule, the Seventh Circuit did not say. Rather, the Seventh Circuit seemed to operate from the assumption that preserving employers’ ability to prevail on summary judgment was more important than fidelity to a recent, unanimous Supreme Court decision.

If the diagnosis that the problem doctrines in the current summary-judgment crisis in employment cases are just a symptom of a deeper problem is true, then fighting the problem doctrines may be like a game of “Whac-A-Mole”: shoot down one problem doctrine and another springs up to take its place.

Perhaps the problem is that judges give employers a hidden presumption of good faith. This hidden presumption comes out in ways large and small. Employee advocates are often flummoxed by the propensity of judges to discount the employee’s testimony as “self-serving” while taking anything a company witness says as gospel—a stance that is exactly contrary to the law of summary judgment.

This hidden presumption of good faith leads to illogical results. From the earliest days of Title VII and the ADEA, it was well-established that the employer’s self-serving “affirmations of good faith” were something the jury had to weigh and not something that would result in summary judgment for the employer.<sup>103</sup> However, if

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100. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).

101. *Traylor*, 295 F.3d at 791 (emphasis added) (holding that the employee had not established that she had suffered an adverse employment action).

102. *Id.*

103. *See, e.g.*, *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342, n.24 (1977) (“[A]ffirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.”) (citation omitted); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011 n.5 (1st Cir. 1979) (stating that it is insufficient for employer “to offer vague, general averments of good faith”), *disapproved by* *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). For a more recent example, see *Dyer v. Cmty. Mem’l Hosp.*, No. 03-10250-BC, 2006 WL 435721, at \*11 (E.D. Mich. 2006) (“[A] self-serving statement by the defendant’s representative that no illegal discrimination animated the defendant’s actions is insufficient to put the plaintiffs to their proofs at the summary judgment stage of the proceedings.”).

self-serving affirmations of good faith do not get an employer summary judgment, then, logically, the following two typical summary judgment arguments should also not result in summary judgment for the employer:

1. An affirmation of good faith combined with a recitation of an alleged reason that is itself suspicious or is possibly even evidence of pretext—such as the “imprudent, ill-informed and inaccurate” investigation in *Kariotis*.<sup>104</sup> If the affirmation of good faith alone is not sufficient for summary judgment, then how can it be strengthened by adding something that really makes no sense? This reasoning alone should defeat the “honest belief” doctrine on summary judgment.
2. A recitation of an alleged reason without an affirmation of good faith, leaving the good faith hidden. But if the employer was not acting in good faith, then summary judgment should be denied. And if the employer is claiming to have acted on the facts it set forth in its motion, then summary judgment should be denied unless and until no reasonable jury could disbelieve that the employer acted based on those facts.

This conclusion takes us full circle back to the basic law of summary judgment: in an employment case, a court should not grant a defendant-employer summary judgment unless and until no reasonable jury could find from the evidence, and the reasonable inferences drawn from that evidence, that the employer had not discriminated or retaliated against the employee. Furthermore, in making that determination, the court cannot take into account any evidence that a reasonable jury would be entitled to reject.<sup>105</sup> Although courts seem to have forgotten this basic law of summary judgment in employment cases, they do remember it in other areas of the law—to which this article now turns.

## V. INFERENCES OF KNOWLEDGE AND INTENT IN OTHER AREAS OF THE LAW

Other areas of the law routinely permit juries to draw inferences or prevent judges from blocking inferences in ways that would revolutionize summary judgment practice in employment law. To review just some:

### *A. Credibility Issue from Defendant's Denials in Its Answer to the Complaint Being Contradicted by Defendant's Actual Knowledge*

In *United States v. Four Parcels of Real Property*, a drug-forfeiture case, the Eleventh Circuit, sitting en banc, held that a variance between the defendant's denials in the answer to the complaint and the defendant's actual knowledge created

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104. See *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672 (7th Cir. 1997); *supra* text accompanying notes 17–43.

105. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150–51 (2000).

## INFERENCES IN EMPLOYMENT LAW COMPARED TO OTHER AREAS OF THE LAW

a credibility question that prevented a grant of summary judgment.<sup>106</sup> Defendant's answer to the complaint specifically denied that a bulldozer that the government sought to forfeit had been purchased "by or for" the alleged drug dealer (who was not the defendant), whereas the defendant's affidavit in support of summary judgment stated that the alleged drug dealer had indeed purchased the bulldozer, but as the defendant's agent.<sup>107</sup> The Eleventh Circuit held that this contradiction between the defendant's affidavit and the defendant's answer to the complaint "casts serious doubt on [defendant's] credibility" and reversed the district court's grant of summary judgment in favor of the defendant.<sup>108</sup> The Eleventh Circuit also noted that the fact that the answer to the complaint had been drafted and filed by counsel did not excuse the inconsistency or make summary judgment proper.<sup>109</sup> Experienced employment law practitioners know that defense counsel often deny virtually everything in the answer to the complaint, and that many of those denials are proven false in discovery. If the test from *United States v. Four Parcels of Real Property* was applied to employment cases, summary judgment would virtually never be granted.

### *B. Irrelevance of Court-Devised Hypothetical Reasons*

As noted, employment law contains an entire jurisprudence of hypothetical reasons to excuse the employer's actions.<sup>110</sup> However, there is strong precedent in other areas of the law holding that hypothetical reasons devised by the court are irrelevant. For example, in the *Batson* line of juror-exclusion cases,<sup>111</sup> which relies heavily on employment cases, the Supreme Court has made clear that hypothetical reasons devised by the court are irrelevant as to whether the prosecutor has presented a pretextual reason for discrimination:

As for law, the rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. *If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up*

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106. 941 F.2d 1428 (11th Cir. 1991) (en banc).

107. *Id.* at 1443.

108. *Id.*

109. *Id.* at 1443 n.32.

110. *See supra* note 4 and text accompanying notes 87–88.

111. *Johnson v. California*, 545 U.S. 162 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that in a criminal trial, peremptory challenges cannot be used to eliminate members of the jury venire on the basis of their races).

as false. The Court of Appeals's and the dissent's substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors' burden of stating a racially neutral explanation for their own actions.<sup>112</sup>

*C. Motive as a Fact Question*

In the North Carolina redistricting case *Hunt v. Cromartie*,<sup>113</sup> the parties had not contested each other's facts, and the district court entered summary judgment.<sup>114</sup> Despite the uncontested factual record, the Supreme Court reversed summary judgment, using what should be one of the great sound-bites for employment law cases: "[M]otivation is itself a factual question."<sup>115</sup> The reason that this should be a great sound-bite for employment law cases is that if motivation is a factual question when, as in *Hunt*, the parties do not contest each other's facts, then motivation is even more a factual question in the typical employment law case in which there is a lot of circumstantial evidence from which a reasonable jury could infer defendant's animus.

*D. Evidence of Corporate Culture*

In the jury-discrimination cases *Miller-El v. Dretke*<sup>116</sup> and *Miller-El v. Cockrell*,<sup>117</sup> the Supreme Court used facts going back almost fifty years, which was probably before any alleged discriminator in these cases had been born, as evidence to support that minorities had been discriminatorily removed from the jury.<sup>118</sup> The Court considered that evidence going back that far was part of "all relevant circumstances" by which discrimination in keeping racial groups off a jury should be determined. By contrast, courts often limit "relevant circumstances" in employment cases to those circumstances virtually simultaneous with the adverse act.<sup>119</sup>

*E. Affirmations of Good Faith Insufficient*

The principle that a movant's self-serving averments of its own good faith are of no value on summary judgment is well-established in jury-exclusion cases.<sup>120</sup> As

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112. *Dretke*, 545 U.S. at 251–52 (emphasis added) (citations omitted).

113. 526 U.S. 541 (1999).

114. *Id.* at 545–49.

115. *Id.* at 549.

116. 545 U.S. 231.

117. 537 U.S. 322.

118. *See Dretke*, 545 U.S. at 264–66; *Cockrell*, 537 U.S. at 334–35.

119. *See, e.g.*, *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204 (10th Cir. 1999); *supra* text accompanying notes 14–16.

120. *See, e.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972) ("[A]ffirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion") (citations omitted).

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Chief Justice Hughes said for the unanimous Supreme Court in *Norris v. Alabama*<sup>121</sup> (one of the famous “Scottsboro Boys” cases):<sup>122</sup>

That showing as to the long-continued exclusion of negroes from jury service, and as to the many negroes qualified for that service, could not be met by mere generalities. If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the constitutional provision—adopted with special reference to their protection—would be but a vain and illusory requirement.<sup>123</sup>

### *F. Suspicion from Commonplace and Potentially Innocent Facts*

As previously noted, Tom Newkirk’s paper from the 2006 NELA Annual Convention pointed out that juries are permitted to draw inferences of criminal guilt from facts that could have a very innocent explanation, such as buying an insurance policy on one’s spouse.<sup>124</sup> This observation is no mere idle speculation from detective fiction. In fact, many cases in many different jurisdictions have this fact pattern.<sup>125</sup>

Perhaps the most instructive comparison between the inferences judges *prohibit* juries from drawing in employment cases and the inferences of murder that juries are *permitted* to draw from the purchase of an insurance policy is *Rhodes v. State*.<sup>126</sup> In *Rhodes*, the jury was allowed to infer the wife’s intent to murder her husband from, among other things, the wife’s purchase of a \$100,000 insurance policy on her husband’s life, even though the wife had never made a claim against the life insurance

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121. 294 U.S. 587 (1935).

122. The Scottsboro Boys cases were a *cause celebre* in the 1930s. Nine black men traveling on a freight train were accused of rape by two white woman. One of the woman later retracted her accusation. The defendants were only given access to their lawyers immediately prior to the trial, leaving little or no time to plan the defense, and eight of the defendants were sentenced to death after one-day trials. The Supreme Court heard the case twice, the first time reversing the convictions and remanding for new trials on the grounds that due process required that a defendant in a capital case had a right to counsel, *Powell v. Alabama*, 287 U.S. 45 (1932), and the second time reversing the convictions and remanding for new trials on the grounds that African Americans had been excluded from the jury pool because of their race. *Norris v. Alabama*, 294 U.S. 587 (1935); *Patterson v. Alabama*, 294 U.S. 600 (1935).

123. *Norns*, 294 U.S. at 598.

124. See *supra* notes 15–16 and accompanying text.

125. See, e.g., *State v. Beckham*, 513 S.E.2d 606, 610–11 (S.C. 1999); *Davidson v. State*, 558 N.E.2d 1077, 1081 (Ind. 1990); *People v. Coleman*, 276 N.E.2d 721, 722 (Ill. 1971); *People v. Goedecke*, 423 P.2d 777, 784 (Cal. 1967), *superseded by statute*, CAL. PENAL CODE § 189 (West 2012), *as recognized in* *People v. Bloom*, 774 P.2d 698, 707 (Cal. 1989); *Commonwealth v. Boden*, 159 A.2d 894, 897 (Pa. 1960), *cert. denied*, 364 U.S. 846 (1960). These and many more such cases are collected in G. Van Ingen, Annotation, *Admissibility in Homicide Prosecution for Purpose of Showing Motive of Evidence as to Insurance Policies on Life of Deceased Naming Accused as Beneficiary*, 28 A.L.R.2d 857 (1953).

126. 676 So. 2d 275 (Miss. 1996).

policy.<sup>127</sup> The policy had a suicide exclusion<sup>128</sup> and the husband's death looked like a suicide.<sup>129</sup> The prosecution argued that the wife intended to kill her husband for the insurance benefits and, when that failed, she made his death appear to be a suicide. The defense argued that the wife's profit motive was obviated by the suicide exclusion and that she therefore had no motive at all to kill her husband in the manner alleged.<sup>130</sup> The court left the competing inferences for the jury to decide.<sup>131</sup>

The purchase of insurance is not the only type of innocent and commonplace fact from which a criminal jury is permitted to draw an inference of murder:

- i. a jury can infer premeditation from the victim having encroached upon the "home turf" of a motorcycle gang and defendant's association with that gang;<sup>132</sup>
- ii. a jury can infer malice aforethought from the accused having "had a difficulty with . . . a near relative of [the victim] immediately before the killing;"<sup>133</sup> and
- iii. a jury is permitted to infer premeditation from such matters as (1) previous difficulties between the parties, (2) the manner in which the homicide was committed, and (3) the nature and manner of the wounds inflicted.<sup>134</sup>

Similarly, in an "innocent-owner" drug-forfeiture case, the allegedly innocent owner's knowledge could be inferred from the owner often visiting the subject property on which marijuana was openly and extensively cultivated; the owner posting bond for her son on two prior occasions involving marijuana-related offenses and allegedly admitting knowledge of her son's continuing marijuana use to the police.<sup>135</sup>

Were judges to apply analogous standards in employment cases, the incidence of summary judgment in employment cases would be transformed. If we take the standard in *Phippen* and transpose it from murder to retaliation, for example, then a jury should be permitted to infer retaliation from "(1) previous difficulties between

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127. *Id.* at 279, 284.

128. *Id.*

129. *Id.* at 284.

130. *Id.*

131. *Id.*

132. *State v. Ruof*, 252 S.E.2d 720, 725 (N.C. 1979).

133. *Turner v. Commonwealth*, 180 S.W. 768, 774 (Ky. 1915).

134. *Phippen v. State*, 389 So. 2d 991, 993 (Fla. 1980).

135. *United States v. 2621 Bradford Drive*, 369 F. App'x 663 (6th Cir. 2010). For further research, see generally Beverly L. Jacklin, Annotation, *Who Is Exempt from Forfeiture of Real Property under "Innocent Owner" Provision of 21 U.S.C.A. § 881(a)(7)*, 110 A.L.R. FED. 569 (1992).

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the parties, (2) the manner in which the [retaliation] was committed,” and (3) “the nature and manner of the [harms] inflicted.”<sup>136</sup>

### *G. Strong Deference to Jury Drawing “Obvious” Inferences from Facts*

The Eleventh Circuit seemingly will not approve any inference in an employment case, but will permit a jury to draw an inference that each and every member of a boat’s crew was a participant in a conspiracy to import marijuana into the United States based on evidence that the boat’s cargo hold contained a volume of marijuana that had a high street value (in the millions of dollars), the marijuana odor was noticeable from the boat’s aft deck even when the cargo hatch was closed, and the boat’s crew consisted of eight people.<sup>137</sup> The Eleventh Circuit permitted the jury (apparently without any evidence on these points) to assume, in drawing the inference of membership in a conspiracy, that drug smugglers are unlikely to employ outsiders to work a boat carrying millions of dollars’ worth of marijuana and that the crew must have had close relationship with each other given that there were only eight of them.<sup>138</sup>

Similarly, in the Ninth Circuit case *United States v. Heredia*,<sup>139</sup> the defendant was the driver of a borrowed car that had “a very strong perfume odor” that, upon a search, was discovered to be coming from dryer sheets wrapped around almost 350 pounds of marijuana in the trunk.<sup>140</sup> The driver was prosecuted for possessing a controlled substance with intent to distribute, and her defense was that the car was not the defendant’s and she did not know what was in the trunk.<sup>141</sup> The Ninth Circuit sitting en banc analyzed the possible jury inferences as follows:

Taking the evidence in the light most favorable to the government, a reasonable jury could certainly have found that [defendant] actually knew about the drugs. Not only was she driving a car with several hundred pounds of marijuana in the trunk, but everyone else who might have put the drugs there—her mother, her aunt, her husband—had a close personal relationship with [defendant]. Moreover, there was evidence that [defendant] and her husband had sole possession of the car for about an hour prior to setting out on the trip to Tucson. Based on this evidence, a jury could easily have inferred that [defendant] actually knew about the drugs in the car because she was involved in putting them there.<sup>142</sup>

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136. *Phippen*, 389 So. 2d at 993.

137. *United States v. Gonzalez*, 810 F.2d 1538, 1543 (11th Cir. 1987).

138. *Id.* at 1543.

139. 483 F.3d 913 (9th Cir. 2007) (en banc), *cert. denied*, 552 U.S. 1077 (2007).

140. *Id.* at 917.

141. *Id.* at 923.

142. *Id.*

Note also that this inference goes not merely to possession, but to possession *with intent to distribute*.<sup>143</sup> The Ninth Circuit did not clarify where the inference of intent to distribute came from; apparently, the court saw it as inherent in the situation.

The prosecution in *Heredia*, covering all its bases, had requested the “deliberate ignorance” jury instruction, which was given as follows:

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.<sup>144</sup>

The Ninth Circuit’s en banc approval of this instruction led to a discussion between the majority and the concurrence that was very enlightening as to what judges accept as evidence of knowledge or intent in other areas of the law compared to what judges accept as evidence of knowledge or intent in employment law.<sup>145</sup> The concurrence objected to the majority’s approval of this instruction on the grounds that, among other things, it could turn FedEx into a criminal for being “deliberately ignorant” of the contents of its packages.<sup>146</sup> The majority responded, “Of course, if a particular package leaks a white powder or gives any other particularized and unmistakable indication that it contains contraband, and [FedEx] fails to investigate, it may be held liable—and properly so.”<sup>147</sup>

Thus, in the view of the Ninth Circuit, a jury is entitled to infer that FedEx had sufficient knowledge that it possessed drugs if FedEx (i.e., some low-level underling at a loading dock) ignored a “package leak[ing] white powder.”<sup>148</sup> Compare that to the amount of evidence needed before a jury could draw a similar inference as to knowledge in an employment case.<sup>149</sup>

Similarly, in an “innocent-owner” drug-forfeiture case, knowledge on the part of an owner who did not live on the property could be inferred because it was “obvious” to an ordinary person that the property was used for drugs based on the extensive

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143. *Heredia* was convicted of possession with intent to distribute, as the panel opinion makes clear. *United States v. Heredia*, 429 F.3d 820, 822 (9th Cir. 2005), *amended by* 483 F.3d 913 (9th Cir. 2007).

144. *Heredia*, 483 F.3d at 917.

145. *Id.* at 926–27.

146. *Id.* at 928–29.

147. *Id.* at 920 n.10.

148. *Id.*

149. *See generally*, Deborah Sprenger, Annotation, *Propriety of Instruction of Jury on “Conscious Avoidance” of Knowledge of Nature of Substance or Transaction in Prosecution for Possession or Distribution of Drugs*, 109 A.L.R. FED. 710 (1992); *see also* Martin McMahon, Annotation, *Drug Abuse: What Constitutes Illegal Constructive Possession Under 21 U.S.C.A. § 841(a)(1), Prohibiting Possession of a Controlled Substance With Intent to Manufacture, Distribute, or Dispense the Same*, 87 A.L.R. FED. 309 (1988).

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foot traffic and the presence of home-protection devices typically used by large-scale drug dealers.<sup>150</sup>

As with suspicion from commonplace and potentially innocent facts, were judges to apply the deference they show in other areas of the law to juries drawing “obvious” inferences from facts to employment law cases, the incidence of summary judgment in employment cases would be transformed.

### *H. Refusal to Believe Protestation of Lack of Knowledge*

In “innocent spouse” tax cases, courts permit juries to infer knowledge, despite protestations of lack of knowledge, from the types of circumstantial evidence that often get employment plaintiffs kicked out of court. For example:

- i. The wife testified that she did not look at the tax return, but the court refused to credit her testimony and instead inferred knowledge on her part from (1) unusual or lavish expenditures; (2) participation in the guilty spouse’s business affairs; and (3) evasiveness by the guilty spouse in explaining the deductions.<sup>151</sup>
- ii. Knowledge on the part of the allegedly innocent spouse can be inferred because the records of the transactions at issue were sent to her attorney during divorce proceedings.<sup>152</sup>
- iii. Knowledge on the part of the allegedly innocent spouse can be inferred because the allegedly innocent spouse “had reason to know.” The facts are telling: the husband was foreign; the wife understood marriage in her husband’s culture to demand unquestioning subservience. The husband told his wife that money from sale of properties in Thailand were not taxed because it was a foreign sale. The money actually came from drug trafficking, but the wife believed her husband. The tax court found for the wife, and the Fourth Circuit reversed.<sup>153</sup>
- iv. A spouse has “reason to know” if, when the tax return was signed, a reasonably prudent taxpayer in his or her position could be expected to know that the stated tax liability was erroneous or that further investigation was warranted.<sup>154</sup>

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150. *United States v. North 48 Feet of Lots 19 & 20*, 138 F.3d 1268, 1269 (8th Cir. 1998).

151. *United States v. Flomenhoft*, No. 86 C 1588, 1987 U.S. Dist. LEXIS 1607, at \*10 (N.D. Ill. Feb. 27, 1987), *aff’d*, 843 F.2d 500 (7th Cir. 1988) (citations omitted).

152. *Bliss v. Comm’r*, 59 F.3d 374, 378 (2d Cir. 1995).

153. *Ratana v. Comm’r*, 662 F.2d 220 (4th Cir. 1981).

154. *Park v. Comm’r*, 25 F.3d 1289, 1298 (5th Cir. 1994).

- v. The wife had reason to know of omitted income, even though she had no knowledge of her husband's income, she and her husband did not maintain a joint checking account, and she testified that she did not look at her husband's Schedule C before she signed the tax return, but rather just "looked at the bottom line" to ascertain whether they were getting a refund.<sup>155</sup>
- vi. The wife did not participate in the preparation of the tax return, did not review the tax return, and did not question her husband regarding the tax return. The wife testified that she had no actual knowledge of the return grossly understating the husband's significant gambling income. The court held that the wife's awareness of the extent of her husband's gambling activities and the fact that the wife's income was too low to support the family's lifestyle "should have put her on sufficient notice to review the return before it was completed and mailed."<sup>156</sup>

#### VI. A TOOLKIT FOR USING OTHER AREAS OF THE LAW TO ARGUE FOR INFERENCES AND FOR EVIDENCE OF KNOWLEDGE OR INTENT

So how can plaintiffs' employment lawyers use the more favorable law in other areas to help themselves? The following are the authors' suggestions for a toolkit:

##### *A. Keep a Research File of "Knowledge and Intent" Cases From Other Areas of the Law*

The American Law Reports (ALR) annotations cited in this article are a good start. In addition, when you are reading your local legal newspaper or an online advance sheet, do not skip over "knowledge and intent" cases—stick them in your research file. Cases for which the headline is something like "Criminal Law—sufficiency of evidence" are pure gold.

##### *B. Explicitly Argue to the Judge How the Proof of Knowledge or Intent in Your Case Would be Treated in Other Areas of the Law*

Take *Nagle* above—the case in which the court held that no reasonable jury could find that the police chief had received notice when the EEOC's letter was addressed to "Chief *David*" rather than to "Chief *Davis*."<sup>157</sup> With hindsight, the plaintiff's lawyer should have explicitly argued in the summary judgment response that the

155. *Chandler v. Comm'r*, 66 T.C.M. (CCH) 1366 (Tax 1993), *aff'd*, 46 F.3d 1131 (6th Cir. 1995).

156. *Norgaard v. Comm'r*, 57 T.C.M. (CCH) 1122 (Tax 1989), *aff'd in part, rev'd in part*, 939 F.2d 874 (9th Cir. 1991). For further research, see generally Jason B. Binimow & G. Knapp, Annotation, *Construction and Application of 26 U.S.C.A. § 6015(b)(1)(C) Requiring that Spouse Not Know of Understatement of Tax Arising from Erroneous Deduction, Credit, or Basis to Obtain Innocent Spouse Exemption from Liability for Tax*, 154 A.L.R. FED. 233 (1999), updated, 161 A.L.R. FED. 373 (2000).

157. *Nagle v. Village of Calumet Park*, 554 F.3d 1106 (7th Cir. 2009); *see also supra* text accompanying notes 47–50.

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defendant's view of evidence of knowledge would never be adopted in other areas of the law. Here is an attempt to write a posthumous argument for that case, explicitly analogizing to the criminal law:

Defendant's argument that no reasonable jury could find that Chief Davis knew of the EEOC Charge because of a minor typo in the last letter of his last name ("Chief David" rather than to "Chief Davis") is simply not the law as to what constitutes evidence of knowledge. Were our case a criminal case—had Chief Davis, for example, been accused of stealing for his own use drugs seized by his police department and had the misaddressed letter had been mailed by the DEA or the United States Attorney rather than by the EEOC—is there any doubt that a court would permit a jury to infer Chief Davis's knowledge of the letter? Apparently, defendant believes that the jury must be required as a matter of law to believe that a mail-clerk would react as follows upon receiving mail from the EEOC:

"Wow, this is a letter from the EEOC. That's a government agency! This could be really important! I better deliver it quickly to who it's going to! Oh, wait, the letter's addressed to Chief 'David.' We have a Chief 'Davis,' and if the letter was addressed to him, I'd know to whom to deliver it. But this letter is addressed to Chief 'David.' I have no clue who that is! I guess I should just throw this official letter from the EEOC into the garbage!"

Considering that such a rule of evidence would be laughed out of court in a criminal case—in which the standard proof is beyond a reasonable doubt—in employment law cases, which require only a preponderance of the evidence, such a rule of evidence should be even more laughable.

### *C. Expressly Analogize the "Rule" the Defendant Is Arguing for to How Such a "Rule" Would Be Treated in Other Areas of the Law*

For another example, look at the question of whether an arbitration agreement between private parties can preclude a government agency from obtaining relief for one of the parties to that agreement. That question was, of course, decided in the negative by the Supreme Court in *EEOC v. Waffle House, Inc.*,<sup>158</sup> in which the Court, reversing the Fourth Circuit, ruled 6–3 that a complainant's agreement to arbitration with the respondent did not preclude the EEOC from seeking in-court relief specific to that complainant. But in what other area of the law would the theory that a government agency was prohibited from seeking relief for an individual claimant because of a private arbitration agreement that claimant had signed be taken seriously? Would the Court take seriously the argument that the Securities and Exchange Commission (SEC) was prevented from seeking restitution or disgorgement in court because the brokerage house's agreement with its customers had a form arbitration clause (which they all do)? Would a form arbitration clause between a business and its customers prevent the Department of Justice from seeking restitution

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158. 534 U.S. 279 (2002).

or disgorgement in court in an antitrust case?<sup>159</sup> Is a judge's power to order restitution in certain criminal cases abrogated if the criminal and the victim had a private arbitration agreement (as could happen in a criminal anti-trust case, a criminal Racketeer Influenced and Corrupt Organizations Act (RICO) case, a criminal securities case, etc.)?

*D. Research and Argue Jury Instructions*

Jury instructions from other areas of the law can be a source of good arguments regarding the types of inferences that are commonly allowed in other areas of the law that would, if permitted in employment law, greatly reduce grants of summary judgment.<sup>160</sup>

*E. In Drafting the Complaint and Arguing Motions, Use the Active Verb "Choose" to Focus on the Defendant's Actions or Omissions*

Using forms of the active verb "choose" continually (and almost subliminally) reminds the reader that the defendant was making choices—choices on which that reader will connect the dots and come on his or her own to the conclusion that defendant's choices were discriminatory or retaliatory. Using the language of choice is particularly effective in turning omissions into actions. The language of choice is also helpful with those audiences—like judges, judges' law clerks, and business people who will decide whether to settle—who are predisposed to think that defendant had no "choice" in performing its discriminatory and/or retaliatory acts.

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159. Microsoft mounted a vigorous defense to the government's anti-trust prosecution, but neither author recalls Microsoft claiming that the Antitrust Division of the Department of Justice could not seek victim-specific relief because its software licenses have an arbitration clause (which they all do). *See Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004) (en banc); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

160. *See, e.g., United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc); *see also supra* text accompanying notes 141–52 (discussing Ninth Circuit "willful blindness" criminal jury instruction); SIXTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS § 1.05 (2011), *available at* [www.ca6.uscourts.gov/internet/crim\\_jury\\_insts/pdf/07\\_Chapter\\_1.pdf](http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/07_Chapter_1.pdf) ("You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion."); SEVENTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTIONS § 3.03 (1998), *available at* [www.ca7.uscourts.gov/Pattern\\_Jury\\_Instr/pjury.pdf](http://www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf) ("You have heard evidence that \_\_\_\_\_ accused the defendant of a crime, and that the defendant did not deny or object to the accusation. If you find that the defendant was present and heard and understood the accusation, and that it was made under circumstances that the defendant would deny it if it were not true, then you may consider whether the defendant's silence was an admission of the truth of the accusation."); EIGHTH CIRCUIT CRIMINAL PATTERN JURY INSTRUCTION § 7.05 (2011), *available at* [www.juryinstructions.ca8.uscourts.gov/crim\\_man\\_2011.pdf](http://www.juryinstructions.ca8.uscourts.gov/crim_man_2011.pdf) ("[Intent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant's knowledge or intent.] [You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted].") (footnote omitted).

## INFERENCES IN EMPLOYMENT LAW COMPARED TO OTHER AREAS OF THE LAW

### *F. Avoid Arguing and Direct vs. Circumstantial Evidence and the McDonnell Douglas Paradigm—Just Argue the Evidence*

Through years of judicial interpretation, the *McDonnell Douglas* paradigm has become a trap for plaintiffs.<sup>161</sup> Accordingly, just argue the evidence—do not argue the applicability of *McDonnell Douglas*. In the Seventh Circuit, the jury is not even instructed on *McDonnell Douglas*.<sup>162</sup>

When you avoid arguing about *McDonnell Douglas*, also avoid arguing what type of evidence you have (i.e., direct or circumstantial)—again, just argue the evidence. As one commentator stated, “[t]he point is that any evidence is fair game—any, at all. Some will be direct, some indirect, some circumstantial, some not.”<sup>163</sup> The Seventh Circuit has been moving toward the position that it does not matter whether you call the evidence direct, circumstantial, etc.<sup>164</sup> What matters is whether the evidence supports the plaintiff’s claim:<sup>165</sup> “[t]he distinction between direct and circumstantial evidence is vague, but more important it is irrelevant to assessing the strength of a party’s case. From the relevant standpoint—that of probative value—‘direct’ and ‘circumstantial’ evidence are the same in principle.”<sup>166</sup>

Also, when you are arguing the evidence, remember that “pretext” is not merely a step in a *McDonnell Douglas* analysis; pretext is itself circumstantial evidence of discrimination, as the U.S. Supreme Court has twice unanimously and recently stated that “evidence that a defendant’s explanation for an employment practice is ‘unworthy of credence’ is ‘one form of circumstantial evidence that is probative of intentional discrimination.’”<sup>167</sup>

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161. Named after the leading case *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* paradigm is usually considered based on plaintiff proving a (variously phrased) prima-facie case, defendant articulating through admissible evidence an alleged legitimate non-discriminatory business reason, and plaintiff having an opportunity to prove that that alleged reason is pretext. See, e.g., *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). For a recent judicial critique of the *McDonnell Douglas* paradigm, see *Coleman v. Donohoe*, 667 F.3d 835, 859 (7th Cir. 2012) (Wood, J., concurring).

162. See generally SEVENTH CIRCUIT FEDERAL CIVIL PATTERN JURY INSTRUCTION § 3.01 (2009), available at [www.ilnd.uscourts.gov/Legal/Jury/7thCivInst2005.pdf](http://www.ilnd.uscourts.gov/Legal/Jury/7thCivInst2005.pdf), and commentary thereto.

163. Robert A. Kearney, *Rethinking Employment Discrimination: How Lawyers and Judges Both Can Do Better*, 2001 L. REV. MICH. ST. U. DET. C.L. 1077, 1082 (2001).

164. SEVENTH CIRCUIT FEDERAL CIVIL PATTERN JURY INSTRUCTION § 3.01 (2009), available at [www.ilnd.uscourts.gov/Legal/Jury/7thCivInst2005.pdf](http://www.ilnd.uscourts.gov/Legal/Jury/7thCivInst2005.pdf), and commentary thereto.

165. See, e.g., *Sylvester v. SOS Children’s Vills. Ill., Inc.*, 453 F.3d 900 (7th Cir. 2006).

166. *Id.* (citations omitted).

167. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99–100 (2003) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)); see also *Griffith v. City of Des Moines*, 387 F.3d 733, 746 (8th Cir. 2004) (Magnuson, J., concurring) (“Of course, pretext is circumstantial evidence that may sufficiently demonstrate that an employer was motivated by an improper consideration.”).

**VII. CONCLUSION**

Judges should treat inferences in employment cases the same way they treat inferences in cases in other areas of the law, and employee advocates should look to other areas of the law for analogies and precedents when arguing about what inferences a court, as opposed to a jury, may draw and about evidence of knowledge or intent.