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I. INTRODUCTION

In *Pretext in Peril*, Professor Martin examines the interplay between procedural and substantive law in disparate treatment cases in which plaintiffs offer circumstantial evidence – evidence of pretext – as opposed to direct evidence[2] to maintain their employment discrimination claims. Pretext constitutes an evidentiary showing that the defendant's asserted reason for an adverse employment action that the plaintiff suffered is not the real reason or that an impermissible classification like race more likely than not motivated the adverse employment action.[3] Professor Martin argues that through the confluence of substantive and procedural law a plaintiff's evidence of pretext has become "hollow and forceless in evidentiary value."[4] With precision,

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2. "The classic notion of 'direct evidence' is evidence that, if believed, proves the ultimate question at issue *without drawing any inferences*." MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 29 (7th ed. 2008). A typical example of direct evidence of unlawful intentional discrimination is an employer's express statement that an employee was fired because she was Black.

3. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

4. Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 314 (2010).

Professor Martin critiques courts' use of "evidentiary-dilution devices,"[5] making evidence of pretext devoid of discriminatory or prejudicial content. She also shows how courts employ "procedural reinforcement,"[6] which results in the overwhelming grant of employers' motions to dismiss, motions for summary judgment, and judgments notwithstanding the verdict. In turn, courts' application of "evidentiary-dilution devices" and procedure impedes the viability of disparate treatment cases and the ability of plaintiffs to redress discrimination in the contemporary workplace.

According to Professor Martin, one "evidentiary-dilution device" courts advance is an interpretation of pretextual evidence that "leav[es] the meaning of pretext indeterminate and meaningless"[7] and "severely undercut[s] plaintiffs' efforts to prove discriminatory bias."[8] Consequently, this response to Professor Martin's article addresses such an "evidentiary-dilution device" utilized by courts in race discrimination cases at both post-trial and pre-trial phases. Namely, this response places under scrutiny courts' acontextual, colorblind analyses of pretextual evidence offered by plaintiffs to demonstrate that they suffered an adverse employment action because of their race. In doing so, this response focuses on two disparate treatment cases originating in Alabama, where the plaintiffs, African American men, were addressed as "boy" by their white male supervisors. In both cases, the plaintiffs presented this highly emotive term as circumstantial evidence supporting their claims of race discrimination.

First, this response addresses the lower courts' opinions in *Ash v. Tyson Foods, Inc.*,[9] as well as the Supreme Court's per curiam opinion in this case,[10] which espouses a more contextualized analysis of pretext in race-based disparate treatment cases. Next, this response examines *Holiness v. Moore-Handley, Inc.*[11] and the acontextual, colorblind analysis the court applied. Each case illustrates the negative effects of courts analyzing pretext without context at different stages of race discrimination litigation: during post-trial phases in *Ash v. Tyson Foods, Inc.* and at the summary judgment stage in *Holiness v. Moore-Handley, Inc. Ash v. Tyson Foods, Inc.* and *Holiness v. Moore-Handley, Inc.* reveal judicial nullification of the jury's role and provide an opportunity to show the importance of contextualizing facts in race discrimination cases. I argue that judges should not eliminate this jury function summarily in disparate treatment cases; moreover, courts must apply a

5. Martin, *supra* note 4, at 401.

6. *Id.* at 400.

7. *Id.* at 345.

8. *Id.* at 344.

9. Ash v. Tyson Foods, Inc., No. 96-RRA-3257-M, 2004 WL 5138005 (N.D. Ala. Mar. 26, 2004); Ash v. Tyson Foods, Inc., 129 F. App'x 529 (11th Cir. 2005); Ash v. Tyson Foods, Inc., 190 F. App'x 924 (11th Cir. 2006).

10. 546 U.S. 454 (2006) (per curiam).

11. 114 F. Supp. 2d 1176 (N.D. Ala. 1999).

more nuanced methodology to these claims.[12] Accordingly, I proffer a more contextualized approach to the *Holiness* case that considers historical and contemporary race and gender relations in the United States and their manifestations in the workplace. Finally, this response briefly considers transformations of jurisprudential methodology needed in disparate treatment cases to redress the subtleties of racial inequality and stigmatization and thus unlawful race discrimination in the contemporary workplace.

II. *ASH V. TYSON FOODS, INC.*: A CALL FOR CONTEXT

In *Ash v. Tyson Foods, Inc.*, Anthony Ash and John Hithon claimed that they were denied promotions to shift manager at the Tyson Foods plant in Gadsden, Alabama.[13] They filed suit against Tyson Foods, alleging violations of Title VII of the Civil Rights Act of 1964[14] and Section 1981 of the Civil Rights Act of 1866.[15] Like most disparate treatment cases, Ash's and Hithon's Title VII and Section 1981 claims were not supported by "direct evidence" that they were denied promotions because of their race.[16] Therefore, during the pre-trial phase, the facts of the case were analyzed pursuant to the *McDonnell Douglas*[17] burden-shifting framework.[18] In the failure-to-promote context, "a [plaintiff's] prima facie case is ordinarily established by proof that the employer, after having rejected the plaintiff's application for a

12. This Article does not address disparate treatment cases reviewed pursuant to the "mixed-motive" analytical framework Congress codified in the Civil Rights Act of 1991. *See* Pub. L. 102-166, 105 Stat. 1071 (1991). I limit the scope of my discussion to the application of the traditional analytical paradigm adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

13. No. 96-RRA-3257-M, 2004 WL 5138005, at *2 (N.D. Ala. Mar. 26, 2004).

14. Title VII prohibits employment practices because of race, color, sex, religion, and national origin. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

15. *See Ash*, 546 U.S. at 455. Section 1981 affords every individual the right to "make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). The Supreme Court has interpreted this statutory language to bar intentional racial discrimination in private employment. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 459-60 (1975). The *McDonnell Douglas* framework is applied in Section 1981 cases. *See* Cooper v. S. Co., 390 F.3d 695, 724 n.16 (11th Cir. 2004).

16. *See Ash*, 546 U.S. at 455.

17. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

18. *See Ash*, 546 U.S. at 455. It is important to note that at the post-trial stage, upon consideration of a post-trial motion, for example, the court does "not view employment discrimination claims through the prism of the prima facie case/burden-shifting paradigm set forth in *McDonnell Douglas Corp. v. Green*," Davis v. Wis. Dep't of Corr., 445 F.3d 971, 975-76 (7th Cir. 2006), but rather considers "whether a defendant is entitled to judgment as a matter of law when the plaintiff's case consists exclusively of a prima facie case of discrimination and sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory explanation for its action." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 137 (2000).

. . . promotion, continued to seek applicants with qualifications similar to the plaintiff's."[19] Establishing a prima facie case essentially raises a presumption that the adverse employment action occurred because of the plaintiff's race, color, national origin, sex, or religion.[20]

In response to the plaintiff's prima facie case, the employer must articulate a "legitimate, nondiscriminatory reason[]" for its adverse employment action.[21] Once the employer has satisfied its burden, the plaintiff must then produce evidence showing that the employer's asserted reason is pretextual – that the asserted reason is false or that race, color, national origin, religion, or sex more likely than not motivated the adverse employment action.[22] The plaintiffs in *Ash v. Tyson Foods, Inc.* survived the summary judgment stage, and at trial the plaintiffs presented numerous arguments[23] to challenge the

19. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988). Modes of establishing a prima facie case are meant to be flexible rather than rigid in nature to conform to the particular facts of the case. *See McDonnell Douglas*, 411 U.S. at 802 n.13.

20. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 n.7 (1981).

21. *Id.* at 256.

22. Upon reviewing Tyson Foods' motion for judgment as a matter of law on the plaintiffs' discrimination claims pursuant to Federal Rule of Civil Procedure 50, the district court implored that "[i]t is incumbent on a plaintiff to show pretext as to each and every reason given by the decisionmaker for taking the action complained." Ash v. Tyson Foods, Inc., No. 96-RRA-3257-M, 2004 WL 5138005, at *2 (N.D. Ala. Mar. 26, 2004). The court defined pretext as a "lie" or a "phony reason for some action." *Id.* (quoting Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995)). The court held that "the plaintiffs must present evidence that Hatley lied." *Id.* at *3. Moreover, to affirm the jury's decision in favor of the plaintiffs, there must have been "sufficient evidence . . . presented at trial to show that Hatley's reason for selecting King and Dade over Hithon was not real, and that his real reason for selecting King and Dade was to deny Hithon promotion because he [was] black." *Id.* at *4. Notably, the court considered the "honest belief rule" in its exposition of pretext. *See id.* at *2. The "'honest belief' rule excuses an employer if it takes action based on a mistake, a good faith belief, or even poor business judgment." Martin, *supra* note 4, at 351. Professor Martin characterizes the "honest belief rule" as a "sub-rule" that courts developed "to balance the employer's right to operate with autonomy and the worker's right to be free from discrimination in the workplace." *Id.* at 351-52. Yet the "honest belief rule" has thwarted a plaintiff's ability to demonstrate that "the employer's reason is unworthy of credence" through evidence of the falsity of the employer's reason. *Id.* at 352. Accordingly, in applying the "honest belief" rule at the post-trial phase, the district court subverted the persuasiveness of the plaintiffs' evidence casting doubt on the truthfulness of Tyson Foods' reasons for not promoting Ash and Hithon.

23. The Eleventh Circuit outlined all of the arguments the plaintiffs presented to undermine the credibility of Tyson Foods' proffered reasons for not promoting them: (1) Hatley offered inconsistent reasons for his decision not to promote the plaintiffs; (2) Hatley did not use the required qualifications outlined in the company policy and thereby excluded the plaintiffs who were qualified pursuant to company policy; (3) Hatley did not assess the performance reviews or personnel files of the white males he

veracity of Tyson Foods' asserted reasons[24] for not promoting Ash and Hithon. To further support their claims that they were denied promotions because they were Black[25] – and specifically because they were Black men – the plaintiffs presented undisputed evidence: white men were selected for the managerial positions;[26] no Black employee had ever served as a shift manager at the Gadsen plant;[27] and Hatley called both plaintiffs "boy" several times.[28]

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promoted and "only checked the references for black candidates"; (4) Hatley was untruthful when he stated that a college degree was required for the shift manager position, knowing that this requirement would disqualify the plaintiffs from the promotion; (5) Hatley extended an offer to one promoted individual prior to interviewing Hithon for the position; (6) "Hatley hand-picked [the second promotee] for the shift manager position despite telling the superintendents that he would hold the position open before deciding on the promotion"; (7) Tyson Foods did not prove that the Gadsden plant was suffering financial difficulties while Ash and Hithon were employed as superintendents of the plant; and (8) Hatley engendered a racially isolating work environment, in which the promotion decisions were made, by exhibiting a "cool demeanor toward [Ash and Hithon] and addressing them as 'boys.'" Ash v. Tyson Foods, Inc., 129 F. App'x 529, 531 (11th Cir. 2005).

24. Hatley testified that he selected two white male applicants for the promotion instead of Hithon because of their "experience in the poultry industry in a successful plant; leadership and organizational skills; experience in more than one plant; having a college degree; and as the primary consideration, [his] belief that it would be better to have as shift managers persons who were not associated with the badly-performing Gadsden facility." *Ash*, 2004 WL 5138005, at *1. Hatley also testified that he did not consider Ash for the shift manager position because Ash told Hatley that he was not "ready" for the position. *Id.* at *2. However, Ash testified that he informed Hatley that "he wanted to be considered for the job." *Id.*

25. Professor Kimberlé Crenshaw has explained that "Black" deserves capitalization because "Blacks, like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) (citing Catharine A. MacKinnon, *Feminism, Marxism, Method and State: An Agenda for Theory*, 7 SIGNS 515, 516 (1982)). Additionally, Professor Neil Gotanda contends that the capitalization of Black is appropriate since it "has deep political and social meaning as a liberating term." Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 4 n.12 (1991). I agree with both Professors Crenshaw and Gotanda, and, for both reasons, throughout this Article when I reference people of African descent individually and collectively, the word "Black" will be represented as a proper noun. I, however, maintain the preferences of those authors to which I cite.

26. *See Ash*, 129 F. App'x at 531.

27. *See Ash*, 2004 WL 5138005, at *7 (holding that the plaintiffs' testimony that the Gadsden plant never employed a Black shift manager was insufficient evidence of race discrimination because their testimony was not supported by statistical evidence and thus was "meaningless" and noting that Hatley was not responsible for the lack of Black plant managers because those hiring decisions were made before Hatley began working at the plant).

According to Mr. Ash, on one occasion Mr. Hatley called him "boy" in front of his wife,[29] and, when Ash's wife retorted that "her husband was an adult," Hatley responded by laughing.[30] At trial, Mr. Hithon testified that he perceived the appellation, as spoken by Hatley, to implicate his race and gender. Hithon explained that "[b]oy . . . is a term that was used back during slavery times to describe a black male."[31] Significantly, at trial, Tyson Foods' counsel even admitted that, based on his experience growing up in Anniston, Alabama, during the 1950s, addressing a Black man as "boy" was "fighting words."[32] According to defense counsel, Hatley calling Ash and Hithon "boy" was a "mean thing to say" and indefensible.[33] Moreover, defense counsel addressed the tone in which the witnesses testified that Hatley called them "boy." He acknowledged that, "[had] Hatley stated it the way it was said on [the] witness stand by [those] witnesses, you know, back when I was growing up, there would probably be a little trouble."[34] The plaintiffs' evidence persuaded a jury that they were denied promotions because of their race; a jury found in their favor on their Title VII and Section 1981 claims not once but twice.[35] Following the first trial, Tyson Foods sought a judgment as

28. *See* Brief on Behalf of Tyson Foods, Inc. at 7, Ash v. Tyson Foods, Inc., 129 F. App'x 529 (11th Cir. 2006) (No. 04-11695-AA) (citing to Trial Record). In support of their claim, plaintiffs also referred to evidence that Hatley only spoke to and ate with white employees. *Ash*, 2004 WL 5138005, at *7.

29. *Ash*, 2004 WL 5138005, at *6. Ash's wife also worked at Tyson Foods in the human resources department.

30. *See* Brief on Behalf of Tyson Foods, Inc. at 7, Ash v. Tyson Foods, Inc., 129 F. App'x 529 (11th Cir. 2006) (No. 04-11695-AA).

31. *See id.* at 8.

32. *See id.* at 7.

33. *Id.* at 7 n.5.

34. *Id.* (quoting Trial Transcript at pg. 611). Significantly, the defense attorney acknowledged the racial implications of a white man calling a Black man "boy" and that such an incident could have provoked violence fifty or more years ago. *Id.* at 9. However, the attorney implied that Hatley calling Ash and Hithon "boy" in contemporary times – though "mean" and "indefensible" – conveyed a different meaning and engendered a non-subordinating or non-stigmatizing effect due to the advancements within American race relations since the 1950s. Ash's testimony regarding the racial significance and emotional consequence of being called "boy" by Hatley demonstrates the continuing impact of historical racial subordination on individual and collective relationships within the modern workplace. In assessing claims of race discrimination, courts, therefore, cannot ignore the continued salience of racial hierarchies and the attendant social practices that were developed to keep racial minorities, and in the instant cases Black men, in subordinated positions.

35. After the first trial, a jury awarded Ash and Hithon $250,000 in compensatory damages and $1.5 million in punitive damages. *See* Ash v. Tyson Foods, Inc., No. 96-RRA-3257-M, 2004 WL 5138005, at *1 (N.D. Ala. Mar. 26, 2004) (granting the employer's renewed motion for judgment and conditional order of a re-trial on the ground that the damages awarded by the jury for mental anguish and punitive damages were excessive as a matter of law pursuant to Federal Rule of Civil Proce-

a matter of law on the plaintiffs' claims of discrimination, including both compensatory and punitive damages, pursuant to Federal Rule of Civil Procedure 50.[36]

In deciding whether the use of "boy" was sufficiently probative evidence of race discrimination, the district court held that "even if Hatley had made these statements, it cannot be found, without more, that they were racial in nature."[37] Notably, the court did not explain what "more" the plaintiffs needed to offer for the word "boy" to be deemed "racial in nature," though the district court implied that Hatley addressing the men as "boy" could have been viewed as a racial insult if Ash and Hithon would have complained.[38] The district court granted Tyson Foods' motion for judgment as a matter of law and, in the alternative, ordered a new trial.[39] Plaintiffs Ash and Hithon appealed the district court's dismissal to the Court of Appeals for the Eleventh Circuit.[40] The Eleventh Circuit, however, adopted an extreme stance concerning the evidentiary value of the word "boy" in race discrimination cases. According to the Eleventh Circuit, an accompanying racial classification or modifier, like "[B]lack" or "white," was needed for the word "boy" to suffice as evidence of race discrimination.[41] Thereby, the court foreclosed the word's probative value in disparate treatment race cases analyzed pursuant to the *McDonnell Douglas* framework.

The United States Supreme Court granted certiorari to address the Eleventh Circuit's holding,[42] and, in a per curium opinion, the Court held that a

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dure 50). A new trial was held after the Eleventh Circuit upheld the district court's opinion. *See* Hithon v. Tyson Foods, Inc., No. 96-RRA-3257-M, 2008 WL 4921515, at *1 (N.D. Ala. Sept. 30, 2008). After the second trial, the jury found in favor of the plaintiffs again, awarding Ash and Hithon damages: $35,000 for back pay, $300,000 for mental anguish, and $1 million in punitive damages. *See id.* (granting Tyson Foods' Rule 50(b) renewed motion for judgment as a matter of law due to insufficient evidence that Hatley's actions supported a punitive damage award against Tyson, thus setting aside the $1 million punitive damage award against Tyson).

36. *Ash*, 2004 WL 5138005, at *1.

37. *Id.* at *6.

38. After outlining portions of the testimony that describe instances of Hatley calling Ash and Hithon "boy," the court noted that "neither Ash nor Hithon complained about the statements. Even if Hatley made these statements, it cannot be found without more, that they were racial in nature." *Id.*

39. *Id.* at *10.

40. *See* Brief of the Appellants, Anthony Ash and John Hithon at 3, 129 F. App'x 529 (11th Cir. 2006) (No. 04-11695-AA).

41. Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005) (affirming in part and reversing in part the district court's grant of Tyson Foods' motion for judgment as a matter of law).

42. *See* Ash v. Tyson Foods, Inc., 546 U.S 454 (2006) (deciding that the Eleventh Circuit Court of Appeals's standards requiring assertions of racial modifiers like "Black" or "white" in tandem with the word "boy" and "disparit[ies] in [the plaintiff's and selected applicant's] qualifications [for an employment position to be] so appar-

racial modifier is not necessary for a word like "boy" to be deemed probative evidence of race discrimination.[43] The Court acknowledged that, in Title VII and Section 1981 race cases, courts must analyze a word's intended or conveyed meaning within context to ascertain whether adverse employment actions were based on an employee's race.[44] The Supreme Court enumerated five non-exclusive factors that courts should assess in determining the speaker's meaning of a "disputed word": "context, inflection, tone of voice, local custom, and historical usage."[45] On remand, rather than examine these factors with respect to the label "boy," the Eleventh Circuit invoked an "evidentiary dilution device": the "stray remarks" doctrine.[46] In so doing, the Eleventh Circuit maintained a colorblind, non-discriminatory, and harmless view of the word "boy" and preserved its previous position that "boy" articulated in any context is insufficient to support a finding of unlawful race discrimination. The Eleventh Circuit held that Hatley calling Ash and Hithon "boy" "was not sufficient, *either alone, or with the other evidence*, to provide a basis for a jury reasonably to find that Tyson's stated reasons for not promoting the plaintiffs was racial discrimination."[47] According to the Eleventh Circuit,

> [T]he usages [of the word "boy"] were conversational and as found by the district court were *non-racial* in context. But even if somehow construed as racial, we conclude that the comments were *am-*

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ent as virtually to jump off the page and slap you in the face" to suffice as evidence of pretext were erroneous) (quoting Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004)).

43. *Id.* at 456.

44. *Id.*

45. *Id.*

46. *See* Ash v. Tyson Foods, Inc., 190 F. App'x 924, 926 (11th Cir. 2006). The "stray remarks" doctrine derived from Justice O'Connor's concurring opinion in a pivotal sex discrimination case: *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Justice O'Connor opined that

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

Id. at 277 (O'Connor, J., concurring) (emphasis added). Professor Martin critiques the stray remarks doctrine in light of "[r]ecent cases reveal[ing] that the lower courts continue to regard biased comments with skepticism even when they are offered only as circumstantial evidence of discriminatory intent." Martin, *supra* note 4, at 350. Justice O'Connor's opinion afforded lower courts great discretion in dismissing prejudicial or biased statements of decisionmakers and co-workers as "stray remarks" – which courts have overwhelmingly done, as seen in *Ash v. Tyson Foods* – and thus forcing "pretext [into] peril." *See generally id.*

47. *Ash*, 190 F. App'x at 926 (emphasis added).

> *biguous* stray remarks not uttered in the context of the decisions at issue and are not sufficient circumstantial evidence of bias to provide a *reasonable* basis for a finding of racial discrimination in the denial of the promotions. Even if "boy" is considered to have racial implications . . . the statements were remote in time to the employment decision, totally unrelated to the promotions at issue, and showed no indication of the general racial bias in the decision making process at the plant or by [the supervisor]. Moreover, there is *nothing* in the record about the remaining factors to support an inference of racial animus in the use of the term "boy."[48]

The Eleventh Circuit's opinion is problematic for several reasons. First, the Eleventh Circuit essentially ignored the Supreme Court's call for a contextualized approach to ascertaining the meaning of words used in the workplace. As Hithon's testimony and defense counsel's account illustrated, the racial connotation of the word "boy" is rooted in an extensive history of racial subordination of people of color – specifically Black men. The Eleventh Circuit casually notes the racial implication of a white man addressing Black men as "boy," yet the court neutralizes this interaction. Simultaneously, the Eleventh Circuit diminishes the jury function of contextualizing the facts propounded through live testimony. The court disregarded the jury's assessment of the tone, inflection, and context in which Hatley called Ash and Hithon "boy" as well as the historical and contemporary usage and consequence of white men calling Black men "boy." According to the Eleventh Circuit, even if the jury interpreted Hatley's use of "boy" as racially pejorative, this label was *ambiguous* because it was not used in relation to the promotion decisions or near the time the decisions were made. Yet the paucity of evidence that Hatley called the plaintiffs "boy" during the decisionmaking process or in close proximity thereof does not make the meaning of the word *ambiguous*. The temporal proximity of Hatley's use of the word to the promotion decision is not the only relevant context in which the term should be analyzed.

Additionally, the emphasis on Hatley's racial animus or malevolent mindset should not control the court's analysis. The historical, social, and relational contexts and the employee's perspective of the word's usage are also relevant and should be considered.[49] In light of Hithon's, Ash's, and Hatley's race and gender, as well as the workplace dynamics, the term could be reasonably viewed as racially subordinating, "mean," and indefensible. Hithon and Ash are Black men, and Hatley is a white man. Hatley served as a manager – a position of authority – within a workforce where no Black males occupied managerial positions or comparable authoritative positions.

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48. *Id.* (emphasis added).

49. *See* D. Wendy Greene, *Title VII: What's Hair (And Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1383-94 (2008).

Furthermore, the plaintiffs claimed that Hatley treated them indifferently yet was friendly toward white male employees. Thus, the long history of white men addressing Black men as "boy" to reinforce socially and legally constructed statuses of subordination and lines of demarcation clarifies the "ambiguity" of the word's meaning and its impact on workplace interactions.

Hithon's and Ash's race- and gender-conscious interpretation of the word "boy" was influenced by historical, social, and legal forces as well as contemporary workforce dynamics; their understanding of the word cannot be discounted. Similarly, the confluence of these contexts on Hatley's choice to call Ash and Hithon "boy" (whether conscious or unconscious) on several occasions, his particular usage in front of Ash's wife, and his laughter in response to her open disapproval of the term cannot be ignored or supplanted by a judicially approved rule like the "stray remarks" doctrine. Thus, in cases such as *Ash v. Tyson Foods, Inc.*, where racially contingent words like "boy" are used in the workplace and offered in support of disparate treatment race claims, courts must, like juries have done, place such words and accompanying actions within their historical, social, and workplace context. *Ash v. Tyson Foods, Inc.* reveals the destabilizing effect of an acontextual and colorblind judicial approach in a race discrimination case during its post-trial phase: the litigation of multiple trials and the overhaul of two jury verdicts in favor of the plaintiffs. Similarly, the next case, *Holiness v. Moore-Handley, Inc.*, illustrates the dismissal of a viable disparate treatment case due to an acontextual and colorblind analysis of facts that, if contextualized within their race, gender, and workplace dynamics, could reasonably support a finding of race discrimination in violation of federal employment discrimination laws.

III. *HOLINESS V. MOORE-HANDLEY, INC.*

Beginning in September 1995, Glenn Holiness, a Black man, worked as a warehouse inventory order worker for Moore-Handley, a corporation that sells hardware and building supplies at wholesale and retail.[50] In April 1996, Holiness was promoted to commodities salesman.[51] In this capacity, Holiness sold building materials and contacted vendors to satisfy customers' purchase orders.[52] During his employment with Moore-Handley, Holiness and his coworker Alysia Housey, a white woman, became friends.[53] According to Housey, her supervisor informed her that members of management, Robert Tolbert and Ed Plemons (Holiness's immediate supervisor), "didn't like [Housey's] association with Glenn Holiness."[54] Lewis also cautioned Housey that

50. Holiness v. Moore-Handley, Inc., 114 F. Supp. 2d 1176, 1178 (N.D. Ala. 1999).

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

she risked losing her job and her family because of her friendship with Holiness.[55] Housey told Holiness about the comments that their friendship engendered.[56] Another co-worker even reported to Holiness that "unspecified people were 'talking' about his being fired because of his association with Housey."[57]

Simultaneously, Holiness observed what he considered to be a reduction in his salary.[58] When he received his first paycheck, Holiness noticed that his hourly compensation reflected an annual salary of $18,000.[59] However, according to Holiness, when he was offered the commodities sales position, Mike Hardin, Moore-Handley's manager of building materials, stated that the starting annual salary for this position was $20,000.[60] When Holiness asked Hardin about the discrepancy in pay, Hardin denied ever telling Holiness that he would make $20,000 per year and became defensive, asking Holiness "if he was threatening him."[61] Holiness went on to complain to Plemons, his immediate supervisor, without success.[62] Approximately two weeks later, Plemons met with Holiness to tell him that some of the vendors complained that he was "too familiar" with them on the phone.[63] During this conversation, Plemons also confirmed Holiness's observation that he was receiving less compensation than originally stated. Allegedly, Plemons told Holiness that he was not being paid a $20,000 salary because of a pricing mistake he made on a lumber order.[64] A week after this conversation, Holiness again noticed that his hourly rate reflected an $18,000 salary and informed the president of Moore-Handley, Bud White.[65] According to Holiness, White acknowledged that he was aware of the salary issue but told him "that he was being paid what he was supposed to be paid and that he should just stop worrying about his salary and do his job."[66] Later that day, Plemons terminated Holiness.[67] On the form authorizing Holiness's removal from the company payroll, Plemons wrote that Holiness was terminated due to an "inability to do [his] job, lack of product knowledge, poor telephone mannerism (sic), customer complaints, [and] errors."[68]

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55. *Id.*
56. *Id.* at 1187.
57. *Id.*
58. *Id.* at 1178.
59. *Id.*
60. *Id.*
61. *Id.* at 1179.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 1179-80.
68. *Id.* at 1180.

Holiness alleged that Moore-Handley discriminated against him based on race in violation of Title VII and Section 1981.[69] Specifically, Holiness asserted several claims: disparate treatment, hostile work environment, and retaliation.[70] Holiness's race discrimination claim was based upon his friendship with Housey.[71] Regarding Holiness's disparate treatment claim, the district court assumed for the purposes of summary judgment that Holiness established a prima facie case of race discrimination since Moore-Handley did not dispute this issue.[72] The court held that Moore-Handley satisfied its burden of producing a legitimate, nondiscriminatory reason for Holiness's termination.[73] Moore-Handley maintained that the reasons provided on the authorization form removing Holiness from the company payroll were its legitimate, nondiscriminatory reasons for Holiness's termination.[74]

To survive summary judgment, the district court outlined two ways Holiness could "create a genuine issue of material fact as to whether the reasons advanced by Moore-Handley were pretextual."[75] Holiness could satisfy his burden "by showing that the legitimate nondiscriminatory reasons should not be believed or by showing that, in light of all of the evidence, discriminatory reasons more likely motivated the decision than the proffered reasons."[76] Though Holiness attempted to undermine the veracity of Moore-Handley's grounds for his termination,[77] the district court held that Holiness did not meet his burden of demonstrating that race more likely than not motivated his termination because he did not present "evidence undercutting Moore-Handley's [receipt of] . . . customer and vendor complaints about [Holiness's]

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69. *Id.*

70. *Id.*

71. *Id.* The Eleventh Circuit and other circuits have recognized Title VII and Section 1981 race discrimination claims based upon an employee's interracial relationship or association. *See id.* at 1183 n.6 (citing Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986)); *see also* Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008).

72. *Moore-Handley, Inc.*, 114 F. Supp. 2d at 1182.

73. *Id.*

74. *See id.*

75. *Id.*

76. *Id.*

77. Holiness contended that he contacted vendors with whom he worked regularly and asked if they had any complaints with his work performance or if any errors arose from the purchase orders he made. *Id.* According to Holiness, they stated that "they were satisfied with him." *Id.* He also alleged that Moore-Handley did not advise him of errors he made on customers' purchase orders. *Id.* The district court held that the evidence Holiness offered to demonstrate that his job performance was satisfactory "[was] insufficient to show that Moore-Handley's proffered reasons [were] pretextual." *Id.* at 1182-83. Significantly, the district court also raised sua sponte the honest belief rule, thereby legitimizing any potentially erroneous judgment that Moore-Handley may have made about Holiness's job performance and resulting termination. *Id.* at 1183.

lack of product knowledge and familiar terms of address" and Moore-Handley's characterization of Holiness's "job performance as inadequate."[78]

To prove intentional racial discrimination, Holiness also presented circumstantial evidence of Plemons's and Tolbert's disdain for his friendship with Housey.[79] As previously discussed, Moore-Handley employees informed both Housey and Holiness that they risked losing their jobs because of their friendship.[80] Holiness also offered evidence that Tolbert treated Housey's relationships with Black male employees differently than her relationships with white male employees.[81] Housey claimed that "Tolbert 'confronted' her once about having a conversation with another black male coemployee" and asked her questions about the development of their relationship, which she considered "personal" in nature.[82] Housey also indicated that "she was not subjected to such behavior when talking to white males."[83] However, the district court held that the evidence of Tolbert's and Plemons's alleged disapproval of Housey's friendship with Holiness and other Black male employees was "not sufficiently probative to indicate that Holiness was terminated based upon racial considerations."[84] Moreover, as it pertained to allegations that Holiness's supervisors disapproved of his friendship with Housey, the district court advanced an "ambiguity" rationale like the Eleventh Circuit's in *Ash v. Tyson Foods, Inc.* In doing so, the court summarily rejected the probative value of the statements to the ultimate issue of whether a reasonable fact-finder could surmise that Holiness's race motivated his termination. The court held that these "isolated and *ambiguous* comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of [unlawful] discrimination."[85]

The court stated that "even assuming Tolbert and Plemons may not have 'liked' an association between Housey and Holiness, it does not necessarily follow that such disapproval was based upon racial considerations, as opposed to, for example, the fact that Housey was married and Holiness was engaged."[86] Like in *Ash v. Tyson Foods, Inc.* and other race discrimination cases,[87] the *Holiness* court advanced a colorblind and acontextual view of the

78. *Id.* at 1186.
79. *Id.* at 1178.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 1183-84.
85. *Id.* at 1184 (emphasis added) (citing Phelps v. Yale Sec., Inc., 986 F.2d 1020, 1025 (6th Cir. 1993), and quoting Gagne v. Nw. Nat'l Ins. Co., 881 F.2d 309, 314 (6th Cir. 1989)).
86. *Id.*
87. *See, e.g.*, Bryant v. Begin Manage Program, 281 F. Supp. 2d 561 (E.D.N.Y. 2003).

allegations that Tolbert and Plemons disliked Ms. Housey's associations with Black male employees and specifically her friendship with Mr. Holiness.

In light of the evidence presented, it is unsound to argue that Tolbert's and Plemons's disapproval of Housey and Holiness's relationship was possibly due to their respective relationship statuses. First, the court does not cite to any evidence whereby Tolbert or Plemons admitted that they disapproved of Housey and Holiness's relationship because Housey was married and Holiness was engaged. Moreover, Ms. Housey claimed that the supervisors only inquired into her associations with Black male employees; this assertion does not support the court's alternative, race-neutral interpretation that the supervisors were troubled by their association because of Holiness's relationship status.

Though neither Tolbert nor Plemons ever expressed to Holiness that he disapproved of his friendship with Housey because Holiness was Black or that he was terminated because of their friendship, this direct evidence is not necessary under the *McDonnell Douglas* framework. Professor Michael Zimmer opines,

> The *McDonnell Douglas* concept of "pretext" carries probative potential beyond proof that the employer consciously lied. An alternative way of justifying the *McDonnell Douglas* approach is based on the broader notion that it involves a process of elimination that can be used to build a chain of inferences leading to the conclusion that the employer acted with intent to discriminate.[88]

However, as demonstrated in the *Holiness* case, rather than establishing a chain of inferences leading to the supposition that the employer may have acted unlawfully, courts appear to be inserting race-neutral, acontextual inferences that justify a finding of lawful behavior and dismissal of discrimination claims.[89] Such a dismissive approach to pretextual evidence during the pretrial phases of litigation obstructs the viability of Title VII disparate treatment cases. By viewing the allegations in these race discrimination cases in a historical and contemporary social and relational context, a reasonable factfinder could infer that an adverse employment action suffered by an employee was motivated by race or, as in the case of Holiness, race and gender.

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88. Michael J. Zimmer, *A Chain of Inferences Proving Discrimination*, 79 U. COLO. L. REV. 1243, 1285 (2008).

89. Indeed, in *Bryant v. Begin Manage Program*, the district court intimated that, had the defendant employer countered the plaintiff's racially contingent meaning of the label "wannabe" with a race-neutral explanation, it would have accepted the employer's interpretation. 281 F. Supp. 2d at 570 n.7.

IV. *HOLINESS V. MOORE-HANDLEY, INC.* IN CONTEXT

For the vast majority of America's existence, laws proscribed certain associations between Blacks and whites.[90] But laws specifically targeting personal relationships, namely sexual relationships, between Black men and white women were created and enforced with the greatest intensity. As early as the colonial period, legislatures enacted laws prohibiting interracial unions between Blacks and whites, primarily barring intimate relationships between white women and Black men.[91] During the antebellum years, "when [Southern] states utilized the laws [against interracial liaisons,] they generally did so in cases involving public interracial domestic relationships between black men and white women."[92] During Reconstruction, United States Congressmen voiced their opposition against constitutional amendments granting equal rights to Blacks because of their concerns that the legislation would repeal or prevent state anti-miscegenation laws and permit Black men and white women to marry.[93] After the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, Southern whites engaged in pervasive violence to maintain the sanctity and superiority of white male and white female statuses and their relationships by maiming, killing, and brutalizing Black men who encroached on these legally and socially constructed spaces.[94] "Southern whites explained and justified their support for lynching as a needed tool to control the 'beastly' sexual desire of black men for white women."[95]

During the Jim Crow era, the enactment of anti-miscegenation laws increased, and penalties intensified for violations.[96] Indeed, in 1866, Alabama

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90. See A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, RACE AND THE AMERICAN LEGAL PROCESS: THE COLONIAL PERIOD (1978) for a comprehensive examination of colonial laws enacted to regulate individuals based on race.

91. *See id.* at 40-42 (explaining that initially colonial legislatures enacted laws proscribing all intimate relationships between men and women outside the bounds of marriage, yet the enforcers of these laws were "brutally harsh on infractions between black males and white females [because of . . .] [t]he law's greater sensitivity to interracial sexual activity and white male domination . . ."); *see also id.* at 42-47 (describing the first colonial statutes enacted by the Virginia legislature specifically barring interracial sexual relationships, which represented a colonial legal system and society dominated by white men who "fervently desired to preclude any sexual relationships between black males and white females").

92. CHARLES F. ROBINSON, II, DANGEROUS LIAISONS: SEX AND LOVE IN THE SEGREGATED SOUTH 11 (2006).

93. *See generally id.* at 25-26.

94. *Id.* at 75.

95. *Id.*

96. *See* PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 134 (2009) (stating that "[f]rom the 1890s through the 1920s, as the movement for white supremacy spread its tentacles through American society, the guardians of white purity began to ask for new and even tougher miscegenation laws").

became one of the few states to enact "miscegenation laws that set specific penalties for interracial sex as well as marriage [whereby] an interracial couple could be indicted for living in adultery and fornication, as well as marriage, both of which carried a punishment of two to seven years in prison."[97] Additionally, interracial couples faced greater criminal penalties for illicit sex than did couples of the same race.[98] Alabama prosecutors' vigorous enforcement of the post-Civil War anti-miscegenation law between 1868 and 1877 resulted in five different cases before the Supreme Court of Alabama considering the legality of the state's anti-miscegenation statute.[99] One of these cases reached the United States Supreme Court, which aided in cementing the constitutionality of anti-miscegenation laws.[100] Consequently, in 1901, Alabama placed an express prohibition against interracial marriage in its state constitution.[101] It was not until 1967, in *Loving v. Virginia*,[102] that the United States Supreme Court pronounced anti-miscegenation laws unconstitutional.

Viewing the allegations presented in the *Holiness* case against this backdrop, Holiness's claims of discrimination based on his race (and, I argue, his gender) were plausible. Holiness characterized the racial animosity at Moore-Handley as "very subtle."[103] Also, within close temporal proximity of his alleged salary decrease[104] and termination, Holiness was allegedly informed that his job was at risk because of his friendship with Housey. Housey likewise claimed that she was told that she risked losing her job and her family because of her friendship with Holiness. Furthermore, one of the supervisors responsible for Holiness's termination allegedly inquired into the personal details of Housey's associations with Black male co-workers, whereas he did not investigate her associations with white male co-workers. Additionally, when Holiness allegedly asked his supervisors about the discrepancy in his pay, one could reasonably conclude that he was met with hostility or retaliatory animus (conscious or unconscious) by his supervisors because he was a Black man who befriended a co-worker who was a white woman. Furthermore, it is reasonable to believe that the adverse employment actions

97. *Id.* at 135.

98. *Id.*

99. *See id.* at 57.

100. Pace v. Alabama, 106 U.S. 583 (1882). Significantly, this case involved the criminal prosecution of a Black man and a white woman for illicit sex in violation of Alabama state law.

101. *Id.* at 63.

102. 388 U.S. 1 (1967).

103. Holiness v. Moore-Handley, Inc., 114 F. Supp. 2d 1176, 1187 (N.D. Ala. 1999).

104. Though Mr. Holiness did not specifically allege that Moore-Handley reduced his salary based on his race and gender in violation of Title VII and Section 1981, a viable argument could be made that the pay deduction also constituted an adverse employment action due to his race and gender.

Holiness suffered – an alleged salary decrease and termination on the day he voiced concerns about his salary – were motivated by Holiness's non-conformity with race and gender performance expectations.[105]

Notably, Holiness alleged that the same supervisor who told him initially that his salary would be $20,000 – and later denied informing him of the higher salary and accused Holiness of "threatening him" when he inquired about the salary discrepancy – also called Holiness "boy" in a manner he found offensive.[106] As previously discussed, Holiness's supervisors calling him "boy" could reasonably be construed as racially subordinating in light of the historical usage, tone, and inflection of the word.[107] The supervisors' alleged defensiveness and non-responsiveness to Holiness's concerns about his salary could reasonably be interpreted as a conscious or unconscious response to Holiness's presumed challenge to the supervisors' authority – their actual authority over Holiness within Moore-Handley's organizational hierarchy and a sense of authority based on their socially constructed[108] status as

105. A reasonable jury could conclude that the evidence reflected a conscious or unconscious expectation that, as a Black man, Holiness should not confront authority (perceived race- or gender-based and actual organizational authority) or establish friendships with white female co-workers. Therefore, by voicing concerns about his salary and becoming friends with his white female co-worker, Holiness did not "perform" or act in conformity with his race and gender, ultimately resulting in his termination. As previously examined, law and society have interacted to create and reinforce racialized and gendered performance expectations and thus have constructed an essentialist view of how individuals behave in relation to and independent of one another based on race and gender. Over time, notions of racialized and gendered performance expectations have become entrenched through legal and social media and appear in workplace behaviors and decisionmaking.

106. *Moore-Handley, Inc.*, 114 F. Supp. 2d at 1178-79. Holiness also alleged that early in his employ one of his co-workers called him a "Black monkey." *Id.* at 1187. Holiness reported this incident to a manager, who in turn instructed the employee to "leave [Holiness] alone." *Id.* Though Holiness was called a "Black monkey" and "boy" at isolated times by different employees, these comments provide important insight into the type and level of race- and gender-based subordination targeted at Black men – and Holiness specifically – in the workplace. Therefore, in a race and gender disparate treatment claim initiated by a Black man, such comments should be deemed sufficient evidence of pretext for a claim to reach a jury.

107. As I have argued elsewhere, whether the supervisor consciously or unconsciously called Holiness "boy" with the intent to discriminate should not be the primary focus of courts in Title VII disparate treatment cases. Courts must also consider the perspective of the employee, the negative stigma associated with the employer's conduct, and the emotional and material effects of the conduct on the employee. *See* Greene, *supra* note 49, at 1383-94.

108. Professor Ian Haney López theorizes that the concept of race is a product not of biological or natural forces but rather of human thought, reification, and interaction; yet race nonetheless "constitute[s] an integral part of a whole social fabric that includes gender and class relations." Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L.

white males and Holiness's socially constructed status as a Black male.[109] Simultaneously, Holiness's supervisors allegedly disapproved of his association with Ms. Housey, a white female co-worker, and employees informed Holiness and Housey that their friendship could lead to termination of their employment. These contemporaneous occurrences buttress the perception that Holiness violated presumed racial and gender boundaries created by American law and society that continue to influence contemporary social and workplace dynamics – consciously and unconsciously. Thus, these simultaneous events support a reasonable and legitimate inference that Holiness's race and gender motivated not only his reduction in salary but also his termination. Legal and extra-legal efforts were intended to send a message to Black men that they were not to cross racialized and gendered boundaries and were to remain in their socially constructed subordinate positions or else suffer real consequences – legal, material, emotional, physical, and even fatal. America's long history of anti-miscegenation laws and the public and political rhetoric supporting boundaries between Black men and white women have indeed shaped contemporary views of interracial associations between Black men and white women.

The *Holiness* case illustrates the importance of applying analytical approaches to workplace race discrimination claims informed by America's history and current reality of race and gender relations and, thus, placing evidence of pretext in social and relational contexts. The *Holiness* court, like many courts, failed to employ a nuanced analysis of Holiness's evidence of pretext. Title VII and Section 1981 claims of race discrimination – like the claims in *Holiness v. Moore-Handley, Inc.* – that warrant the denial of summary judgment are summarily dismissed and are never provided an opportunity to be heard by a jury. Thus, courts' colorblind and acontextual analyses of pretext during pre-trial phases effectively preclude the viability of disparate treatment claims of racial discrimination common in contemporary workplaces – "subtle" but nonetheless real instances of adverse treatment based on race in violation of federal employment discrimination laws.

V. CONCLUSION

The foregoing case studies demonstrate that some judges place comments and actions in isolation of one another and do not view workplace behaviors as a continuum of individual interactions imbued with cultural, racial, and gendered stereotypes – conscious and unconscious. Courts' restrictive methodology in disparate treatment race claims weakens the very protection

REV. 1, 28 (1994). Accordingly, intersecting constructs of race and gender influence our conscious and unconscious perceptions of our relationships with others.

109. I would argue that the supervisors' actual positions of authority over Mr. Holiness within the workplace environment could reinforce a perceived sense of authority, conscious or unconscious, based on race and gender.

antidiscrimination laws are meant to offer employees. Seceding America's race and gender relations from analyses of race discrimination cases through a colorblind and acontextual approach undermines the prohibitions and promise of our antidiscrimination laws. Moreover, contemporary claims of race discrimination involving allegations that are not "direct" and subject to varying interpretations based on history, tone, inflection of voice, and geographical circumstances, for example, must be examined in context. Jurors should be provided the opportunity to contextualize facts, and judges should not eliminate this jury function summarily. However, judges must also place pretext in context during pre-trial and post-trial phases of disparate treatment cases. In her pioneering article, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, Professor Linda Krieger explains that

> [i]n the vast majority of cases now adjudicated under the pretext model of proof, the nondiscriminatory reason(s) articulated by the employer probably did play an actuating role in the employer's decision. But it does not follow from this that no discrimination occurred. . . . [G]iven the ubiquity and biasing effects of social stereotypes the tendency towards schematic information processing, the salience of race, gender, and other social categories, and the apparent automaticity of ingroup favoritism, it is reasonable to presume in such situations that the employer's decisionmaking was contaminated by cognitive sources of intergroup bias.[110]

Therefore, a more contextualized and nuanced approach is needed for the survival of race discrimination claims.

As *Ash v. Tyson Foods, Inc.* and *Holiness v. Moore-Handley, Inc.* illustrate and Professor Krieger points out, "the 'colorblindness' approach to the nondiscrimination duty embodied in current disparate treatment jurisprudence cannot succeed in eliminating category-based judgment errors and thus cannot effectuate equal employment opportunity."[111] At pre-trial phases, courts should not sua sponte advance race-neutral, acontextual explanations to legitimize the employer's behavior; where there are alternative meanings of words and behaviors in the workplace, courts should submit the case to the jury.[112]

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110. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1162, 1241-42 (1995).

111. *Id.* at 1240.

112. *See, e.g.*, Holcomb v. Iona Coll., 521 F.3d 130, 142-44 (2d Cir. 2008) (vacating the district court's grant of summary judgment in favor of the employer and recognizing that the plaintiffs' evidence of pretext offered on summary judgment was subject to varying reasonable inferences and that the racial discrimination case should be heard by a jury). It is important to note that the plaintiffs argued their claims utilizing the mixed-motive theory of discrimination – that "an employment decision was

The Supreme Court made it clear that "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[113] At the post-trial phase, where jurors have already made their credibility, weight, and inferential assessments, courts must not substitute the jury's interpretation of the facts with their own factual interpretations while advancing rules like the "stray remarks" doctrine and the "honest belief" rule.

Ash v. Tyson Foods, Inc. and *Holiness v. Moore-Handley, Inc.* demonstrate not only the practical consequence of acontextual and colorblind analyses of race claims supported by workplace words and actions – often "subtle" in nature yet nonetheless probative – but also the effect of such judicial approaches on the continued dismantlement of racial inequality in the workplace. The application of narrow jurisprudential methodologies to workplace words and actions can engender and preserve racial inequality, racial stigmatization, and thus unlawful racial discrimination in employment. Effectively addressing discrimination in contemporary workplaces requires that courts heed the call of the Supreme Court in *Ash v. Tyson Foods, Inc.* and view pretext *within* context. In race discrimination cases, courts must consider not only the histories of systems of racial slavery, colonization, and discrimination but also the manifestations of attendant racial hierarchies and stigmatization – embodied consciously and unconsciously by individuals – that are still present in both our workplace and our society.

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motivated both by legitimate and illegitimate reasons." *Id.* at 144. I do not propose, however, that, for disparate treatment cases to proceed beyond the pre-trial phases, plaintiffs should (or must) concede at the outset that mixed motives motivated the adverse employment action and thus not articulate their theory of discrimination pursuant to the *McDonnell Douglas* framework.

113. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).