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THE POLITICS OF REVERSAL: THE SEVENTH CIRCUIT REINS IN A DISTRICT COURT JUDGE'S WAYWARD EMPLOYMENT DISCRIMINATION DECISIONS

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INTRODUCTION

Many court observers perceive the Seventh Circuit to be hostile to civil rights claims, including employment discrimination claims.¹ Some attribute this perceived bias to the law and economics bent of some of the Circuit's more prominent jurists.² However, in 2006, within a four month span, the Seventh Circuit published three opinions

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¹ See Paul W. Mollica, *Employment Discrimination Cases in the Seventh Circuit*, 1 EMPL. RTS. & EMPL. POL'Y J. 63, 92, 96-99 (1997) (noting the perception of Seventh Circuit's employer bias and highlighting the numerous instances of fiercely anti-plaintiff and anti-EEOC rhetoric in Seventh Circuit employment discrimination opinions compared to the paucity of similar attacks against employers and their attorneys); see also Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 764-64, 771, 778, 780-81, 782, 785-86, 791-92, 822 (1994) (discussing several Seventh Circuit jurists' pro-government and pro-employer records in civil rights and employment discrimination cases).

² Jeffrey W. Stempel, *Two Cheers for Specialization*, 61 BROOKLYN L. REV. 67, 128 (1995); see also Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, *supra* note 1, at 812.

that reversed the same district court judge, Judge Samuel Der-Yeghiayan, in favor of employment discrimination plaintiffs.³ The Seventh Circuit eventually published five opinions in 2006 that treated Judge Der-Yeghiayan's summary judgment rulings in employment discrimination cases. In all five cases, the district court granted the employers' motions for summary judgment.⁴ However, the Seventh Circuit affirmed the district court's decisions in their entirety only twice.⁵ In light of the Seventh Circuit's historic 22% reversal rate for plaintiffs in employment discrimination summary judgment appeals,⁶ the Court's 60% reversal rate of Judge Der-Yeghiayan's decisions is surprising. Without a doubt, five cases is a small sample set. Nonetheless, three employment discrimination opinions that reverse the same judge within a four month period are sufficient to provoke curiosity. Notably, in 2006, the Seventh Circuit never reversed any other district court judge's summary judgment employment discrimination decisions more than once.⁷

³ Paz v. Wauconda Healthcare and Rehab. Ctr., LLC, 464 F.3d 659 (7th Cir. 2006); Thanongsinh v. Bd. of Educ., 462 F.3d 762 (7th Cir. 2006); and Valentine v. City of Chicago, 452 F.3d 670 (7th Cir. 2006).

⁴ Thanongsinh v. Sch. Dist. U-46, No. 05-3002, 2005 U.S. Dist. LEXIS 16457, at *1 (N.D. Ill. Jun. 13, 2005); Pruitt v. City of Chicago, No. 03 C 2877, 2005 U.S. Dist. LEXIS 44274, at *1 (N.D. Ill. Jun. 8, 2005); Paz v. Wauconda Healthcare and Rehab. Ctr., LLC, No. 04 C 3341, 2005 U.S. Dist. LEXIS 10554, at *1 (N.D. Ill. May 23, 2005); Crawford v. Ind. Harbor Belt R.R. Co., No. 04 C 2977, 2005 U.S. Dist. LEXIS 10553, at *1 (N.D. Ill. May 23, 2005); Valentine v. City of Chicago, No. 03 C 2918, 2005 U.S. Dist. LEXIS 430, at *1 (N.D. Ill. Jan. 11, 2005).

⁵ Pruitt v. City of Chicago, 472 F.3d 925 (7th Cir. 2006); Crawford v. Ind. Harbor Belt R.R. Co., 461 F.3d 844 (7th Cir. 2006).

⁶ Mollica, *supra* note 1, at 77. In an empirical study of the court's employment discrimination decisions from 1992 to 1996, the author found that the Seventh Circuit's reversal rate for plaintiffs in summary judgment cases was 21.77%. *Id.* Since the study's completion, the court's composition has changed very little, losing Judge Walter Cummings, and adding Judge Diane Sykes and Judge Ann Williams.

⁷ In 2006, the Seventh Circuit published 49 opinions dealing with appeals from summary judgment rulings in employment discrimination cases. During this period, the court reversed summary judgment decisions in favor of plaintiffs in 12 opinions. Thus, 25% of those 12 opinions reversed Judge Der-Yeghiayan's rulings. The remaining 9 opinions each reversed decisions by different district court judges:

Moreover, the Seventh Circuit's reversals of summary judgment decisions are always intriguing to a degree, for as Judge Posner noted in the employment discrimination decision *Shager v. Upjohn Co.*,⁸ growing docket pressures on trial courts make the courts of appeals extremely reluctant to overrule grants of summary judgments by lower courts "merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter."⁹ So what explains the Seventh Circuit's lack of reluctance in reversing Judge Der-Yeghiayan's rulings during this brief period?

Perhaps the Court is sending the recently-appointed district court judge a message? To this end, some will undoubtedly speculate that political forces motivate these three decisions. Indeed, at first blush, the cynical specter of political partisanship certainly appears to hover over these reversed decisions. This is because Judge Der-Yeghiayan was recently appointed to the Northern District Court of Illinois by

Goodwin v. Bd of Trs. Of the Univ. of Ill., 442 F.3d 611 (2006) (reversing Chief Judge McKinney); *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650 (2006) (reversing Judge Kennelly); *Phelan v. Cook County*, 463 F.3d 773 (2006) (reversing Judge Marovich); *EEOC v. Target Corp.*, 460 F.3d 946 (2006) (reversing Chief Judge Randa); *Patton v. Keystone RV Co.*, 455 F.3d 812 (2006) (reversing Chief Judge Miller); *Roe v. Oberweis Dairy*, 456 F.3d 704 (2006) (reversing Judge Darrah); *Smith v. Castaways Family Diner*, 453 F.3d 971 (2006) (reversing Judge Sharp); *Sylvester v. SOS Children's Vills. Ill., Inc.*, 453 F.3d 900 (reversing Judge Guzman); *Burnett v. LFW Inc.*, 472 F.3d 471 (2006) (reversing Judge Kocoras).

This dataset was developed by culling all of the Seventh Circuit's published opinions in Lexis's Seventh Circuit database that decided cases under the chief federal anti-discrimination statutes creating private rights of action: Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000); the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000); the Equal Pay Act, 29 U.S.C. § 206(d) (2000); the Rehabilitation Act, 29 U.S.C. § 791, 794 (2000); the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213 (2000); sections 1981 and 1983 of Title 42, 42 U.S.C. §§ 1981, 1983 (2000) (including only those 1983 cases involving employment discrimination); and the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654.

⁸ 913 F.2d 398, 403 (7th Cir. 1990) (emphasis in original).

⁹ *Id.* at 403.

President George W. Bush,¹⁰ a president whose disregard for employment discrimination rights is often noted by his critics.¹¹ Therefore, perhaps these three decisions constitute a check on the current administration's attempt to curtail employment discrimination rights' statutes through judicial appointment.

On a purely surface level, the possibility of a political subtext is reinforced by the fact that Judge Richard Posner and Judge Frank Easterbrook authored the only two 2006 opinions¹² that affirmed the entirety of Judge Der-Yeghiayan's summary judgment decisions in favor of employers. This fact supports such a possibility because many view Judges Posner and Easterbrook as sympathetic to the Executive Branch's conservative policies and hostile to employment discrimination plaintiffs.¹³

On the one hand, a close reading of the Seventh Circuit's three opinions¹⁴ that reverse the district court does indeed elicit a slight aroma of employer bias wafting from Judge Der-Yeghiayan's decisions. One may suspect such a bias because these decisions uniformly adopt a disapproving and critical view of the district court's reasoning and attention to detail,¹⁵ and because the district court's

¹⁰ Bill Meyers, *He has a reputation for being open, giving*, CHICAGO DAILY LAW BULLETIN, Aug. 20, 2003 (discussing August 2003 appointment of Judge Der-Yeghiayan).

¹¹ See, e.g., Alia Malek, *Bush civil rights nominee under fire*, SALON, Jul. 28, 2007, <http://www.salon.com/news/feature/2007/07/28/eeoc/index.html?source=search&aim=/news/feature> (describing reaction of president's critics to president's efforts to install a new commissioner at the Equal Employment Opportunity Commission); See *infra* Part II.

¹² *Pruitt v. City of Chicago*, 472 F.3d 925 (7th Cir. 2006); *Crawford v. Ind. Harbor Belt R.R. Co.*, 461 F.3d 844 (7th Cir. 2006).

¹³ See, e.g., Stempel, *supra* note 2. See also RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006) (defending executive branch measures such as warrantless surveillance against critics' contentions that such measures are unconstitutional).

¹⁴ *Paz v. Wauconda Healthcare and Rehab. Ctr., LLC*, 464 F.3d 659 (7th Cir. 2006); *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762 (7th Cir. 2006); and *Valentine v. City of Chicago*, 452 F.3d 670 (7th Cir. 2006).

¹⁵ See *infra* Part I.D.

flaws always managed to benefit employers. In addition, the tenor of the Seventh Circuit's three opinions generally reflects disbelief that the plaintiffs had been unable to withstand summary judgment.¹⁶ Thus, when viewed in the context of the President George W. Bush's policy concerning employment discrimination rights and his strategy to appoint federal judges that will carry out his policy preferences on the bench,¹⁷ it is tempting to conclude that the Seventh Circuit's reversals of the President's recent appointee contain a political subtext.

However, these three opinions cannot be read as a political rebuke of a partisan district judge. The conservative reputations of the opinion's authors¹⁸ and the panelists¹⁹ that joined the opinions undermine such speculation. Nor can these opinions be read as an admonishment of the district judge for harboring an employer bias. The Court's criticisms of the district court are simply not severe enough to suggest such judicial impropriety.²⁰ Nonetheless, the Seventh Circuit's three opinions do provide a fascinating prism through which one can recognize the imprint of the President's policy preferences on a sampling of his appointee's rulings. In addition, although these opinions do not likely represent a political check on the President's attempt to shape policy through judicial appointment, these opinions do reflect the Seventh Circuit's efforts to bring a new, slightly overzealous district judge more in line with some of the Seventh Circuit's more salient institutional traits. Specifically, these three opinions reflect the Court's warnings to district court judges to avoid using summary judgment motion as a means of docket control. In addition, these opinions comport with the Court's general unwillingness to allow hyper-technical barriers to proof of an employer's motive or intent to discriminate.

This comment explores three Seventh Circuit opinions that reversed the decisions of the same district court to determine what, if

¹⁶ See *infra* Part I.D.

¹⁷ See *infra* Part II.

¹⁸ Judges Bauer, Ripple, and Flaum. See *infra* Part III.

¹⁹ Including Judges Posner and Kanne. See *infra* Part III.

²⁰ See *infra* Part III.

anything, the Court is communicating to the district judge, and what the Court's message says about the Seventh Circuit and certain tendencies in the Seventh Circuit's employment discrimination jurisprudence. Part I introduces the three opinions that reverse the summary judgment rulings of District Court Judge Samuel Der-Yeghiayan. Part II explores the hypothesis that the Seventh Circuit's criticisms of the district judge contain a political subtext. Part III rejects the argument that the Seventh Circuit intended its opinions to communicate a political message. Part IV argues that the criticisms in these opinions can be explained as an effort to "socialize" a newly-appointed district judge.

I. THE REVERSED DECISIONS

The three Seventh Circuit opinions²¹ that reversed the district court's summary judgment rulings point towards a consistent pattern in Judge Der-Yeghiayan's employment discrimination decisions. This pattern suggests that the district court judge tends to dispose of his employment discrimination cases too quickly, often through a misplaced, myopic reliance on technicalities and an inattention to critical facts contained in the record.

A. *Thanongsinh v. Board of Education*

In *Thanongsinh v. Board of Education*,²² Thanongsinh, a school custodian, filed a Title VII²³ claim against his employer, alleging, *inter alia*, that the school demoted him based on his race—Asian-American of Chinese and Laotian descent. Thanongsinh had been a custodian at the school for ten years, receiving uniformly effusive praise from his

²¹ Paz v. Wauconda Healthcare and Rehab. Ctr., LLC, 464 F.3d 659 (7th Cir. 2006); *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762 (7th Cir. 2006); and *Valentine v. City of Chicago*, 452 F.3d 670 (7th Cir. 2006).

²² 462 F.3d. at 766, 769.

²³ See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2000).

supervisors.²⁴ In 2002, due to budgetary constraints, the school administered a two-part written and oral exam to phase out the highest-paid custodians.²⁵ Thanongsinh failed the exam and was subsequently demoted.²⁶ He alleged, *inter alia*, that his supervisor administered the oral portion of his exam in a racially discriminatory manner.²⁷ Specifically, he contended that whereas his supervisor gave him an automatic zero on one portion of the oral exam for forgetting to bring relevant forms, the same supervisor allowed a Caucasian employee, who similarly forgot to bring the same forms, to take and pass that portion of the exam.²⁸ In addition, Thanongsinh alleged that the school's supervisor denigrated Thanongsinh's English language abilities at a grievance hearing convened to review his demotion.²⁹

Under Title VII a plaintiff can establish a *prima facie* case of employment discrimination in response to a motion for summary judgment in one of two ways: by producing direct or circumstantial evidence under the "direct method" of proof; or by utilizing the indirect, burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*.³⁰ Thanongsinh relied on the indirect method,³¹ which required him to demonstrate that he: (1) is a member of a protected class; (2) is qualified for the position sought; (3) was rejected for the position; and (4) was treated less favorably than similarly situated individuals outside of his protected class.³² In response, the school had to assert a legitimate, non-discriminatory reason for the demotion.³³ Finally, Thanongsinh had to produce sufficient evidence from which a reasonable factfinder could conclude that the school's asserted reason

²⁴ *Thanongsinh*, 462 F.3d at 767.

²⁵ *Id.* at 767.

²⁶ *Id.* at 767-68.

²⁷ *Id.* at 769.

²⁸ *Id.*

²⁹ *Id.* at 768.

³⁰ 411 U.S. 792 (1973).

³¹ *Thanongsinh*, 462 F.3d at 772.

³² *See McDonnell Douglas*, 411 U.S. at 802.

³³ *See id.* at 802-03.

was pretextual.³⁴ The parties only contested whether: Thanongsinh was qualified; he was treated less favorably than similarly situated individuals outside of his protected class; and the employer's proffered non-discriminatory reason for the demotion was pretextual.³⁵

The district court granted the school's motion for summary judgment on all counts,³⁶ disregarding a wealth of credible evidence that: Thanongsinh had been uniformly praised as an outstanding employee prior to the test; a Caucasian custodian who took the oral exam was treated preferentially; and the school's asserted non-discriminatory reason for demotion—Thanongsinh's poor performance on the exam—was pretext. First, the district court held that Thanongsinh was not a qualified employee because he failed the certification exam.³⁷ Second, the district court held that Thanongsinh failed to identify similarly situated individuals who were treated more favorably because the evidence relied on by Thanongsinh to establish this fact would have been inadmissible at trial.³⁸ Third, the district court held that even if Thanongsinh could establish a *prima facie* case, he could not discredit the school's asserted non-discriminatory reason for his demotion—that Thanongsinh failed the certification exam.³⁹

The Seventh Circuit disagreed with Judge Der-Yeghiayan's reasoning and conclusions on every one of these issues. First, the Seventh Circuit held that Thanongsinh's strong annual employment evaluations created a genuine issue of material fact as to whether he was a qualified employee, notwithstanding the results of his certification exam that was itself the focus of the discrimination lawsuit.⁴⁰ His performance evaluations were indeed consistently

³⁴ *See id.* at 804.

³⁵ *Thanongsinh*, 462 F.3d at 772.

³⁶ *Id.* at 769-71.

³⁷ *Id.* at 770.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 773.

glowing in the years leading up to 2002. Among other things,⁴¹ they commended Thanongsinh for “the pride and ownership he shows” for the school, his job knowledge and quality of work, his “wide variety of skills,” and his attention to detail.⁴² The court explained that Judge Der-Yeghiayan erred in finding that Thanongsinh’s performance on the 2002 certification exam had objectively shown that Thanongsinh was not a qualified employee, for if “the integrity of the administered examination is at issue,” the school could not rely on it to attack Thanongsinh’s qualification.⁴³

Second, the court rejected Judge Der-Yeghiayan’s conclusion that the evidence on which Thanongsinh relied to identify similarly situated custodians lacked proper foundation and was thus inadmissible.⁴⁴ The evidence at issue was a Caucasian custodian’s score sheet that the school used to judge his oral certification exam.⁴⁵ Like Thanongsinh, the Caucasian custodian had forgotten to bring the required materials to the exam, a fact indicated by handwriting in the margins of the score sheet.⁴⁶ However, unlike Thanongsinh, who received a zero on that portion of the test, the Caucasian employee’s score sheet indicated that the examiner asked that employee questions concerning those materials and awarded him points on that portion of

⁴¹ *Id.* at 767 (noting Thanongsinh’s generally outstanding work evaluations and specific praise, such as: “[he is] fussy about things being done right;” “he can do many things in the way of repairs, and he does so;” and “[he] has a wide variety of skills related to maintenance and upkeep of the physical plant, equipment and supplies. These skills are evidenced by the work he has done in the areas of plumbing, electricity, and HVAC, without assistance of those in the trade.”)

⁴² *Id.*

⁴³ *Id.* (citing *Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 807 (7th Cir. 1999) (observing that, when the standards for assessing qualifications are themselves allegedly discriminatory, whether the plaintiff was meeting her employer’s “legitimate performance expectations . . . dovetails with the issue of pretext” and requires a court to assume, for the purpose of reaching the pretext inquiry, that the plaintiff had made out a prima facie case) (parenthetical in original)).

⁴⁴ *Id.* at 774.

⁴⁵ *Id.* at 775.

⁴⁶ *Id.* (noting interviewer’s handwritten remarks “don’t have” next to relevant question and “No M.S.D.S.book” in narrative section).

the exam.⁴⁷ The district court found that the exam score sheet and supervisor's marginalia were inadmissible hearsay because Thanongsinh failed to lay the proper foundation for their authenticity.⁴⁸ However, the Seventh Circuit appeared to be somewhat perplexed that Judge Der-Yeghiayan barred this powerful circumstantial evidence of a similarly situated employee, and needed to expend little effort to find the document admissible under two common exceptions to hearsay doctrine.⁴⁹ As to whether the proper foundation for the score sheet's admission existed, the court noted that "a *careful* examination of the record reveals that defendants have conceded the admissibility of [the] score sheet."⁵⁰

Third, the court rejected the district court's conclusion that Thanongsinh had failed to show that the school's proffered reason for his demotion—that he failed the certification exam—was pretextual. To show pretext, Thanongsinh pointed to evidence that the school conducted the certification exam in a discriminatory manner and the supervisor who conducted the oral exam made untoward remarks that disparaged Thanongsinh's English abilities.⁵¹ After noting that the "district court disregarded each piece of evidence cited by Mr. Thanongsinh on this matter as being based on 'pure speculation' or requiring unreasonable inference,"⁵² the court proceeded to articulate the reasonable inferences that could be drawn from such evidence. First, the court held that if Thanongsinh's contention that the oral exam had been administered in a discriminatory fashion was correct,

⁴⁷ *Id.*

⁴⁸ *Id.* at 770, 775, 776 n.11.

⁴⁹ *Id.* at 775-79. The Seventh Circuit ruled that Judge Der-Yeghiayan's evidentiary ruling was an abuse of discretion because the document was "*precisely* the type" of document that is admissible under the business record exception to the hearsay rule. *Id.* at 776-77 (citing Fed. R. Evid. 803(6)) (emphasis added). The court buttressed this conclusion by noting that the document would have also been admissible against the school as an admission by one of its representatives. *Id.* at 779 (citing Fed. R. Evid. 801(d)(2)).

⁵⁰ *Id.* at 778-79 (emphasis added).

⁵¹ *Id.* at 780-81.

⁵² *Id.* at 780.

then the school could not rely on the exam's results as a legitimate reason for demoting him.⁵³ The court concluded that the evidence suggesting that the school scored the Caucasian custodian in a preferential manner supported this contention,⁵⁴ as did the supervisor's alleged comments, telling Thanongsinh he "should learn better English."⁵⁵ These comments occurred at a grievance meeting convened to review Thanongsinh's demotion, where the supervisor who administered the oral exam allegedly responded to Thanongsinh's complaints about the test by saying that he could not understand Thanongsinh, and that Thanongsinh "should learn better English."⁵⁶ Whereas Judge Der-Yeghiayan believed it "unreasonable" to label such a comment "in the abstract as an insult,"⁵⁷ the context of the statement led the Seventh Circuit to conclude that it "could be reasonably interpreted by a juror as probative evidence that [the supervisor] harbored animus against persons for whom English is a second language."⁵⁸ The court further remarked that interpreting an ambiguous statement and "determining the significance of these events is a task more appropriate for trial, not for summary judgment."⁵⁹

B. Paz v. Wauconda Healthcare

In *Paz v. Wauconda Healthcare*,⁶⁰ a decision decided less than a week after *Thanongsinh*, Paz, a chef, sued her former employer, Wauconda, under Title VII. Paz alleged that her supervisor discriminated against her persistently on the basis of her national

⁵³ *Id.*

⁵⁴ *Id.* at 780-81.

⁵⁵ *Id.* at 781-82.

⁵⁶ *Id.* at 781.

⁵⁷ *Thanongsinh v. Sch. Dist. U-46, No. 03 C 8842, 2005 WL 1866092, at *8* (N.D. Ill. Jun. 13, 2005).

⁵⁸ *Thanongsinh*, 462 F.3d at 782.

⁵⁹ *Id.* (internal quotation marks omitted).

⁶⁰ 464 F.3d 659, 661 (7th Cir. 2006).

origin—Hispanic of Mexican descent—and pregnancy.⁶¹ Additionally, Paz claimed that her supervisor retaliated against her for complaining about discrimination.⁶² The Seventh Circuit’s recitation of the facts catalogued a wealth of alleged incidents that reflected poorly on her employer.⁶³ For instance, on one occasion, the supervisor allegedly told Paz, “God, you people just come to [the] United States to cause so many problems and steal American people’s job[s].”⁶⁴ A coworker reported this comment to an assistant administrator, who, in turn, discussed it with Paz, and told Paz to not tell anyone about the comment and keep it confidential.⁶⁵ Paz also alleged that after she first told her supervisor that she was pregnant, the supervisor responded, “[y]ou’re not going to be allowed to work, to just start getting Do you know what, I think you should move to dietary aide instead of be a cook.”⁶⁶ Afterwards, according to Paz, her supervisor frequently told her that she should have an abortion.⁶⁷ Finally, after Paz complained about her supervisor’s conduct to an administrator, her supervisor issued a suspicious string of employee warnings against Paz⁶⁸ and, ultimately, told her she was fired.⁶⁹

The district court granted Wauconda’s motion for summary judgment on all counts and denied Paz’s motion for reconsideration.⁷⁰ The Seventh Circuit reversed and remanded for trial, noting in disbelief, “*we fail to see* how the district court granted summary judgment for the defendant.”⁷¹ The court’s criticism of Judge Der-

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 661-63.

⁶⁴ *Id.* at 662 (alterations in original).

⁶⁵ *Id.*

⁶⁶ *Id.* at 662 (alteration in original).

⁶⁷ *Id.*

⁶⁸ *Id.* at 665-66 (noting that the warnings even referenced Paz’s complaint of discrimination).

⁶⁹ *Id.* at 663-64.

⁷⁰ *Id.* at 661.

⁷¹ *Id.* at 664, 667 (emphasis added).

Yeghiayan's analysis observed that the district court improperly relied on a piecemeal view of the alleged events to sidestep "significant factual disputes in the record."⁷² In addition, the court found that the district court's alternative basis for summary judgment misconstrued agency law and lacked common sense.⁷³

Engaging in a lengthy review of the above-mentioned incidents, among others that likewise reflected unfavorably on Wauconda, the Seventh Circuit found the record "*replete* with credibility questions and competing versions of facts" that "should be sorted out by the trier of fact."⁷⁴ In light of the record's glaring credibility questions and competing versions of fact, the court found it "worth mentioning that the district court and Wauconda were under the mistaken belief that Paz cannot proceed under the direct method [of proof] because some of [the supervisor's] comments were made two months prior to [Paz's] firing."⁷⁵ Under the direct method of proof, plaintiffs can rely on direct and circumstantial pieces of evidence to show an inference of intentional discrimination.⁷⁶ These pieces of evidence do not have to be conclusive separately, but they must compose a convincing "mosaic" of discrimination when viewed together.⁷⁷ The court explained that the lapse of time between an allegedly discriminatory remark and the termination was not a technical, dispositive bar to proceeding under the direct method of proof, but merely went to whether the evidence was convincing enough to suggest a "mosaic of discrimination."⁷⁸ In conclusion, the court admonished the district court's myopic analysis, stating, "a district court cannot view the record in small pieces that are mutually exclusive of each other."⁷⁹

⁷² *Id.* at 666.

⁷³ *Id.*

⁷⁴ *Id.* at 665 (emphasis added).

⁷⁵ *Id.* at 666.

⁷⁶ *Id.* at 665.

⁷⁷ *Id.* at 666 (citing *Walker v. Bd. Of Regents of University of Wis.*, 410 F.3d 387, 394 (7th Cir. 2005)).

⁷⁸ *Id.*

⁷⁹ *Id.*

The district court reasoned in the alternative that Paz effectively abandoned her job and could not claim discriminatory termination because Paz did not know her employer's chain of command, and thus could not have known whether her supervisor's statement, "You're fired," constituted an actual termination.⁸⁰ The court quickly disposed of this argument, reasoning that under agency law, Paz's supervisor likely had the requisite apparent or actual authority to fire her, insofar as the supervisor "had hired [Paz], evaluated her, assigned her work schedule, and oversaw her work duties."⁸¹ The court also indirectly called the district court's common sense into question, quipping that "we fail to see why, if an employee's supervisor tells her, 'You're fired,' the employee should run this statement up the ladder just to double-check her status."⁸²

C. Valentine v. City of Chicago

Donna Valentine was one of only a handful of female truck drivers working for the City of Chicago's Department of Transportation (CDOT).⁸³ Valentine alleged that her coworker, Tominello, began sexually harassing her immediately after she started working as a driver.⁸⁴ For a period of six months, she allegedly dealt with remarks from Tominello, like "nice ass. It would look good on my face."⁸⁵ In addition, Valentine alleged that Tominello asked her to leave her fiancé on more than twenty occasions, telling her that he could show her a better time.⁸⁶ Further, Valentine alleged that she had to reject approximately forty of Tominello's requests to go out to dinner with him.⁸⁷

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Valentine v. City of Chicago, 452 F.3d 670, 680 (2006).

⁸⁴ *Id.* at 675.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

Valentine contended that she complained to the Lot Supervisor, Mike DiTusa, about Tominello's harassment approximately ten times during this time span.⁸⁸ Valentine understood DiTusa to be her supervisor.⁸⁹ This understanding was common sense: DiTusa held the title of Lot Supervisor, and he was responsible for making sure trucks were serviced, assigning trucks to drivers, keeping records when drivers signed in and out for work, addressing workplace disputes, and reporting problems to his superiors.⁹⁰ However, DiTusa never reported Valentine's complaints to his superiors, even after he witnessed the following incident.⁹¹

According to Valentine, Tominello's harassment culminated in an episode in September, where Tominello took a powdered crescent-shaped cookie into the break room, feigned masturbation with it in front of Valentine, and shook the powdered sugar onto her lap.⁹² Valentine stated that in response, she yelled at Tominello.⁹³ Later that afternoon, Valentine alleged that she "saw wet chewed cookie spit on the driver's side window of her car."⁹⁴ Her car was parked in a fenced-in area secured by security watchmen at all times.⁹⁵ Valentine complained to DiTusa about the incident, explaining that she believed Tominello responsible.⁹⁶ DiTusa allegedly told her there was nothing he could do about it, unless she could prove it.⁹⁷ Upon returning to her car, Valentine said she "found a plastic penis under the windshield wiper."⁹⁸

⁸⁸ *Id.* at 674-75

⁸⁹ *Id.* at 678, 679.

⁹⁰ *Id.* at 674, 678.

⁹¹ *Id.* at 675-76.

⁹² *Id.* at 675.

⁹³ *Id.* at 675-76.

⁹⁴ *Id.* at 675.

⁹⁵ *Id.* at 676-76.

⁹⁶ *Id.* at 676.

⁹⁷ *Id.*

⁹⁸ *Id.*

Later that same day, Valentine bypassed DiTusa and reported the incident higher up the chain of command.⁹⁹ According to Valentine, as a result of this, she endured the wrath of her male co-workers; they would not speak to her and left her intimidating voice mails.¹⁰⁰ She alleged that she had to speak with city counselors because of the fear and anxiety caused by the incident.¹⁰¹ Subsequently, Valentine was transferred and filed suit against the City of Chicago, DiTusa, and others, alleging, *inter alia*, sexual harassment and hostile work environment claims under Title VII.¹⁰²

To establish a *prima facie* case of hostile environment sexual harassment under Title VII, Valentine had to show that: (1) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (2) the harassment was based on sex; (3) the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (4) there is a basis for employer liability.¹⁰³

The district court granted the defendants' motion for summary judgment in full, finding that Valentine could not prove the fourth element of her claim—that there was a basis for employer liability.¹⁰⁴ The Seventh Circuit rejected the district court's conclusion¹⁰⁵ and exposed a serious deficiency in the district court's attention to the details of the record.

According to the district court, Valentine did not put the City on notice of Tominello's alleged harassment by complaining to DiTusa

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Parkins v. Civil Constructors of Ill., Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998).

¹⁰⁴ *Valentine*, 452 F.3d at 677-79, 681

¹⁰⁵ *Id.* at 678-80.

because DiTusa lacked the authority to transfer employees and thus, could not have been Valentine's supervisor for purposes of Title VII liability.¹⁰⁶ The essence of supervisory status for purposes of Title VII liability depends on the power to hire, fire, demote, promote, *transfer*, or discipline an employee.¹⁰⁷ Valentine argued that DiTusa had the authority to transfer employees,¹⁰⁸ but the district court rejected this contention as hearsay, explaining that Valentine "'admitted during her deposition that she has no basis other than her own personal belief that DiTusa in fact transferred other employees to other yards.'"¹⁰⁹ However, the Seventh Circuit rebuffed this conclusion as "erroneous," stating that Valentine's argument was "[c]learly" not hearsay, for the defendants had admitted in their statement of uncontested facts that DiTusa had the power to transfer individuals between various yards within CDOT.¹¹⁰

In addition, the district court concluded that no reasonable trier of fact could find that Valentine thought DiTusa was the proper person to complain to about sexual harassment.¹¹¹ To reach this conclusion, the district court relied on the fact that three years prior to the alleged harassment, Valentine attended a workplace training session, at which she received "'the telephone number and the address of the City's Sexual Harassment Office.'"¹¹² The district court thus reasoned that this training session was sufficient to put Valentine on notice that she should bring sexual harassment complaints through the City's Sexual Harassment Office only, and not her supervisor.¹¹³ However, the Seventh Circuit disagreed, noting that the City's sexual harassment policy instructed employees to bring complaints to either the Sexual

¹⁰⁶ *Id.* at 677-79.

¹⁰⁷ *Id.* at 678 (emphasis in original).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (emphasis added).

¹¹¹ *Id.* at 679.

¹¹² *Id.*

¹¹³ *Id.*

Harassment Office *or* a supervisor.¹¹⁴ In light of the fact that DiTusa supervised Valentine and her colleagues on a daily basis, the Seventh Circuit held that this was sufficient to create material question of fact as to whether Valentine believed DiTusa to be an appropriate person with whom she could lodge a sexual harassment complaint.¹¹⁵

Finally, the Seventh Circuit noted that because the district court rested its decision on DiTusa's supervisory status, the district court failed to consider the remaining dispositive issues: whether Valentine's complaints were sufficient to notify DiTusa that she was being sexually harassed, and whether Tominello's actions were sufficiently severe to constitute a hostile work environment.¹¹⁶ Nonetheless, the Seventh Circuit analyzed these issues to determine whether there was an alternate ground for affirmance, and easily concluded that material issues of fact existed on both questions.¹¹⁷

D. Common Themes

The Seventh Circuit's criticism of the district court in these three opinions reveals a recurring pattern in Judge Der-Yeghiayan's employment discrimination rulings, namely that the district court judge is too quick to substitute summary judgment for trial. In each case, the Court commented on Judge Der-Yeghiayan's misplaced reliance on discrete technical issues that allowed him to sidestep blatant factual and credibility disputes at issue. In addition, these opinions underscore Judge Der-Yeghiayan's hastiness, as reflected by his tendency to overlook critical factual details in the record.

In all the opinions discussed above, the Seventh Circuit commented on the district court's misplaced reliance on technical barriers to proof of an employee's intentional discrimination. For instance, in *Thanongsinh*, the court found that the district court abused its discretion by improperly excluding evidence of similarly situated

¹¹⁴ *Id.* at 679-80.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 681.

¹¹⁷ *Id.* at 680-82.

non-minority employees as inadmissible hearsay.¹¹⁸ Likewise, in *Valentine*, the court rejected the district court's conclusion that the plaintiff's only evidence establishing employer liability was inadmissible hearsay.¹¹⁹ Finally, in *Paz*, the court criticized the district court's assumption that a two month time lapse between allegedly discriminatory remarks and the plaintiff's termination constituted a technical barrier to the plaintiff's ability to proceed under the direct method of proof.¹²⁰ Additionally, the court rejected the district court's effort in *Paz* to sidestep glaring credibility and factual disputes through a faulty application of agency law.¹²¹

Additionally, these three opinions highlight the district judge's hastiness, which caused him to overlook critical facts in the record in favor of the employer-defendants. For instance, in *Valentine*, the Seventh Circuit found that two of the district court's major conclusions were contradicted by the record.¹²² In *Thanongsinh*, the Seventh Circuit likewise found that the district court's evidentiary ruling was contradicted by facts in the record.¹²³ The Seventh Circuit thus rebutted several of the district court's dispositive conclusions by merely pointing to facts in the record that the district court had overlooked. Additionally, in *Valentine*, the court noted that the district judge had cut its analysis short after ruling for the employer on the basis of one issue, and thus had failed to discuss the remaining dispositive issues even briefly.¹²⁴

¹¹⁸ *Thanongsinh v. Bd. of Educ.*, 462 F.3d 762, 775-79 (7th Cir. 2006). *See supra* Part I.A. and note 48.

¹¹⁹ *Valentine*, 452 F.3d at 678-79. *See supra* Part I.C.

¹²⁰ *Paz v. Wauconda Healthcare and Rehab. Ctr., LLC*, 464 F.3d 659, 666 (7th Cir. 2006). *See supra* Part I.B.

¹²¹ 464 F.3d at 666; *see supra* Part I.B.

¹²² 452 F.3d at 678-79; *see supra* Part I.C.

¹²³ 462 F.3d at 779; *see supra* Part I.A.

¹²⁴ 452 F.3d at 681; *see supra* Part I.C.

It is not likely that the Seventh Circuit would have reviewed the record in such great detail¹²⁵ to rebut the district court's conclusions on these issues if the Seventh Circuit had determined that the plaintiffs in these cases lacked a fighting chance on other dispositive issues. Accordingly, the tone of the court's recitation of the facts in these decisions makes it clear that the court believed that each case presented blatant questions of credibility and disputed facts that should have been sorted out at trial—not summary judgment. To achieve this tone, the Seventh Circuit underscored details that were exceptionally jarring. For instance, in *Thanongsinh*, the court took great care to establish the plaintiff's exceptional qualities as a custodian,¹²⁶ which effectively made the school's allegedly preferential treatment of a Caucasian custodian¹²⁷ and the plaintiff's subsequent demotion appear all the more unjust. In *Paz*, the court focused on the supervisor's shocking comments to the plaintiff, such as the supervisor's daily admonishment to the plaintiff to get an abortion, and the supervisor's derogatory remarks concerning Mexicans.¹²⁸ In *Valentine*, the court called attention to the plight of women working in a traditionally male workplace,¹²⁹ and the court's recitation of the facts lingered on plaintiff's account of her male coworker's obscene and revolting behavior towards her.¹³⁰ This account made her supervisor's subsequent failure to respond to the plaintiff's sexual harassment complaints appear all the more unfair.¹³¹ The aggregate rhetorical effect of the court's presentation of the facts begs the question, how could the district court have overlooked some of these issues and ruled in favor of the employer on technicalities like hearsay? The court's

¹²⁵ See, e.g., *Thanongsinh*, 462 F.3d at 778 (noting “a careful examination of the record reveals that the defendants have conceded the admissibility of [the piece of evidence at issue].”)

¹²⁶ *Id.* at 767; see *supra* Part I.A. and note 41.

¹²⁷ *Thanongsinh*, 462 F.3d at 774-75; see *supra* Part I.A.

¹²⁸ 464 F.3d at 662. See *supra* Part I.B.

¹²⁹ 452 F.3d at 680.

¹³⁰ *Id.* at 675. See *supra* Part I.C.

¹³¹ *Valentine*, 452 F.3d at 676. See *supra* Part I.C.

tone thus colors its view of the district court's efforts to dispose of the cases. Whereas a misplaced reliance on technical rulings and overlooked facts in cases with borderline frivolous allegations would hardly be worth examining, the tone that the Seventh Circuit adopts in narrating the facts of the case makes the district court's mistakes appear more egregious.

II. IS THIS A SEVENTH CIRCUIT POLITICAL CHECK ON AN ULTRA-CONSERVATIVE APPOINTEE?

Given the unusually high reversal rate of Judge Der-Yeghiayan's employment discrimination decisions over such a short period of time, court observers might speculate as to whether the Seventh Circuit's recurring criticisms of the district court in these cases actually convey a broader, political message. Specifically, given that Judge Der-Yeghiayan was recently appointed to the bench by President George W. Bush,¹³² and that the President has never been reticent to appoint judges who are compatible with his highly conservative ideology,¹³³ it is possible to hypothesize that these three decisions speak more broadly to the president's policy preferences as reflected through his judicial appointees. However, given the politically conservative nature of the panels that decided these cases, and the judges who authored the decisions, it is highly unlikely that these decisions constitute any sort of political reproach.¹³⁴ Nonetheless, these decisions do provide a forum to ponder the possibility of a connection between the President's policy values and the decision-making patterns of one of his district court appointees.

Promoting the enforcement of a particular political agenda through ideologically driven appointments to the federal judiciary is certainly nothing new. Franklin Delano Roosevelt famously appointed liberal judges that would grant the federal government more power to

¹³² Meyers, *supra* note 10.

¹³³ See David E. Sanger, *In Reading Bush On Court, Words Don't Always Help*, N.Y. TIMES, Jul. 5, 2005, at A15.

¹³⁴ See *infra* Part III.

regulate the economy and not frustrate the president's New Deal projects.¹³⁵ Decades later, Reagan screened judicial candidates using an ideological "litmus tests" to choose jurists who were strict constructionists, tough on crime, anti-abortion, and pro-family.¹³⁶ Reagan did not hide his methods. As his White House communications director, Patrick J. Buchanan, put it, "[Our conservative appointment strategy] . . . could do more to advance the social agenda—school prayer, anti-pornography, anti-busing, right-to-life and quotas in employment—than anything Congress can accomplish in 20 years."¹³⁷ As for President George W. Bush's appointments, one study found that they are the most conservative of any group of judicial appointees since before Franklin D. Roosevelt's presidency.¹³⁸ The study concludes that when making appointments to federal court, "Bush puts ideology first."¹³⁹

As for President Bush's policy concerning employment discrimination, he has been assailed by critics for undermining the enforcement of traditional civil rights laws through the appointment of partisan political managers, line attorneys and other professional staff to the Civil Rights Division and the United States Equal Employment Opportunity Commission.¹⁴⁰ Recently, prominent Democrats in the Senate attacked the Bush administration for nominating David Palmer to take over the EEOC.¹⁴¹ Supervisors, colleagues and subordinates that worked alongside Palmer when he was the head of the Department of Justice's Civil Rights Division—the agency that enforces employment discrimination claims in state and local government workplaces—claimed that he significantly underenforced

¹³⁵ Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES, Mar. 9, 2003, § 6 (Magazine), at 40.

¹³⁶ *Id.*

¹³⁷ ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 230-31 (2007).

¹³⁸ Sanger, *supra* note 133.

¹³⁹ *Id.*

¹⁴⁰ See, e.g., Malek, *supra* note 11; Neil A. Lewis, *Justice Department Reshapes its Civil Rights Mission*, N.Y. TIMES, Jun. 14, 2007, at A1.

¹⁴¹ Malek, *supra* note 11.

discrimination laws during his tenure and did not “understand the basic principles of Title VII and constitutional law.”¹⁴² Disturbingly, there is at least one internal complaint of employment discrimination that has been filed against Palmer during his tenure as section chief.¹⁴³

President Bush, like his conservative forebears, Ronald Reagan and George H.W. Bush,¹⁴⁴ appears to have appointed Supreme Court Justices who are philosophically adverse to employment discrimination rights. In the 1988 term, Reagan’s and Bush I’s conservative appointees to the Supreme Court played a large role in deciding six major employment discrimination cases,¹⁴⁵ and commentators subsequently argued that these decisions undercut the enforcement of employees’ civil rights.¹⁴⁶ Indeed, in the wake of these decisions, the Democrat-controlled Congress passed the Civil Rights Act of 1991¹⁴⁷ to supersede these cases and expand the scope of employees’ civil rights. More recently, Supreme Court observers have noted¹⁴⁸ how President George W. Bush’s recent appointments to the Supreme Court impacted the outcome in *Ledbetter v. Goodyear Tire & Rubber Co.*,¹⁴⁹ a decision that commentators contend reflects a highly

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See, e.g., Christopher E. Smith and Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of President Reagan and Bush*, 57 ALB. L. REV. 1111, 1122-24 (1994).

¹⁴⁵ *Public Employees Retirement Sys. of Oh. v. Betts*, 492 U.S. 158 (1989); *Independent Fed. of Flight Attendants v. Zipes*, 491 U.S. 754 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT & T Technologies, Inc.*, 490 U.S. 900 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁴⁶ See, e.g., Smith, *supra* note 144.

¹⁴⁷ Pub. L. No. 102-166, § 112, 105 Stat. 1071, 1078-79 (codified at 42 U.S.C. § 2000e-5(e)(2000)). See *Mollica*, *supra* note 1, at 64.

¹⁴⁸ See, e.g., Linda Greenhouse, *Justices’ Ruling Limits Lawsuits on Pay Disparity*, N.Y. TIMES, May 30, 2007, at A1 (noting, “this decision showed the impact of Justice Alito’s presence on the court. Justice Sandra Day O’Connor, whom he succeeded, would almost certainly have voted the other way, bringing the opposite outcome.”).

¹⁴⁹ 127 S. Ct. 2162 (2007).

formalist judicial philosophy that “focuse[s] solely on the consequences of the case for employers, rather than for the victims of discrimination.”¹⁵⁰

The ideological nature of President Bush’s appointments to the United States Court of Appeals has occasionally been brought to the foreground by Democrat filibusters in the Senate.¹⁵¹ For instance, Democrats in the Senate protested vociferously against the appointment of Judge Charles Pickering to the Fifth Circuit and stalled his confirmation for some time, largely due to his civil rights record.¹⁵²

Appointments to the lower judiciary are less newsworthy and rarely the source of controversy.¹⁵³ However, that is not to say that a district court’s decisions cannot reflect policy preferences. A district courts’ discretion is hardly corralled by the courts of appeals and the United States Supreme Court—even in summary judgment rulings. For, as Judge Posner noted, courts of appeals are reluctant to overrule grants of summary judgments by lower courts “merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter.”¹⁵⁴ This admission that district court judges decide cases without trial even where a rational factfinder *could* find for the plaintiff underscores the influential role that a district court’s policy preferences can play at the summary judgment stage. Thus, examining the three Seventh Circuit opinions at issue in this comment provides an opportunity to explore a subject matter that is oft overlooked by law reviews and journals,

¹⁵⁰ See, e.g., Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism* 121 HARV. L. REV. 4, 79-82 (2007).

¹⁵¹ See Sheryl Gay Stolberg, *Democrats Issue Threat to Block Court Nominees*, N.Y. TIMES, Mar. 27, 2004, at A1.

¹⁵² Adam Liptak, *A Judge Appointed by Bush After Impasse in Senate Retires*, N.Y. TIMES, Dec. 10, 2004, at A22. The judge’s critics cited an article he wrote on anti-miscegenation laws as a young man and a 1994 trial he presided over in which he took steps to reduce the sentence of a man convicted in a cross-burning. *Id.*

¹⁵³ See CARP, *supra* note 137, at 216.

¹⁵⁴ *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990) (emphasis in original).

namely the link between a president's policy preferences and a sampling of one of his appointee's summary judgment rulings.

Due to the relatively low profile of district court nominations, they are less likely to command the personal involvement of the president, and are typically left to the judgment of the White House Staff or the Justice Department.¹⁵⁵ Those who do send forth the names of candidates typically consider potential nominees' political affiliations and record of political activity.¹⁵⁶ Before his nomination on March 5, 2003, Judge Der-Yeghiayan was active in the public sector for over 20 years, working as an attorney and then District Counsel for the Immigration and Naturalization Service (INS).¹⁵⁷ In 2000, he was appointed to be an immigration review judge under the Clinton administration.¹⁵⁸ He received numerous distinctions during his time with the INS.¹⁵⁹ In addition, his nomination was not likely hindered by the fact that he was a close college friend of Wes Ashcroft, who is the brother of former Attorney General John Ashcroft.¹⁶⁰

In the case of district court appointments, hearings in front of the Senate Judiciary Committee are largely perfunctory because the norm of senatorial courtesy has essentially already determined whether the particular candidate will survive the hearing and be confirmed by the Senate.¹⁶¹ Senatorial Courtesy is the unwritten rule that home-state senators of the president's political party have veto power over the president's district judge nominations.¹⁶² Notably, during Judge Der-Yeghiayan's hearing in front of the Senate Judiciary Committee, Senators Fitzgerald and Durbin of Illinois both spoke in bipartisan

¹⁵⁵ CARP, *supra* note 137, at 216, 218 ("regardless of who comes up with a basic list of names, the Justice Department's primary duty is to evaluate the candidates' personal, professional, and political qualifications.").

¹⁵⁶ *Id.* at 211-12 (noting that at least 90 percent of all federal judicial nominees are of the same political party as the appointing president).

¹⁵⁷ Meyers, *supra* note 10.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ CARP, *supra* note 137, at 224.

¹⁶² *Id.*

support of the judge's nomination.¹⁶³ Senator Fitzgerald commented on his public service and the fact that he would be the first immigrant of Armenian descent ever nominated and confirmed for the Federal Judiciary.¹⁶⁴ Senator Durbin likewise commented on the judge's immigrant background, as well as the trust that he had earned from both Federal law enforcement and immigrant communities.¹⁶⁵ These comments concerning the judge's background dovetail with general observations about President Bush's appointees as a group, which note that the President places a high priority on the diverse background of his appointments, second in importance only to the nominees' conservative ideology.¹⁶⁶

The politics surrounding judicial appointments can make judges hyperconscious of their political sponsors. Fourth Circuit Court of Appeals Judge Michael Luttig, who was recently on the short list of President Bush's picks of nominees for the Supreme Court, recognized this pressure, explaining, "Judges are told, 'You're appointed by us to do these things.' So then judges start thinking, Well, how do I interpret the law to get the result that the people who pushed for me to be here want me to get? I believe there's a natural temptation to line up as political partisans that is reinforced by the political process."¹⁶⁷

According to one empirical study, this kind of political pressure also applies to district court judges who seek elevation to the U.S. Courts of Appeals.¹⁶⁸ This study concluded that the likelihood of a U.S. District Court Judge being elevated to the Court of Appeals is

¹⁶³ *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, 108th Cong. 108-135 (2003) (statements of Senators Peter Fitzgerald and Dick Durbin of Illinois).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Sanger, *supra* note 133.

¹⁶⁷ Sontag, *supra* note 135.

¹⁶⁸ See Elisha Carol Savchak, Thomas G. Hansford, Donald R. Songer, Kenneth L. Manning, & Robert A. Carp, *Taking It to the Next Level: The Elevation of District Court Judges to the U.S. Courts of Appeals*, 50 AM. J. OF POL. SCI. 478, 485 (2006).

more likely if the judge's published opinions evince an ideological compatibility with the nominating president.¹⁶⁹

Yet another empirical study found a direct correlation between district court jurists' decisions and the policies and values of the president who appointed them.¹⁷⁰ In this study, presidents who chose jurists based on a partisan, ideological basis were more likely to obtain district court jurists whose supported their policy views.¹⁷¹ For instance, judges appointed by a liberal president on a partisan, ideological basis were more likely to take a broadening position on civil rights than conservative jurists.¹⁷² Similarly such liberal judges were more likely to rule for labor interests, whereas as conservative judge would tend to side with business interests.¹⁷³ The percentage of "liberal" decisions rendered by Jimmy Carter's appointees was 54 percent, whereas the percentage of "liberal" decisions published by Gerald Ford's and Ronald Reagan's appointees were 45 percent and 36 percent respectively.¹⁷⁴

President George W. Bush has often expressed his intention to appoint Supreme Court justices in the same ideological mold as those appointed by Nixon and Reagan.¹⁷⁵ Thus, it is reasonable to suppose that this intention applies equally to his appointees to the federal district courts, especially seeing as how the President used partisan, ideological criteria even when hiring traditionally non-political U.S.

¹⁶⁹ *Id.* (noting that "[t]he extent to which the judge's published decisions are congruent with the president's preferences . . . also exerts a positive and significant effect on the judge's chances for being elevated to an appeals court vacancy. Judges deciding cases in a conservative manner, for example, are more likely to be elevated when a Republican president is in office. The decisions published by a district court judge act as a signal to the president regarding the relevant preferences of the judge and thus their likely future behavior on an appeals court.").

¹⁷⁰ See CARP, *supra* note 137, at 238-39.

¹⁷¹ *Id.* at 229-30.

¹⁷² *Id.* at 234

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 236.

¹⁷⁵ See Jeffrey Rosen, *Can Bush Deliver a Conservative Supreme Court?*, N.Y. TIMES, Nov. 14, 2004, § 4 (Week In Review Desk), at 1.

Attorneys¹⁷⁶ and career staff in the Department of Justice.¹⁷⁷ Notably, beginning in 2003 under Attorney General John Ashcroft, the DOJ took strong conservative credentials into account when hiring traditionally non-political career professionals for the Department of Justice's civil rights division.¹⁷⁸ Successful applicants' resumes reflect that these strong conservative credentials included membership in the Republican National Lawyers Association and the Federalist Society, and limited civil rights experience.¹⁷⁹

If these were the credentials that Attorney General Ashcroft's Justice Department looked for in hiring traditionally non-political career attorneys, then it is reasonable to suspect that Ashcroft looked for similar ideological qualifications when screening judicial nominees. It is likewise a reasonable assumption that Ashcroft was familiar with Judge Der-Yeghiayan's policy and political preferences prior to the nomination process because the Judge was a close, personal friend of the Attorney General's brother.¹⁸⁰ This leads us to the question: do the Seventh Circuit's three opinions that reversed Judge Der-Yeghiayan's summary judgment rulings reflect any correlation between President Bush's policy preferences and the district judge's decision-making tendencies in employment discrimination cases?

Looking at the patterns indicated by the Seventh Circuit's criticism of Judge Der-Yeghiayan's analysis, it is not difficult to

¹⁷⁶ See David Johnston & Eric Lipton, *E-Mail Identified G.O.P. Candidates for Justice Jobs*, N.Y. TIMES, Apr. 14, 2007, at A1.

¹⁷⁷ Alia Malek, *Bush's long history of politicizing justice*, SALON, Mar. 30, 2007, http://www.salon.com/news/feature/2007/03/30/civil_rights/index.html.

¹⁷⁸ Charlie Savage, *Justice Dept. probes its hirings: Investigating for bias toward conservatives*, THE BOSTON GLOBE, May 31, 2007, at A1; David Johnston & Eric Lipton, *Ex-Justice Aide Admits Politics Affected Hiring*, N.Y. TIMES, May 24, 2007, at A1 (quoting top Justice Department aide, Monica Goodling, testifying to Congress that she had "gone too far in asking political questions of applicants for career positions and I may have taken inappropriate political considerations into account.").

¹⁷⁹ Savage, *supra* note 178.

¹⁸⁰ See Meyers, *supra* note 10.

discern traces of President Bush's policy imprint on the district court's rulings. To begin with, although the Seventh Circuit repeatedly noted how Judge Der-Yeghiayan misconstrued the Federal Rules of Evidence,¹⁸¹ misapplied agency law,¹⁸² and misunderstood the law concerning the direct method of proving intentional discrimination,¹⁸³ *all* of the judge's mistakes favored the defendant-employer and precluded the plaintiff-employee's discrimination claims. Likewise, although the Seventh Circuit consistently found that Judge Der-Yeghiayan had overlooked critical facts in the record,¹⁸⁴ the judge's inattention to detail *always* favored the employers. A judge's mistakes should, in theory, benefit both sides if they result from random misapplications of law or careless inattention to the factual record.

However, these three decisions are an extremely small sample size. As a result, it is far too easy to read conclusions into these opinions based on what is already known about the Judge's backgrounds. Looking beyond the three decisions discussed by this comment, Judge Der-Yeghiayan has ruled on summary judgment motions in 49 employment discrimination cases, and plaintiffs in those cases have withstood summary judgment only 6 times.¹⁸⁵ And in those 6 cases where the plaintiffs survived summary judgment, only 2 escaped entirely unscathed;¹⁸⁶ the district court granted partial summary judgment for the employer in the remaining 4 cases.¹⁸⁷

¹⁸¹ See *supra* Part I.D.

¹⁸² *Id.* at 19.

¹⁸³ *Id.*

¹⁸⁴ See *supra* Part I.D.

¹⁸⁵ This dataset was developed by culling all Judge Der-Yeghiayan's employment discrimination summary judgment decisions through November 2007 from Lexis's database, using the same criteria discussed *supra* note 7.

¹⁸⁶ *Farina v. Ciccone Food Prods.*, No. 04 C 2383, 2005 U.S. Dist. LEXIS 9962 (N.D. Ill. May 12, 2005); *Loera v. AMTRAK*, No. 02 C 736, 2004 U.S. Dist. LEXIS 16979 (N.D. Ill. Aug. 24, 2004).

¹⁸⁷ *Carlson v. Ill. Cmty. College Dist.* 525, No. 05 C 5975, 2006 U.S. Dist. LEXIS 73653 (N.D. Ill. Sept. 27, 2006); *Grew v. Kmart Corp. of Ill., Inc.*, No. 05 C 2022, 2006 U.S. Dist. LEXIS 6994 (N.D. Ill. Feb. 26, 2006); *Santos v. Boeing Co.*,

While these numbers might discourage employment discrimination plaintiffs who find themselves before Judge Der-Yeghiayan, conclusions about the district court's policy preferences based on these statistics alone would be premature without a statistical comparison to other district judges. A conclusion that Judge Der-Yeghiayan harbors an employer bias is also contradicted by lawyers' evaluations of the judge, which mostly report that the judge is not biased in any way.¹⁸⁸

Thus, there is no firm statistical or anecdotal basis suggesting that the Seventh Circuit's three opinions discussed in this comment are indicative of a broader correlation between President Bush's employment discrimination policy preferences and his recent appointee's summary judgment rulings. Nonetheless, there is certainly nothing in these opinions that provides reassurance for those who suspect otherwise.

III. NO (THE ABSENCE OF A POLITICIZED EXPLANATION).

Whatever one might be able to read into the Seventh Circuit's criticism of Judge Der-Yeghiayan's employment discrimination decisions, it is highly unlikely that the Court intended its three opinions to contain any political subtext. The politically conservative reputations of the panelists who voted on the opinion and the opinions' authors undercuts assertions to the contrary. Additionally, the tone of the Seventh Circuit's criticisms of the district court is uniformly

No. 02 C 9310, 2004 U.S. Dist. LEXIS 17666 (N.D. Ill. Sept. 1, 2004); *Chears v. Potter*, No. 03 C 115, 2004 U.S. Dist. LEXIS 17238 (N.D. Ill. Aug. 25, 2004).

¹⁸⁸ See The Chicago Council of Lawyers, *An Evaluation of the United States District Court Judges in Chicago* (2006), <http://www.chicagocouncil.org> ("Lawyers do not report that Judge Der-Yeghiayan is biased in any way or susceptible to any outside influences."). *But see* Aspen Law & Bus., 1 Almanac of the Federal Judiciary, 7th Cir. Section at 9-10 (2007-2 Supp.) (concluding that "[Judge Der-Yeghiayan] is fair-to-defense oriented in civil matters, according to lawyers who represent both plaintiffs and defendants," and including the following evaluations by lawyers: "He is a total pawn for the government, big business, and any large entity" . . . "He leans totally to big business and the government. The little guy and the underdog do not stand a chance" . . . "It is sickening how pro-government he is. It is easier to give it all to the prosecution").

tempered and moderate, which undermines speculation that the Court sought to accuse Judge Der-Yeghiayan of harboring any unseemly political bias in favor of employers.

However, the shared themes of the criticism in the Seventh Circuit's opinions do correlate with some of the more salient traits of the Seventh Circuit's employment discrimination jurisprudence. Namely, the Court has previously made it clear that district courts must not use summary judgment as a means for docket clearing. Also, the Court has repeatedly expressed an aversion to bright line rules and technical barriers that preclude courts from going further to reach the merits of the case. Therefore, the Court's common, frequent criticisms of the district court in these three opinions can be explained as a kind of socialization process, which seeks to implant the Circuit's own values and tendencies in a recently appointed district judge.

An examination of the political makeup of the Seventh Circuit jurists who reversed Judge Der-Yeghiayan makes it highly unlikely that these opinions implicitly signal any sort of broad check on a politically partisan appointee.

First, all of the Seventh Circuit jurists who authored *Thanongsinh*, *Paz*, and *Valentine* were appointed by Republican presidents: President Reagan appointed Judges Ripple and Flaum, the authors of *Thanongsinh* and *Valentine*; and President Ford appointed Judge Bauer, the author of *Paz*.¹⁸⁹ Working under the assumption that Republican Presidents Reagan and Ford appointed judges who were politically sympathetic with their own conservative policies and values,¹⁹⁰ it would be incongruous for these judges to express any broad criticism of the current Republican President's policies through attacks on one of his recent district judge appointments.

Second, judicial evaluations have consistently described these judges' reputations as moderate to conservative. Both Judges Ripple and Bauer are described as being open-minded and impartial, but

¹⁸⁹ Aspen Law & Bus., 2 Almanac of the Federal Judiciary, 7th Cir. Section at 10, 24, 34 (2008-1 Supp.).

¹⁹⁰ See *supra* Part II.

moderately conservative.¹⁹¹ Whereas one evaluation describes Judge Flaum as having no leaning in civil or criminal matters,¹⁹² another suggests that his conservative policy preferences have, at times, colored his opinions, including labor disputes.¹⁹³ Notably, a major employment discrimination case authored by Judge Flaum's disappointed employment discrimination plaintiffs; this decision was affirmed by Supreme Court of the Reagan-Bush Era, and then superseded by the Democrat-controlled Congress in the Civil Rights Act of 1991.¹⁹⁴ However, Judge Flaum has asserted his political independence. On three occasions,¹⁹⁵ the judge sharply criticized the Reagan Justice Department for failing to fulfill a Carter administration pledge to make adequate resources available to Chicago schools for the implementation of school desegregation plans.¹⁹⁶ Yet, he has never levied such criticism at judges. Judge Flaum is noted for treating district courts with great deference.¹⁹⁷ Additionally, Judge Flaum, joined by Judge Bauer, wrote a special concurrence criticizing plaintiffs' lawyers in an anti-trust case for accusing Judge Posner of

¹⁹¹ See 2 Almanac of the Federal Judiciary, *supra* note 190, at 25, 36.

¹⁹² See *id.* at 12-13.

¹⁹³ Chicago Lawyer's Council, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, *supra* note 1, at 771 (comparing *Montgomery Ward & Co. v. NLRB*, 904 F.2d 1156 (7th Cir. 1990) (noting that the judge showed "virtually no deference to the NLRB, refusing to enforce an NLRB bargaining order and leaving unremedied some extreme labor law violations") with *Cowherd v. HUD*, 827 F.2d 40 (7th Cir. 1987) (noting that the judge "showed great deference to a HUD decision to sell and essentially abandon a floundering public housing unit without requiring future rent subsidies").

¹⁹⁴ *Id.* at 771-72 (citing *Lorance v. AT&T Technologies, Inc.*, 827 F.2d 163 (7th Cir. 1987), *aff'd*, 490 U.S. 900 (1989)).

¹⁹⁵ *United States v. Board of Educ.*, 799 F.2d 281 (7th Cir. 1986); *United States v. Board of Educ.*, 744 F.2d 1300 (7th Cir. 1984); *United States v. Board of Educ.*, 717 F.2d 378 (7th Cir. 1983).

¹⁹⁶ *Board of Educ.*, 744 F.2d at 1308. See Chicago Lawyer's Council, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, *supra* note 1, at 775-77.

¹⁹⁷ Chicago Lawyer's Council, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, *supra* note 1, at 769.

acting with bias.¹⁹⁸ Therefore, it would be out of character for any of these judges to author decisions that attacked a district judge for harboring a conservative bias in employment discrimination cases.

For many of the same reasons, it is unlikely that Judge Posner, who joined the opinions in *Paz* and *Thanongsinh*, or Judge Kanne, who joined the opinion in *Thanongsinh*, would have been interested in attaching their names to opinions that attacked a district judge's politically conservative policy preferences. Both are Reagan appointees with conservative reputations.¹⁹⁹ One judicial evaluation even contains criticism of Judge Kanne for leaning towards employers' interests.²⁰⁰ Thus, it would be highly out of character for these judges to join in any criticism of a district judge for ruling in a politically partisan direction on employment discrimination issues.

Finally, the tone of the Seventh Circuit's criticisms in these three opinions is too moderate and tempered to rise to the level of a politicized rebuke of the district judge. Although the Seventh Circuit has shown that is unafraid to employ severe language to criticize judges, no such language is evident in these opinions. For instance, the Court provided a sampling of its own scathing criticisms of Immigration Judges and the Board of Immigration Appeals in *Benslimane v. Gonzales*,²⁰¹ including comments such as:

“the [immigration judge’s] opinion is riddled with inappropriate and extraneous comments” . . . “this very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner’s] case” . . . “the procedure that the [immigration judge] employed in this case is an affront to [petitioner’s] right to be heard” . . . the immigration judge’s factual

¹⁹⁸ *Id.* at 774-75 (citing *Olympia Equipment Leasing Co. v. Western Union Telephone Co.*, 797 F.2d 370 (7th Cir.), *reh'g denied*, 802 F.2d 217 (7th Cir. 1986)).

¹⁹⁹ See 2 *Almanac of the Federal Judiciary*, *supra* note 190, at 14, 22.

²⁰⁰ Chicago Lawyer's Council, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, *supra* note 1, at 778.

²⁰¹ 430 F.3d 828 (7th Cir. 2005).

conclusion is “totally unsupported by the record” . . . “the immigration judge’s unexplained conclusion is “hard to take seriously” . . . “the elementary principles of administrative law, the rules of logic, and common sense seem to have eluded the Board in this as in other cases.”²⁰²

No criticism in these three opinions rises to the level of severity of those scalding attacks. For instance, the district court’s erroneous evidentiary rulings are underscored indirectly. In *Valentine*, to refute the district court’s contention that a critical piece of evidence relied on by the plaintiff was solely based on the plaintiff’s “own speculation,” the Seventh Circuit merely stated, “Clearly, this is not a hearsay statement by [the plaintiff]—it is an admission by [the defendants],” and then pointed to the defendants’ statement of uncontested facts, which corroborated the plaintiff’s “speculation.”²⁰³ Additionally, Judge Bauer’s criticisms are almost overly deferential to the district judge, remarking, “It is worth mentioning that the district court and Wauconda were under the mistaken belief that Paz cannot proceed under the direct method because some of [the supervisor’s] comments were made two months prior to her firing.”²⁰⁴ Judge Bauer’s remarks are curious because it seems unremarkable to note that the defendants were arguing against the plaintiff’s position; courts of appeals reverse district court’s rulings, not the positions argued by the advocates. However, this tone dovetails with court observers’ remarks that Judge Bauer is overly deferential towards district judges.²⁰⁵ In sum, none of

²⁰² *Id.* at 829 (citations omitted). See generally, John R. Floss, *Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process*, 1 SEVENTH CIRCUIT REV. 216 (2006), at <http://www.kentlaw.edu/7cr/v1-1/floss.pdf>.

²⁰³ *Valentine v. City of Chicago*, 452 F.3d 670, 678 (2006). See also *Thanongsinh v. Bd. Of Educ.*, 462 F.3d 762, 776 (2006) (noting evidence excluded by district court as hearsay was “precisely the type of ‘memorandum’ or ‘record’ that falls within the ambit of the business record exception”).

²⁰⁴ *Paz v. Wauconda Healthcare and Rehab. Ctr.*, 464 F.3d 659, 666 (2006).

²⁰⁵ Chicago Lawyer’s Council, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, *supra* note 1, at 730 (citing *Higgins v. White Sox*

the criticisms in these opinions reach the level of severity that the Court has clearly shown itself capable of reaching. Thus, it is unreasonable to conclude that these opinions contain an intentional, politicized subtext, attacking the district judge for granting employers' motions for summary judgment in an untoward, partisan manner.

IV. THE SOCIALIZATION OF A RECENT JUDICIAL APPOINTEE

Another explanation for the consistent pattern of criticisms reflected by these opinions is that Judge Der-Yeghiayan is a new judge and relatively inexperienced in matters unrelated to immigration law. This possibility is corroborated by lawyers' evaluations of the district judge, which frequently comment on his inexperience and its negative impact on his rulings.²⁰⁶ Although lawyers' evaluations must always be taken with a grain of salt because it is to be expected that losing parties will complain about the judge's abilities, lawyers' criticisms concerning Judge Der-Yeghiayan are surprisingly consistent.²⁰⁷

Baseball Club, Inc., 787 F.2d 1125, 1131 (7th Cir. 1986) (Bauer, J., dissenting) (objecting to a remand for a new trial because of garbled and error-filled jury instructions, based largely on the ground that the trial judge was "a veteran of ten years on the district court and twelve years as a trial and appellate court judge of the state of Illinois").

²⁰⁶ See e.g., 1 Almanac of the Federal Judiciary, *supra* note 189, at 9-10 ("He is legally incompetent in both criminal and civil matters. He doesn't have much real experience. It is frightening" . . . "His background makes him ill-suited to be a federal judge. He is equally incompetent when dealing with either civil or criminal matters" . . . "He has no idea what he is doing."); Chicago Council of Lawyers, *An Evaluation of the United States District Court Judges in Chicago*, *supra* note 188, at 10 ("many of the lawyers interviewed about Judge Der-Yeghiayan reported that he lacks an adequate understanding of the Federal Rules of Civil Procedure and suggested that the judge's background has not prepared him to assume such an important post").

²⁰⁷ Chicago Council of Lawyers, *An Evaluation of the United States District Court Judges in Chicago*, *supra* note 188, at 10 (noting that "the vast majority of lawyers interviewed gave [Judge Der-Yeghiayan] poor marks on virtually all areas relevant to the Council's evaluation, and these poor marks are consistent with the ratings given to Judge Der-Yeghiayan by respondents to the Council's written

Moreover, these opinions were not the first time in 2006 that the Seventh Circuit had to educate the district judge in a particular area of law. Earlier that year, in *Murray v. GMAC Mortgage Co.*,²⁰⁸ the Seventh Circuit reversed Judge Der-Yeghiayan's denial of class certification, and explained how each of the four reasons given for the denial was improper.

There is a qualitative difference between these opinions and other Seventh Circuit opinions in 2006 that reversed different district judge's summary judgment rulings on employment discrimination matters. For instance, none of these other opinions call attention to critical facts in the record that were overlooked by the district judges.²⁰⁹ Instead, these opinions tend to deal with garden variety disagreements with the district court over resolving unsettled areas of law,²¹⁰ interpreting Seventh Circuit precedent,²¹¹ and weighing the evidence in view of what a reasonable jury could possibly conclude.²¹² In one such decision, the Seventh Circuit even acknowledged that the proper interpretation of the controlling precedent was not obvious.²¹³ Accordingly, the qualitative difference between the opinions that reversed Judge Der-Yeghiayan's decisions and the opinions reversing different district judges makes it more likely that the criticisms in *Thanongsinh*, *Paz*, and *Valentine* are not merely random. The exceptional nature of these opinions may be explained as instructive,

survey. . . [I]n comparison to his fellow judges in the Northern District of Illinois, Judge Der-Yeghiayan was rated below average in every survey category.”).

²⁰⁸ 434 F.3d 948 (2006).

²⁰⁹ *Goodwin v. Bd of Trs. Of the Univ. of Ill.*, 442 F.3d 611 (2006); *Maalik v. Int'l Union of Elevator Constructors, Local 2*, 437 F.3d 650 (2006); *Phelan v. Cook County*, 463 F.3d 773 (2006); *EEOC v. Target Corp.*, 460 F.3d 946 (2006); *Patton v. Keystone RV Co.*, 455 F.3d 812 (2006); *Roe v. Oberweis Dairy*, 456 F.3d 704 (2006); *Smith v. Castaways Family Diner*, 453 F.3d 971 (2006); *Sylvester v. SOS Children's Vill. Ill., Inc.*, 453 F.3d 900; *Burnett v. LFW Inc.*, 472 F.3d 471 (2006).

²¹⁰ *See, e.g., Phelan*, 463 F.3d at 780-81.

²¹¹ *See, e.g., Patton*, 455 F.3d at 816-17.

²¹² *See, e.g., Target Corp.*, 460 F.3d at 955-56, 961-62; *Patton*, 455 F.3d at 817-18

²¹³ *Smith*, 453 F.3d at 984.

an effort to educate a new district judge about the finer points of evidentiary rulings and methods for proving intentional discrimination in employment law.

The Seventh Circuit's criticism of Judge Der-Yeghiayan's inattention to critical details in the record also reflects another trend in the district judge's decisions that finds corroboration in evaluations of the judge's performance. Namely, both the district judge's detractors and defenders all agree that the judge makes short work of his docket.²¹⁴ In fact, at Judge Der-Yeghiayan's confirmation before the Senate Judiciary Committee, Senator Fitzgerald praised the district judge for his ability to handle "one of the heaviest case loads in the entire immigration court system."²¹⁵ Thus, it is possible that the Seventh Circuit opinions are telling the district judge to slow down a bit and proceed with more caution.

When these criticisms are read in conjunction, they can be explained as a sort of socialization of a newly appointed judge to the norms and tendencies of the Seventh Circuit's jurisprudence. First, the opinions reflect some of the Seventh Circuit's more general statements that warn district courts against using summary judgment as a means of docket control. Second, the criticisms reflect the Seventh Circuit's aversion to hyper-technical barriers that preclude proof of an employer's intent to discriminate.

First, the Seventh Circuit's criticism of the district court's inattention to critical factual details in the record reflects the Seventh Circuit's broader concerns about district court's over-reliance on summary judgment as a means of quickly disposing of rapidly expanding case loads. In *Wallace v. SMC Pneumatics, Inc.*,²¹⁶ Judge

²¹⁴ See, e.g., 1 Almanac of the Federal Judiciary, *supra* note 189, at 9-10 (*comparing* one attorney's observation, "Be prepared. I think he has one of the shortest calendars from filing to trial. He does not like to give continuances. I think he is a terrific person and judge. His rulings are quick" . . . *with* others', "File your brief late and he will throw the case out" . . . "He is more interested in his schedule than in his cases.").

²¹⁵ *Confirmation Hearings on Federal Appointments Before the S. Comm. on the Judiciary*, *supra* note 164.

²¹⁶ 103 F.3d 1394 (7th Cir. 1997).

Posner warned district courts against using Rule 56²¹⁷ as a means of docket control, stating:

The expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted unless and until Rule 56 is modified.²¹⁸

In *Thanongsinh* and *Valentine*, the Seventh Circuit criticized the district court for disposing of the case on summary judgment based on conclusions that were contradicted by overlooked facts in the record.²¹⁹ Additionally, in *Valentine*, the court noted the district judge's incomplete analysis of all the dispositive issues.²²⁰ Thus, these opinions reflect one of the Court's larger concerns that district judges are being cavalier in granting summary judgment, in violation of the demands of Rule 56.

Additionally, these three decisions reflect the Seventh Circuit's relative skepticism about technical barriers that preclude an employer's liability. Judge Easterbrook noted the simplicity with which courts should view employment discrimination cases by suggesting the following formulation for an ADEA jury instruction: "You must decide whether the employer would have fired [demoted, laid off] the employee if the employee had been younger than 40 and everything else had remained the same."²²¹ Although this is clearly not

²¹⁷ Fed. R. Civ. P. 56.

²¹⁸ *Wallace*, 103 F.3d at 1397 (citations omitted).

²¹⁹ *See supra* Part I.D.

²²⁰ *Id.*

²²¹ *Gehring v. Case Corp.*, 43 F.3d 340 (7th Cir. 1994). The Court has continued to urge this standard for employment discrimination in subsequent opinions. *See, e.g., Fuka v. Thomson Consumer Elec.*, 82 F.3d 1397 (7th Cir. 1996);

the standard that the Seventh Circuit uses for ruling on employment discrimination summary judgment motions, it nonetheless expresses the Court's allergy to overly technical methods of disposing employment discrimination cases that prevent courts from reaching the merits of the case. Accordingly, the Seventh Circuit has, in the past, rejected half a dozen technical arguments and defenses advanced by employers.²²² For instance, prior to the Supreme Court's resolution of the issue in *McKennon v. Nashville Banner Publishing Co.*,²²³ several Circuits allowed an employer to uncover evidence of an employee's misconduct on the job through the discovery process and then use such evidence as an affirmative defense to discrimination claims, even if such evidence was not known to the employer at the time of the allegedly discriminatory action.²²⁴ However, the Seventh Circuit allowed employers to use such "after-acquired" evidence only to limit back pay from the date the alleged misconduct was discovered.²²⁵

Along those same lines, in the three opinions discussed by this comment, the Seventh Circuit was highly skeptical of the district court's efforts to dispose of cases that were "replete"²²⁶ with credibility issues and contested matters of facts²²⁷ solely on the basis of technicalities. For instance, the Court rejected the district judge's reasoning in *Thanongsinh* and *Valentine*, which heavily relied on

Kuhn v. Ball State Univ., 78 F.3d 330 (7th Cir. 1996); Uempleby v. Potter & Brumfield, Inc., 69 F.3d 209 (7th Cir. 1995).

²²² Including: "pretext-plus;" "the after-acquired evidence rule;" "tender back," and "estoppel of ADA Claims." See generally Mollica, *supra* note 1, at 100-11 (describing Seventh Circuit's rejection of all these various technical defenses to discrimination).

²²³ 513 U.S. 352 (1995).

²²⁴ See e.g., Welch v. Liberty Machine Works, Inc., 23 F.3d 1403 (8th Cir. 1994); Dotson v. United States Postal Service, 977 F.2d 976 (6th Cir. 1992); and Summers v. State Farm Mutual Auto. Ins., 864 F.2d 700 (10th Cir. 1988).

²²⁵ See Kristufek v. Hussman Food Service Co., 985 F.2d 364 (7th Cir. 1993).

²²⁶ Paz v. Wauconda Healthcare and Rehab. Ctr., LLC, 464 F.3d 659, 666 (7th Cir. 2006).

²²⁷ See *supra* Part I.D.

findings that key evidence was “inadmissible” hearsay.²²⁸ Additionally, the Seventh Circuit admonished the district court for adhering to a non-existent formal barrier to a plaintiff’s use of the “direct” method of proof.²²⁹ This is not to say that the Seventh Circuit would be entirely adverse to correctly reasoned summary judgment decisions that reflected a formalist philosophy, but the Court’s skepticism of Judge Der-Yeghiayan’s efforts to sidestep the merits by basing his conclusions on technicalities does reflect the Seventh Circuit’s tendency to look past formal, technical barriers to an employer’s liability to reach the merits of the case.

CONCLUSION

Although all participants and actors in the legal system must act as if the law is a neutral arbiter—and judges “umpire”²³⁰—this hardly dampens the speculation among court observers and attorneys that a judge’s personal values and policy preferences can impact cases substantially. The discretion afforded to district judges—even at the summary judgment phase²³¹—provides them with an immediate and practical means to shape the outcome of their decisions in accordance with their personal policy preferences.²³² Thus, the specter of political partisanship is often unavoidable when attempting to explain a series of opinions. However, speculation about the politicization of the judicial sphere can also cloud an understanding of what courts’ opinions are really attempting to communicate.

This comment examined trends in a series of summary judgment employment discrimination opinions that reversed the same district judge, Judge Samuel Der-Yeghiayan. The Seventh Circuit’s criticisms

²²⁸ See Part I.D.

²²⁹ *Id.*

²³⁰ As Chief Justice Roberts put it during his confirmation hearing. Robin Toner & David D. Kirkpatrick, *Liberals and Conservatives Remain Worlds Apart on Roberts’s Suitability*, N.Y. TIMES, Sept. 16, 2005, at A22.

²³¹ See *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990); *supra* Introduction.

²³² See CARP, *supra* note 137, at 229-30.

of the district judge shared common themes and expressed a pattern. It thus appeared that the Seventh Circuit was communicating something broader than the holdings themselves. Due to the fact that this district judge had recently been appointed by President George W. Bush, whose record for politicizing traditional civil rights enforcement and the judicial sphere is often noted,²³³ it was reasonable to suspect that the Seventh Circuit's criticisms spoke to this subject matter.

However, this hypothesis defeated itself. Proceeding under the assumption that judges tend to reflect the values and policy preferences of the presidents who appointed them,²³⁴ it was impossible to square the politically conservative makeup of the Seventh Circuit judges who decided these three opinions with an argument that these opinions were intended to emphasize Judge Der-Yeghiayan's partisan bias or communicate a broader political critique of the Executive Branch's civil rights policy. Moreover, the Seventh Circuit's criticisms of the district judge in these opinions may be consistent and express a pattern, but they are not nearly severe enough to suggest that the district judge harbors a partisan bias in favor of employers.

Nonetheless, this comment concluded that these three opinions do not express a merely random pattern of criticism. Instead, the Seventh Circuit's criticisms can be read as an attempt to socialize a newly appointed judge. This explanation coincides with judicial evaluations, which emphasize the district judge's relative unfamiliarity with his new duties and the judge's tendency to work quickly. Additionally, this explanation makes sense because the Seventh Circuit's criticisms reflect some of the Court's broader norms, such as the Court's concerns over district courts' abuse of summary judgment. Also, the criticisms correlate with the Seventh Circuit's general distaste for technical defenses and barriers to employment discrimination claims. Thus, these opinions represent an effort to bring a district judge's wayward decision-making tendencies more in line with certain salient features of the Seventh Circuit's employment discrimination jurisprudence.

²³³ See *supra* Part II.

²³⁴ See CARP, *supra* note 137, at 238-39; *supra* Part II.