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## Shortcuts in Employment Discrimination Law

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## SHORTCUTS IN EMPLOYMENT DISCRIMINATION LAW

KERRI LYNN STONE\*

### ABSTRACT

Are employment discrimination plaintiffs viewed by society and by judges with an increased skepticism? This Article urges that the same actor inference, the stray comment doctrine, and strict temporal nexus requirements, as courts have applied them, make up a larger and dangerous trend in the area of employment discrimination jurisprudence—that of courts reverting to special, judge-made “shortcuts” to curtail or even bypass analysis necessary to justify the disposal or proper adjudication of a case. This shorthand across different doctrines reveals a willingness of the judiciary to proxy monolithic assumptions for the individualized reasoned analyses mandated by the relevant antidiscrimination legislation. This Article contrasts the shortcuts trend in employment discrimination jurisprudence with those presumptions and inferences that have traditionally been afforded to plaintiffs suing under traditional tort law. It also explores the potential root causes of the skepticism and hostility with which judges have regarded employment discrimination plaintiffs, as opposed to the way in which they have regarded traditional tort plaintiffs.

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## INTRODUCTION

Research confirms everyday observations of how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs to survive pre-trial motions to dismiss their cases and to win at trial or on appeal.<sup>1</sup> Indeed, recent studies confirm that judicial hostility toward Title VII claims is on the rise.<sup>2</sup> In one recently conducted evaluation and analysis of federal civil cases filed between 1970 and 2006, the authors found that employment discrimination claims that go before a bench are more likely than other kinds of claims to fail, both at the district court and at the appellate level.<sup>3</sup>

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1. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) (“Employment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.”); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (analyzing statistics of 615 ADA cases terminated between 1992 and 1998 and finding that 92.7% of those cases were won by defendants, and of those, 38.7% were resolved on summary judgment); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 205–06 (1993) (observing the difficulties that employment discrimination plaintiffs face on summary judgment); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 897–900, 899 n.49 (2006) (discussing statistics demonstrating that employment discrimination plaintiffs are seldom successful); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007) (observing that 73% of summary judgment motions in employment discrimination cases are granted, and that nearly all are in favor of defendants); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 574–75 (2001) (arguing that “employment discrimination cases are unusually difficult to win, contrary to the reigning perspective, and that the various biases courts bring to the cases deeply affect how courts analyze and decide cases”); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to the Honorable Michael Baylson, U. S. Dist. Court Judge, E. Dist. of Pa. (June 15, 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (analyzing 17,969 cases terminated in the seventy-eight federal district courts and finding that 73% of summary judgment motions in employment discrimination cases are granted, while the average for all civil cases is just 60%).

2. See generally Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009) (documenting various statistics that led the authors to conclude that judges harbor anti-plaintiff views); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 95 (2010) (“Recent studies indicate that judicial hostility to Title VII claims in particular continues.”).

3. Clermont & Schwab, *supra* note 2, at 105–06, 127, 130 (“Employment discrimination plaintiffs, unlike most other plaintiffs, have always done substantially worse in judge trials than in jury trials. In numbers, employment discrimination plaintiffs have won only 19.62% of judge trials. While employment discrimination plaintiffs have thus won fewer than one in five of their

The authors also found that the majority of appeals in federal employment discrimination cases are made by plaintiffs, a statistic that they claim “mainly reflects that plaintiffs suffer most of the losses at the district court level.”<sup>4</sup> Moreover, while the appeal *rates* of plaintiffs and defendants parallel one another, “plaintiffs’ appeals (12,608) are ten times more frequent in absolute numbers than defendants’ appeals (1260).”<sup>5</sup> More salient is the fact that the reversal rate of defendants on appeal is much greater than that of plaintiffs, with the respective rates for defendants and plaintiffs from victories at the pretrial adjudication stage being 30% versus 11%, and the respective rates from trial stage wins being 41% versus 9%.<sup>6</sup> The study’s authors, Professor Kevin Clermont and Dean Stewart J. Schwab, have discerned what they call an “anti-plaintiff effect,” whereby employment discrimination plaintiffs appear to be systemically disadvantaged by judicial skepticism toward the plausibility of what they are alleging.<sup>7</sup>

This effect is manifest in the “shortcut” doctrines that premise often lethal inferences against employment discrimination plaintiffs on simplistic caricatures of the mechanics of human behavior and workplace dynamics. A “shortcut,” as the term is used in this Article, may be defined as a label or inference that proxies for reasoned analysis. Shortcuts unfairly skew toward a defendant’s case by permitting or compelling a trier to make unwarranted assumptions or to attach undue significance to a single fact or facet of a case. This is done at the expense of a more holistic assessment of all properly-considered evidence against the backdrop of the overarching question posed by the relevant legislation: did employment discrimination “because” of an unlawful consideration occur? This Article will focus on a critique of several shortcuts, the same actor inference, the stray comment doctrine, and various

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judge trials, other plaintiffs have won 45.53% of their judge trials.”); see also Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 958 (2002) (“Job discrimination plaintiffs are one of the least successful classes of plaintiffs at the trial court level.”).

4. Clermont & Schwab, *supra* note 2, at 109.

5. *Id.*

6. *Id.* at 111.

7. *Id.* at 112–13; see also Suzette M. Malveaux, *Is it the “Real Thing”? How Coke’s One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 93–94 (2009) (noting that (1) “the vast majority of employment discrimination cases that come up on appeal involve claims of intentional discrimination—which require credibility determinations usually subject to greater deferential review”; (2) “there is no reason to believe that plaintiffs’ employment attorneys—who labor under the same economic pressures to succeed under contingency fee agreements—are more inclined to bring frivolous cases than other plaintiffs’ attorneys”; and (3) “those cases that survive the gauntlet of procedural hurdles—motion to dismiss, summary judgment, and trial—and do not settle are non-frivolous, close matters that one would expect could go either way: reversal or affirmance”).

temporal nexus requirements, as they have evolved and exist in the law of employment discrimination.

Federal employment discrimination statutes typically prohibit discrimination “because of” protected class membership.<sup>8</sup> However, stringent temporal nexus and context requirements to which judges subject comments alleged to evince bias reveal courts’ insular views as to how discriminatory bias is fomented and expressed. Numerous courts dismiss or discount comments that appear to evince protected class-based bias as “stray” pursuant to their jurisdictions’ view that the timing or context of an utterance must coalesce nearly perfectly with an adverse employment action for it to have evidentiary value.<sup>9</sup> This represents a fragmented view of human nature and the formation and expression of bias; it gives voice to a belief that one’s biased comment made mere days or weeks prior to an action can be said to yield little to no insight into one’s beliefs, motivations, or intentions.

On the other hand, there is the so-called “same actor inference,” pursuant to which courts have held that an inference of an absence of discriminatory intent arises when the same person hires or promotes a protected class member and then later fires her.<sup>10</sup> Despite the multitude of reasons as to why one with some level of bias may hire or promote a protected class member, and despite the ways in which bias may form, evolve, or manifest itself during the passage of years, courts have persisted in applying the same actor inference. This inference, like the stray comment doctrine, operates without any grounding in a refined understanding of human behavior, interpersonal dynamics, or the formation and expression of bias. As opposed to an assumption that one’s words cannot evince the bias one is alleged to have had mere weeks later, the inference inexplicably creates an assumption that a single act evinces a mindset that one should be presumed to have years later.

This Article aims to do several things. First, it urges that the doctrines described above—the same actor inference, the stray comment doctrine, and strict temporal nexus requirements—should be seen today, as courts have applied them, as comprising a larger and dangerous trend in the area of employment discrimination jurisprudence—that of courts reverting to special, judge-made “shortcuts” to curtail or even bypass analysis necessary to justify the disposal or proper adjudication of a case. While some aspects of these doctrines have been critiqued individually,<sup>11</sup> when they are viewed together

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8. See, e.g., 29 U.S.C. § 623(a) (2006) (Age Discrimination in Employment Act); 42 U.S.C. § 2000e-2(a)(1) (2006) (Title VII).

9. See *infra* Part II.C.

10. See, e.g., *Antonio v. Sygma Network, Inc.*, 458 F.3d 1177, 1183 (10th Cir. 2006); *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991).

11. See, e.g., *Natasha T. Martin, Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117 (2008) (same-actor

and framed as part of a larger pathology, the large themes that define this trend emerge and underscore the need for judicial vigilance and reform. So, for example, each shortcut uses broad-brush assumptions about how human beings act, reason, and express themselves either to foreclose what might be valuable evidence from consideration automatically or to erect an inference—which some judges will treat as a presumption<sup>12</sup>—against a plaintiff’s case before her evidence is even proffered. This shorthand across different doctrines reveals a willingness of the judiciary to substitute monolithic assumptions for the individualized reasoned analyses mandated by the relevant legislation.

Second, this Article contrasts the shortcuts trend in employment discrimination jurisprudence with those presumptions and inferences that have traditionally been afforded to plaintiffs suing under traditional tort law. Obviously, the circumstances under which plaintiff-oriented inferences and presumptions are properly invoked in tort law are not completely analogous to those in most employment discrimination cases. Nonetheless, courts’ stated rationales for affording them reinforce the idea that there ought to be judicial sensitivity to the less-than-ideal situation of plaintiffs in certain types of cases to gather the evidence that they will need to prevail. Moreover, while nothing about tort law “shortcuts” that favor plaintiffs compels the genesis of similar shortcuts in employment discrimination law, they should compel a rethinking of the defendant-favoring shortcuts that exist. There ought to be more of a judicial disinclination to substitute a platitude or rote cutoff for a comprehensive analysis where an employment discrimination plaintiff tries to proffer admissible, probative evidence.

Third, this Article explores the potential root causes of the skepticism and hostility with which judges have regarded employment discrimination plaintiffs, as opposed to the way in which they have regarded traditional tort plaintiffs (at least as evidenced by judge-made doctrines).<sup>13</sup> Awareness of and vigilance to this phenomenon is crucial to a more evenhanded treatment of employment discrimination plaintiffs by courts and by jurisprudence going forward.

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inference); Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 791–92 (2010) (stray remarks doctrine); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 76 MO. L. REV. (forthcoming 2012) (stray remarks doctrine).

12. Although inferences and presumptions are wholly distinct concepts, with a presumption being traditionally defined as an assumption of fact compelled by the law under certain circumstances, and an inference being a logical deduction, courts have often and continually conflated or confused the two concepts using “imprecise language.” *Nazir v. United Airlines, Inc.*, 100 Cal. Rptr. 3d 296, 321–22 (Cal. Ct. App. 2009); see also Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 382–83 (2010) (discussing *Nazir*).

13. See *infra* Part IV.E.

Ultimately, this Article advocates for a reconciliation of employment jurisprudence with a realistic view of human behavior so that the narratives that underlie the jurisprudence comport with a holistic, integrated, realistic view of human beings and the interplay among their beliefs, motivations, expressions, and actions. Simplistic narratives such as “someone who hires a member of a group should be presumed to act without bias toward that group or its members,” or “as a matter of law, if he were to retaliate he would need to have done it by X date,” and the shortcuts that they buttress, have no place in employment discrimination law, especially at the summary judgment stage. While there is nothing wrong with a judge—or a jury—concluding that, upon consideration of all appropriate evidence, a plaintiff’s case is not tenable, analysis and a focus on relevant queries, rather than shortcuts, ought to pave the road to that conclusion.

#### *A WORD ABOUT SHORTCUTS AND SUMMARY JUDGMENT*

For decades, scholars who evaluate employment discrimination jurisprudence have consistently bemoaned “the gradual and continuing erosion of the factfinder’s role in federal employment discrimination cases and its replacement by an increasing use of summary judgment through which the courts make pretrial determinations formerly reserved for the factfinder at trial,”<sup>14</sup> alluding to “courts’ willingness to continue to compartmentalize various aspects of plaintiff’s proof to find that none is sufficient,”<sup>15</sup> and the common practice of courts in “slicing and dicing away the probative value of the evidence of the prima facie case, of the falsity of [the] defendant’s explanation and of . . . [discriminatory] statements.”<sup>16</sup> These scholars have accused judges, especially those adjudicating cases with female or minority plaintiffs alleging employment discrimination, of, in the course of deciding summary judgment motions, parsing “law and fact in a technical and mechanistic way without evaluating the broad context on an arid record,”<sup>17</sup> and “promoting form over substance in the quest to define civil rights, applying formalistic rigidity to a complex and elusive phenomenon like workplace

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14. See, e.g., McGinley, *supra* note 1, at 203, 206 (observing that “[c]ivil rights are under siege,” discussing a “misapplication of civil procedural rules to employment discrimination cases [that] threatens substantive anti-discrimination law,” and noting that “[t]his trend . . . substantially undermines the efficacy of the nation’s laws against discrimination”).

15. Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 216 n.93 (2009) (observing that such willingness “is directly contrary to the holistic approach to evaluating evidence of discrimination that the [Supreme] Court require[s]”).

16. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 585 (2001) (calling “such slicing and dicing of all of plaintiff’s evidence . . . the death knell for the *McDonnell Douglas* approach”).

17. Schneider, *supra* note 1, at 729.



discrimination.”<sup>18</sup> Despite these entreaties, however, as the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the jurisprudence that has grown up around them move into their sixth decade of existence, the law of employment discrimination remains as confused and unfocused as ever, seemingly moving away from, rather than toward the statutes’ goals of eradicating workplace discrimination.<sup>19</sup>

Although this Article takes aim at shortcuts generally, it should be noted that in most of the cases discussed in connection with the various shortcuts, the shortcut has been invoked at the summary judgment phase of litigation.<sup>20</sup> This adds an additional dimension to the difficulties posed by the already-problematic shortcuts, despite the fact that, in theory, each shortcut’s effect at summary judgment should be the same as it would be at trial.

Indeed, if a facet of a proffered comment will render it ineligible for consideration by a jury at trial, or insufficient (even when considered alongside all other evidence) as a matter of law to raise a triable issue, it is proper for a court to discount it, and perhaps to grant summary judgment. However, as discussed, courts deciding summary judgment motions in employment discrimination cases often view evidence in a piecemeal manner.<sup>21</sup> They do things like disregard discrete pieces of evidence, often based on nothing more than a hastily-affixed label like “stray.”<sup>22</sup> They often resultantly determine that triable issues may not be discerned as a matter of law, bypassing analysis or explanation as they prematurely foreclose a viable case.

Furthermore, when, a shortcut is as incoherent and amorphous as the stray comment doctrine, for example, it further enables improper grants of summary judgment that are deficient in reasoning, if not also in result. Because the doctrine is not really, as will be discussed, a unified rule or theory, courts impute a variety of meanings and significance to the word “stray” on summary judgment.<sup>23</sup> One court may use it as shorthand to mean “not relevant” without further establishing or justifying this assertion. If this is, in fact, the case, then that court will properly disregard the evidence on summary judgment, but will not furnish a necessary attendant explanation.

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18. Martin, *supra* note 12, at 329.

19. See Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 71, 124 (2011) (observing that “the key question in modern discrimination cases is often whether the plaintiff can cram his or her facts into a recognized structure and not whether the facts establish discrimination,” and that “employment discrimination law is held captive by [an] increasingly complicated web of frameworks, which facilitate a reflexive, formalistic view of discrimination”).

20. See, e.g., *Mieczkowski v. York City Sch. Dist.*, 414 F. App’x 441, 448 (3d Cir. 2011); *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 255, 261–62 (6th Cir. 2002); *Watkins v. Johnson*, No. 3:10-cv-00025, 2010 WL 5479169, at \*4–5 (W.D. La. Dec. 30, 2010).

21. See *infra* Part IV.A.

22. See *infra* Part II.B.

23. See *infra* Part II.B.

Another court, however, may use the label “stray” to mean “insufficient,” standing alone, to establish a triable issue of fact, and then disregard the comment (in whole or in part) despite the fact that it does *not* stand alone as evidence. Still another court may simply affix the label and, on summary judgment, proceed to devalue or wholly discount the evidence without any elucidation as to what it is doing or why. Each of these scenarios is clearly undesirable in the summary judgment context because the court is not, as it should be, viewing the facts in the light most favorable to the non-movant, and examining all appropriate evidence, satisfying itself that the case may not proceed as a matter of law.

At least when shortcuts are presented to juries as inferences or queries (such as when a court instructs a jury that it may infer a lack of discriminatory intent from the same actor inference or when it defines the word “stray,” but lets the jury determine the strength of admissible evidence), the jury will, presumably, get to hear all admissible evidence and determine the strength of that inference, as well as whether and when it is rebutted. As the Eleventh Circuit has noted, “it is the province of the jury rather than the court . . . to determine whether the inference generated by ‘same actor’ evidence is strong enough to outweigh a plaintiff’s evidence of pretext.”<sup>24</sup> Moreover, several of the few published opinions that address the stray comment doctrine in the context of a trial rather than of summary judgment seem to acknowledge that the Federal Rules of Evidence, rather than parties’ characterizations of the strength of evidence, ought to govern admissibility.<sup>25</sup>

Instead, on summary judgment, the often sloppy use of an ambiguous “shortcut” term like “stray” may permit the substitution of judges’ personal evaluations of evidence for that which a reasonable juror *could* conclude. The discounting of potentially helpful evidence combined with undue strength accorded to the same actor inference may result in the premature and unjust foreclosure of a case. Shortcuts, because they are cloaked in the mantle of official doctrines, appear to allow large-scale assumptions that on summary judgment are often held up as ineluctable truths. They accomplish this very succinctly and without very much hashing of evidence, making them further contravene the statutory schemes and goals of the employment discrimination statutes being utilized.

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24. *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir.1998).

25. *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 771 (7th Cir. 2006); *see also* *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 521–22 (3d Cir. 1997) (“Of course, the district court must also keep in mind . . . that stray remarks are not categorically excludable even though not directly connected to the particular employment decision at issue.”); *Harris v. Wackenhut Servs., Inc.*, 648 F. Supp. 2d 53, 61–62, 61 n.5 (D.D.C. 2009) (“The Court agrees with the plaintiff that stray remarks may be probative of discriminatory intent . . . .”); *EEOC v. Schott N. Am., Inc.*, No. 06cv1246, 2009 WL 310897, at \*4–5 (M.D. Pa. Feb. 5, 2009) (applying general evidentiary principles to stray remarks).

## I. BACKGROUND

This Article focuses primarily on cases brought by employment discrimination plaintiffs under Title VII of the Civil Rights Act of 1964<sup>26</sup> and the Age Discrimination in Employment Act of 1967 (“ADEA”).<sup>27</sup> Under Title VII, it is “an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>28</sup>

To allege a claim of intentional disparate treatment under the statute, a plaintiff may show either that discrimination was the only factor engendering an employment decision, or, under the 1991 amendments to the Act, that it was a “motivating factor,”<sup>29</sup> although in the latter instance, a plaintiff’s remedies may be limited.<sup>30</sup> Courts seeking to ascertain whether an action was taken “because of” a plaintiff’s protected class status or whether a defendant’s proffered reason is viable often employ the *McDonnell Douglas Corp. v. Green*<sup>31</sup> burden-shifting framework. In the course of this analysis, the plaintiff initially sets forth a prima facie case that she experienced unlawful discrimination.<sup>32</sup> This usually consists of evidence that the plaintiff belongs to a protected class, that she was satisfactorily performing her job duties, that she suffered an adverse employment action, and that it happened under circumstances giving rise to a legitimate inference of unlawful discrimination.<sup>33</sup> Then, the burden shifts to the defendant to articulate a

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26. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

27. 29 U.S.C. §§ 621–34 (2006).

28. 42 U.S.C. § 2000e-2(a)(1).

29. Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m)) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

30. 42 U.S.C. § 2000e-5(g)(2)(B) (“On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court . . . shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment . . .”).

31. 411 U.S. 792 (1973).

32. *Id.* at 802.

33. See, e.g., *Seeney v. Elwyn, Inc.*, 409 F. App’x 570, 573 (3d Cir. 2011) (per curiam) (“A prima facie case is established where the plaintiff shows that (1) she is a member of a protected class; (2) she was qualified for the position in question; (3) she suffered an adverse employment action; and (4) that adverse employment action gives rise to an inference of unlawful discrimination.”); *Galdwin v. Pozzi*, 403 F. App’x 603, 605 (2d Cir. 2010) (“In order to make out a prima facie case of race or gender discrimination, [plaintiff] must allege the following four

legitimate, nondiscriminatory reason for the adverse action.<sup>34</sup> Lastly, the burden shifts back to the plaintiff, who must ultimately persuade the trier of fact that the rationale proffered by the defendant is a mere pretext for discrimination.<sup>35</sup>

In the Civil Rights Act of 1991, Congress codified Title VII's so-called "mixed-motive" theory, and it became clear that a plaintiff could prevail in her case where she could show that an improper consideration was "a motivating factor" for an adverse employment action.<sup>36</sup> If, however, the defendant can prove by a preponderance of the evidence that it would have taken the same action even absent the impermissible motivating factor, the plaintiff's relief may be limited.<sup>37</sup> Courts evinced confusion as to when a so-called mixed motive instruction was appropriate, with some holding that *McDonnell Douglas* remained the proper framework for use only when they were adjudicating cases that lacked "direct evidence" of discriminatory intent.<sup>38</sup>

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elements: (1) she falls within a protected class, (2) she was performing her duties satisfactorily, (3) she was subject to an adverse employment action, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination.").

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

35. *Id.* at 804; *see also* *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143 (2000) ("[T]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.' And . . . to satisfy this burden, the plaintiff . . . must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981))).

36. Civil Rights Act of 1991, Pub. L. No. 102-166, §107(a), 105 Stat. 1071, 1075 (1991) (codified at 42 U.S.C. § 2000e-2(m)).

37. 42 U.S.C. § 2000e-5(g)(2)(B).

38. *See White v. Baxter Healthcare Corp.*, 533 F.3d 381, 397 (6th Cir. 2008) ("For the first decade after the enactment of 42 U.S.C. § 2000e-2(m), many federal courts required a Title VII plaintiff asserting a mixed-motive claim under this section to produce direct, as opposed to circumstantial, evidence that consideration of a protected characteristic was a motivating factor in the challenged employment decision."); *see also, e.g., Haddon v. Exec. Residence at the White House*, 313 F.3d 1352, 1357-59 (Fed. Cir. 2002) (determining that absent direct evidence of retaliation, the Equal Employment Opportunity Commission ("EEOC") properly applied the *McDonnell Douglas* burden shifting approach); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 n.4 (3d Cir. 1995) ("In a 'mixed-motives' or *Price Waterhouse* case, the employee must produce direct evidence of discrimination, *i.e.*, more direct evidence than is required for the *McDonnell Douglas/Burdine* prima facie case." (citing *Armbruster v. Unisys Corp.*, 32 F.3d 768, 778 (3d Cir. 1994); *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1225 n.6 (3d Cir. 1994)); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995) ("To earn a mixed-motive instruction . . . requires 'direct evidence . . .'" (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring))), *abrogated by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *cf. Buchsbaum v. Univ. Physicians Plan*, 55 F. App'x 40, 44-45 (3d Cir. 2002) ("While a motion for summary judgment on an employment discrimination claim under the ADA or the ADEA is typically considered under the burden-shifting analysis established in *McDonnell Douglas*, the

In 2004, the Supreme Court held that to establish a jury question as to a § 703(m) “mixed motive” violation, “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’”<sup>39</sup> This should have obviated the need for courts to try to distinguish between direct and indirect evidence,<sup>40</sup> but courts persist in their confusion as to the type and strength of evidence needed to make out a Title VII claim, varying in their interpretations of what constitutes “direct evidence,”<sup>41</sup> and what is required to make out a successful discrimination case.<sup>42</sup>

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‘mixed motive’ analysis of *Price Waterhouse* may be applied instead if the plaintiff has produced ‘direct evidence’ of the employer’s discriminatory animus.” (citation omitted)).

39. *Desert Palace*, 539 U.S. at 101 (2003) (quoting 42 U.S.C. § 2000e-2(m)).

40. *See id.* at 98–99; *see also* B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 463–64 (2008) (“In *Desert Palace* . . . the Supreme Court . . . made clear that the Civil Rights Act of 1991 amendments eliminated any distinction between direct evidence and circumstantial evidence cases that *Price Waterhouse* might have implied.” (footnote omitted)); Thomas F. Kondro, Comment, *Mixed Motives and Motivating Factors: Choosing a Realistic Summary Judgment Framework for § 2000e-2(m) of Title VII*, 54 ST. LOUIS U. L.J. 1439, 1455 (2010) (noting the “abolishment of the distinction between direct and circumstantial evidence[] for purposes of evaluating mixed-motive claims”).

41. *See Torgerson v. City of Rochester*, 643 F.3d 1031, 1053 (8th Cir. 2011) (Colloton, J., concurring) (noting the “confusion that has arisen from efforts to apply a ‘direct evidence’ standard”). *Compare Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (“Direct evidence . . . is not the converse of circumstantial evidence, as many seem to assume. Rather, direct evidence is evidence ‘showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated’ the adverse employment action.” (quoting *Thomas v. First Nat’l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997))), *with Bakhtiari v. Lutz*, 507 F.3d 1132, 1138–39 (8th Cir. 2007) (Shepherd, J., concurring in part and writing separately in part) (disagreeing that “circumstantial evidence” is part of the “direct evidence” analysis under *Griffith*).

42. *See White*, 533 F.3d at 398 (“Since *Desert Palace*, the federal courts of appeals have, without much, if any, consideration of the issue, developed widely differing approaches to the question of how to analyze summary judgment challenges in Title VII mixed-motive cases.”); *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1115 (9th Cir. 2006) (“It is not entirely clear exactly what this evidence must be, but nothing in *Price Waterhouse* suggests that a certain type or quantity of evidence is required to prove a prima facie case of discrimination.”). *Compare Calhoun v. Johnson*, 632 F.3d 1259, 1261 (D.C. Cir. 2011) (“Where, as here, the plaintiff lacks direct evidence of discrimination or retaliation, we analyze her claims under the framework of *McDonnell Douglas* . . .”), and *Paup v. Gear Prods., Inc.*, 327 F. App’x 100, 117 (10th Cir. 2009) (“Where, as here, a plaintiff lacks direct evidence of discriminatory intent, she may carry her burden ‘by presenting *circumstantial* evidence in accord with the familiar *McDonnell Douglas* burden-shifting framework.” (quoting *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1195 (10th Cir. 2008))), *with Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284–85 (4th Cir. 2004) (stating that the employee may proceed by (1) “demonstrating through direct or circumstantial evidence that sex or age discrimination motivated the employer’s adverse

Under Title VII's anti-retaliation provision, an employer is prohibited from retaliating against an employee because she opposed practices made unlawful by Title VII or because she "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."<sup>43</sup> Typically, to make out a retaliation claim, a plaintiff must show that she engaged in protected activity and that this protected activity caused the relevant decision maker to confer an adverse employment action upon her.<sup>44</sup>

Under the ADEA, an employer may not discriminate against an employee because of that employee's age, and employees who are forty years old or older merit protection.<sup>45</sup> The Supreme Court, in what has been a controversial decision,<sup>46</sup> held in 2009 that to bring a successful disparate treatment claim under the ADEA, a plaintiff must prove by a preponderance of the evidence that her age was not merely one cause, but rather the "but-for" cause of the adverse employment action that befell her.<sup>47</sup> The Court found that:

[u]nlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways.<sup>48</sup>

This holding has made it much more difficult for ADEA plaintiffs to prove age discrimination under the statute.<sup>49</sup>

employment decision," or (2) by "establishing a prima facie case" through *McDonnell Douglas*), and *Elnashar v. Speedway SuperAmerica, LLC*, 484 F.3d 1046, 1055 (8th Cir. 2007) (stating that "*Desert Palace* is entirely consistent with our precedent under which a plaintiff survives summary judgment either by providing direct evidence of discrimination or by creating an inference of discrimination through the *McDonnell Douglas* framework").

43. 42 U.S.C. § 2000e-3(a).

44. See, e.g., *Burnell v. Gates Rubber Co.*, 647 F.3d 704, 709 (7th Cir. 2011) ("Burnell must provide evidence that he engaged in statutorily protected activity, that he suffered a materially adverse employment action, and that the former caused the latter.").

45. 29 U.S.C. §§ 623(a), 631(a) (2006).

46. See, e.g., Jim Goh, *Caught in the Judicial-Congressional Tug of War: Making Sense of Recent and Upcoming Supreme Court Decisions and Congressional Legislation*, in *EMPLOYMENT LAW 2010: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR* 19, 22, 24 (2010) (stating that "there is congressional activity afoot to repudiate the decision"); Michael Foreman, *Gross v. FBL Financial Services—Oh So Gross!*, 40 U. MEM. L. REV. 681, 685–86 (2010) (arguing that the *Gross* majority ignored precedent).

47. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009).

48. *Id.* at 2349.

49. See, e.g., Foreman, *supra* note 46, at 688 ("*Gross* significantly changed the rules of the game for those attempting to prove age discrimination. Plaintiffs now face uncertain standards at summary judgment, an onerous burden at trial, and new concerns in pleading age discrimination."). See generally Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil*

As per the Federal Rules of Civil Procedure, it is only proper for a court to grant summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”<sup>50</sup> When a judge adjudicates a motion for summary judgment, he or she must view the record in the light most favorable to the non-moving party, and must draw all reasonable inferences in her favor.<sup>51</sup> To survive the motion, however, the non-movant must “produce admissible evidence containing specific facts showing that there is a genuine issue for trial.”<sup>52</sup> As will be discussed, the presence of “shortcuts” in employment discrimination law and particularly their misuse or misapplication can hinder a non-movant plaintiff’s entitlement to have a court fully evaluate all appropriate evidence in the light most favorable to her.

## II. JUDGE-MADE “SHORTCUTS” TO HELP DISPENSE WITH AND DISPOSE OF CASES

*“Courts take a snapshot of the plaintiff’s work life before and after the alleged adverse employment action, search for a common thread, and assign meaning without any regard for the powerful human and institutional forces at work.”*<sup>53</sup>

Despite the fact that Title VII’s broad remedial goals are articulated so clearly and steeped in so much history, judges have taken it upon themselves to craft strictures that serve to bar or impede certain cases not barred by any language in the statute or any procedural rule.<sup>54</sup> These artificially-drawn bright-lines, inferences, and cutoffs—“shortcuts”—are clearly designed to help screen out cases that judges feel are too tenuous with respect to causation or state of mind. However, these doctrines operate, often at the summary judgment level, to help judges screen out cases based on a mechanistic application of a rigid rule when a reasonable trier of fact, assessing the totality

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*Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010) (discussing courts’ historical treatment of ADEA causation, critiquing the *Gross* majority opinion, and positing appropriate legislative response to *Gross*).

50. FED. R. CIV. P. 56(c).

51. *Mitchell v. Gershen*, No. 10-1956, 2011 WL 2134341, at \*1 (3d Cir. May 31, 2011).

52. *Id.* (quoting *Vitalo v. Cabot Corp.*, 399 F.3d 536, 542 (3d Cir. 2005)) (internal quotation marks omitted).

53. *Martin*, *supra* note 11, at 1121.

54. *See id.* at 1120 (“Efforts to explore the circumstantial terrain for meaningful markers of discriminatory conduct have produced various interpretational sideshows; formulations that often bear no connection to modern workplace realities. These judicial maneuvers have diminished the statute’s effectiveness as a shield for workers from the venom of discrimination.”).

of the evidence to ascertain an elusive truth, could, in fact, be persuaded of the plaintiff's claim.<sup>55</sup>

These "shortcuts" can operate systemically to disadvantage employment discrimination plaintiffs who attempt to prove that an adverse employment action befell them "because of" their protected class status or protected activity.<sup>56</sup> Their claims may be prematurely foreclosed or hindered without ample analysis or explanation because a "shortcut" has been applied against the credibility of the narrative that they are attempting to tell,<sup>57</sup> because the chronology of their story failed to adhere to an arbitrary temporal cutoff between the time a comment was uttered and the moment that an adverse action was taken,<sup>58</sup> or because a comment, alleged to be indicative of a given mindset, is determined to be a misspeak or somehow too insignificant to merit evaluation.<sup>59</sup>

Each "shortcut" is rooted in a deceptively simple logic that attempts to narrate the ways in which the human mind works and the ways in which human beings will react in given situations. This monolithic approach to disregarding evidence and, ultimately, whole cases, lacks the nuance and complexity necessitated by a query as intricate as that posed by Title VII: Was this plaintiff treated differently with respect to the terms and conditions of her employment "because of" her protected class status?<sup>60</sup>

Moreover, these shortcuts appear to spawn and perpetuate an alluring sense of security in judges. The narratives that underlie the shortcuts, like, for example, the assumption that a comment removed by a certain number of weeks or months from an action cannot belie a motive for that action, supply a false sense of security that embeds itself in the jurisprudence of a jurisdiction.<sup>61</sup>

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55. *See id.* ("[T]he courts have created various loopholes that allow organizations to remain relatively autonomous, freely adhere to their particular business goals, and, far too often, escape liability for workplace discrimination."); McGinley, *supra* note 1, at 206–07 (arguing that the liberal use of summary judgment in Title VII cases is inconsistent with the statutory scheme).

56. *See supra* note 1 and accompanying text.

57. *See, e.g.,* Carlton v. Mystic Transp., Inc., 202 F.3d 129, 137 (2d Cir. 2000) ("Case law teaches that where the termination occurs within a relatively short time after the hiring there is a strong inference that discrimination was not a motivating factor in the employment decision.").

58. *See, e.g.,* Parker v. Verizon Pa., Inc., 309 F. App'x 551, 559 (3d Cir. 2009) ("[S]tray remarks are rarely given great weight when made temporally remote from the decision to terminate [the plaintiff].").

59. *See, e.g.,* Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1025 (6th Cir. 1993) (dismissing comments that are "too abstract, in addition to being irrelevant and prejudicial, to support a finding of . . . discrimination" (quoting Gagné v. Nw. Nat'l. Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989)) (internal quotation marks omitted)).

60. *See supra* note 19 and accompanying text.

61. *See, e.g.,* Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 667 (7th Cir. 2008) (finding that comments by her boss that the plaintiff's medical problems were a "kiss of death" were deemed



Judges who employ these shortcuts seem to rely on the fact that they are adhering to precedent developed within their jurisdictions and become complacent.<sup>62</sup> These judges, by invoking these well-known doctrines and citing precedent that has done the same, appear to feel as though they have substantiated the outcome of their cases. This is despite the fact that they are “shortcutting” around a fuller analysis.<sup>63</sup>

A shortcut invoked at trial to instruct a jury as to permissible inferences and/or compelled conclusions often baselessly skews toward a defendant-friendly result. When judges invoke shortcuts in the course of deciding summary judgment motions, they may improperly substitute their view as to when an already questionable shortcut operates to foreclose a case as a matter of law, without resort to a trier of fact. Moreover, even where a judge uses a shortcut to get to what may ultimately be a proper grant of summary judgment based on the whole of the evidence of record, that shortcut may obviate or curtail analysis necessary to the thorough, substantiated, and transparent reasoning that all litigants should expect on a dispositive motion. As will be discussed, judges claim to remain bound and constrained by the cutoffs, inferences, and other shortcuts, which, ironically, free them up to clear their dockets without the sense that they have acted independently to cut off a claim. Courts seem to cling to this security, apparently insistent in believing that they are efficiently ridding their dockets of cases in which no reasonable trier could discern discrimination. In this vein, courts divest themselves of the obligation to make difficult calls on questions of fact and law.<sup>64</sup> Similarly, these shortcuts

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“stray remarks” because they were not made “contemporaneously or in connection with” the termination).

62. See, e.g., *Rubinstein v. Adm’rs of the Tulane Educ. Fund*, 218 F.3d 392, 400–01 (5th Cir. 2000) (concluding that the comments could not defeat summary judgment “standing alone” because “these comments are best viewed under our Circuit precedent as stray remarks, thus not warranting survival of summary judgment”).

63. See McGinley, *supra* note 1, at 208 (noting the increased use of summary judgment in civil rights cases, although these types of cases most often turn on credibility and intent that only a fact finder should decide).

64. See McGinley, *supra* note 1, at 207 (“[L]ower courts have granted summary judgment in cases where there exist questions of fact concerning the employer’s motive, thereby denying to employment discrimination plaintiffs their ‘day in court’ historically promised by the American model of litigation.” (footnote omitted)); Ross B. Goldman, Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1566 (2007) (“Because questions of fact are reserved for the finder of fact, and because juries are factfinders, courts usurp the juries’ authority when they find facts, assess the credibility of the evidence, and allow summary judgment for an employer—and this is precisely what happens in same-actor cases.”).

often alleviate responsibility for employers' violations of Title VII, permitting employers to exploit them.<sup>65</sup>

Three "shortcuts" will be discussed below: the same actor inference; the "stray comment" doctrine; and the temporal nexus requirement regarding the lapse of time between a comment or protected action and an adverse action.

#### A. *Same Actor Inference*

Pursuant to the so-called same-actor inference, first posited by the Fourth Circuit in 1991, when the same actor responsible for an adverse employment action either hired or promoted the employee at issue, there arises a "strong inference that the employer's stated reason for acting against the employee is not pretextual," and ultimately that discrimination did not underlie the adverse action.<sup>66</sup> Though never sanctioned (or even mentioned) by the Supreme Court, the same actor inference, in some iteration, has won widespread acceptance throughout all of the federal jurisdictions in the United States, which vary in the strength they each accord it.<sup>67</sup> The length of time that elapses between the

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65. See, e.g., Martin, *supra* note 11, at 1122 ("[T]he same-actor principle exonerates employers from their responsibility to address structural and cultural barriers to workplace equality, forces within the employers' control and which often they employ strategically for business reasons.").

66. Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991); see also Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1923 n.99 (2009) ("[T]he 'same actor' inference . . . permits a factfinder to conclude that the supervisor who hired the plaintiff did not later discriminate on the basis of a characteristic that would have been evident at the time of hiring.").

67. See, e.g., Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (recognizing that the same actor inference has been recognized by almost every circuit and agreeing that in cases where an "employee was hired and fired by the same person within a relatively short time span, there is 'a strong inference that the employer's stated reason for acting against the employee is not pretextual'" (footnote omitted) (quoting Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991))); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1442-43 (11th Cir. 1998) (finding that where the same individual was responsible for hiring, promoting, and ultimately terminating plaintiff, that the "facts may give rise to a *permissible inference* that no discriminatory animus motivated [defendant's] actions"); Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997) (finding that it would be "difficult to impute . . . an invidious motivation that would be inconsistent with the decision to hire"); Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270-71 (9th Cir. 1996) ("[W]here the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."); Buhmaster v. Overnite Transp. Co., 61 F.3d 461, 463 (6th Cir. 1995) (stating that the same actor inference "allows one to infer a lack of discrimination from the fact that the same individual both hired and fired the employee"). Moreover, in a variation on this inference, in more than one jurisdiction, an inference of discrimination may be weakened where the plaintiff and the decision maker belong to the same protected class. See, e.g., Coggins v. Gov't of D.C., No. 97-2263, 1999 WL 94655, at \*4 (4th Cir. Feb. 19, 1999); Gray v. Motorola, Inc., No. CV 07-1466-PHX-MHM, 2009 WL 3173987, at \*14 (D. Ariz. Sept. 30, 2009); Ziegler v. Del. Cnty. Daily Times, 128 F. Supp. 2d

hiring or promotion and the adverse action is, however, usually considered highly relevant to the strength and application of the inference by many jurisdictions,<sup>68</sup> and time lapses of up to seven years have been held to properly invoke the inference.<sup>69</sup>

Some circuits, like the Second Circuit, have been explicit about the fact that the inference is permissive, and courts in that circuit have noted that no court needs to “give [the defendant] the benefit of the inference at [the summary-judgment] stage of the litigation.”<sup>70</sup> Nonetheless, the inference is alive and well in modern employment discrimination jurisprudence.<sup>71</sup> Despite courts’ sporadic admonitions that the inference’s “use is not to become a substitute for a fact-intensive inquiry into the particular circumstances of the case at hand”<sup>72</sup> and that “[t]he same-actor inference is not dispositive,

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790, 811 n.47 (E.D. Pa. 2001); *Jackson v. Sch. Bd. of Richmond*, No. 99-CV-642, 2000 WL 34292578, at \*7 (E.D. Va. Mar. 15, 2000); *DeWitt v. Mecklenburg Cnty.*, 73 F. Supp. 2d 589, 598–99 (W.D.N.C. 1999). This shows the extent of the assumptions at work when only a mere fact about the protected class membership or one-time act of a decision maker is known, as well as the power of these assumptions.

68. See, e.g., *Jetter v. Knothe Corp.*, 324 F.3d 73, 76 (2d Cir. 2003) (“[The same actor] rationale is that when the person who made the decision to fire was the same person who made the decision to hire, especially when the firing occurred only a short time after the hiring, it is difficult to impute to him an invidious firing motivation that would be inconsistent with his decision to hire.”); *Grady*, 130 F.3d at 560 (noting that the same actor inference is “especially” strong “when the firing has occurred only a short time after the hiring”); *Hartsel v. Keys*, 87 F.3d 795, 804 n.9 (6th Cir. 1996) (“The passage of time between those two events [of hiring and firing the plaintiff] is a relevant factor in weighing the [same actor] inference.”); *Velez v. SES Operating Corp.*, No. 07 Civ. 10946(DLC), 2009 WL 3817461, at \*10 (S.D.N.Y. Nov. 12, 2009); cf. *Vancour v. Bozzuto’s Inc.*, No. 03CV2088 (JBA), 2006 WL 758636, at \*7 n.5 (D. Conn. Mar. 24, 2006) (finding that the same actor inference does not mandate summary judgment when many years had lapsed between positive employment decisions and termination).

69. *Martin*, *supra* note 11, at 1135; see, e.g., *Herr v. Airborne Freight Corp.*, 130 F.3d 359, 362–63 (8th Cir. 1997) (two-year interval); *Hansen v. Clark Cnty.*, No. 2:05-CV-672-BES-VPC, 2007 WL 1892127, at \*2, 8 (D. Nev. June 27, 2007) (approximately seven-year interval); *Hollingsworth v. Henry Cnty. Med. Ctr. EMS, Inc.*, No. 05-1272 B, 2007 WL 1695303, at \*1, 5 n.3 (W.D. Tenn. June 12, 2007) (six-year interval).

70. *Collins v. Conn. Job Corps*, 684 F. Supp. 2d 232, 251 (D. Conn. 2010) (quoting *Memnon v. Clifford Chance US, LLP*, 667 F. Supp. 2d 334, 351 (S.D.N.Y. 2009)) (internal quotation marks omitted). The *Collins* court further noted that “the inference alone is generally not a sufficient basis to grant summary judgment for the employer, at least when the employee has proffered evidence of pretext’ . . . or where there are ‘changes in circumstances during the course of [the plaintiff’s] employment.’” *Id.* (quoting *Masters v. F.W. Webb Co.*, No. 03-CV-6280L, 2008 WL 4181724, at \*6 (W.D.N.Y. Sept. 8, 2008); *Feingold v. New York*, 366 F.3d 138, 155 (2d Cir. 2004)).

71. See, e.g., *Dasgupta v. Harris*, 407 F. App’x 325, 329 (10th Cir. 2011); *Spears v. Patterson UTI Drilling Co.*, 337 F. App’x 416, 422 (5th Cir. 2009); *Knadler v. Furth*, 253 F. App’x 661, 663 (9th Cir. 2007).

72. *Collins*, 684 F. Supp. 2d at 251 (quoting *Copeland v. Rosen*, 38 F. Supp. 2d 298, 305 (S.D.N.Y. 1999)) (internal quotation marks omitted).

however, when the decisionmaker makes comments demonstrating discriminatory animus,”<sup>73</sup> other courts have held that where a short timeframe strengthens the inference, little short of “egregious facts,” will enable a plaintiff to overcome or rebut it.<sup>74</sup> Noting that “in most cases involving [the same actor inference], [countervailing evidence of pretext] will not be forthcoming,” such courts have approached same actor decisions with overwhelming skepticism toward the plaintiff’s case from the outset.<sup>75</sup>

The same actor inference, then, though rebuttable, is extremely difficult for a plaintiff to overcome as a practical matter. In a noteworthy 2001 Fifth Circuit case, the plaintiff, attempting to surmount the application of the same actor inference, alleged that a decision maker “during a few staff meetings . . . admonished the attendees to listen carefully to [the plaintiff] because he did not speak English well.”<sup>76</sup> Despite the fact that the court found that there was “no question that [the decision maker] had significant influence in the decision to discharge [the plaintiff]” and that it was “likely that remarks such as [those at issue] could, under other circumstances, provide support for a charge of discrimination based on national origin,” it held that the remarks constituted insufficient evidence of a factual issue as to pretext.<sup>77</sup> In fact, the court held, in light of the plaintiff’s dearth of other evidence to rebut the legitimate nondiscriminatory reason proffered by the decision maker, the “remarks at most create a weak factual issue” because “[s]tanding alone, [the] remarks cannot defeat the inference created by the fact that [the plaintiff] was discharged by . . . the same individual who hired him — i.e., the inference that the discharge was not motivated by discrimination.”<sup>78</sup>

In another recent case, the district court concluded that the plaintiff had failed to meet even the “minimal burden applicable at the *prima facie* stage” with respect to her production of evidence, declaring in no uncertain terms that the plaintiff had “identified no evidence, whether direct or circumstantial, that would permit a reasonable fact-finder to draw an inference that plaintiff’s

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73. *Smith v. Tuckahoe Union Free Sch. Dist.*, No. 03 Civ. 7951(PGG), 2009 WL 3170302, at\*8 (S.D.N.Y. Sept. 30, 2009).

74. *See, e.g., Penalver v. Res. Corp. of Am.*, No. 3:10-CV-0280-D, 2011 WL 1885988, at \*5 (N.D. Tex. May 18, 2011) (“[T]he question is whether [the plaintiff] has proffered evidence of sufficiently egregious facts to overcome the same actor inference and enable a reasonable jury to find that RCA’s articulated reasons for discharging her are pretextual.”); *Watkins v. Johnson*, No. 3:10-cv-00025, 2010 WL 5479169, at \*5 (W.D. La. Dec. 30, 2010) (“As in *Brown*, the evidence, construed in the light most favorable to [the plaintiff], is not sufficiently egregious to overcome the same-actor inference.” (citing *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir. 1996)).

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

76. *Cartagena v. Aegis Mortg. Corp.*, No. 01-20324, 2001 WL 1268730, at \*6 (5th Cir. Oct. 16, 2001).

77. *Id.*

78. *Id.*

discharge was the result of unlawful discrimination against her because of her race or ethnicity.”<sup>79</sup> This conclusion came despite the fact that the plaintiff set forth four occasions on which she alleged that workplace administrators utilized “racially insensitive language.”<sup>80</sup> This language included the epithets “spics” and “dumb Puerto Rican” (referring to the plaintiff), as well as a reference to “you people” by an administrator while speaking to the plaintiff.<sup>81</sup> The court found that this inflammatory evidence could not properly be placed before a jury for evaluation due to the strength of the same actor inference:

[P]laintiff’s allegations that Thadal called plaintiff a “dumb Puerto Rican,” that Thadal said the word “spics” during a telephone call with an unknown party, and that Thadal referred to “you people” while speaking to plaintiff, are effectively negated by the fact that Thadal herself was responsible . . . for the decision to hire plaintiff fewer than three months earlier.<sup>82</sup>

By contrast, other courts have held that “the strength of that inference is for the jury to determine, not the court.”<sup>83</sup> The rationale or narrative underlying the same actor inference is that “it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them) only to fire them once they are on the job.”<sup>84</sup> Simply put, “it is suspect to claim that the same manager who hired a person in the protected class would suddenly develop an aversion to members of that class.”<sup>85</sup>

This rationale, and the inference itself, however, have come under heavy criticism. According to Professor Natasha Martin:

The same-actor doctrine is based on several faulty assumptions. First, it presumes that discrimination emanates only from a single bad actor, a biased individual who harbors negative feelings about another. Second, it assumes that voluntary association with one who is different in the context of work means the decision-maker harbors no such negative feelings, or if he did, he

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79. *Velez v. SES Operating Corp.*, No. 07 Civ. 10946(DLC), 2009 WL 3817461, at \*9 (S.D.N.Y. 2009).

80. *Id.* at \*10.

81. *Id.*

82. *Id.*

83. *Bernstein v. Sephora*, 182 F. Supp. 2d 1214, 1223 (S.D. Fla. 2002); *see also Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir. 1998) (“[I]t is the province of the jury rather than the court . . . to determine whether the inference generated by ‘same actor’ evidence is strong enough to outweigh a plaintiff’s evidence of pretext.”).

84. *Zambetti v. Cuyahoga Cmty. Coll.*, 314 F.3d 249, 261 (6th Cir. 2002) (quoting *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991)) (internal quotation marks omitted); *accord Speed v. Adidas Am., Inc.*, No. 04-CV-1430-PK, 2006 WL 897978, at \*7 (D. Or. Apr. 6, 2006) (“It is illogical to assume that Mr. Hewitt, who advocated on Speed’s behalf for years, would suddenly turn against him and fire him based on race.”).

85. *Watt v. N.Y. Botanical Garden*, No. 98 Civ. 1095(BSJ), 2000 WL 193626, at \*7 (S.D.N.Y. Feb. 16, 2000).

has now resolved them and they are incapable of resurrection. This greatly oversimplifies how bias operates and ignores the prevalence of grouping and collective processing in organizations, vectors that create the conditions for bias to flourish.<sup>86</sup>

Scholarship and social science research reveal that the bias one harbors may not necessarily impede one's hiring of an individual, for one reason or another (the bias is subconscious or unconscious); the bias may be concealed until the hired individual commences work, etc., but may emerge thereafter.<sup>87</sup> Indeed, scholars have taken note of the irony and unjustness of employers being able to claim credit for hiring members of minority groups, only to subsequently discriminate against them and elude liability due to the application of the same actor inference.<sup>88</sup>

Scholars have long pointed to the incongruities between the contemporary American workplace and the narrative and logic that underlie the application of the same actor inference.<sup>89</sup> Despite the fact that scholars have exhorted courts to forego the summary dismissal of cases based on the crude, unfounded, and simplistic assumptions embedded in the same actor inference's narrative, and engage in thoughtful, searching decision-making,<sup>90</sup> it does not appear that the

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86. Martin, *supra* note 11, at 1122.

87. *See id.* (“[B]ias may not rear its ugly head until after an employee is immersed in a work setting or work group.”); *see also* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CALIF. L. REV. 1251, 1314–16 (1998) (discussing how the same actor inference is inconsistent with the way in which the mind really works).

88. *See, e.g.*, Martin, *supra* note 11, at 1122 (“By ‘hiring brown’ in the first instance, for example, a racist employer is shielded against allegations of racism or somehow incapable of racist tendencies altogether in the eyes of the courts. In this way, the same-actor doctrine operates as a subsidy for those employers that make the effort to diversify their workforces, cheapening notions of acceptability and workplace inclusiveness.”).

89. *See* Krieger, *supra* note 87, at 1314 (stating that “there is substantial reason to believe that [the same actor doctrine’s] . . . underlying assumptions are wrong, that this is simply not how discrimination works, at least not discrimination deriving from implicit stereotypes about the aptitudes and abilities associated with different demographic groups”); Martin, *supra* note 11, at 1139 (arguing that new and evolving “work structure, evaluative models, and relational dynamics” in the contemporary workplace “serve as vectors for the injection of bias into the decision-making process between the time an individual is hired and fired, or otherwise subjected to adverse treatment”).

90. Goldman, *supra* note 64, at 1560 (“[C]ourts that dismiss plaintiffs’ claims on account of the same-actor inference act in a way contrary to the implicit mandate of the Supreme Court that such broadly applicable per se rules are misplaced in employment discrimination litigation.”); Martin, *supra* note 11, at 1170 (“[C]ourts should engage the shifting and complex nature of any particular work setting instead of proclaiming the existence of same-actor evidence determinative of, or even pertinent to, the ultimate question of discrimination, and thereby summarily dismissing plaintiff’s claims.”).

inference is going anywhere. If anything, it has become more entrenched in employment discrimination jurisprudence recently.<sup>91</sup>

### B. “Stray Comments”

Another so-called shortcut that courts have used to foreclose a plaintiff’s case at the summary judgment stage is the stray comment or stray remark doctrine, which also is not a uniform, coherent, and consistent doctrine from jurisdiction to jurisdiction.<sup>92</sup> This doctrine is invoked at various stages of a case, but often when a plaintiff proffers as evidence of discrimination one or more discriminatory comments, and the court arrives at the conclusion that the comments are, as a matter of law, “stray,” and thus either wholly not relevant or insufficient, without more (or sometimes with more), to propel the plaintiff’s case forward.<sup>93</sup> Moreover, courts may allude to comments as “stray” when, in fact, the courts may be summarily dismissing them as not relevant to the adjudication at hand for any number of reasons.<sup>94</sup> Thus, a court may use the word stray to mean that a comment is wholly not relevant,<sup>95</sup> but another court may use the word to mean that while the comment may have relevance, it will not be sufficient evidence of the discrimination alleged to, as a matter of law, warrant going before a trier of fact.<sup>96</sup>

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91. See Martin, *supra* note 12, at 358 (“Since the formulation of the same-actor principle in 1991, its evolution has been steady and expansive. The principle has received affirmation from most of the courts addressing the issue, with most endorsing the *Proud* court’s rationale with, if not resounding approval, at least passive acceptance.”).

92. For a more expansive discussion of the evolution of the stray remark doctrine and a critique of its promulgation and application, see generally Stone, *supra* note 11.

93. See, e.g., Nichols v. S. Ill. Univ.-Edwardsville, 510 F.3d 772, 781–82 (7th Cir. 2007) (“[S]tray remarks that are neither proximate nor related to the employment decision are insufficient to defeat summary judgment.” (quoting Sun v. Bd. of Trs. of Univ. of Ill., 473 F.3d 799, 813 (7th Cir. 2007)) (internal quotation marks omitted)); Rubinstein v. Adm’rs of the Tulane Educ. Fund, 218 F.3d 392, 400–401 (5th Cir. 2000); see also Martin, *supra* note 12, at 347 (“What accounts for this unfavorable treatment of expressions of bias is what is commonly known as the ‘stray remarks doctrine.’ Under this construct, courts reviewing statements of bias often describe them as ‘stray remarks.’ While admissible, they are often insufficient to raise a triable issue of fact.” (footnote omitted)).

94. See generally Stone, *supra* note 11.

95. See, e.g., Shefferly v. Health Alliance Plan of Mich., 94 F. App’x 275, 280 (6th Cir. 2004) (“[I]solated and ambiguous comments are too . . . irrelevant and prejudicial[] to support a finding of . . . discrimination.” (quoting Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1025 (6th Cir. 1993)) (internal quotation marks omitted)); Smith v. Leggett Wire Co., 220 F.3d 752, 760 (6th Cir. 2000).

96. See, e.g., Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 368 (3d Cir. 2008) (“As the Court of Appeals for the Eighth Circuit has opined, ‘although . . . stray remarks, standing alone, may not give rise to an inference of discrimination, such remarks are not irrelevant.’” (quoting Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 922 (8th Cir. 2000))); Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 36 (1st Cir. 2001) (“As we have acknowledged, in combination with other

Courts seeking to decide whether a comment may provide a basis upon which to infer that discriminatory animus motivated an adverse employment decision have traditionally looked to the following factors:

- (1) whether the remarks were made by the decision maker or by an agent of the employer uninvolved in the challenged decision; (2) whether the remarks were isolated or part of a pattern of biased comments; (3) whether the remarks were made close in time or remote from the challenged decision; and (4) whether the remarks were ambiguous or are clearly reflective of discriminatory bias.<sup>97</sup>

In fact, several jurisdictions have held that a discriminatory comment made by a decision maker must be deemed a stray comment *unless* it 1) directly addresses the plaintiff's protected class; 2) is temporally connected to the adverse employment action at issue; 3) is made by a person with authority over the employment decision at issue; and 4) relates directly to the precise adverse action at issue.<sup>98</sup> Other jurisdictions will seize upon one facet of a comment, such as the fact that it was uttered by a non-decision maker,<sup>99</sup> too far in time

evidence[,] so-called stray remarks may permit a jury reasonably to determine that an employer was motivated by a discriminatory intent." (citation omitted) (internal quotation marks omitted)); *Walden v. Ga.-Pac. Corp.*, 126 F.3d 506, 522 (3d Cir. 1997) ("Because it is clear, however, that stray remarks by non-decisionmakers may be relevant to the question whether the plaintiffs were fired in retaliation for protected activity, these facts in and of themselves are not sufficient to deem the Woodham and Fuller statements irrelevant."); *Merrick v. Farmers Ins. Grp.*, 892 F.2d 1434, 1438–39 (9th Cir. 1990) (finding that stray remarks will not create a triable issue); *see also* *Stone*, *supra* note 11 (manuscript at 8–15) (describing examples of courts' application of the stray comment doctrine).

97. *Sanders v. Kettering Univ.*, No. 07-11905, 2009 WL 3010849, at \*15 (E.D. Mich. Sept. 17, 2009) (referring to factors involved in state actions brought under the Elliott-Larsen Civil Rights Act), *aff'd in part, rev'd in part on other grounds*, 411 F. App'x 771 (6th Cir. 2010) (reversing only judgment with respect to the breach of contract claim); *accord* *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 683 (5th Cir. 2001) ("Remarks may serve as sufficient evidence of age discrimination if they are: 1) age related, 2) proximate in time to the employment decision, 3) made by an individual with authority over the employment decision at issue, and 4) related to the employment decision at issue.").

98. *Jackson v. Cal-W. Packaging Corp.*, 602 F.3d 374, 380 (5th Cir. 2010); *Brown v. Dir. SCDC*, No. 8:08-3761-HFF-BHH, 2010 WL 3167332, at \*8 (D.S.C. May 28, 2010) (citing *Patel v. Midland Mem'l Hosp. & Med. Ctr.*, 298 F.3d 333, 344 (5th Cir. 2002)); *Delgado Graulau v. Pegasus Commc'ns of P.R.*, 130 F. Supp. 2d 320, 330 (D.P.R. 2001).

99. *See, e.g., Mieczkowski v. York City Sch. Dist.*, 414 F. App'x 441, 448 (3d Cir. 2011) ("There is nothing in the record to suggest that either the board member who told Penn to go 'after whites' or Penn had any involvement in the decision to reprimand Mieczkowski . . . . Accordingly, we find that the District Court correctly concluded that . . . Mieczkowski failed to show that [the decision maker] treated Mieczkowski less favorably than other employees based on her race."); *Bennett v. Saint-Gobain Corp.*, 507 F.3d 23, 29 (1st Cir. 2007) ("We add, moreover, that even if the grievances did not comprise hearsay, they would not have had a decisive bearing on the issues before the district court. After all, [the commenter] was not the decisionmaker here.").



from the adverse action,<sup>100</sup> about an individual other than the plaintiff,<sup>101</sup> or even about the plaintiff, but in a context apart from the adverse action,<sup>102</sup> in order to deem the comment “stray.”

This doctrine has been criticized for permitting judges and juries alike to bypass a reasoned analysis of the totality of the circumstances of a case, in favor of a rote applied label, “stray,” that often serves, without justification, to divest the evidence of its probative value.<sup>103</sup> Moreover, scholarship has criticized the individual considerations that can lead a court to relegate a

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100. *See, e.g.,* *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 491 (7th Cir. 2007) (finding that the decision maker’s comment that the employee looked tired and old, made more than a year before the adverse action at issue, was insufficient to prove discrimination); *Read v. BT Alex Brown Inc.*, 72 F. App’x 112, 120 (5th Cir. 2003) (“The comment, however, was made at the beginning of Read’s tenure with Brown, and almost three years prior to her termination. As the district court concluded, therefore, this comment cannot be viewed as proximate in time to the challenged employment decision, and cannot therefore be considered as meaningfully probative evidence that Read’s termination was discriminatory.”).

101. *See, e.g.,* *Petts v. Rockledge Furniture LLC*, 534 F.3d 715, 721 (7th Cir. 2008) (finding that the manager’s “acting like a man” comment made to another female employee more than one year before the adverse action in question was insufficient evidence of discriminatory intent); *Brauninger v. Motes*, 260 F. App’x 634, 640 (5th Cir. 2007) (“Brauninger offers the fact that Roniger, who was one year older than Brauninger, had referred jokingly to himself, Brauninger, and another employee as ‘grey-haired men.’ Such stray remark, however, is not unambiguous evidence of animus, given that Roniger was referring to himself as well as to Brauninger.”); *Cox v. Infomax Office Sys., Inc.*, No. 4:07-cv-0457-JAJ, 2009 WL 124700, at \*8 (S.D. Iowa Jan. 16, 2009) (“Here, all Cox has shown is that Jacobs’ [sic] made a stray remark about another employee. Having already discounted much of Cox’s other evidence, this evidence also does not raise an inference of age discrimination.”).

102. *See, e.g.,* *Fjelsta v. Zogg Dermatology, PLC*, 488 F.3d 804, 810 (8th Cir. 2007) (“As there is no other evidence linking this comment to the job performance actions taken more than one month later, we agree with the district court that Deanne Zogg’s comment, in context, was a ‘stray remark in the workplace.’”); *Shahriary v. Teledesic LLC*, 60 F. App’x 157, 161 (9th Cir. 2003) (“Although the statements relied upon by Shahriary in support of his national origin claim . . . might suggest ethnic bias, Shahriary has produced no evidence showing a causal connection between those statements and his termination. Without such a connection, the statements can only be interpreted as stray remarks . . . .”); *Straughn v. Delta Air Lines, Inc.*, 250 F.3d 23, 36–37 (1st Cir. 2001) (“Straughn proffered no evidence that Giglio ever used the nondescript ‘southern black’ accent either *during or in relation to* the challenged employment action. . . . Thus, Straughn’s naked *ipse dixit* was insufficient to generate a genuine issue of material fact.”).

103. *See, e.g.,* *Sperino*, *supra* note 11, at 791 (“However, even in the indirect liability context, the stray remarks doctrine may be too expansive, causing courts to limit the types of evidence that plaintiffs can marshal on behalf of their claims of individual discrimination.”); *Stone*, *supra* note 11 (manuscript at 3) (“[T]he stray comments ‘doctrine’ does more harm than good and . . . courts wishing to grant a defendant summary judgment on a claim should have to do so by looking at the totality of circumstances, rather than summarily using a single facet of a comment to dismiss it from consideration.”).

comment to “stray” status as being unfounded.<sup>104</sup> So, for example, the fact that a racist comment was made about an individual by a decision maker is likely probative of the speaker’s mindset, even if it was made outside of the precise timeframe or context of the adverse employment action at issue.<sup>105</sup> Similarly, it ought to be possible to find probative value in a discriminatory comment made by one other than the decision maker, especially if the comment is indicative of the workplace culture, ethos, or atmosphere.<sup>106</sup> Further, courts that deem a comment “stray” simply because it is somewhat ambiguous may be improperly removing a valid judgment as to the plausibility of a certain interpretation from a trier of fact by deeming the comment benign as a matter of law.<sup>107</sup>

### C. Temporal Nexus Requirement

There are two primary ways in which courts may invoke what they call a temporal nexus/proximity requirement to sometimes automatically, and sometimes artificially, cut off a plaintiff’s case. In the first of these two scenarios, a plaintiff who is alleging discrimination of some kind is fortunate

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104. See, e.g., Sperino, *supra* note 11, at 791 (“The stray remarks doctrine also poses a problem within the employment discrimination field, and this problem is one that shares some connection with the focus on the rogue actor and a simplified view of workplace decisionmaking.”); Stone, *supra* note 11 (manuscript at 26) (“[W]here social science is permitted to inform an analysis of the underlying premises of the stray comment doctrine and the factors that could cause a judge to ascribe the dooming moniker ‘stray’ to evidence, it becomes clear that these premises are flawed and fail to comport with the way in which people really interact, react, and form and impressions or biases.”).

105. See Sperino, *supra* note 11, at 791 (“Further, especially with subjective assessments that could be made over time, a comment that was made several years away from the final decision may demonstrate that the decisionmaker had biased viewpoints that led either directly or indirectly to faulty or even false assessments of the employee’s performance.”); Stone, *supra* note 11 (manuscript at 29) (“This is despite the fact that there is often every reason to believe that one who voices a discriminatory belief very likely adheres to that belief in other contexts.”).

106. See Sperino, *supra* note 11, at 791 (“Remarks being made by coworkers and others within the workplace may influence the decision ultimately made, as a decisionmaker may either explicitly or implicitly take these remarks into consideration when making an employment decision.”).

107. See *infra* note 197 and accompanying text. In the specific instance in which an alleged discriminatory comment is deemed to be too removed in time from the adverse action at issue, some courts refer to the comment as a “stray comment,” and others talk about a “temporal nexus requirement” that was not met so as to permit the case to proceed. For the sake of clarity, examples of such cases will be addressed in the discussion below, Part II.C, which is devoted to so-called “temporal nexus requirements.” Such requirements are found in both cases alleging disparate treatment in which proffered comments are deemed to be too removed in time from the adverse action at hand and retaliation cases, in which courts find as a matter of law that a claim may not be maintained because too much time has elapsed between the plaintiff’s protected activity and the adverse action that later befalls the plaintiff.

enough to have evidence that a decision maker made what might be interpreted as a comment evincing animus or some kind of bias against the protected class to which the plaintiff belongs. This is significant, as will be discussed, because bias in the workplace tends, due to cultural, social, and even legal pressures, to be repressed and unexpressed explicitly.<sup>108</sup> However, due to the presence of an arbitrarily-chosen cutoff with respect to how much time may elapse between such a comment and an adverse employment action in the given jurisdiction, the judge declines to attach significance to the comment, adverting to either a failed “temporal nexus requirement” or to a resultant “stray comment.”<sup>109</sup>

### 1. Comments

Most courts agree that an employment discrimination plaintiff may make out her case by either using the *McDonnell Douglas* burden-shifting framework<sup>110</sup> discussed previously or by using direct evidence of discrimination.<sup>111</sup> Although the Supreme Court has not articulated a definition

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108. See Bartlett, *supra* note 66, at 1895–96 & nn.2–3 (2009) (discussing how social psychology research has revealed that racial and gender bias is “invisible, deep and pervasive,” and asserting that such bias, though increasingly implicit or unconscious, still exists and causes discrimination); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (stating that “subtle, often unconscious forms of bias” are more common in the modern workplace than “the deliberate discrimination prevalent in an earlier age”); Dale Larson, *Antidiscrimination Law in the Workplace: Moving Beyond the Impasse*, 9 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 303, 306 (2009) (stating that despite the realization that “modern workplaces often rely heavily on informal interactions and subjective measures of performance, thereby increasing opportunities for subtle discrimination to take place . . . the law continues to assume that discrimination is only the result of individual, explicit animus reflected clearly in the evidence of the discriminatory act”); Ishra Solieman, Note, *Born Osama: Muslim-American Employment Discrimination*, 51 ARIZ. L. REV. 1069, 1082–83 (2009) (“Research in cognitive psychology has also shown that modern discrimination in the workplace is more subtle and complex than traditional modes of employment discrimination.”).

109. See, e.g., *Wittenburg v. Am. Express Fin. Advisors, Inc.*, 464 F.3d 831, 837 (8th Cir. 2006) (finding that the statement did not establish that age was a factor for the employee’s termination over a year later); *Conley v. Vill. of Bedford Park*, 215 F.3d 703, 711 (7th Cir. 2000) (finding that a comment made more than two years from the adverse employment action was too far removed to constitute evidence of discriminatory motive); *Wohler v. Toledo Stamping & Mfg. Co.*, No. 96-4187, 1997 WL 603422, at \*3 (6th Cir. Sept. 30, 1997) (“This court has in the past concluded that a comment made even a year before discharge is too far removed in time to be indicative of discriminatory intent behind the termination decision.”). *But see Johnson v. Kroger Co.*, 319 F.3d 858, 868 (6th Cir. 2003) (finding that despite the two-year gap between the discriminatory statements and the adverse action, “Newman’s statement must . . . be viewed in connection with the evidence concerning racial jokes and slurs prior to Johnson’s arrival at the Wheelersburg store”).

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

111. See, e.g., *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (stating that in the absence of direct evidence, a plaintiff can defeat summary judgment by establishing an

of “direct evidence,” it has been defined as “evidence which reflects a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee. . . . [and] indicate[s] that the complained-of employment decision was *motivated* by the decision-maker’s [racial animus].”<sup>112</sup> However, “[t]o qualify as direct evidence of discrimination, [courts] require that a biased statement by a decision-maker be made concurrently with the adverse employment event, such that no inference is necessary to conclude that the bias necessarily motivated the decision.”<sup>113</sup> Thus, biased statements that do not meet these criteria are cast into the realm of evidence that may, at best, help establish a plaintiff’s case that her employer’s alleged legitimate nondiscriminatory reason for its action is pretextual and masking discrimination.<sup>114</sup>

In any event, however, courts adjudicating claims of employment discrimination brought under federal statutes have routinely excluded evidence at trial or refused to accord evidence of biased comments enough weight to stave off a grant of summary judgment for the employer, without any thought

inference of discrimination through the *McDonnell Douglas* burden shifting analysis); *Luciano v. Monfort, Inc.*, 259 F.3d 906, 909 (8th Cir. 2001) (“Without any evidence . . . that [the comment-maker] was a decisionmaker . . . his statements are insufficient to form the basis for a direct evidence analysis. Therefore, the district court properly applied *McDonnell Douglas* rather than a direct evidence analysis.”).

112. *Williamson v. Adventist Health Sys./Sunbelt, Inc.*, 372 F. App’x 936, 940 (11th Cir. 2010) (per curiam) (quoting *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1358–59 (11th Cir. 1999)); *accord King v. Hardesty*, 517 F.3d 1049, 1058 (8th Cir. 2008) (“We have held that direct evidence . . . include[s] ‘evidence of actions or remarks of the employer that reflect a discriminatory attitude,’ ‘comments which demonstrate a discriminatory animus in the decisional process,’ or comments ‘uttered by individuals closely involved in employment decisions.’” (quoting *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991))); *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 993 (5th Cir. 2005) (“When a person or persons with decision making authority evinces racial animus that may constitute direct evidence of discrimination.”); *Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 720 (7th Cir. 2005) (“Direct evidence ‘can be interpreted as an acknowledgment of discriminatory intent by the defendant or its agents.’ Direct evidence is a ‘distinct’ type of evidence that uniquely reveals ‘intent to discriminate[, which] is a mental state.’” (quoting *Troupe v. May Dep’t Stores*, 20 F.3d 734, 736 (7th Cir. 1994))); *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999) (“In discrimination cases, direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.”).

113. *Williamson*, 372 F. App’x at 940.

114. See, e.g., *Indurante v. Local 705, Int’l Bhd. of Teamsters*, 160 F.3d 364, 367 (7th Cir. 1998) (“‘[S]tray remarks’—biased comments ‘made by the decisionmaker but not related to the disputed employment action.’ . . . ‘may be relevant to the question of pretext . . . even though they do not constitute direct evidence of discriminatory intent.’” (quoting *O’Connor v. DePaul Univ.*, 123 F.3d 665, 672 (7th Cir. 1997))); see also *Martin*, *supra* note 12, at 347 (“Even where a plaintiff’s evidence fails to establish direct evidence of discrimination, it may serve as circumstantial proof that the employer’s explanation is merely a pretext for discrimination.”).

as to what probative value or insight they might have provided, simply because an arbitrary time limit had been exceeded.<sup>115</sup> Although there is no guidance in the statute itself as to how to assess such evidence or when a court should declare what might otherwise be a “smoking gun” revealing the prejudices or biases of a decision maker valueless, courts have nonetheless taken it upon themselves to impose such cutoffs—permissible periods of time that may elapse between the utterance of a biased comment and an adverse action before the evidence may no longer be considered.<sup>116</sup>

Such cutoffs, especially when used at the summary judgment stage to foreclose a case without an ample look at all of the evidence, are dangerous and may subvert employment discrimination statutes’ abilities to serve as instruments in furtherance of their stated goals.<sup>117</sup> Discrimination simply cannot be properly ferreted out and victims vindicated when much of the scant extant evidence of that which biased decision makers try so hard to hide—their true feelings of bias—is dismissed as wholly not relevant and beyond the bounds of consideration. While the passage of time or the changing of contexts may attenuate the strength of evidence, removing the evidence from consideration denies a trier of fact the opportunity to assess the totality of circumstances surrounding an allegation of workplace discrimination. This is particularly so where (1) such comments may very well be indicative of the speaker’s feelings generally or in other contexts and (2) social, legal, and other pressures conspire to compel the repression of such sentiments, such that their

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115. See, e.g., *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 405 (5th Cir. 2001) (finding a comment made “nearly a year” before the adverse employment action was too remote to be indicative of discriminatory intent); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655–56 (5th Cir.1996) (finding a sixteen-month old comment to be too “vague, indirect, and remote in time” to propel the case past summary judgment); see also Stone, *supra* note 11 (manuscript at 12) (“Due to the presence of an arbitrarily chosen cutoff time with respect to how much time may elapse between a comment alleged to evince bias and an adverse employment action in the given jurisdiction, judges often decline to attach significance to the comment.”).

116. The temporal proximity of a comment to an adverse action, even if established, will not necessarily be dispositive on the issue of whether a material fact adequate to ensure the plaintiff’s case’s survival is created. See, e.g., *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*9 (N.D. Ind. Jan. 5, 2009) (“Mr. Berrier and Ms. Carlson fired Ms. Creed on the spot after she informed them that she couldn’t conform her appearance to the male standard. Mere temporal proximity alone, however, is insufficient to establish a genuine issue of material fact. As a result, Ms. Creed must rely on evidence in addition to the timing of her termination in order to proceed under the direct method of proof.” (citations omitted)); see also *Tubergen v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 517 F.3d 470, 475 (7th Cir. 2008) (“Overall, the record reflects that Tubergen cannot employ the direct method to make a case for age discrimination. The ‘old guard’ comment[, which was made shortly after Tubergen’s termination,] was made in reference to a completely different group of individuals—those working in the children’s hospital—and was likely to refer to structure, as opposed to the age of the employees being eliminated.”).

117. See *supra* notes 54–60 and accompanying text.

expression and their being “captured” as evidence through testimony, is quite rare. While on a case-by-case basis, it should be, of course, permissible for a court or juror to find that (as a matter of law or otherwise) a plaintiff’s case fails, it is incredibly one-dimensional to *presume* that there is a concrete, fixed point after which there is no room for consideration of the possibility that a speaker evinced his or her true feelings or tendencies with a biased comment and thereupon belied his or her public or professional persona.

On one hand, it may be the case that a court finds that a plaintiff lacks a legal basis to proceed past the summary judgment stage where her evidence of a biased comment is sufficiently attenuated because of a deficiency in timing or context, *and* the defendant’s legitimate nondiscriminatory reason for doing what it did is unassailable and/or undisputed.<sup>118</sup> At a certain point, a court ought to be able to say that, as a matter of law, the plaintiff’s case lacks merit. On the other hand, however, where a mixed motive is alleged, there may be room to find that dual motives were underlying the decisions made, and in such a case, where the evidence of a biased comment might prove illustrative or useful, its use should not be foreclosed simply and only because some rigid, arbitrary criterion has not been met.

## 2. Retaliation

A court may foreclose a plaintiff’s retaliation case under Title VII or some other remedial statute that prohibits workplace discrimination where it determines that the protected activity for which the plaintiff alleges he was retaliated is too far removed in time from the adverse action that the plaintiff alleges constitutes the retaliatory act.<sup>119</sup> To make out a case of retaliation under Title VII, most employment discrimination statutes, and the common law generally, a plaintiff must show: that she engaged in protected activity (defined explicitly by the statute in which an anti-retaliation provision might be embedded or determined by courts to be the type of activity that the law seeks

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118. *See, e.g.,* Torres v. Cooperativa de Seguros de Vida de P.R., 260 F. Supp. 2d 365, 372–73 (D.P.R. 2003) (holding that the employer’s proffered reason for terminating the employee was not pretext for discrimination where the supervisor’s comments lacked the temporal relationship and specificity that would connect them to the employee’s termination).

119. *See, e.g.,* McCray v. Wal-Mart Stores, Inc., 377 F. App’x 921, 924 (11th Cir. 2010) (“Although McCray claims to have complained of racial discrimination in 1997 and 2001, such complaints are too far removed from McCray’s termination to satisfy causation . . . .”); Pham v. City of Seattle, 7 F. App’x 575, 577 (9th Cir. 2001) (“The alleged retaliation occurred a decade after Pham engaged in the protected activity—too temporally removed to establish a prima facie case of retaliatory motive.”); Szabo v. Trs. of Bos. Univ., No 98-1410, 1998 WL 1085688, at \*4 (1st Cir. Dec. 31, 1998) (“The alleged refusal to sign the application is temporally too far removed from Szabo’s complaints about Labadie for a rational jury to find a causal link between the protected activity (complaining about Labadie) and the adverse personnel action (refusal to sign the application) . . . .”).

to safeguard), that she suffered an adverse employment action, and that there is a tenable causal connection between the protected activity and the adverse action.<sup>120</sup>

In 2001, the Supreme Court observed that “[t]he cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close,’”<sup>121</sup> and pointed to two court of appeals cases in which a four-month time gap and a three-month time gap were each held to be insufficient to sustain an inference of retaliation.<sup>122</sup> The Fourth Circuit Court of Appeals has, for its part, held that absent direct evidence of retaliation, a three-month nexus will suffice to demonstrate an inference of causal connection,<sup>123</sup> but noted that a four-month nexus will not.<sup>124</sup> The Ninth Circuit, evaluating a retaliation claim under ERISA, noted that “[w]hile the timing of a discharge

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120. See 42 U.S.C. § 2000e-3(a) (2006) (Title VII’s anti-retaliation provision states that “[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter.”); 42 U.S.C. § 12203(a) (2006) (ADA’s anti-retaliation provision states that “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter.”); Age Discrimination in Employment Act § 4(d), 29 U.S.C. § 623(d) (2006) (ADEA’s anti-retaliation provision states “[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.”); see also *Crawford v. Metro. Gov’t of Nashville & Davidson Cnty., Tenn.*, 129 S. Ct. 846, 850–51 (2009) (stating that employees who raise concerns about discrimination or harassment in an internal investigation are protected from retaliation under Title VII’s anti-retaliation clause); *Gomez-Perez v. Potter*, 128 S. Ct. 1931, 1943 (2008) (finding that a federal employee who is a victim of retaliation due to the filing of a complaint of age discrimination may assert a claim under the federal-sector provision of the ADEA); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006) (holding that Title VII’s anti-retaliation provision prohibits not just adverse employment-related actions, but any action that might “dissuade a reasonable worker from making or supporting a charge of discrimination”); *Hanig v. Yorktown Cent. Sch. Dist.*, 384 F. Supp. 2d 710, 724 (S.D.N.Y. 2005) (finding that the filing of a complaint with EEOC is a protected activity for purposes of establishing participation in protected activity as a element of retaliation claim under ADA).

121. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam) (quoting *O’Neal v. Ferguson Constr. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001)).

122. *Id.* (citing *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997)) (three-month period insufficient); *Hughes v. Derwinski*, 967 F.2d 1168, 1174–75 (7th Cir. 1992) (four-month period insufficient).

123. *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989).

124. *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (citing *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997)).

may in certain situations create the inference of reprisal [under ERISA],” such an inference must be reasonable when evaluating the evidence.<sup>125</sup>

“Accordingly,” a district court in the First Circuit has observed, “even very close temporal proximity is not always sufficient to carry a plaintiff’s prima facie case.”<sup>126</sup> The Seventh Circuit Court of Appeals has held that “in order to support an inference of retaliatory motive, the termination must have occurred ‘fairly soon after the employee’s protected expression,’”<sup>127</sup> and a district court noted that “[f]airly soon’ is limited to days, not weeks or months.”<sup>128</sup>

As with other types of employment discrimination, the complex, nuanced dynamics that go into how the impetus to retaliate forms and how and when it is acted upon is incredibly difficult to capture or pin down. The notion that one who seeks to exact revenge on another or to otherwise deter another from engaging in an activity will only act relatively quickly following the activity is overly simplistic.<sup>129</sup> There are, in fact, numerous reasons as to why a longer period than the number of days, weeks, or months allotted by a particular jurisdiction may elapse before someone retaliates against another. Someone may wish to wait for the ideal opportunity to exact retribution on another, and that opportunity may not arise for a period of time. Thus, a decision maker may wait for business to be slow and ensure that all of those whom she considers to be “troublemakers” are laid off. Such an act may also reflect ones deliberately waiting before retaliating against another precisely so she can take revenge against someone and not have it appear to be retaliation. Indeed, someone who is schooled in the relevant law of a given jurisdiction may wait

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125. *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869, 881 (9th Cir. 1989).

126. *Vázquez Segarra v. P.R. Tel. Co.*, 2008 WL 1745869, at \*5 (D.P.R. 2008).

127. *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009–10 (7th Cir. 2000) (quoting *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998)).

128. *Chapman v. Essex Grp., Inc.*, No. 1:06-CV-84 TS, 2007 WL 1891813, at \*11 (N.D. Ind. June 29, 2007); accord *Timm v. Wright State Univ.*, 375 F.3d 418, 423 (6th Cir. 2004) (“Eight months is a long period of time for an employer to wait to retaliate against an employee with a termination notice . . . .”); *Wascara v. City of S. Miami*, 257 F.3d 1238, 1248 (11th Cir. 2001) (finding that a “three and one-half month temporal proximity [between a protected activity and an adverse employment action] is insufficient to create a jury issue on causation”); *Hafford v. Seidner*, 183 F.3d 506, 515 (6th Cir. 1999) (finding that the plaintiff could not demonstrate a temporal nexus between filing OCRC and EEOC complaints and disciplinary actions which occurred two to five months afterwards); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (“[A] three-month period, standing alone, is insufficient to establish causation.”); *Cooper v. City of N. Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) (holding that the employer’s discharge of the plaintiff four months after the plaintiff filed a discrimination claim is insufficient to establish a prima facie case of retaliatory discharge).

129. See, e.g., Justin P. O’Brien, Note, *Weighing Temporal Proximity in Title VII Retaliation Claim*, 43 B.C. L. REV. 741, 768–69 (2002) (citing Charles A. Shanor, *Preventing and Defending Against Retaliation Claims*, A.L.I.-A.B.A. COURSE OF STUDY: ADVANCED EMP. L. & LITIG. 547, 586–91 (Dec. 2, 1999)).



precisely so that as a matter of law, the retaliation can no longer be established. Human beings' desires to retaliate or to exact retribution do not necessarily dissipate with the passage of mere weeks or months,<sup>130</sup> but rather, may actually intensify over time.

Absent other compelling evidence of retaliation, the more time that elapses before retaliation occurs, the more attenuated the idea that the act at issue really was motivated by retaliation becomes.<sup>131</sup> Notwithstanding, a rote, mechanistic cutoff stipulated by a given jurisdiction does nothing to promote justice where it automatically forecloses a court's consideration of the allegations in their totality, including, for example, the substance of the comment. Ultimately, it merely serves to educate one who might retaliate as to precisely how he may do so most effectively. Moreover, variations in the threshold in different jurisdictions just render the limits more arbitrary. Some courts, for example, have held that it is only appropriate to require a small lag in time between a protected activity and an adverse action "where the plaintiff is relying exclusively on a temporal nexus to establish the causation element of a prima facie case."<sup>132</sup>

At the very least, courts should not identify a set timeframe beyond which they will refuse to recognize, as a matter of law, that retaliation has occurred.<sup>133</sup> Rather, even if a court decides that in the absence of direct or other evidence, too much time has, in fact, elapsed to sustain the inference that retaliation occurred, it should nonetheless be compelled to engage in an analysis of the totality of the circumstances, including the defendant's rationale for conferring the adverse action at issue upon the plaintiff.<sup>134</sup>

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130. *See id.*

131. *See, e.g.,* Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273–74 (2001) (per curiam) (noting that a great lapse in time can defeat an inference of causation); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) ("A lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action . . . negates any inference that a causal connection exists between the two.").

132. *Thomas v. iStar Fin., Inc.*, 508 F. Supp. 2d 252, 256–57 (S.D.N.Y. 2007), *aff'd* 629 F.3d 276 (2d Cir. 2010) (per curiam). In *Thomas*, the court held that the plaintiff's additional evidence made it such that "[t]he jury may well have determined, based on the evidence presented, that Baron and Agrawal were intent on seeing Thomas fired as of when he complained but that it was not until August of 2003 that a sufficient opportunity to play a significant role in Thomas's termination, and thus effectuate their retaliatory intentions, presented itself." *Id.* at 257.

133. O'Brien, *supra* note 129, at 768–69.

134. *See* Coates v. Dalton, 927 F. Supp. 169, 170–71 (E.D. Pa. 1996) (determining, despite a four-year lag between the plaintiff's protected activity and his adverse employment action, "as no evidence was presented at trial that an earlier opportunity for promotion existed, the jury could have inferred that plaintiff was denied a promotion on the very first possible occasion following his [protected] activity"); *cf.* Troy B. Daniels & Richard A. Bales, *Plus at Pretext: Resolving the Split Regarding the Sufficiency of Temporal Proximity Evidence in Title VII Retaliation Cases*, 44 GONZ. L. REV. 493, 496–97, 514 (2008/09) (arguing that courts should require temporal

### III. WAYS IN WHICH TORT LAW AIDS PLAINTIFFS BY FURNISHING THEM WITH BENEFICIAL MEANS OF MAKING OUT THEIR CASES

In contrast with the law of employment discrimination, tort law is replete with examples of presumptions, shortcuts, and inferences that fill evidentiary gaps for plaintiffs who, like employment discrimination plaintiffs, seek to vindicate their rights in court and procure recompense for their damages. In some cases, like those of certain intentional torts, courts crafting jurisprudence over centuries have aided plaintiffs seeking to establish the presence of the requisite intent.<sup>135</sup> In others, like negligence cases in which the plaintiff has to demonstrate that the requisite level of care was not taken by another, certain inferences help to establish that based upon the very nature of an activity alleged to confer the harm at issue, no amount of actual care taken suffices to deflect liability for actual harm conferred.<sup>136</sup> In each case, courts adjudicating tort disputes seem to have taken a reasoned look at the relative inability of plaintiffs to procure certain bits of information to which only the defendant would be privy. An example of this would be exactly how a barrel of flour might have fallen out of the window of a bakery<sup>137</sup> or whether a defendant who kicked a plaintiff volitionally meant to harm him or merely to nudge him<sup>138</sup>—as well as the assumed nature of humans and human perception—in a way that courts adjudicating employment discrimination disputes have stubbornly refused to do.

The so-called “shortcuts” that judges in the area of employment discrimination employ stand in stark contrast with the reasoned methodologies that courts permit plaintiffs’ attorneys to employ in order to build a case involving an intent requirement against a defendant in other areas of law. Title VII does not require specific intent to harm another person, malice, invidious or overt discrimination, or conscious animus of any kind.<sup>139</sup> However, in tort

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proximity only at the prima facie stage, but then require “Temporal Proximity Plus at the pretext stage”).

135. See, e.g., *Quilici v. Second Amendment Found.*, 769 F.2d 414, 417–18 (7th Cir. 1985) (discussing statements considered libelous per se).

136. See, e.g., *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299, 301 (Exch.); *Larkin v. State Farm Mut. Auto. Ins. Co.*, 97 So. 2d 389, 391–92 (La. 1957); *State Farm Mut. Auto. Ins. Co. v. Wrap-On Co.*, 626 So. 2d 874, 876–77 (La. Ct. App. 1993).

137. *Byrne*, 159 Eng. Rep. at 301.

138. See RESTATEMENT (SECOND) OF TORTS § 13(a)–(b) (1965) (stating that mere intent to cause imminent apprehension of harmful or offensive contact when such contact results will lead to liability for battery); see also *Garratt v. Dailey*, 279 P.2d 1091, 1093–94 (Wash. 1955) (stating in a case involving an intentional tort, that a defendant need act only volitionally with knowledge that contact or apprehension will result, not with purpose to harm or offend another).

139. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (“Under [Title VII], practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”).

law, where these specific states of mind must sometimes be established, inferences and presumptions typically work to aid plaintiffs.

It is common knowledge in the litigation of civil wrongs, or torts, that the requisite intent to be proven by a plaintiff complaining of an intentional tort may be proven via circumstantial evidence.<sup>140</sup> Similarly, negligence, or the breach of the duty of care that society ascribes to an individual in a given situation, may also be established through circumstantial evidence.<sup>141</sup> Traditionally in tort law, the burden resides wholly with the plaintiff to prove that it is more likely than not that her harm was caused by the defendant's negligence or intentional tort.<sup>142</sup> Notwithstanding, however, numerous doctrines, inferences, and presumptions have been crafted by courts over centuries that seem to account for how ill-equipped a plaintiff might be to procure or furnish key evidence regarding a tortfeasor's mental state or precise, undisclosed misstep that engendered the plaintiff's harm. Invoked in circumstances where it is relatively safe to accord the benefit of any doubt to the plaintiff—in other words, circumstances in which the plaintiff, through no fault of her own, clearly looks to be in the right for one reason or another—these so-called “shortcuts” operate to assist plaintiffs and to permit their cases to get before a trier of fact.

#### A. *Res Ipsa Loquitur*

The doctrine of *res ipsa loquitur*, which is Latin for “the thing speaks for itself,”<sup>143</sup> is, according to the *Restatement (Second) of Torts*, “merely one kind of case of circumstantial evidence.”<sup>144</sup> Its origin, as per the *Restatement (Second) of Torts*, was as a phrase “let fall” by attorney Baron Pollock in the course of arguing a case in 1863.<sup>145</sup>

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140. *Woods v. Gen. Motors Corp.*, No. 98-3560, 1999 WL 685926, at \*3 (6th Cir. Aug. 25, 1999) (“A plaintiff may establish his or her intentional workplace tort claim by presenting . . . circumstantial evidence of such intent.”); see also Eric P. Voigt, *Driving Through the Dense Fog: Analysis of and Proposed Changes to Ohio Tortious Interference Law*, 55 CLEV. ST. L. REV. 339, 358 n.63 (2007) (“Circumstantial evidence is often used to establish the intent element of other intentional torts.”).

141. RESTATEMENT (SECOND) OF TORTS § 328D cmt. b (1965); see, e.g., *Thomas v. Great Atl. & Pac. Tea Co.*, 233 F.3d 326, 329–30 (5th Cir. 2000) (“[N]egligence may be proved by circumstantial evidence, provided that the circumstances are sufficient to take the case ‘out of the realm of conjecture and place it within the field of legitimate inference.’” (quoting *K-Mart Corp. v. Hardy*, 735 So. 2d 975, 981 (Miss. 1999))).

142. Steven Hetcher, *The Kids Are Alright: Applying a Fault Liability Standard to Amateur Digital Remix*, 62 FLA. L. REV. 1275, 1326 (2010).

143. RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965).

144. *Id.* § 328D cmt. b.

145. *Id.* § 328D cmt. a.

*Res ipsa loquitur*, then, is a principle of evidence rather than a distinct cause of action that may be brought against another.<sup>146</sup> Specifically, this principle allows a trier of fact to infer a defendant's negligence, or specifically, a defendant's breach of a duty of care that the law has assigned him, based upon his circumstances and situation. So, for example, the law assigns a duty of reasonable care to be taken by everyone—from a driver behind the wheel of a car to a doctor who has been practicing medicine in a large city to a shopkeeper who has opened a store in a small town. Traditionally, a cause of action for negligence may be made out against an individual who breaches his ascribed duty of care, thereby conferring harm upon another.

In certain cases, however, a plaintiff is not situated so as to be able to allege with any specificity how, or even that, a breach of one's duty of care occurred. The paradigmatic example that most law students learn comes directly from Baron Pollock's 1863 case, and it involves a barrel of flour that fell out of a place of business's window and struck a pedestrian below.<sup>147</sup> Although the pedestrian may not have been able to ascertain how or even that a breach occurred, the fact of the breach was able to be inferred from the circumstances surrounding the incident; things like that do not fall from windows in the absence of someone's negligence, or the breach of someone's duty of care.<sup>148</sup> Thus, the law supplies the missing piece of the plaintiff's case by furnishing the requisite inference, and as long as the plaintiff can demonstrate that his injury was proximately caused by the incident inferred to have stemmed from the breach of the duty, the plaintiff may recover for the injury. In this way, the law obviates the need for the provision of the specifics that the plaintiff cannot reasonably be expected to procure. The rationale for its application is that there are some instances in which (1) an accident has occurred that would typically not occur in the absence of the breach of a duty of care,<sup>149</sup> and (2) due to a lack of direct evidence, the plaintiff cannot be rationally expected to ascertain the origins of the harm that befell him with enough precision to sustain a claim in the absence of such an inference.<sup>150</sup>

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146. *Id.*; see also, e.g., Jamey B. Johnson, Note, *Torts—Res Ipsa Loquitur Is Inapplicable When a Plaintiff Offers Expert Testimony to Furnish a Complete Explanation of the Specific Cause of an Accident*, 25 U. BALT. L. REV. 261, 263 (1996) (“*Res ipsa loquitur* is neither an independent tort doctrine nor a cause of action. Rather, *res ipsa loquitur* is an evidentiary principle, and, more specifically, it is a rule of circumstantial evidence.” (footnote omitted)).

147. *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299, 299 (Exch.).

148. *Id.* at 301.

149. RESTATEMENT (SECOND) OF TORTS § 328D cmt. c (1965).

150. See *Byrne*, 159 Eng. Rep. at 301 (“A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff . . . must call witnesses from the warehouse to prove negligence seems to me preposterous.”); RESTATEMENT (SECOND) OF TORTS § 328D cmt. a (1965) (“In its inception the principle of *res ipsa loquitur* was merely a rule of evidence,

The doctrine of *res ipsa loquitur* is properly invoked when harm is caused by an agent or instrument somehow under the defendant's control, there is no contributory negligence on the plaintiff's part, and

the circumstances surrounding [the] accident are so unusual as to give rise to an inference of negligence or liability on the part of the defendant and that, under such circumstances, the only reasonable and fair conclusion is that the accident resulted from a breach of duty or omission on the part of the defendant.<sup>151</sup>

So, the doctrine is properly invoked, for example, where a consumer is injured by a piece of glass that comes in a can of spinach that he purchased<sup>152</sup> or where a patient awakes from an operation to find that a surgical tool was left inside of her and needs to be subsequently retrieved.<sup>153</sup> Other examples furnished by the *Restatement* include: "objects falling from the defendant's premises, the fall of an elevator, the escape of gas or water from mains or of electricity from wires or appliances, [and] the derailment of trains or the explosion of boilers."<sup>154</sup> In each of these situations, it is reasonable to conclude that the event at issue would not have transpired but for someone's negligence.<sup>155</sup> These types of events stand in stark contrast with occurrences like a person's falling down a flight of stairs or a tire becoming flat, which may or may not have been brought about by someone's negligence.<sup>156</sup>

The doctrine is a creature of state law, and as such, its precise nature varies from jurisdiction to jurisdiction.<sup>157</sup> Certain courts are prone to according more

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permitting the jury to draw from the occurrence of an unusual event the conclusion that it was the defendant's fault.").

151. *Desoto v. Ford Motor Co.*, 975 So. 2d 195, 198 (La. Ct. App. 2008); *cf.* RESTATEMENT (SECOND) OF TORTS § 328D cmt. o (1965) ("The inference arising from a *res ipsa loquitur* case may, however, be destroyed by sufficiently conclusive evidence . . . that the event was caused by some outside agency for which he was not responsible, or that it was of a kind which commonly occurs without negligence on the part of anyone and could not be avoided by the exercise of all reasonable care . . .").

152. RESTATEMENT (SECOND) OF TORTS § 328D cmt. e, illus. 1 (1965). This example was taken from *Richenbacher v. California Packing Corp.*, 145 N.E. 281 (Mass. 1924). 2 RESTATEMENT (SECOND) OF TORTS App. § 328D, at 60 (1966).

153. RESTATEMENT (SECOND) OF TORTS § 328D cmt. g, illus. 9 (1965). This example was taken from *Ales v. Ryan*, 64 P.2d 409 (Cal. 1936). 2 RESTATEMENT (SECOND) OF TORTS App. § 328D, at 61 (1966).

154. *Id.* § 328D cmt. c; *see also id.* § 328D cmt. g, illus. 6, 8 & cmt. i, illus. 11 (providing more detailed hypothetical situations where the doctrine would apply).

155. *Id.* § 328D cmt. c.

156. *Id.* § 328D cmt. c ("The fact that a tire blows out, or that a man falls down stairs is not, in the absence of anything more, enough to permit the conclusion that there was negligence in inspecting the tire, or in the construction of the stairs, because it is common human experience that such events all too frequently occur without such negligence.").

157. *See id.* § 328D cmt. m.

probative weight than are others to the circumstantial evidence at bar.<sup>158</sup> In such courts, the doctrine gives rise to a presumption, under which the defendant must either somehow provide a compelling explanation for the evidence or be found liable.<sup>159</sup> This is especially true in circumstances in which the defendant undertook some special obligation to the plaintiff, such as a doctor performing surgery on a patient.<sup>160</sup> Other courts have found that the doctrine engenders nothing more than a permissible inference as to the absence of reasonable care taken, and the trier of fact is left as the arbiter as to its applicability.<sup>161</sup>

The doctrine of *res ipsa loquitur* has thus been referred to by some courts as “nothing more than a brand of circumstantial evidence,”<sup>162</sup> but it is nonetheless a powerful force that militates against holding a plaintiff’s lack of access to crucial evidence against him where the totality of the circumstances indicates that there is not a sound reason to do so. Moreover, while “[t]he requirement does not mean that the possibility of other causes must be altogether eliminated,” it does mean that “their likelihood must be so reduced that the greater probability lies at the defendant’s door.”<sup>163</sup> Therefore, the doctrine, itself, may be seen as a “shortcut” of sorts, but rather than one that clears courts’ dockets by disposing of cases in which amassing the kind of evidence a plaintiff needs is difficult, one that creates a mechanism for bypassing the chasm between what can reasonably be proven and what likely happened, and making the necessary inferential leap.

### B. *Defamation Per Se*

The principle of defamation per se is another principle that highlights courts’ willingness to permit a plaintiff to maintain her case, and indeed to prevail, where she may have difficulty proving the necessary elements of a tort due to her situation within the facts, but where the context and the totality of the circumstances indicate that an inference is warranted. As is the case with *res ipsa loquitur*, the resulting inference or presumption is made in the plaintiff’s favor.

Defamation consists of the publication of a communication—either written, which is libel, or spoken, which is slander—that is both false and

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158. See RESTATEMENT (SECOND) OF TORTS § 328D cmt. m (1965).

159. *Id.* (“Some courts have tended in the past, and some few still tend, to give *res ipsa loquitur* the effect of a presumption, which requires a directed verdict for the plaintiff if the defendant offers no evidence to rebut it.”).

160. See *id.* § 328D cmt. g, illus. 9.

161. *Id.*

162. *Morejon v. Rais Constr. Co.*, 851 N.E.2d 1143, 1149 (N.Y. 2006).

163. *Dermotossian v. N.Y.C. Transit Auth.*, 492 N.E.2d 1200, 1205 (N.Y. 1986) (citations omitted) (internal quotation marks omitted).

injurious to the reputation of another.<sup>164</sup> Under common law, all libel is actionable per se, meaning that the plaintiff need not proffer proof of either actual or special damages, and these damages, which may include the harm one endures to her reputation and emotional harm stemming from the publication, will be presumed.<sup>165</sup> In contrast, however, slander is not presumed to be actionable absent a plaintiff's proffer of evidence to establish the existence of special damages.<sup>166</sup> The *Restatement (Second) of Torts* uses the term "special harm" to define special damages as:

[T]he loss of something having economic or pecuniary value. In its origin, this goes back to the ancient conflict of jurisdiction between the royal and the ecclesiastical courts, in which the former acquired jurisdiction over some kinds of defamation only because they could be found to have resulted in "temporal" rather than "spiritual" damage. The limitation has persisted in the requirement that special harm, to serve as the foundation of an action for slander that is not actionable per se, must be "temporal," "material," pecuniary or economic in character.<sup>167</sup>

A court, however, is permitted to find as a matter of law that certain statements that are likely to injure another's personal or professional reputation constitute defamation per se.<sup>168</sup> Courts typically find that a communication has this tendency when it contains "a serious charge of incapacity or misconduct in words so obviously and naturally harmful that proof of their injurious character can be dispensed with."<sup>169</sup> Specifically, the law in most jurisdictions considers words to amount to defamation per se if they impute (1) criminal conduct or offense; (2) a loathsome disease; (3) misconduct, lack of integrity, or inability in a person's trade, profession, office, or occupation; or (4) sexual misconduct.<sup>170</sup>

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164. See RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."); *id.* § 568(1)–(2) (distinguishing between libel and slander); *id.* § 577 (describing what is considered a "publication").

165. *Id.* § 569 & cmt. b.

166. *Id.* § 575 cmt. a; *cf. id.* § 571 (allowing certain slander claims to be actionable per se when the alleged slander imputes criminal conduct on the defendant); *id.* § 574 (allowing slander claims concerning sexual misconduct to be actionable per se).

167. *Id.* § 575 cmt. b.

168. *Id.* § 570.

169. *Quilici v. Second Amendment Found.*, 769 F.2d 414, 417–18 (7th Cir. 1985) (citing *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 268 (7th Cir. 1983)); *see also Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 263 (Ind. 1994) (discussing what type of communications are considered defamatory).

170. See RESTATEMENT (SECOND) OF TORTS § 570 (1977). See generally *id.* § 571 (criminal offenses); *id.* § 572 (loathsome diseases); *id.* § 573 (professional misconduct); *id.* § 574 (sexual misconduct).

California, for example, proposes the following jury instruction for presumed damages, which do not require proof from a plaintiff who has established defamation *per se*:

Presumed damages are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include, but are not limited to, reasonable compensation for loss of personal [or professional] reputation, shame, mortification, and hurt feelings. No definite standard [or method of calculation] is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable.<sup>171</sup>

The presumption that damages inured to the plaintiff as a result of the publication is thus afforded to the plaintiff without the requirement that the plaintiff procure and proffer evidence of these damages on her own.<sup>172</sup> Indeed, “[t]he doctrine of defamation *per se* was developed out of a need to provide a remedy for a person whose reputation was damaged by the very utterance of the defamatory words, even though the person could not point to a specific pecuniary loss.”<sup>173</sup>

### C. *Inherently Dangerous, Unreasonably Unsafe*

In a similar vein, plaintiffs who sustain harm as a result of others’ abnormally dangerous activities need not show that the others were somehow remiss or negligent as to their execution of these activities; they need only show that the others were engaged in the activities and that the activities caused the harm.<sup>174</sup>

So, for example, according to the *Restatement (Second) of Torts*, “[o]ne who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.”<sup>175</sup> When deciding

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171. CALIFORNIA CIVIL JURY INSTRUCTIONS § 7.10.1 (10th ed. 2010).

172. *But see* RESTATEMENT (SECOND) OF TORTS § 569 cmt. b (1977) (explaining that some courts require defamatory meaning of publication to be evident on its face without reference to extrinsic facts, otherwise plaintiff must show proof of harm). *See generally id.* § 621 cmt. a (“[G]eneral damages are imposed for the purpose of compensating the plaintiff for the harm that the publication has caused to his reputation . . . . [G]eneral damages have traditionally been awarded not only for harm to reputation that is proved to have occurred, but also, in the absence of this proof, for harm to reputation that would normally be assumed to flow from a defamatory publication of the nature involved.”).

173. *Syngy, Inc. v. Scott-Levin, Inc.*, 51 F. Supp. 2d 570, 581 n.9 (E.D. Pa. 1999).

174. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

175. *Id.* § 519(1).



whether an activity is, in fact, “abnormally dangerous” so as to warrant this imposition of strict liability, courts are urged by the Restatement to weigh the

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) [the] likelihood that the harm that results from it will be great; (c) [the] inability to eliminate the risk by the exercise of reasonable care; (d) [the] extent to which the activity is not a matter of common usage; (e) [the] inappropriateness of the activity to the place where it is carried on; and (f) [the] extent to which its value to the community is outweighed by its dangerous attributes.<sup>176</sup>

The resolution of the issue, a question of law, essentially boils down to whether “the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care.”<sup>177</sup> This doctrine has been traditionally applied to activities including blasting, keeping wild animals, and other activities that courts feel confer such a high degree of risk that a great magnitude of harm will result that cannot be prevented through the exercise of due care.<sup>178</sup>

Clearly, then, strict liability is imposed absent a showing by the plaintiff in such a case that the defendant has been remiss in the execution of a duty of care because of the law’s desire to deter certain types of activities performed in unusual places and to apportion risk to those who, by the very nature of what they are doing, expose others to a certain amount of endangerment irrespective of how much care is taken.<sup>179</sup> The end result, however, is that a plaintiff who is harmed as a result of such an activity need not supply what would normally be vital information or allegations as to precisely what went wrong so as to generate the harm, in order to recover.

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176. *Id.* § 520.

177. *Id.* § 520 cmt. f.

178. *Whitman Hotel Corp. v. Elliott & Watrous Eng’g Co.*, 79 A.2d 591, 595 (Conn. 1951) (“[W]hen one engages in the inherently dangerous operation of blasting with dynamite under such circumstances that the person or property of another is necessarily or obviously exposed to the danger of probable injury, he does so at his peril. He is absolutely liable for damages which result from that blasting whether he was negligent in his conduct of the operation or not.”); RESTATEMENT (SECOND) OF TORTS § 507 (1977) (possessors of wild animals subject to liability even when utmost care was taken to prevent harm); *id.* § 509 (possessors of abnormally dangerous domestic animals subject to liability even when utmost care was taken to prevent harm); *id.* § 520A (imposing liability for damage caused by overflying airplanes even when the operator has exercised utmost care); *id.* § 520 cmt. h.

179. RESTATEMENT (SECOND) OF TORTS § 520 cmt. j (1977) (“[T]he fact that the activity is inappropriate to the place where it is carried on is a factor of importance in determining whether the danger is an abnormal one.”); *id.* § 520 cmt. k (discussing how value to the community, among multiple factors, is considered when determining whether an activity is regarded as abnormally dangerous).

#### IV. EVALUATING THE BIG PICTURE OF THE “SHORTCUTS” TREND IN EMPLOYMENT DISCRIMINATION LAW

As stated, the shortcuts discussed in this Article, while previously criticized individually, should be viewed as part of a larger, broader trend, occurring over decades, in which judges are systemically and thoughtlessly disposing of or skewing certain viable employment discrimination cases. Seeing them as part of a larger pathology of sorts invites a crucial discussion as to what judicially and societally-held attitudes and biases may be skewing employment discrimination jurisprudence.

However, older, more established areas of law, like tort law, have traditionally furnished inferences and presumptions that, rather than helping defendants derail cases brought against them, actually aid plaintiffs in establishing necessary elements of their cases under certain circumstances. Obviously, the circumstances in which these inferences and presumptions are activated in tort law do not perfectly mirror those which arise in employment cases. Nevertheless, the existence of and rationales for these inferences and presumptions are instructive. This Article does not advocate for the accordance of any presumption, inference, or other “shortcut” for employment discrimination plaintiffs, but merely for a reasoned look by a court at their cases, unfettered by the imposition of virtually baseless, prejudicial, and pointless defendant-favoring shortcuts.

##### A. *A Trend Involving the Misuse of Flawed Doctrines*

As stated, employment discrimination law contains “shortcuts” through analysis, like the stray comment doctrine, the temporal nexus requirement, and the same actor inference, that substitute undue focus on a single fact for a comprehensive analysis of the fact in tandem with others. These shortcuts are susceptible to being used improperly in the context of summary judgment analysis, but each doctrine, as it has arisen in the substantive law, is somewhat flawed to begin with. In the first place, the logic underlying these shortcuts is inconsistent. For example, on one hand, it has been noted that the same actor inference provides a wide allowance for a decision maker to decide to fire an individual that he hired years earlier and retain the possibly groundless assumption that he was not motivated by unlawful considerations at any time.<sup>180</sup> On the other hand, inexplicably, the stray comment doctrine posits that the mindset ascribable to a racist comment, for example, must be presumed to *not* be present when the comment is followed by an adverse action just a short time later.<sup>181</sup> This asymmetrical treatment of the concepts of the

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180. See *supra* note 88 and accompanying text.

181. See Stone, *supra* note 11 (manuscript at 28) (“The same actor inference persists in the assumption that one who hires an individual cannot subsequently discriminate against that person

passage of time and the likelihood that a bias will foment, inhere, or change over the course of time reveals the internal inconsistencies among these shortcuts to summary judgment.<sup>182</sup>

The temporal nexus requirement involving the time that elapses between a protected activity and an alleged retaliatory act, like the lapse mentioned above in the analysis of the stray comment doctrine, also stands in stark contrast with the same actor inference. In the case of the same actor inference, the court presumes that one who, for any number of possible reasons, performed a single act a number of years prior is incapable of harboring the alleged intent, mindset, or motivation.<sup>183</sup> On the other hand, this same court may very well foreclose the possibility that an actor acted with an alleged retaliatory intent, mindset, or motivation when he did something that would otherwise amount to retaliation, simply because an arbitrary temporal cutoff elapsed.<sup>184</sup>

Additionally, as discussed, each individual doctrine has come under fire for having underlying assumptions and premises about the ways in which bias is formed, fomented, expressed, cultivated, and altered that are simply out of touch with and disconnected from what we know about human behavior.<sup>185</sup> Finally, courts' hasty or misguided applications of these shortcuts in various contexts can cause them to unwittingly flout or undermine the federal rules of evidence or procedure that should underlie and govern their analyses.<sup>186</sup>

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because of his or her protected class status should inhere over a period as long as several years. At the same time, judge-made employment discrimination law simultaneously adheres to the belief that a comment capable of evincing protected class bias, or even animus, may be rendered wholly irrelevant because a decision-maker uttered it outside of the precise time frame or context of the adverse action at issue." (footnote omitted)).

182. *See id.* (manuscript at 28–29) ("There is an extreme asymmetry between the large amount of time that courts will allow between the hiring of a plaintiff and an adverse action where the court permits the same actor inference to take hold and create the assumption that the decision-maker in question could not have discriminated, on the one hand; and, on the other hand, the relatively short amount of time that some jurisdictions will permit to elapse before courts divest what might be probative comments of their evidentiary value.").

183. *See supra* Part II.A.

184. *See supra* Part II.C.2.

185. *See supra* notes 86–87, 104, 129–30 and accompanying text.

186. It is interesting to note that courts appear somewhat confused as to the proper interplay between their various deployments of shortcuts on summary judgment motions and the Federal Rules of Evidence. Under Rule 401, "[r]elevant evidence" is defined broadly as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Further, "all relevant evidence is admissible," FED. R. EVID. 402, but "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," FED. R. EVID. 403. In civil cases, Rule 404 excludes evidence of character, traits, crimes, wrongs, or acts "for the purpose of proving [action] in conformity therewith on a particular occasion." FED. R. EVID. 404.

Different courts use the word “stray” to mean different things. Some courts adjudicating summary judgment motions seem to assume that a comment deemed “stray” is not relevant without explaining or really establishing why the standard enumerated in Rule 401 has not been met. *See, e.g., Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1025 (6th Cir. 1993) (noting that stray remarks are “too abstract, in addition to being irrelevant and prejudicial, to support a finding of . . . discrimination” (quoting *Gagné v. Nw. Nat’l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989)) (internal quotation marks omitted)); *McDonald v. Best Buy Co.*, No. 05-4056, 2010 WL 173893, at \*1 (C.D. Ill. Jan. 13, 2010) (“As a general rule, stray remarks by non-decision makers are irrelevant and not admissible.”); *Greenfield v. Sears, Roebuck & Co.*, No. 04-71086, 2006 WL 2927546, at \*7 (E.D. Mich. Oct. 12, 2006) (“Comments made long before the adverse employment action and comments’ by non-decisionmaker[s] have no probative value in a disparate treatment case.” (quoting *Shefferly v. Health Alliance Plan of Mich.*, 94 F. App’x 275, 280 (6th Cir. 2004))); *see also Sperino, supra* note 11, at 791 (“Under the stray remarks doctrine, courts often consider comments to be irrelevant to the issue of whether discrimination occurred if those comments are made by nonsupervisors, are remote in time from the employment decision at hand, or demonstrate bias against another protected class.”). *But see Talavera v. Shah*, 638 F.3d 303, 311 (D.C. Cir. 2011) (“At the summary judgment stage of proceedings the court is not to weigh the evidence,” and a comment deemed stray by a district court may nonetheless be wholly “relevant to [the] claim of . . . discrimination, illustrative of [the decision maker’s] animus . . . and properly considered in evaluating whether the totality of evidence shows the [defendant’s] explanation was pretextual.”); *Pulsipher v. Clark Cnty.*, No. 2:08-cv-01374-RCJ-LRL, 2010 WL 5437252, at \*9 (D. Nev. Dec. 27, 2010) (“A discriminatory comment made in 2001 is relevant to alleged discriminatory actions taken in 2006, because evidence of a past discriminatory attitude affects the probability that an action taken later was motivated by discriminatory intent, a fact which is of consequence to a discrimination claim. . . . Defendants may certainly argue to the jury that the lapse in time makes the evidence weak-Plaintiff must of course prove intent, . . . but relevance under Rule 401 is an either-or concept, not a sliding scale.”). Other courts seem to conflate or confuse the ideas of relevance and sufficiency of the evidence when assigning the term stray to a piece of proffered evidence. *See, e.g., Bugos v. Ricoh Corp.*, No. 07-20757, 2008 WL 3876548, at \*5 (5th Cir. Aug. 21, 2008) (noting that some stray comments “are appropriately taken into account when analyzing the evidence,” but granting summary judgment because the proffered stray comments “are indeed the only evidence of pretext, and as such, they are not probative” (internal quotation marks omitted)).

For an insightful discussion of the relationship between the same actor inference and the Federal Rules of Evidence, see *Martin, supra* note 12, at 393 n.330 (While “same-actor evidence is at best marginally relevant to the circumstances resulting in adverse action against the plaintiff . . . [It] is extremely prejudicial because, ironically, the very existence of the same-actor presumption demonstrates how natural it is for judges to overvalue it. . . . Thus, its marginal relevance is substantially outweighed by its prejudicial and misleading effects.”). Professor *Martin* also argues that

applying the same-actor inference in this way is akin to the admission of character evidence that reflects one’s propensity to engage in certain behavior. Thus, the evidence is excludable under Federal Rule of Evidence 404, which rejects evidence of prior acts in order to prove that an action is in conformity with one’s character. . . . [C]ourts generally characterize same-actor evidence as general propensity evidence. That is, they accept the employer’s argument that it is not a bigot because it hired the black plaintiff, thus it is reasonable to infer that the employer would act in conformity with that character in its later dealings with the plaintiff. Therefore, when it fired her, it did so for a legitimate

Indeed, a proper application of the summary judgment standard entails looking at the facts in the light most favorable to the nonmovant and examining whether, through this lens, a triable issue of fact may be discerned.<sup>187</sup>

*B. A Trend that Veers Away from Tort Law*

The rigid cutoffs and other shortcuts described above stand in stark contrast with tort law, which, under certain circumstances, invokes inferences, presumptions, and other shortcuts that *aid* plaintiffs both in getting before a trier and, more significantly, in making out a successful case.<sup>188</sup> In a typical employment discrimination disparate treatment scenario, as in a typical negligence or intentional tort situation, the plaintiff must ordinarily come forward with some evidence of that which resides exclusively within the province of the defendant. This may include the state of mind of a key actor, the precise details surrounding a mishap, or the level of care or precaution exercised by a defendant behind closed doors.<sup>189</sup> As discussed, tort law observes that under certain circumstances, it is not reasonable to deny that the breach of some duty of care occurred, and it is also unreasonable to expect the plaintiff to procure and set forth the precise mechanism by which the breach took place.<sup>190</sup> Employment discrimination shortcuts, by contrast, contemplate a plaintiff who has to prove a decision maker's largely undisclosed motivation

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reason and not because it is racist or acted based on racism. This reasoning seems in direct contravention to the boundaries of the rules of evidence.

*Id.* She concludes that

while Rule 404 often precludes plaintiffs' use of prior acts of animus to prove individual disparate treatment, the rule often benefits employers precisely because courts accept and apply the same-actor principle. . . . Ironically, the courts' interpretive rule making that 'chips away' at plaintiffs' evidence of pretext under Title VII has resulted in a common-law modification of the Rules of Evidence.

*Id.*

187. FED. R. CIV. P. 56; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1985).

188. *See supra* Part III.

189. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination."); *see also* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 112 (2003) ("Traditional disparate treatment theory conceptualizes discrimination as individual, measurable, and static, looking into the state of mind of a particular decisionmaker at a discrete point in time. Disparate treatment doctrine has long been understood to require a showing of intentional discrimination, often defined in terms of conscious motivation to discriminate."); Martin, *supra* note 11, at 1127 n.28 ("State of mind of the actor became center stage in workplace law when the Supreme Court devised a framework for analyzing individual claims of discrimination under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973).").

190. *See supra* Part III.A.

in acting, but who *has* some kind of evidence—like a comment—that may very well yield a keen insight into that motivation. These shortcuts can strip that comment of its potential probative value to a trier of fact on the basis of an isolated, often unexamined aspect of its utterance, like the precise time, place, or context in which it was said.

Thus, in the paradigmatic example used in torts classes to teach the doctrine of *res ipsa loquitur*, a barrel of flour falls out of a bakery's window several stories up and hurts a plaintiff below. It may be said that on one hand, the barrel could not have fallen out of the window absent some lapse in the bakery's proper execution of its assigned duty of care to those who walked below its window.<sup>191</sup> It also may be said that the plaintiff who sustains the harm below has no realistic way of ascertaining precisely where or how the bakery was remiss so as to cause his harm; he merely knows that he has been hurt.<sup>192</sup> For these reasons, the law feels that it is both safe and just to supply this plaintiff with the element of his claim that sets forth the breach of the imposed duty of care that proximately caused his harm.

On the other hand, an employment discrimination plaintiff with a *prima facie* case of disparate treatment discrimination, and even with some evidence to help establish pretext, but who happens to have been fired by the same person who hired her, will not only have to make out her affirmative case, but also initially rebut an inference of nondiscrimination in order for her case to survive. Another plaintiff with a sturdy *prima facie* case of retaliation may find herself unable to keep her case viable simply because of the time frame in which events transpired—and the relevant lag may be a matter of mere months or even weeks. This is simply because a shortcut dictates that this time frame is too long as a matter of law to permit a trier of fact to evaluate the totality of the circumstances.

These employment discrimination plaintiffs are besieged by hurdles that are potentially lethal to their cases at the outset. This is despite the fact that they, like the plaintiff harmed by the falling barrel of flour, are not ideally situated to proffer evidence as to the typically undisclosed mindsets of decision makers upon which their cases hinge. Moreover, to the extent that these plaintiffs *have* windows, insights, or clues as to those mindsets—in the form of comments proffered as evidence—these comments will often be summarily deemed “stray” and rendered incapable of helping the plaintiffs' cases to so much as survive summary judgment.<sup>193</sup> In any event, the plaintiffs' evidence

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191. *Byrne v. Boadle*, (1863) 159 Eng. Rep. 299, 301 (Exch.).

192. *Id.* at 300; *see also* *Larkin v. State Farm Mut. Auto. Ins. Co.*, 97 So. 2d 389, 391–92 (La. 1957) (noting that *res ipsa* should be used when “the circumstances [surrounding the] . . . accident are of such an unusual character as to . . . [give rise to an] inference that the accident was due to the negligence of the [defendant] . . .” (internal quotations omitted)).

193. *See supra* Part II.B.

of discrimination, rare and hard to come by as it may be, will often only be considered at all if and after courts apply a potential series of defendant-favoring shortcuts that substitute carelessly-applied labels for reasoned consideration.

C. *A Trend That is Out of Step with the Realities of the Contemporary Workplace*

Because unacceptable utterances that may reflect biases have become taboo in the modern workplace, it is particularly deleterious to a plaintiff's case to allow a shortcut to take what could be construed as powerful evidence by a rational trier and deplete it of its force.

Anti-discrimination law has, over time, both educated and influenced employers and decision makers. While this has been beneficial, it has inoculated individuals in a sense, making them resistant to the biases that plagued their predecessors, who might have had their prejudices fuelled by non-exposure to members of protected classes. In any event, knowledge of the law and the knowledge of the stigma that comes with violating it has imbued most decision makers with a cognizance that overtly discriminatory behavior can harm them both personally (in terms of social stigma/alienation) and professionally (in terms of on-the-job reputation and legal liabilities and ramifications). This has operated to cause even those who clung to and harbored bias after its expression was made taboo by Title VII to mask, suppress, or otherwise veil their true feelings or motives.<sup>194</sup> Perhaps most pernicious, however, are those who harbor racial, gender, and other biases and would like to or do act upon them, but whom the law and the pervasive culture of (at least outward) tolerance that was ushered in its wake, cause to suppress them to the point that they become subconscious or unconscious biases. Such less-than-conscious biases, however, nonetheless impel attitudes, impressions, and ultimately decisions in the workplace.<sup>195</sup> Thus, for many reasons, many decision makers in the workplace wind up, at least on some level, motivated by

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194. See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 741 (2005) ("Gone are the days of 'Whites Only' signs on the doors of offices unwilling to offer a job to an African-American applicant. No longer do many employers tell female applicants directly that they should stay home and have babies. But discrimination is still pervasive, now more often in the form of stereotyping or unconscious bias.").

195. See generally Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997 (2006) (discussing behavioral realism in the context of defining and identifying discriminatory motivation); Hart, *supra* note 194 (discussing Title VII's ability to remedy unconscious discrimination).

bias, prejudice, or animus of some sort in their decision-making, but refrain from any outward expression of this underlying motivation.<sup>196</sup>

To the extent that a plaintiff alleging discrimination in violation of Title VII is, in fact, able to proffer a corresponding comment made by the decision maker, whether or not it was uttered in the context of the specific adverse employment action at issue, there is a fairly sizable chance that that comment may in fact belie the true, but undisclosed mindset or beliefs that motivate that individual in numerous contexts.<sup>197</sup> This is not to say that an alleged comment was, in fact, actually uttered, or that if it was actually uttered, it is necessarily indicative of a discriminatory mindset. Moreover, if it is indicative of a discriminatory mindset, that is not to say that the mindset was the true motivation for the adverse action at issue. It is merely to say that courts should take notice of how hard evidence of employment discrimination can be to come by and should be cognizant of how deleterious shortcuts can be when they operate to discount that evidence. This is not identical to the situation of a plaintiff who invokes *res ipsa loquitur* because what befell him cannot be said to have happened but for the existence of someone's negligence. However, while the plaintiff invoking that doctrine seeks to be supplied with an inference that will permit him to affirmatively establish an element that he needs to make out to win his case, an employment discrimination plaintiff proffering what she fears will be written off as a "stray comment" seeks only to survive the defendant's summary judgment motion and proceed with her claim before a trier of fact, who will be allowed to consider all appropriate, relevant evidence. Inasmuch as it may be said or recognized that one who is proven to have uttered a remark capable of being reasonably construed so as to evince discriminatory bias is likely to be motivated by such bias on any number of levels, so ought a plaintiff proffering such a remark be given an ample opportunity to have the remark evaluated in the context of all of a case's relevant facts.

As with a tort plaintiff invoking the doctrine of *res ipsa loquitur*, an employment discrimination plaintiff is not ideally situated to procure the evidence that she will need to demonstrate another person's motivation or state of mind at the time that a given decision was made.<sup>198</sup> Indeed, the Eighth

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196. See Hart, *supra* note 194, at 751 ("It is an exceedingly rare case in which a plaintiff has true direct evidence of discriminatory intent, such as a statement from the employer that 'we don't hire Mexicans, so you can't have this job.'").

197. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 340 (1987) (An "inadvertent slip of the tongue [is] not random.").

198. Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57, 84-85 (2009) ("[C]ourts have demonstrated increasing hostility to employment discrimination claims, and this burden is not easily met in an era when much overt discrimination



Circuit has repeatedly stated that “summary judgment should be used sparingly in the context of employment discrimination and/or retaliation cases where direct evidence of intent is often difficult or impossible to obtain.”<sup>199</sup> Shortcuts facilitate the rote, thoughtless conferral of summary judgment and improperly skew cases that get to trial in favor of defendants without much reasoning or justification. Other circuits have acknowledged that in an employment discrimination case, “the defendant will rarely admit to having said or done what is alleged,”<sup>200</sup> and that in light of the general scarcity of so-called “smoking gun” evidence, methods of indirect proof and the *McDonnell Douglas* burden-shifting framework are utilized.<sup>201</sup> This, unfortunately, leaves a plaintiff without smoking gun evidence largely disadvantaged because (1) the plaintiff, even having made out her prima facie case, must still shoulder the ultimate burden of persuasion as to the allegation of discrimination and (2) absent favorable statistical evidence or evidence of comparator treatment, one or more so-called “stray comments” without a sufficient nexus to the decision at hand may be all the plaintiff has to keep her case afloat.

#### D. *A Trend that Demands Attention*

It is extremely important for scholars and others who observe and comment upon trends in employment discrimination jurisprudence to be cognizant of the asymmetry in the shortcuts—both the asymmetry within the jurisprudence and the asymmetry seen in the way in which employment discrimination law and tort law each treat plaintiffs. In the first place, the

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has gone underground, meaning smoking-gun evidence of unlawful motive is not readily found.” (footnote omitted)).

199. *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1117 (8th Cir. 2006). The court in this case also specifically noted that “no separate summary judgment standard exists for discrimination or retaliation cases and that such cases are not immune from summary judgment.” *Id.* at 1118 (citing *Berg v. Norand Corp.*, 169 F.3d 1140, 1144 (8th Cir. 1999) (“[T]here is no ‘discrimination case exception’ to the application of Fed.R.Civ.P. 56, and it remains a useful pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial.”)); see also *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc) (noting that “summary judgment is not disfavored and is designed for ‘every action’” and that there is not an exception to the application of summary judgment for discrimination cases).

200. *Danzer v. Norden Sys., Inc.*, 151 F.3d 50, 57 (2d Cir. 1998).

201. See, e.g., *Burgess v. Wash. Dep’t of Corr.*, No. 98-35417, 1999 WL 974182, at \*2 (9th Cir. Oct. 22, 1999) (“In most employment discrimination cases, direct evidence of discriminatory motive is unavailable or difficult to obtain. Therefore, the Supreme Court has set forth an indirect method of proof which relies on presumptions and shifting burdens of production.”); *Bhaya v. Westinghouse Elec. Corp.*, 922 F.2d 184, 191 (3d Cir. 1990) (“We have repeatedly emphasized that direct evidence in the form of a ‘smoking gun’ is not required to prove discrimination.”); see also *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3d Cir. 1989) (“[T]here is usually no ‘smoking gun’ evidence of intentional discrimination.”), *overruled on other grounds by Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1099 n.10 (3d Cir. 1995).

practical ramifications of having a claim—any claim—improperly foreclosed at the summary judgment stage are immense. Most employment discrimination cases never get to trial, but are either dismissed or settled.<sup>202</sup> In an age of prohibitively expensive litigation costs and defendants' growing fears of the public relations and so-called "floodgates" ramifications that flow from protracted litigation, it is the case that once an employment discrimination plaintiff has survived summary judgment, she has, in essence won her case, because the defendant is much more likely to settle.<sup>203</sup>

To the extent that shortcuts reflect legitimate, grounded inferences that are fairly imposed at trial, and to the extent that judges are not substituting their evaluation of evidence for that which a reasonable juror can find, they may get a court to the right, expedient result, albeit without sufficient explanation or analysis. The problem, though, as discussed, is that this is rarely the case; on summary judgment, courts frequently apply misconceived shortcuts that lack grounding in any sound reasoning, *and* they frequently do so in a misguided manner, divesting a trier of fact of a chance to give reasoned, holistic consideration to all admissible evidence. To the extent that these employment discrimination shortcuts, both within the jurisprudence, and in contrast with other areas of law, unfairly skew toward grants of summary judgment to defendants in employment discrimination cases, they are noteworthy.

In the second place, awareness of these trends and, more importantly, of the underlying attitudes and beliefs that they evince should be critical to those who observe the state of employment discrimination jurisprudence.<sup>204</sup> The development and proliferation of shortcuts in employment discrimination jurisprudence reveal a great deal about judicial and societal attitudes toward employment discrimination cases and toward the plaintiffs that bring them. The "shortcuts" explored in this Article that have existed in tort law for centuries are rooted in courts' desires to obviate the need for plaintiffs to procure hard-to-obtain evidence that supports allegations that, based upon the outlying circumstances, need not be proven. For example, proving the breach

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202. Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 46 n.4 (2005) (citing Clermont & Schwab, *supra* note 2, at 440–41); *see also* Selmi, *supra* note 1, at 573 ("Even where those cases succeed in the lower court, they will still have a substantial chance of being reversed on appeal, and the difficulty of winning cases should also counsel in favor of settling cases wherever a reasonable settlement is within reach."); *supra* note 1.

203. *See* Berger, *supra* note 202, at 48–49.

204. "Plaintiffs are . . . half as successful when their cases are tried before a judge than a jury, and success rates are more than fifty percent below the rate of other claims." Selmi, *supra* note 1, at 560–61. "[E]mployment discrimination plaintiffs have long had difficulty with trials before a judge; indeed, only claims filed by prisoners tend to have a lower success rate." *Id.* at 561 (citing Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567 (1989)).

of an assigned duty of care or special damages in certain types of defamation cases becomes unnecessary because it is so logically presumable that based on what occurred, these things must exist. The logic employed to discern their existence presumes that a plaintiff simply will not be privy to certain information or be easily able to access certain evidence.

By way of contrast, the logic in the employment discrimination shortcuts—the logic that says that an individual’s simple act performed years prior engenders an assumption that the individual could not have acted with bias (on any level) more recently, while an individual’s discriminatory speech against a group is wholly not relevant to a decision that he might have made weeks, or even days later—is dumbfounding. This flawed logic bespeaks a fundamental mistrust of plaintiffs’ allegations of intentional discrimination, and the question as to the genesis of this mistrust thus presents itself.

#### E. *A Trend with Deep Roots*

The question of why judges have created these shortcuts and seemingly confined them largely to the employment discrimination field is also of seminal importance. An obvious response is that courts, and specifically judges, may harbor an increased skepticism, and perhaps even hostility toward plaintiffs alleging employment discrimination. Certainly scholars have posited as much.<sup>205</sup> It is important to ask why this would be the case.

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205. See, e.g., Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary’s Honor Center v. Hicks, Pretext, and the “Personality” Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 186 (1997) (“[T]he Court’s ready acceptance of a ‘personality clash’ as a non-discriminatory justification ignores the effects of unconscious bias and stereotyping and opens a gaping loophole in the law.”); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to “No Cause” Employment*, 81 TEX. L. REV. 1177, 1179 (2003) (noting the dramatic shift in presumption regarding discrimination and arguing that such a shift “should only be undertaken carefully and consciously”); Hart, *supra* note 194, at 790 (“Unfortunately for Title VII plaintiffs, the hostility of the federal judiciary to employment discrimination claims has been widely recognized.”); Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 546 (2001); Malveaux, *supra* note 2, at 85–86, 95 (noting the resistance of judges toward employment discrimination cases and noting that several scholars have also acknowledged this fact); Martin, *supra* note 12, at 368 (“Overall, the same-actor principle is symptomatic of the courts’ skepticism about employment discrimination matters, particularly those involving women and persons of color.”); Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 1003 (2007) (“Hostility to the litigation process itself seems the best explanation of how the same Court could be so willing to disallow employment lawsuits for supposed timing and procedural failures, but, when it deems a lawsuit to be properly filed, so willing to allow the plaintiff leeway as to burdens of proof and evidence.” (citations omitted)); Selmi, *supra* note 1, at 564–65; Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL’Y J.

Ever since jury trials were afforded to Title VII plaintiffs via the Civil Rights Act of 1991,<sup>206</sup> scholars have intimated that having a jury versus a judge sit as a trier of fact in an employment discrimination case would likely confer an advantage on a plaintiff because, in the words of one scholar, “judges in the United States are perceived as less likely than a lay jury to be sympathetic to and deliver a verdict in favor of a plaintiff.”<sup>207</sup> Moreover, as another scholar pointed out, when an employment discrimination plaintiff requests a jury trial, this may not only mean that she is counting on jurors’ bias toward discrimination plaintiffs; it can also “reflect a realization that jurors have an equal or weightier bias against the large corporate defendant.”<sup>208</sup>

Judges may see allegations of discrimination as simultaneously so difficult to relate to or identify with (especially if they have never felt discriminated against) and so grave, that they may respond with incredulity.<sup>209</sup> Indeed, judges may be under the misapprehension that society has somehow transcended the problem of unlawful bias, and thus the problem of discrimination in employment.<sup>210</sup> Judges adjudicating employment

37, 63 (2000); Michael J. Zimmer, *Systemic Empathy*, 34 COLUM. HUM. RTS. L. REV. 575, 585 (2003) (describing “unsympathetic” application of antidiscrimination laws by the courts).

206. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1071, 1073 (1991) (codified at 42 U.S.C. § 1981a(c) (2006)) (“If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury . . .”).

207. Donna M. Gitter, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LAB. L.J. 488, 521 (1994); see also Timothy D. Loudon, *The Civil Rights Act of 1991: What Does It Mean and What Is Its Likely Impact?*, 71 NEB. L. REV. 304, 312 (1992) (“The availability of trial by jury is a significant victory for the plaintiffs’ bar.”); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination under Title VII*, 35 WM. & MARY L. REV. 805, 841–42 (1994) (“[T]he Court’s most recent decision interpreting Title VII again demonstrates persistent hostility toward civil rights plaintiffs.”).

208. Kerry R. Lewis, Note, *A Reexamination of the Constitutional Right to a Jury Trial Under Title VII of the Civil Rights Act of 1964*, 26 TULSA L.J. 571, 580 (1991); see also Loudon, *supra* note 207, at 312 (“It is a well-known fact that juries tend to be more sympathetic to the ‘little guy,’ as opposed to the ‘heartless’ corporate entity.”).

209. See Martin, *supra* note 12, at 398 (suggesting that judicial bias against employment discrimination plaintiffs may be due to an “incapacity to relate to discrimination”); cf. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice’s Role*, 26 FORDHAM URB. L.J. 347, 484 (1999) (stating that “[u]nconscious racial identification with white defendants and/or victims by white prosecutors, judges and jurors, and a concomitant failure to identify or empathize with strangers from other racial groups . . . [is part of] ‘a universal dilemma in human relations’” (quoting RANDALL KENNEDY, RACE, CRIME AND THE LAW 350 (1997))).

210. See Malveaux, *supra* note 2, at 93–94 (“With the election of the first African-American President of the United States, Barack Obama, there has been a particularly acute focus on whether American society has become ‘post-racial.’”); Zimmer, *supra* note 16, at 601 (“There is data suggesting that federal judges, without regard to their political background, have come to

discrimination cases, then, appear to observers as increasingly skeptical of these cases and of the plaintiffs who bring them.<sup>211</sup> In fact, while those who observe workplace trends have remarked that the vehicles and mechanisms by which bias operates have become more nuanced and refined over time, as the dictates of the law have created a new social appropriateness and fear of liability,<sup>212</sup> those who observe the *perception* of workplace bias by others have observed that “[t]he reality that discriminators are more sophisticated, secretive, or subtle is decreasingly being viewed as normative.”<sup>213</sup> Thus, as

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view discrimination as less of a problem than it once was and now only involving the idiosyncratic behavior of a few employers.”).

211. See Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 67, 68–69 (2010) (noting that “[w]ith the belief that employment discrimination and its mutations have been arrested and eliminated, judges now adopt a very skeptical view of plaintiffs” and that “[a]lthough case reporters and the EEOC docket provide evidence that large numbers of workers suspect or experience discrimination, judges and society at large increasingly view workplace bias as isolated or aberrant conduct”); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1153–54 (2008) (“These hurdles are indicative of what I refer to as an ‘insider bias’ in the enforcement of antidiscrimination law—meaning the courts tend to reflect the insider view that discrimination is rare and that most claims are meritless, rather than the opposing view that discrimination is pervasive.”).

212. See BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* 205 (2007) (“America’s employers . . . aren’t conspiring to repress workers as some sort of sinister collective assault on the Bill of Rights. . . . [T]hey are taking what the law and conventional economic morality give them: the right to be reflexively suspicious of employee behavior that departs from managerial expectations or usual practice.”); Kevin Leo Yabut Nadal, *Responding to Racial, Gender, and Sexual Orientation Microaggressions in the Workplace*, in 2 PRAEGER HANDBOOK ON UNDERSTANDING AND PREVENTING WORKPLACE DISCRIMINATION 23, 23 (Michele A. Paludi ed., 2011) (“Previous literature has suggested that while overt discrimination is still pervasive in present U.S. society, discrimination has taken more subtle and indirect forms. Given that political correctness has become omnipresent in contemporary times, it is less acceptable for people to be overtly racist, sexist, or heterosexist.” (citations omitted)); Michael Selmi, *Understanding Discrimination in a “Post-Racial” World*, 32 CARDOZO L. REV. 833, 852 (2011) (“Discrimination has become more subtle—implicit rather than explicit—and is often based on expectations.”); Hila Shamir, *About Not Knowing—Thoughts on Schwab and Heise’s Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 CORNELL L. REV. 957, 960 (2011) (“The term ‘second generation employment discrimination’ was coined to describe the more subtle and complex forms of inequity that are evident in contemporary workplaces. The idea is that most employers by now know what first generation discrimination looks like and how to avoid certain patterns of behavior to preclude claims of discrimination.” (footnote omitted)).

213. Plass, *supra* note 211, at 67; see also Malveaux, *supra* note 2, at 94 (“In a ‘post-racial’ society, judges, like many Americans, may operate from the presumption that discrimination—at least racial discrimination—is a thing of the past.”); Kerwin Kofi Charles, *A Simple Model of Subtle Discrimination* 1–2 (Univ. of Mich. Gerald R. Ford Sch. of Pub. Policy, Paper No. 2000-014, 1999), available at [www.fordschool.umich.edu/research/papers/PDFfiles/00-014.pdf](http://www.fordschool.umich.edu/research/papers/PDFfiles/00-014.pdf) (“[R]ather than always being overt[,] discrimination can sometimes be subtle. . . . [I]n a world

one scholar concluded, “judges are not receptive to employees who believe that they are being treated unfairly but cannot overcome their employers’ legal explanations for their adverse actions.”<sup>214</sup>

Professor Trina Jones, noting courts’ inclinations to summarily dispose of employment discrimination claims, posited that:

between 1973, when *McDonnell Douglas* was decided, and 2009 societal beliefs about the prevalence of discrimination in the United States changed. In 1973, as the country emerged from the Jim Crow era, the presumption was one of widespread discrimination. Today, in so-called “post-racial” America, an opposite presumption seems to exist. . . . [T]his shift influences the ways in which judges view discrimination claims.<sup>215</sup>

Indeed, in an era in which this country has a biracial president and in which the Civil Rights Act of 1964 is verging on fifty years old, the misapprehension that antidiscrimination law has outlived its usefulness may well have taken hold even among some educated people.<sup>216</sup>

Another response to the questions of how and why employment discrimination shortcuts were created is that perhaps courts simply wish to clear their dockets. Confronted with both a lack of personal experience with the discrimination alleged and the sheer number of employment discrimination cases on their dockets, some judges may be both afraid of opening up proverbial floodgates by sending too many cases to trial and inclined to see the allegations before them as spurious or exaggerated. Although this is clearly not the case in every instance, a certain relief must accompany some judges’ realizations that they have a simple, though opaque, means by which to dispose of cases in which a certain rigid cutoff has been set. It requires a certain amount of conviction and accountability for a judge to say with certainty that after looking at all of the relevant circumstances of a case and evidence, there remains no triable issue of fact in dispute, (as the *Federal Rules of Civil*

where there is some discrimination that is not overt, societal estimates of the amount of discrimination in the economy will be consistently too low.”).

214. Plass, *supra* note 211, at 67.

215. Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 425 (2010).

216. See Martin, *supra* note 12, at 398 (noting that some judges believe that “discrimination does not exist or deserve policing”); Kevin Leo Yabut Nadal et al., *Processes and Struggles with Racial Microaggressions from the White American Perspective: Recommendations for Workplace Settings*, in 2 PRAEGER HANDBOOK ON UNDERSTANDING AND PREVENTING WORKPLACE DISCRIMINATION 155, 155 (Michele A. Paludi ed., 2011) (“With the election of President Barack Obama in 2008, as well as the decrease in race-based hate crimes over the past 30 years, many believe that racism no longer exists in American society.”); Gregory S. Parks, Jeffrey J. Rachlinski & Richard A. Epstein, Debate, *Implicit Race Bias and the 2008 Presidential Election: Much Ado About Nothing?*, 157 U. PA. L. REV. PENNUMBRA 210, 211 (2009), <http://www.pennumbra.com/debates/pdfs/ImplicitBias.pdf> (stating that “[t]he blogs and the pundits all assert that Obama’s win means that we now live in a ‘post-racial America’”); see also *supra* note 210.

*Procedure* stipulate for a grant of summary judgment), and to fully explain why. Shortcuts, when wielded with a broad brush, obviate the need for a judge to execute and to truly “own” such an analysis, and this may explain their appeal.

It seems clear that the sheer number of employment discrimination cases wending their way through the court system has served to increase judicial skepticism, if not antagonism, by reinforcing the incorrect notion that employees tend to file frivolous claims.<sup>217</sup> Charges filed with the EEOC have increased from 79,896 in 2000 to 99,922 in 2010, representing approximately a twenty-five percent increase,<sup>218</sup> while civil complaints in U.S. district courts have increased from 263,049 in 2000 to 285,215 in 2010, representing just an eight percent increase.<sup>219</sup> As Professor Margaret H. Lemos recently recounted:

In 1993, just as the federal courts were beginning to feel the effects of the 1991 amendments to Title VII, a former federal judge published an editorial in the *New York Times* contending that employment discrimination cases take up too much judicial time because they are “rarely settled, are characterized by high levels of acrimony and subjective claims of victimization; they are immensely time consuming and are controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use.”<sup>220</sup>

Professor Stephen Plass has pointed to the open and explicit statements in judicial opinions, such as “[t]he motives prompting those baseless filings may be inferred to be harassment or intimidation with a view towards being

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217. Plass, *supra* note 211, at 67–68 (“For some judges, the large number of charges reflect [sic] employees’ propensity to file frivolous claims. . . . Bad-faith filings and pressures on judicial resources have likely increased . . . judicial antagonism.”).

218. *Charge Statistics FY 1997 Through FY 2010*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 21, 2011).

219. *Table C: U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending June 30, 2000 and 2001*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2001/jun01/c00jun01.pdf> (last visited Oct. 4, 2011); *Table C: U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending June 30, 2009 and 2010*, U.S. COURTS, <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/C00Jun10.pdf> (last visited Oct. 4, 2011).

220. Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 824 (2011) (quoting Kenneth Conboy, Op-Ed., *Trouble in Foley Square*, N.Y. TIMES, Dec. 27, 1993, at A17). These views are held by many other judges as well. See *id.* at 825 (“The Second Circuit Task Force on Gender, Ethnic, and Racial Fairness in the Courts found that “[m]any federal judges . . . appear to believe that the proliferation of small [employment discrimination] cases involving individual claimants clog up the federal courts and divert judges’ attention from larger, purportedly more significant, civil cases.” (quoting John H. Doyle et al., *Report of the Working Committees to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts*, 1997 ANN. SURV. AM. L. 117, 343)).

rehired.”<sup>221</sup> There have been several other such revelations of this belief in more recent judicial opinions.<sup>222</sup> According to Professor Plass, “[j]udges are concerned because meritless claims not only negatively impact employers but also burden the judiciary” and “[judges’ belief that the claims are baseless] result[] in an almost routine grant of summary judgment for employers because employees’ bare assertions and the absence of direct evidence make it extremely difficult to offer proof of discrimination.”<sup>223</sup>

In 2009, Professor Scott Moss observed that this hostility, when it is discernible, was largely confined to the district courts and the courts of appeals.<sup>224</sup> He noted that:

when the Supreme Court has to issue five unanimous reversals in less than a decade to correct most circuits as to a single body of law—employment discrimination—that indicates a relatively widespread problem of circuit hostility to that particular body of law, which constitutes a sizeable portion of the federal docket. The scattered written decisions by judges openly expressing hostility to that area of law is further evidence, because for every one judge willing to go out on a limb declaring open skepticism or upset about

221. Plass, *supra* note 211, at 67 (quoting *Edwards v. Interboro Inst.*, 840 F. Supp. 222, 231 (E.D.N.Y. 1994)) (internal quotation marks omitted).

222. Professor Scott A. Moss quoted examples from two cases, *Fisher v. Vassar College* and *Rosa v. Brink’s Inc.*, to support his statement that “[s]ome judges express outright hostility to employment discrimination cases, actually mocking plaintiffs’ claims of discrimination, in fairly unprofessional terms, in decisions dismissing such claims.” Scott A. Moss, *The Courts Under President Obama*, 86 DENV. U. L. REV. 727, 739 & n.35 (2009). In *Fisher*, the judge used a “literary reference to mock the idea of discrimination based on an intersection of two or more classes—specifically, plaintiff’s claim, and the lower court finding, of discrimination on the basis of Dr. Fisher’s status as a married woman: ‘How fascinating is that class / Whose only member is Me!’” *Id.* at 739 n.35 (quoting *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1351 n.7 (2d Cir. 1997) (Jacobs, J., concurring)). Similarly, in *Rosa*, the judge “mock[ed] the idea that a bigoted individual could be biased against several groups, beginning a judicial opinion dismissing an employment discrimination claim as follows: ‘Move over, Archie Bunker. According to the plaintiff here, defendant Brink’s Inc. and three of its executives are so steeped in prejudice that they intentionally discriminated against her on grounds of race, national origin, gender, age, and disability—all at once.’” *Id.* (quoting *Rosa v. Brink’s Inc.*, 103 F. Supp. 2d 287, 288 (S.D.N.Y. 2000)). Hostility towards employment discrimination plaintiffs has also been observed by court employees. Lemos, *supra* note 220, at 825 (“The D.C. Circuit’s Task Force on Gender, Race, and Ethnic Bias reported that sixteen to seventeen percent of court employees observed ‘a judge treat an employment discrimination case as unimportant or a waste of time—a higher percentage than for any other case category apart from prisoner petitions.’” (quoting SPECIAL COMM. ON GEND., DRAFT FINAL REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE AND ETHNIC BIAS 101 (1995))).

223. Plass, *supra* note 211, at 68.

224. Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 564–66 (2009).



employment cases, there presumably are others who hold the same view but have the sense of propriety not to declare so in public documents.<sup>225</sup>

With the Supreme Court's June 2011 decision *Wal-Mart Stores, Inc. v. Dukes*,<sup>226</sup> in which it held that the suit, "one of the most expansive class actions ever,"<sup>227</sup> could not proceed because the plaintiffs had not adequately set forth a common corporate pay and promotion policy giving rise to gender discrimination,<sup>228</sup> scholars are now adverting to a judicial hostility toward employment discrimination plaintiffs that knows no such limits.<sup>229</sup>

Scholars have suggested that legal doctrine in this area and the jurisprudence that applies it have become so divorced from the history and legacy of hatred, oppression, and exploitation that engendered it, that judges are not discerning discrimination where it exists.<sup>230</sup> Judges, then, are considered by these scholars to view discrimination more as an isolated or egregious act, rather than embedded in a social or cultural context of any sort or somehow part of something more large scale.<sup>231</sup> As Professor Plass states, "[l]egal doctrine does not require judges to evaluate whether centuries-old exploitative systems and practices are lurking in the shadows."<sup>232</sup> Moreover,

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225. *Id.* at 565–66 (footnote omitted).

226. 131 S. Ct. 2541 (2011).

227. *Id.* at 2547.

228. *Id.* at 2556–57.

229. See Melissa Hart, *Hostility Toward Working Women*, N.Y. TIMES (June 21, 2011, 11:02 AM), <http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/failing-to-recognize-discrimination> ("The most striking and disturbing thing about the Supreme Court's decision in *Wal-Mart Stores[,] Inc. v. Dukes* [sic] is the hostility evinced by the five-justice majority toward efforts of working women to address systemic workplace discrimination."); Tanya Hernandez, *Far from Random Bias*, N.Y. TIMES (June 21, 2011, 12:21 PM), <http://www.nytimes.com/roomfordebate/2011/06/20/a-death-blow-to-class-action/wal-mart-far-from-random-bias> ("Given *Wal-Mart's* size in the labor market, this court decision not only disserves the plaintiffs' search for justice, it also disserves all women's search for gender equality."); *Supreme Court Limits Individuals' Access to Justice Through Procedural Rulings, Says Prof. Hart*, AM. CONST. SOC'Y BLOG (July 5, 2011), <http://www.acslaw.org/acsblog/supreme-court-limits-individuals-access-to-justice-through-procedural-rulings-says-prof-har> ("Hart noted that the [C]ourt's decision in *Wal-Mart* 'really redefined' the class action rule at issue, imposing a higher standard for overcoming the 'threshold inquiry' of whether to certify an employment discrimination class than would have been imposed on these plaintiffs in proving discrimination by *Wal-Mart*.").

230. Plass, *supra* note 211, at 68–69 ("The problem originates partly from the fact that judges work primarily with legal doctrine that is detached from the slavery and post-slavery culture of worker exploitation. As a result, judges do not evaluate employment discrimination cases as camouflaged cultural or institutional phenomena. . . . This ahistorical approach has contributed to the creation and the fostering of a narrow universe of recognized employment discrimination.").

231. *Id.* at 68 ("The rules of adjudication permit judges to reaffirm their perception that discrimination is a narrow practice of a few rogue employers.").

232. *Id.* at 69.

he asserts, with an increasing trend toward having the more meritorious employment discrimination cases resolved through arbitration, the legal system is leaving judges more and more unclear and ignorant as to precisely what dynamics and interactions are occurring in the workplace.<sup>233</sup>

Moreover, once judges undertake to adjudicate employment discrimination claims, it becomes clear that because each judge's life experiences, sensibilities, and sympathies vary so much, and because so much discretion is afforded to judges by the jurisprudence, the outcomes of cases will be and have been wildly inconsistent.<sup>234</sup> Scholarship has pointed to studies that reaffirm that aspects of one's identity, such as one's race, may sway or dictate one's readiness to perceive discrimination in terms of its extent, pervasiveness, or even its existence.<sup>235</sup> Where alternative explanations are proffered for adverse actions taken under circumstances where it is entirely less than clear what actually motivated them, this variation among individuals' perceptions and constructions accounts for a lot of uncertainty and inconsistency in the law.<sup>236</sup>

Further, some scholarship has maintained that appellate judges could be somehow regarding trial court judges as pro-plaintiff, and could perhaps thus

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233. *Id.* ("As more meritorious claims get slated for arbitration, the judiciary's perception of what is occurring in the workplace will become more skewed."); *cf.* The Honorable Robert E. Payne, Austin Owen Lecture, *Difficulties, Dangers & Challenges Facing the Judiciary Today*, 32 U. RICH. L. REV. 891, 900 (1998) ("If we [remember that we can be mistaken], I believe that we can avoid one of the biggest problems that any judicial system can have, and that is the ease with which judges can get out of touch with reality. It is particularly easy for federal judges to succumb to that circumstance.").

234. Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 499 (2010) ("Different judges with different life experiences can be expected to view plausibility differently because they have a different understanding of what is ordinary, commonplace, natural, or a matter of common sense."); Malveaux, *supra* note 2, at 92–93 (2010) (noting that "[b]ased on the differences among judges, one complaint may be dismissed while another survives, solely because of the way a judge applies his 'judicial experience and common sense,'" and that "[t]he problem is not that a judge may be sympathetic or unsympathetic to discrimination claims, but that his personal perception, rather than the law, threatens to become outcome determinative").

235. Malveaux, *supra* note 2, at 93 ("For example, studies indicate that there are significant differences in perception among racial groups over the existence and pervasiveness of race discrimination."); *see also id.* at 93 n.170 (providing studies demonstrating that African Americans are more likely to feel like they have been discriminated against or see racism as an issue compared to whites).

236. *Id.* at 94 ("This perception may contribute to a judge's concluding that intentional discrimination is implausible, especially in light of other alternative explanations available: 'Those who see discrimination as a pervasive and unjust aspect of our society are far more likely to interpret ambiguous events as the product of discrimination, while those who believe, or want to believe, that discrimination has receded in importance will attribute observed inequalities to forces other than discrimination.'" (quoting Michael Selmi, *Subtle Discrimination: A Matter of Perspective Rather Than Intent*, 34 COLUM. HUM. RTS. L. REV. 657, 675 (2003))).

try to remedy the inequality by swaying more toward the defendant.<sup>237</sup> This premise that trial courts are pro-plaintiff is demonstrably false.<sup>238</sup> Thus, although “[t]his appellate favoritism would be appropriate if the trial courts were in fact biased in favor of plaintiffs,” the fact remains that “employment discrimination cases constitute one of the least successful categories at the district court level, in that plaintiffs win a very small percentage of their actions and fare worse than in almost any other category of civil case.”<sup>239</sup> An alternate explanation posited for appellate courts’ seeming antagonism to employment discrimination plaintiffs is that the operational bias is less than conscious, as appeals courts’ distance from the proceedings and from the litigants causes them to be more resistant to recognizing the harms sustained by plaintiffs.<sup>240</sup>

Although there is not a significant difference between the rate of victory in jury trials of employment discrimination cases (37.63%) and that in other cases (44.41%), the rate of victory in bench trials of employment discrimination cases (19.62%), is substantially lower than that in other cases (45.53%).<sup>241</sup> While scholars believe that “in most situations juries and judges act similarly, . . . [i]n employment discrimination litigation, however, it may be that trial judges are more demanding of plaintiffs than juries are, or at least are exhibiting a well-founded fear of any judgments for plaintiffs being more likely reversed.”<sup>242</sup>

#### F. A Dangerous Trend

The Supreme Court has recognized that the purpose of Title VII is to ensure “that the workplace be an environment free of discrimination, where race [or other protected class status] is not a barrier to opportunity.”<sup>243</sup> As early on as 1971, the Court observed that “the very purpose of [T]itle VII is to promote hiring on the basis of job qualifications, rather than on the basis of

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237. Clermont & Schwab, *supra* note 1, at 113 (noting that “[a]ppellate judges may perceive trial courts as pro-plaintiff” in employment discrimination cases).

238. *Id.*

239. *Id.* “More likely, district courts process employment discrimination cases with a neutral or even jaundiced eye toward plaintiffs.” *Id.*

240. *Id.*

241. *Id.* at 130. Another study conducted in 1996 supports the same conclusion. See CAROL J. DEFRANCES & MARIKA F.X. LITRAS, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 173426, BULLETIN: CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 6 tbl.5 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ctevlc96.pdf>. According to that study, overall plaintiffs won 48.7% of jury trials while employment discrimination plaintiffs won about 47.6% of jury trials. *Id.* However, employment discrimination plaintiffs won just 26.0% of bench trials, a rate far less than the 61.6% won by overall plaintiffs. *Id.*

242. Clermont & Schwab, *supra* note 2, at 130–31.

243. Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009).

race or color,”<sup>244</sup> proclaiming that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”<sup>245</sup> The existence of shortcuts in employment discrimination law both undercuts and contravenes the Act’s goals and purposes. By excusing courts from engaging in the reasoned analysis of all of the circumstances surrounding an employment discrimination case, the shortcuts bypass the evaluation of what really occurred in the case that “strick[ing] at the entire spectrum of [discrimination]” would necessitate and entail, and prematurely end the case’s life.<sup>246</sup>

By leaving judges with a sense of security in the knowledge that they are not traversing the threshold set by the cutoffs, the shortcuts set forth clear periods of insulation or buffering, outside of which no insight into what may be one’s true character or disposition may be used against a decision maker. This may very well absolve a decision maker of any taint that may have otherwise been cast by his comment, and it thereby insulates him from the statute’s reach for no good reason. This subverts the goals of Title VII.

#### CONCLUSION

It is only when the doctrines that this Article classifies as “shortcuts” are examined alongside one another that they are properly identified as comprising a larger movement of the judiciary toward foreclosing employment discrimination plaintiffs’ cases without the necessary analysis. Similarly, it is only when these shortcuts are looked at in contrast to the inferences and presumptions that courts have crafted to aid tort plaintiffs that the stark difference between the way in which courts view and treat employment discrimination plaintiffs, as opposed to other plaintiffs, becomes obvious.

Societally-held attitudes about discrimination and how rife or nefarious it is in today’s society can alternately influence or be reflected by judicial skepticism toward employment discrimination cases. Further, judges often curtail or truncate employment discrimination cases’ viability prematurely at the summary judgment stage by improperly substituting their own evaluation of evidence for that of a reasonable juror, even as they invoke shortcuts that would likely make it unduly difficult for a plaintiff at trial in any event. Even in cases in which summary judgment looks to be providently granted in light of the governing rules of evidence and procedure as applied to the evidence in a

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244. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971) (quoting 110 CONG. REC. 7247 (1964)) (internal quotation marks omitted).

245. *Id.* at 431.

246. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (“We have held that this not only covers ‘terms’ and ‘conditions’ in the narrow contractual sense, but ‘evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.’” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))).

case, shortcuts can be improperly wielded by judges to forego what should be a transparent, reasoned analysis.

If a judge wants to say, for example, that a comment is not relevant or insufficient to create a triable issue of fact, she should do so, but only after evaluating all of the evidence, rather than deeming the comment stray and summarily disposing of the case. If a judge wants to deem a comment too attenuated by the passage of time to be relevant to a plaintiff's case, she should do so, again, after a thorough assessment of the content and context, including the timing of the comment and all other relevant evidence. If a judge wants to declare an act to be, as a matter of law, incapable of being called retaliatory by a reasonable trier, she should do so, rather than merely invoking an arbitrary temporal cutoff and using this cutoff to obviate a look at all relevant evidence. If a judge wants to hold that an actor, as a matter of law, *could not have acted* with the bias or intent alleged, she should be able to do so without resort to and overreliance on the fact that the actor may have hired the plaintiff. A protracted passage of time between a biased comment or a protected activity and an adverse action may certainly attenuate the strength of evidence. While some judges may still conclude that some cases, upon consideration, warrant a grant of summary judgment, the retraction of rigid cutoffs will require a trier of law, and perhaps a trier of fact as well, to review all of the evidence in a case before weighing in on the strength of a plaintiff's case.

The law of employment discrimination ought to be drawn into sharper focus as having its roots in torts—the law of civil wrongs. Tort law has long recognized the plight of certain plaintiffs who cannot, because of their situation, easily establish certain elements of their cases, although the ultimate fact of the defendant's liability is clear. Employment discrimination law ought not, even when liability is less than clear, prematurely foreclose cases in which plaintiffs have often hard-to-come-by evidence of possible discrimination. When, however, the law permits the attaching of undue meaning to something as potentially innocuous as the act of hiring, or the quick affixing of a lethal label to evidence, it does just that.

“Shortcuts,” applied to supplant or obviate analysis, facilitate docket clearing and often provide a bright line that seems to both embolden and comfort those who employ them. When wielded with a heavy hand and little to no analysis, however, they fail to comport with the dictates of anti-discrimination legislation, the considerations that animate tort law, and, often, the procedural and evidentiary rules that govern the proper disposal or adjudication of a case. They also contravene the clear and broad goals of anti-discrimination legislation and the spirit of fair, transparent, and holistic consideration that should be part and parcel of anti-discrimination jurisprudence. Shortcuts should thus be eschewed in favor of comprehensive analyses in which courts have room, and indeed a mandate, to weigh—and explicitly weigh in on—all appropriately considered evidence of record.



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CURRENT  
SCHOLARSHIP IN  
LABOR AND  
EMPLOYMENT LAW**

