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Andrea L. Miller

THE USE (AND MISUSE) OF THE SAME-ACTOR INFERENCE IN FAMILY RESPONSIBILITIES DISCRIMINATION LITIGATION: LESSONS FROM SOCIAL PSYCHOLOGY ON FLEXIBILITY STIGMA

Andrea L. Miller[†]

† JD Candidate, University of Minnesota Law School, 2015; PhD Candidate, University of Minnesota Department of Psychology, 2015. Thank you to Eugene Borgida and Jill Hasday for advice on my broader program of research in this area. Many thanks to Aleksander Ksiazkiewicz, Victor Quintanilla, and Erik Girvan for discussing these ideas and for providing feedback on this Article. Thanks also to the editors and staff of *William Mitchell Law Review*, especially Nicole Faulkner.

I. INTRODUCTION

In May 2014, Candis Riggins was fired from her position as a maintenance worker at Walmart because she had missed work on a few occasions to seek medical treatment.[1] Ms. Riggins was pregnant

1. Letter from Dina Bakst & Elizabeth Gedmark, A Better Balance, Cyrus Mehri & Ellen Eardley, Mehri & Skalet, PLLC, & Emily Martin, Elizabeth Watson & Elizabeth Johnston, Nat'l Women's Law Ctr., to Rebecca Tenbrook & Cynthia

and, for about two months, had been experiencing pain and illness caused by the harsh cleaning chemicals that she used at work.[2] During this time, Ms. Riggins was hospitalized twice and passed out at a bus stop on one occasion.[3] She repeatedly submitted requests for a temporary job change, as she was trained and qualified to perform duties as both a cashier and a greeter.[4] However, these requests were not answered.[5] Meanwhile, according to Ms. Riggins, employees with non-pregnancy-related medical conditions were routinely granted accommodations and job changes.[6] In other words, Ms. Riggins alleges that Walmart denied accommodations to a pregnant worker that it routinely granted to other employees; Walmart even went so far as to fire Ms. Riggins when her medical conditions became so bad that she started to miss work.[7] This incident is just one recent example of family responsibilities discrimination (FRD) faced by many women and men in the United States.

Family responsibilities discrimination is discrimination against an individual because of his or her real or perceived caregiving responsibilities.[8] FRD can take many different forms, including denying a mother a promotion because her employer assumes that she does not want to travel for work, or denying a father family leave because his employer thinks his wife should be taking care of things at home.[9] FRD jurisprudence developed rapidly over the last decade, and cases arise under various legal causes of action related to employment discrimination.[10] Unfortunately, plaintiffs' success

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Scott, Senior Assoc. Gen. Counsel & Assoc. Gen. Counsel, Walmart Stores, Inc. 3 (Jul. 31, 2014), http://www.abetterbalance.org/web/images/stories/Documents/Riggins_Candis_Letter_7-31-14_FINAL.pdf.

2. *Id.* at 2–3.

3. *Id.*

4. *Id.* at 2–4.

5. *Id.*

6. *Id.* at 3.

7. *See also* Amicus Curiae Brief of the Am. Civil Liberties Union & a Better Balance, et al., in Support of Petitioner, Young v. United Parcel Serv., Inc. at 7, 707 F.3d 437 (2014) (No. 12-1226), 2014 WL 4536938, at *7 (asserting that UPS, in violation of the Pregnancy Discrimination Act, denied light duty to pregnant workers that it routinely provided other employees).

8. Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006).

9. *Id.* at 177–78, 181. These examples are drawn from real FRD cases. *Id.*

10. Williams & Bornstein, *supra* note 8, at 172, 181–82.

in FRD cases often depends on individual lawyers' and judges' understanding of gender stereotyping; as a result, inconsistent and inaccurate folk theories about gender stereotypes often impact case outcomes.[11] One particularly harmful implication of this problem has been the use of the same-actor inference to dismiss meritorious FRD cases.[12] The same-actor inference is a strong presumption of non-discrimination that arises when the same actor who engaged in an adverse action against the employee previously engaged in a positive action toward that employee.[13] The same-actor inference is based on lay theories of psychology that persist despite being contradicted by decades of empirical psychological research.

This Article posits that although social psychological research has thoroughly refuted the validity of the same-actor inference, courts continue to use it to dismiss FRD cases that have merit. Part II of this Article describes existing social psychological research on FRD in the workplace.[14] Researchers have established that FRD is discrimination based on sex and that stereotyping and discrimination are highly context dependent.[15] Part III analyzes the extent to which the same-actor inference has been disproven by social psychological evidence, as well as its harmful role in FRD litigation.[16] The same-actor inference rests on the faulty assumption that individuals' stereotypes and prejudices are consistently expressed in a conscious, discrete manner against all individuals from a protected class.[17] It causes significant harm to plaintiffs in FRD cases and is at odds with the purpose of Title VII.[18] Part IV discusses possible solutions to the problem and proposes that the same-actor inference be abolished from FRD cases under Title

11. *See generally* Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 835 (2004) (arguing that "[f]lawed intuitive psychological models presently limit the law's effectiveness in dismantling the maternal wall").

12. *See, e.g.*, Hayden v. Garden Ridge Mgmt., LLC, Civil Action No. 4:08CV172, 2009 WL 5196718, at *5 (E.D. Tex. Dec. 22, 2009); *see also* Andrea Miller, Note, *The Separate Spheres Ideology: An Improved Empirical and Litigation Approach to Family Responsibilities Discrimination*, 99 MINN. L. REV. 343, 345 (2014).

13. *See* Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).

14. *See infra* Part II.

15. *See infra* Part II.B.

16. *See infra* Part III.

17. *See infra* Part III.A.3.a.

18. *See infra* Part III.B.

VII.[19] This Article argues that by eliminating the same-actor inference from FRD litigation, judges can adopt an empirically grounded social psychological understanding of FRD, develop a body of law that reflects the realities of gender roles in modern society, and provide the kind of justice to FRD plaintiffs that Title VII is meant to provide.[20]

II. SOCIAL PSYCHOLOGICAL RESEARCH ON FLEXIBILITY STIGMA AND FAMILY RESPONSIBILITIES DISCRIMINATION

Legal scholars who study FRD have been in tune with social science knowledge regarding gender inequality in the workplace from the time FRD first developed as a legal claim.[21] This attention to social science has helped ground FRD scholarship in empirical reality and has most likely contributed to the development of FRD law in ways that reflect the actual lived experiences of the men and women harmed by rigid gender norms and gendered inequality.[22] This Part provides background information on the current state of gendered workplace inequality and on the existing social psychological research that informs FRD theorizing.

A. Gender Inequality in the United States Is Linked to Caregiver Status

In many ways, the United States has made substantial progress toward gender equality. For example, income levels for women under thirty who have no children are almost equal to those of men in the same category.[23] For women who are mothers, however, persistent and dramatic forms of inequality remain. The motherhood penalty, or the "maternal wall," has severe economic consequences for women.[24] As of 2010, for example, mothers

19. *See infra* Part IV. The same-actor inference likely causes similar problems in all types of discrimination cases; however, other forms of discrimination are outside the scope of this Article.

20. *See infra* Part IV.

21. *See* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 101–10 (2000) [hereinafter UNBENDING GENDER]. *See generally* Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401 (2003).

22. *See* Miller, *supra* note 12, at 346.

23. JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 15 (2010).

24. *Id.*

earned sixty-seven cents for every dollar earned by fathers,[25] suggesting that "motherhood may in fact have replaced gender as the primary factor constraining women's choices."[26] It is clear that gender inequality cannot simply be reduced to sex or gender; it is often driven by the intersection between gender and caregiving responsibilities.[27] Legal scholarship and social-science research on FRD recognize this complexity and attempt to address gendered inequality in the workplace as it relates to caregiving responsibilities.[28] Fortunately, legal scholars have access to years of research from social psychologists on stereotyping and discrimination processes in the workplace as they relate to gender and caregiving responsibilities.[29]

B. *Social Psychological Research that Informs Family Responsibilities Discrimination*

Social psychologists have spent decades examining stereotyping and discrimination processes in the workplace to try to understand inequality based on gender and other factors.[30] Stereotypes are beliefs about the traits or characteristics of members of a group.[31] The act of stereotyping is assuming that an individual has a particular trait or characteristic because he or she

25. JOAN WILLIAMS ET AL., CENTER FOR WORKLIFE LAW, "OPT OUT" OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 17 (2006) [hereinafter CENTER FOR WORKLIFE LAW], *available at* http://www.worklifelaw.org/pubs/OptOutPushedOut.pdf.

26. STEPHANIE COONTZ, A STRANGE STIRRING: THE FEMININE MYSTIQUE AND AMERICAN WOMEN AT THE DAWN OF THE 1960S, at 177–78 (2011).

27. Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL'Y 1, 25–28, 34–39 (2012). Gender inequality is also characterized by intersections with race, class, sexuality, immigrant status, disability, and many other sources of inequality. *See, e.g.*, *id.* at 30–40; Joan C. Williams et al., *Cultural Schemas, Social Class, and the Flexibility Stigma*, 69 J. SOC. ISSUES 209, 227 (2013) [hereinafter *Cultural Schemas*]. While these intersecting identities are important parts of gender inequality and FRD, they are outside the scope of this paper.

28. *See generally* UNBENDING GENDER, *supra* note 21; CENTER FOR WORKLIFE LAW, *supra* note 25.

29. *See infra* Part II.B.1.

30. *See infra* Part II.B.1.

31. *See* Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 357, 357 (Daniel T. Gilbert, Susan T. Fiske & Gardner Lindzey eds., 4th ed. 1998) (distinguishing stereotyping as a cognitive attitude "to people from groups perceived to differ significantly from one's own").

is a member of that group.[32] Discrimination, in contrast, is more behavioral; it is making a decision about an individual or taking an action against an individual because he or she is a member of a particular group.[33] Although there is still more work to be done,[34] social psychological research has led to at least two broad principles of stereotyping and discrimination that can inform legal scholarship on FRD and other types of discrimination. These principles are well established by decades of empirical evidence.[35] The first principle is that FRD is characterized by descriptive and prescriptive stereotypes about men and women, meaning that it is discrimination based on sex.[36] The second principle is that stereotyping and discrimination are context dependent.[37] The remainder of this Part will discuss each of these principles in turn.

1. *Family Responsibilities Discrimination Is Based on Sex and Gender*

For more than a decade, the dominant social psychological approach to studying FRD has been to investigate the role of descriptive and prescriptive gender stereotypes.[38] Until recently, research on descriptive and prescriptive stereotyping in FRD focused primarily on discrimination against women.[39] More

32. *See id.* at 368.

33. *Id.* at 357.

34. Miller, *supra* note 12, at 378 (noting that "many courts believe that their lay theories of gender stereotypes and discrimination" are adequate to achieve justice).

35. *See generally Cultural Schemas*, *supra* note 27; James L. Hilton & William von Hippel, *Stereotypes*, 47 ANN. REV. PSYCHOL. 237, 238–40 (1996).

36. Miller, *supra* note 12, at 348–50 (highlighting the stereotypical differences between the sexes).

37. Hilton & von Hippel, *supra* note 35, at 255–56.

38. *See, e.g.*, Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665 (1999); Joan C. Williams, Hibbs *as a Federalism Case;* Hibbs *as a Maternal Wall Case*, 73 U. CIN. L. REV. 365, 387 (2004); Joan C. Williams & Allison Tait, *"Mancession" or "Momcession"?: Good Providers, a Bad Economy, and Gender Discrimination*, 86 CHI.-KENT L. REV 857, 865 (2011).

39. *See generally, e.g.*, Michelle Hebl et al., *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. APPLIED PSYCHOL. 1499 (2007); Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743 (2001); Pamela Stone & Lisa Ackerly Hernandez, *The All-or-Nothing Workplace: Flexibility Stigma and "Opting Out" Among Professional-Managerial Women,*

recently, researchers have also begun to examine the negative effects of descriptive and prescriptive stereotyping against men.[40] Taken together, this body of research makes clear that FRD is discrimination based on sex and gender.

a. Family Responsibilities Discrimination Against Gender-Conforming Women

Descriptive stereotypes describe how men and women are generally thought to be.[41] According to traditional gender stereotypes, men are agentic and competent and women are communal and warm.[42] When a woman announces she is pregnant, has a child, or otherwise activates caregiving concepts in the workplace, people tend to see her as having more feminine attributes (i.e., warmth) and fewer masculine attributes (i.e., competence).[43] People who endorse these descriptive stereotypes tend to assume that mothers are less agentic, competent, and committed to the workplace than non-mothers, because mothers seem to fit the descriptive stereotypes of women.[44] One of the consequences of descriptive stereotypes about women is FRD. The perception that women who engage in caregiving are less competent can lead to lower salary,[45] fewer promotions,[46] lower

69 J. SOC. ISSUES 235 (2013).

40. *See generally* Scott Coltrane et al., *Fathers and the Flexibility Stigma*, 69 J. SOC. ISSUES 279 (2013); Laurie A. Rudman & Kris Mescher, *Penalizing Men Who Request a Family Leave: Is Flexibility Stigma a Femininity Stigma?*, 69 J. SOC. ISSUES 322 (2013); Joseph A. Vandello et al., *When Equal Isn't Really Equal: The Masculine Dilemma of Seeking Work Flexibility*, 69 J. SOC. ISSUES 303 (2013).

41. Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657, 658–59 (2001).

42. *Id.* at 658.

43. Amy Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701, 711 (2004); *see also* Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878, 887 (2002) (finding that housewives are consistently perceived as high in warmth and low in competence). *See generally* Heilman, *supra* note 41, at 666–69.

44. Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60 J. SOC. ISSUES 737, 748 (2004).

45. Tamar Kricheli-Katz, *Choice-Based Discrimination: Labor-Force-Type Discrimination Against Gay Men, the Obese, and Mothers*, 10 J. EMPIRICAL LEGAL STUDIES 670, 682 (2013).

hiring rates,[47] and less willingness to educate mothers compared to other employees.[48] Women are also penalized by the assumption that they *may* become caregivers, even when they have not had children.[49]

In contrast to descriptive stereotypes, prescriptive stereotypes describe how men and women *should* be.[50] People who endorse prescriptive gender stereotypes tend to believe that men *should* be agentic and competent and that women *should* be communal and warm.[51] In employment, this means that people tend to believe that women should engage in caregiving rather than pursuing career achievement.[52] Like descriptive stereotypes, prescriptive stereotypes about women can lead to FRD. For example, in many organizations, there is a stigma against women who make use of their companies' flexibility policies (e.g., part-time hours, parental leave, and telecommuting).[53] This phenomenon is called "flexibility stigma."[54] Flexibility stigma can result in wage penalties, lower performance evaluations, fewer promotions, and lower-status assignments.[55] For women, this stigma originates in prescriptive stereotypes that expect women to prioritize childrearing over their careers, which makes them ideal parents but bad employees.[56] Women who are mothers or who use flexibility benefits at work are seen as fulfilling their proper gender role by engaging in caregiving but deviating from proper workplace performance.[57] In many workplaces, women are actually praised for opting out of the

46. Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. APPLIED PSYCHOL. 189, 196 (2008).

47. Cuddy et al., *supra* note 43, at 711; Kricheli-Katz, *supra* note 45, at 681.

48. Cuddy et al., *supra* note 43, at 711.

49. *See* Alexander H. Jordan & Emily M. Zitek, *Marital Status Bias in Perceptions of Employees*, 34 BASIC & APPLIED SOC. PSYCHOL. 474, 474–75, 479 (2012).

50. Heilman, *supra* note 41, at 659.

51. *Id.*

52. *See generally* Hebl et al., *supra* note 39; Rudman & Glick, *supra* note 39.

53. *Cultural Schemas*, *supra* note 27, at 209–10.

54. *Id.*

55. Jeffrey R. Cohen & Louise E. Single, *An Examination of the Perceived Impact of Flexible Work Arrangements on Professional Opportunities in Public Accounting*, 32 J. BUS. ETHICS 317, 324–25 (2001); Jennifer Glass, *Blessing or Curse?: Work-Family Policies and Mother's Wage Growth Over Time*, 31 WORK & OCCUPATIONS 367, 387 (2004); Stone & Hernandez, *supra* note 39, at 246–52. *See generally* PAMELA STONE, OPTING OUT?: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME (2007).

56. *Cultural Schemas*, *supra* note 27, at 221–22.

57. *Id.*

workplace entirely to care for their children but are punished if they stay at work and make use of flexibility policies.[58] Accordingly, while FRD against women is based on their actual or perceived caregiving duties, it is also based on descriptive and prescriptive stereotypes about women belonging in the home rather than the workplace. In other words, although this type of FRD occurs against a specific sub-group of women, it is based on sex and gender.

b. Family Responsibilities Discrimination Against Gender-Nonconforming Men

In recent years, researchers have increasingly recognized that gender equality in the workplace is not simply a matter of women's work-life conflict and the treatment of women at work; in order for society to achieve gender equality, men must be able to participate fully in their family lives.[59] Men, like women, experience FRD at work, but FRD against men originates in different prescriptive stereotypes. Prescriptive stereotypes of men dictate that they should devote themselves fully to the workplace, displaying agency, competence, and commitment.[60] Because earning a living is seen as the primary role of fatherhood, fathers are penalized for using flexibility benefits at work; using flexibility benefits is regarded as inappropriate for men, because it suggests that they are not completely devoted to their careers.[61] In sum, FRD for men results from men's gender-nonconforming behavior. This is in contrast to FRD against women, which results from the supposedly gender-conforming behavior of prioritizing children over work.[62] Therefore, although both men and women experience FRD, this stigma is highly gendered and manifests against men and women in

58. Stone & Hernandez, *supra* note 39, at 252.

59. *See* Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1299–1300 (2012); Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267, 1282–86 (2012). *See generally* Kelli K. Garcia, *The Gender Bind: Men as Inauthentic Caregivers*, 20 DUKE J. GENDER L. & POL'Y 1 (2012).

60. *Cultural Schemas*, *supra* note 27, at 220–21; Williams & Tait, *supra* note 38, at 865–69.

61. Jennifer L. Berdahl & Sue H. Moon, *Workplace Mistreatment of Middle Class Workers Based on Sex, Parenthood, and Caregiving*, 69 J. SOC. ISSUES 341, 358 (2013); Coltrane et al., *supra* note 40, at 297–98; Rudman & Mescher, *supra* note 40, at 335–36; Vandello et al., *supra* note 40, at 315–16.

62. *See supra* Part II.B.1.a.

distinct ways. Although FRD is directed primarily at subsets of men and women, social psychological evidence makes clear that FRD is discrimination based on sex and gender.

2. *Stereotyping and Discrimination Are Context Dependent*

One important feature of social psychology as a discipline is its focus on the power of social situations to shape individuals' thoughts, feelings, and behaviors.[63] Years of research on stereotyping and discrimination have made clear that these processes, like any other psychological process, are context dependent.[64] Depending on the social context, an individual's stereotypes or prejudices regarding a social group are not always expressed or may be expressed in different ways.[65]

a. *Structural Constraints Influence Stereotyping and Discrimination*

One important aspect of social context that influences stereotyping and discrimination is the existence of structural constraints on decision making.[66] In many cases, people are aware that it is socially unacceptable to discriminate.[67] Individuals sometimes alter their behavior because they do not want to be

63. *See* Gordon W. Allport, *The Historical Background of Social Psychology, in* HANDBOOK OF SOCIAL PSYCHOLOGY 1 (Gardner Lindzey & Elliot Aronson eds., 3d ed. 1985).

64. *See generally* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1039–41 (2006) (characterizing situationism as "one of the most important" concepts to emerge in social psychology over the last fifty years).

65. *See generally* Christian S. Crandall & Amy Eshleman, *A Justification-Suppression Model of the Expression and Experience of Prejudice*, 129 PSYCHOL. BULL. 414 (2003) (examining in depth the theory that prejudice is often restrained by a desire to suppress it).

66. *See, e.g., id.* at 415 ("White Americans do not wish to express prejudice in word or deed, for reasons that include liberalism, egalitarianism, sympathy for the underdog, maintaining a nonprejudiced self-image, social norms, 'political correctness,' and humanitarian values.").

67. *See* Hilton & von Hippel, *supra* note 35, at 255–56. *See generally* Ziva Kunda & Steven J. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 PSYCHOL. BULL. 522, 525 (2003) (discussing the nexus between social pressure and avoiding prejudice).

caught stereotyping or discriminating.[68] Sometimes the structural features of the situation are such that discriminatory behaviors will be obvious; other times, discriminatory behaviors can be concealed using a non-discriminatory pretext.[69] Social psychologists have found that when the structural features of the environment make discriminatory behaviors easily identifiable, individuals are less likely to engage in these behaviors.[70] In one study, for example, individuals were more likely to avoid sitting next to an individual with a disability when that decision could be masked as a preference to watch a different movie.[71] In another study, individuals were more likely to discriminate against a child in academic ratings on the basis of socio-economic status when they could attribute their ratings to other, more individuating information (even though this individuating information was identical for all subjects).[72] In a third study, discrimination against black college applicants was "most likely to be expressed when . . . negative responses [could] be justified on factors other than

68. *See generally* Kunda & Spencer, *supra* note 67 ("The motivation to avoid prejudice can also prompt such inhibition when perceivers believe that any stereotyping may indicate prejudice."); Melvin L. Snyder et al., *Avoidance of the Handicapped: An Attributional Ambiguity Analysis*, 37 J. PERSONALITY & SOC. PSYCHOL. 2297 (1979) (analyzing the findings of a study testing the theory that people may purposely choose to sit next to a physically handicapped person in a theater to avoid appearing prejudicial).

69. *See, e.g.*, Snyder et al., *supra* note 68, at 2297 ("However, if we ask a person to choose between two movies, one of which apparently by accident happens to entail sitting next to a handicapped person, the other next to a normal, he can avoid the handicapped while appearing to exercise a preference for a movie.").

70. *See generally* John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 30 (1983) (speculating that participants in study may have been less likely to discriminate based on awareness they were being observed); Gordon Hodson et al., *Processes in Racial Discrimination: Differential Weighting of Conflicting Information*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 460, 460 (2002) (observing that participants in study did not discriminate against black applicants relative to white applicants when their credentials were identical); Snyder et al., *supra* note 68, at 2298 (discussing a strategy to detect concealed prejudice when structural factors make identification difficult); Vincent Y. Yzerbyt et al., *Social Judgeability: The Impact of Meta-Informational Cues on the Use of Stereotypes*, 66 J. PERSONALITY & SOC. PSYCHOL. 48, 48 (1994) (demonstrating the results of a study supporting the notion that people may take social rules into consideration before discriminating).

71. *See* Snyder et al., *supra* note 68, at 2303–04.

72. *See* Darley & Gross, *supra* note 70, at 20.

race."[73] However, the information the study participants relied on was not actually diagnostic of perceived merit; across study conditions, participants heavily weighted whichever piece of information was weaker for the black applicant.[74]

Generally speaking, the research shows that the presence of some individuating information frees people to discriminate against others when they otherwise would not, for fear of having their discrimination be revealed.[75] Social norms regarding the appropriateness of discrimination can be very powerful; individuals sometimes go so far as to engage in *more* stereotyping and discrimination when these individuals perceive the social norms of the situation to encourage this conduct. One study found that black men were more likely to denigrate a Native American job applicant to a white audience when the participants believed that the white audience endorsed negative attitudes about Native Americans.[76] In these cases, the evaluations that black participants expressed to the white audience were actually more negative than the impressions the participants privately held.[77] The black participants, however, did not denigrate the Native American applicant when the participants perceived the white audience to hold positive attitudes about Native Americans.[78] Thus, although individuals typically make use of informational and structural environments to mask discrimination when it would be perceived as undesirable, discriminatory activity may also increase when doing so is perceived as the norm.[79] In either case, individuals adjust the use of stereotypes and discrimination based on the structural and normative features of the environment around them.[80] This research highlights the context-dependent nature of stereotyping and discriminating, and it makes clear that individuals

73. *See* Hodson et al., *supra* note 70, at 469.

74. *Id.*

75. *See* William G. Graziano et al., *Attraction, Personality, and Prejudice: Liking None of the People Most of the Time*, 93 J. PERSONALITY & SOC. PSYCHOL. 565, 579 (2007) (examining, in Study 5, anti-fat attitudes and situations in which people may suppress prejudice toward overweight partners).

76. Jenessa R. Shapiro & Steven L. Neuberg, *When Do the Stigmatized Stigmatize? The Ironic Effects of Being Accountable to (Perceived) Majority Group Prejudice-Expression Norms*, 95 J. PERSONALITY & SOC. PSYCHOL. 877, 894 (2008).

77. *Id.*

78. *Id.*

79. *See id.*

80. *See id.*

do not always act on personal stereotypes and biases against a given group in the same way.[81]

Applying these findings to the context of FRD, the research suggests that although a supervisor's discriminatory conduct against an employee with family responsibilities is rooted in gender stereotypes, it does not follow that the supervisor will always have the opportunity to express these stereotypes as discriminatory conduct. The structural features of a particular decision-making context might make it more difficult to engage in FRD (without being detected) at some times than at others.

b. Motivation Influences Stereotyping and Discrimination

Another aspect of the social context that may influence stereotyping and discrimination in the workplace is individual motivation. Social psychology research reveals that individuals strategically make use of stereotypes and engage in discrimination depending on individual motivations in any given situation.[82] In one study, for example, individuals discriminated against women instructors and managers by giving them negative ratings relative to men, but only after receiving negative evaluations themselves.[83] In other words, individuals who had received negative evaluations and were motivated to restore self-esteem engaged in sex discrimination, whereas participants who had received positive evaluations did not engage in sex discrimination.[84] In another study, participants watching an interview of a black individual experienced cognitive activation of racial stereotypes after fifteen seconds of the interview, but the stereotypes dissipated over time as the participants learned more individuating information about the black individual.[85] However, participants who discovered at the end of the interview that the black individual disagreed with the participant about the verdict in a court case revived racial stereotypes, and participants who agreed with the black individual

81. *See id.*

82. *See, e.g.*, Ziva Kunda et al., *The Dynamic Time Course of Stereotype Activation: Activation, Dissipation, and Resurrection*, 82 J. PERSONALITY & SOC. PSYCHOL. 283, 295 (2002); Lisa Sinclair & Ziva Kunda, *Motivated Stereotyping of Women: She's Fine if She Praised Me but Incompetent if She Criticized Me*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1329, 1340 (2000).

83. *See* Sinclair & Kunda, *supra* note 82, at 1340.

84. *Id.*

85. *See* Kunda et al., *supra* note 82, at 295.

did not engage in racial stereotyping.[86] Taken together, this research makes clear that individuals modulate the use of stereotypes and discriminatory behavior in strategic ways according to individual motivations at any given time; stereotyping and discrimination against a specific group of people are not uniform across situations.[87] To place this research in the FRD context, these findings suggest that although a supervisor might harbor gendered stereotypes about employees with family responsibilities, he or she may only be motivated to express these stereotypes as discriminatory conduct in certain situations.[88]

c. Past Non-Discrimination Influences Stereotyping and Discrimination in the Present

A third feature of the social context that may influence individuals' stereotyping and discrimination is past conduct. When individuals engage in behaviors that individuals deem positive, prosocial, or morally right, they perceive themselves as having gained "moral credentials"[89] or "legitimacy credits."[90] These credentials then free people (subjectively) to engage in more problematic or antisocial behaviors, including discrimination.[91] One study, for example, found that participants who expressed disagreement with sexist statements were subsequently more willing to discriminate against women in hiring.[92] In other studies, participants who gave high ratings of an advertisement featuring a black model were then more likely to discriminate against black models in ratings of subsequent advertisements;[93] participants who chose a black applicant for one job were then more likely to discriminate against a black applicant for a subsequent job;[94] and participants who recalled times in the past in which they did not take racist actions later made hiring decisions and allocated money

86. *Id.*

87. *See id.*; Sinclair & Kunda, *supra* note 82, at 1340.

88. *See* Kunda et al., *supra* note 82, at 295.

89. *See generally* Benoît Monin & Dale T. Miller, *Moral Credentials and the Expression of Prejudice*, 81 J. PERSONALITY & SOC. PSYCHOL. 33 (2001).

90. *See* Crandall & Eshleman, *supra* note 65, at 428–29.

91. *See id. See generally* Monin & Miller, *supra* note 89.

92. *See* Monin & Miller, *supra* note 89, at 35.

93. *See* Beomjoon Choi et al., *Permission to Be Prejudiced: Legitimacy Credits in the Evaluation of Advertisements*, 44 J. APPLIED. PSYCHOL. 190, 197 (2014).

94. *See* Monin & Miller, *supra* note 89, at 37.

in racially discriminatory ways.[95] In some cases, individuals rely on *others'* moral credentials to justify their discriminatory behavior.[96] Participants in one study who learned of previous non-discriminatory behavior by members of their own group were then more likely to engage in discrimination in hiring.[97] Finally, a group of studies revealed that individuals strategically build up moral credentials in advance when they anticipate engaging in discrimination in the future.[98] Participants who expected to reject a black job applicant in the near future preemptively took action to acquire moral credentials by expressing greater racial sensitivity; they were then more likely to reject the black applicant for a job later on.[99] Taken together, this research challenges the common-sense wisdom that people who have not engaged in stereotyping and discrimination in the past will not do so in the future. At times, the very act of being egalitarian or prosocial frees individuals to engage in discrimination later.[100] These findings make clear that stereotyping and discrimination against a particular group are not consistent over time and across situations. In the FRD context, this means that individuals who hire employees with family responsibilities are not only not immune from discriminating against these employees in the future, but may actually feel more licensed to do so.

d. Cognitive, Physical, and Self-Regulatory Resources Influence Stereotyping and Discrimination

Another feature of the situation that can have an impact on stereotyping and discrimination is the set of cognitive, physical, and self-regulatory resources available to the individual at any particular time. Social psychology research has generally revealed that it takes

95. *See* Daniel A. Effron et al., *Inventing Racist Roads Not Taken: The Licensing Effect of Immoral Counterfactual Behaviors*, 103 J. PERSONALITY & SOC. PSYCHOL. 916, 928 (2012).

96. Maryam Kouchaki, *Vicarious Moral Licensing: The Influence of Others' Past Moral Actions on Moral Behavior*, 101 J. PERSONALITY & SOC. PSYCHOL. 702, 713 (2011).

97. *Id.*

98. *See* Anna C. Merritt et al., *The Strategic Pursuit of Moral Credentials*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 774, 774–76 (2012).

99. *Id.* at 775.

100. *Id.* at 776.

effort to inhibit stereotyping and discrimination.[101] To the extent that individuals are more or less able to exert this effort in any given situation, the likelihood of stereotyping and discrimination varies depending on the levels of cognitive load.[102] Heavy cognitive load, a situation in which an individual uses high cognitive effort and has few cognitive resources to spare, is one situation in which individuals tend to lack the mental resources necessary to inhibit stereotyping and discriminatory behavior.[103] In one study, for example, participants who were under heavy cognitive load had an easier time recalling stereotype-consistent information about another individual, whereas participants who experienced low cognitive processing loads were more likely to recall individuating, stereotype-inconsistent information.[104] In another study, participants rated male workers' performance higher than female workers' performance when the participants' attention was divided and they faced time pressure; without these cognitive constraints, discrimination in performance ratings diminished.[105] In other studies, heavy cognitive load led to age discrimination in the evaluation of job applications,[106] ethnic stereotyping and prejudice,[107] sex discrimination in evaluations of leadership

101. *See* Marilynn B. Brewer, *A Dual Process Model of Impression Formation, in* ADVANCES IN SOCIAL COGNITION 1, 27–30 (Thomas R. Srull & Robert S. Wyer, Jr. eds., 1988); Susan T. Fiske et al., *The Continuum Model: Ten Years Later, in* DUAL PROCESS THEORIES IN SOCIAL PSYCHOLOGY 231, 237 (Shelly Chaiken & Yaacov Trope eds., 1999).

102. *See* Diana J. Burgess, *Are Providers More Likely to Contribute to Healthcare Disparities Under High Levels of Cognitive Load? How Features of the Healthcare Setting May Lead to Biases in Medical Decision Making*, 30 MED. DECISION MAKING 246, 247–48 (2010).

103. *See, e.g.*, Russell Spears & S. Alexander Haslam, *Stereotyping and the Burden of Cognitive Load, in* THE SOCIAL PSYCHOLOGY OF STEREOTYPING AND GROUP LIFE 171, 171 (Russell Spears et al. eds., 1997).

104. C. Neil Macrae et al., *Processing Load and Memory for Stereotype-Based Information*, 23 EUR. J. SOC. PSYCHOL. 77, 77–78 (1993).

105. *See* Richard F. Martell, *Sex Bias at Work: The Effects of Attentional and Memory Demands on Performance Ratings of Men and Women*, 21 J. APPLIED PSYCHOL. 1939, 1950 (1991).

106. *See* Elissa L. Perry et al., *Moderating Effects of Personal and Contextual Factors in Age Discrimination*, 81 J. APPLIED PSYCHOL. 628, 638 (1996).

107. Anton J. Dijker & Willem Koomen, *Stereotyping and Attitudinal Effects Under Time Pressure*, 26 EUR. J. SOC. PSYCHOL. 61, 69 (1996); Daniel H. Wigboldus et al., *Capacity and Comprehension: Spontaneous Stereotyping Under Cognitive Load*, 22 SOC. COGNITION 292, 299–300 (2004).

competence,[108] gender stereotyping of computer behavior,[109] and racial discrimination in police shooter simulations.[110] Taken together, this body of research indicates that an individual's tendency to engage in stereotyping and discrimination depends on the cognitive resources available at any given moment.

In addition to cognitive resources, the availability of physical and self-regulatory resources can influence the extent to which an individual is capable of inhibiting stereotypes and discriminatory responses. Research on resource depletion (also called "regulatory depletion") indicates that hunger, exhaustion, the use of self-control, and other forms of resource depletion can decrease an individual's ability to inhibit stereotyping and discrimination. In one study, for example, participants who engaged in self-control to suppress their stereotypes for a period of time experienced a depletion of regulatory resources; the stereotypes they had been suppressing then became particularly salient in a subsequent task.[111] In another set of studies, individuals who were sleepy were more likely to stereotype Muslim women and to discriminate against black job applicants.[112] Other researchers have found that resource depletion leads to racial biases in both police officers' shooting decisions[113] and weapons identification tasks.[114] This body of research, along with the research on cognitive load, demonstrates

108. Sabine Sczesny & Ulrich Kühnen, *Meta-Cognition About Biological Sex and Gender-Stereotypic Physical Appearance: Consequences for the Assessment of Leadership Competence*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 13, 18 (2004).

109. Eun-Ju Lee, *Gender Stereotyping of Computers: Resource Depletion or Reduced Attention?*, 58 J. COMM. 301, 308 (2008).

110. Sang Hee Park et al., *Implicit Motivation to Control Prejudice Moderates the Effect of Cognitive Depletion on Unintended Discrimination*, 26 SOC. COGNITION 401, 412–13 (2008) (finding that cognitive depletion led to racial shooter biases among those with a low motivation to control prejudice).

111. Ernestine H. Gordijn et al., *Consequences of Stereotype Suppression and Internal Suppression Motivation: A Self-Regulation Approach*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 212, 218–21 (2004) (finding that stereotype suppression led to greater activation of stereotypes and greater use of stereotypes among those with a low motivation to suppress stereotypes).

112. Sonia Ghumman & Christopher M. Barnes, *Sleep and Prejudice: A Resource Recovery Approach*, 43 J. APPLIED SOC. PSYCHOL. E166, E169–71 (2013).

113. Debbie S. Ma et al., *When Fatigue Turns Deadly: The Association Between Fatigue and Racial Bias in the Decision to Shoot*, 35 BASIC & APPLIED SOC. PSYCHOL. 515, 522–23 (2013).

114. Olesya Govorun & Keith Payne, *Ego-Depletion and Prejudice: Separating Automatic and Controlled Components*, 24 SOC. COGNITION 111, 120–21, 128 (2006).

that an individual's ability to suppress tendencies toward stereotyping and discrimination depends on the available cognitive, physical, and self-regulatory resources. These findings make clear that an individual's tendency to express stereotypes and biases against various groups in society is not stable over time and is highly context dependent. Thus, rates of FRD from any given supervisor may vary from situation to situation based on the cognitive resources available to the supervisor.

e. Priming Influences Stereotyping and Discrimination

A fifth feature of the social context that can influence stereotyping and discrimination is the extent to which individuals are primed by their surroundings. A large body of research in psychology suggests that exposure to messages in society, even outside of conscious awareness, can influence how we perceive and respond to others.[115] These messages can activate stereotypes and prejudicial attitudes in people's cognitive structures that influence subsequent behavior.[116] One study, for example, demonstrated that after being primed with advertisements that portrayed women as sex objects, male participants obtained more stereotypical information about women job applicants during an interview and engaged in more sexualized behavior toward the women in the interview.[117] Another study found that after subliminally priming individuals with the concept of *career woman*, participants were more likely to believe that a neutral target woman had the stereotypical attributes of career women.[118] In another study, women who were primed with traditional gender roles were more likely to associate men's names with power-related words and

115. *See generally, e.g.*, John A. Bargh et al., *Automaticity of Social Behavior: Direct Effects of Trait Construct and Stereotype Activation on Action*, 71 J. PERSONALITY & SOC. PSYCHOL. 230 (1996).

116. *See generally* Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 305–07, 313 (2003); Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

117. Laurie A. Rudman & Eugene Borgida, *The Afterglow of Construct Accessibility: The Behavioral Consequences of Priming Men to View Women as Sex Objects*, 31 J. EXPERIMENTAL SOC. PSYCHOL. 493, 503, 506–08 (1995).

118. Lisa Irmen, *Automatic Activation and Use of Gender Subgroups*, 55 SEX ROLES 435, 439–40 (2006).

women's names with warmth-related words.[119] Other studies have shown that exposing participants to either stereotypically male or female roles resulted in the false recognition of stereotypically gendered roles and traits in a subsequent task,[120] that priming individuals with stereotypes about black criminals led to decreased support for welfare policies that would benefit black victims of Hurricane Katrina,[121] and that priming individuals with the sense that their own decision making was objective and unbiased made them more likely to engage in gender discrimination in hiring.[122] Taken together, these findings demonstrate the power of priming in shaping stereotyping and discrimination behavior. Individuals who are exposed to certain concepts in their surroundings, even outside of conscious awareness, can become more likely to utilize these concepts in subsequent decisions and tasks. This research suggests that individuals are not always equally likely to express the stereotypes that they hold; stereotyping and discrimination depend on what kinds of concepts are salient in the immediate social context. Rates of FRD from a particular supervisor may depend on the extent to which traditional gender roles and stereotypes are primed by the individuals' surroundings.

As the findings summarized in this Part demonstrate, individuals who hold stereotypes and prejudices against certain groups in society are not always equally likely to express these stereotypes or engage in discrimination. Discriminatory conduct can be influenced by many features of the immediate social context, including: structural constraints that limit an individual's ability to mask discriminatory acts; self-esteem and other motivations that determine how an individual strategically uses stereotypes of others; the extent to which an individual feels morally credentialed enough to justify discrimination; the availability of cognitive, physical, and self-regulatory resources; and

119. Laurie A. Rudman & Julie E. Phelan, *The Effect of Priming Gender Roles on Women's Implicit Gender Beliefs and Career Aspirations*, 41 SOC. PSYCHOL. 192, 196–98 (2010).

120. Allison P. Lenton et al., *Illusions of Gender: Stereotypes Evoke False Memories*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 3, 11 (2001).

121. James D. Johnson et al., *Priming Media Stereotypes Reduces Support for Social Welfare Policies: The Mediating Role of Empathy*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 463, 472 (2009).

122. Eric Luis Uhlmann & Geoffrey L. Cohen, *"I Think It, Therefore It's True": Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORG. BEHAV. & HUM. DECISION PROCESSES 207, 218 (2007).

the concepts and stereotypes that an individual is exposed to by his or her surroundings.[123] To situate these findings in the context of FRD, this research suggests that although a supervisor's discriminatory acts against employees with family responsibilities likely stem from the supervisor's relatively stable stereotypes and prejudices, it does not follow that the supervisor will act on those stereotypes and prejudices in every case. The situational context surrounding the supervisor will influence whether he or she is able and motivated to express stereotypes and engage in discriminatory behavior against employees with family responsibilities. The next portion of this Article discusses the same-actor inference, which relies on assumptions that are directly contradicted by these insights from social psychology. It also addresses the improper use of the same-actor inference to dismiss FRD cases that have merit.

III. THE SAME-ACTOR INFERENCE

A significant aspect of judges' and fact-finders' jobs involves making assertions and assumptions about human psychology and behavior.[124] When judges' theories about human behavior are consistent with empirical reality, judges are in a position to make decisions that further justice and the goals of public policy. When judges' theories about human behavior are inaccurate, however, they can inadvertently cause significant harm to the parties and to society as a whole.[125] Because human psychology and behavior are so integral to the law, some scholars argue for a "psychological

123. Social psychological research also demonstrates that many forms of stereotyping and discrimination take place outside of an individual's complete awareness and control. Several scholars have made strong cases for the relevance of these forms of discrimination for law and policy, so this Article will not duplicate those efforts here. *See generally, e.g.*, John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39 (2009); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Krieger & Fiske, *supra* note 64; Brian A. Nosek & Rachel G. Riskind, *Policy Implications of Implicit Social Cognition*, 6 SOC. ISSUES & POL'Y REV. 113 (2012). It is worth pointing out that the existence of implicit biases and discrimination makes it even clearer that the courts' traditional understanding of how discrimination works is severely divorced from reality.

124. Krieger & Fiske, *supra* note 64, at 997–98.

125. Krieger, *supra* note 11, at 836; Krieger & Fiske, *supra* note 64, at 998–99. *See generally* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM (Eugene Borgida & Susan T. Fiske eds., 2008).

jurisprudence"; psychological jurisprudence aims to "make legal assumptions about human nature as consistent with contemporary psychological knowledge as possible, that is, to close the gap between folk and scientific theories of the person."[126] To that end, it is important that judges and fact-finders deciding FRD cases clearly understand how gender stereotyping and discrimination really operate.[127]

There is currently no federal statute that defines caregivers as a protected class.[128] In other words, there is no FRD cause of action *per se.* In order to succeed in a claim under federal law or most states' laws, a plaintiff must fit FRD under another cause of action. At the federal level, successful FRD cases have arisen under several different statutes, including Title VII of the Civil Rights Act of 1964 (Title VII), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Employment Pay Act (EPA), and the Employee Retirement Income Security Act (ERISA).[129] Title VII provides plaintiffs the most flexibility in the types of legal theories that are available to them.[130] Title VII also covers more employers than the FMLA and other statutes.[131] Therefore, plaintiffs are in the most advantageous position if they

126. Tom R. Tyler & John T. Jost, *Psychology and the Law: Reconciling Normative and Descriptive Accounts of Social Justice and System Legitimacy, in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 807, 808 (A.W. Kruglanski & E.T. Higgins eds., 2d ed. 2007), *available at* http://www.psych.nyu.edu/jost/Tyler%20&%20Jost%20(2007)%20Psychology%20and%20the%20law.pdf.

127. Krieger & Fiske, *supra* note 64, at 1000.

128. Steven I. Locke, *Family Responsibilities Discrimination and the New York City Model: A Map for Future Legislation,* 51 S. TEX. L. REV. 19, 29 (2009). A few states and several dozen local governments recognize parental or caregiver status as a protected class for discrimination purposes. Joan C. Williams & Stephanie Bornstein, *The Evolution of "FRED": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias,* 59 HASTINGS L.J. 1311, 1346 (2008).

129. Williams & Bornstein, *supra* note 8, at 181–82.

130. *Id.* at 182–85 (stating that cases have been brought under "disparate treatment or gender discrimination . . . hostile work environment, harassment, constructive discharge, and retaliation").

131. The FMLA covers employers with fifty or more employees within seventy-five miles of the worksite; furthermore, employees must be employed for at least twelve months by the employer and work at least 1250 hours to be covered by the FMLA. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2611 (2012). In contrast, Title VII covers all employers with fifteen or more employees. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

can make the case that the FRD they experienced was based on sex for the purposes of Title VII.

As discussed above in Part II, FRD is rooted in traditional descriptive and prescriptive stereotypes about the proper roles of men and women in the workplace and the home.[132] As such, FRD is discrimination based on sex for the purposes of Title VII,[133] as well as other employment discrimination statutes that define sex or gender as protected classes.[134] The United States Supreme Court has made clear that making employment decisions on the basis of descriptive and prescriptive stereotypes about gender is a violation of Title VII.[135] Because caregiving and career roles are integral parts of descriptive and prescriptive stereotypes about men and women,[136] FRD falls squarely in the category of discrimination covered by Title VII. Furthermore, plaintiffs' reliance on comparator evidence[137] in FRD cases has decreased in recent years;

132. *See supra* Part II.B.1.

133. *See* 42 U.S.C. § 2000e-2(a)(1) (making it an unlawful employment practice to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex"); *id.* § 2000e-2(a)(2) (making it an unlawful employment practice "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex").

134. *See, e.g.*, Minnesota Human Rights Act, MINN. STAT. § 363A.08, subdiv. 2 (2012) (making it an unfair employment practice "for an employer, because of . . . sex . . . to: (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) discharge an employee; or (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment"). Sex discrimination claims under the Minnesota Human Rights Act utilize the same legal principles as those under Title VII. Saulsberry v. St. Mary's Univ. of Minn., 318 F.3d 862, 866 (8th Cir. 2003).

135. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ."); *see also* Stephanie Bornstein, *The Legal and Policy Implications of the "Flexibility Stigma,"* 69 J. SOC. ISSUES 389, 389–91 (2013).

136. *See supra* Part II.B.1.

137. Comparator evidence is evidence showing that an individual who is similarly situated to the plaintiff (in all relevant ways except for the plaintiff's protected class) received different treatment from the plaintiff. *See* BLACK'S LAW

instead, more and more plaintiffs are proving their cases using evidence of gender stereotyping.[138] Accordingly, the need for judges to understand psychological theories of stereotyping and discrimination is growing. Unfortunately, judges' lay understanding of FRD, and of gender biases more broadly, has been inconsistent and often inaccurate. A major consequence has been the problematic use of the same-actor inference in FRD jurisprudence.

A. *The Same-Actor Inference Is Empirically Invalid*

The same-actor inference is rooted in fundamental misunderstandings on the part of judges and fact-finders that directly contradict social psychological evidence. The remainder of this Part will describe the same-actor inference and discuss the extent to which it has been invalidated by social psychology.

1. *The* McDonnell-Douglas *Burden-Shifting Framework*

FRD and other discrimination cases under Title VII are analyzed using the *McDonnell-Douglas* burden-shifting framework.[139] This approach follows three stages of analysis. First, the plaintiff must make a prima facie case of discrimination, using direct or circumstantial evidence of a discriminatory motive.[140] To make a prima facie case, plaintiffs must show that: 1) they are members of a protected class under Title VII; 2) they met the employer's legitimate expectations for job performance; 3) they suffered an adverse employment action; and 4) the circumstances give rise to an inference of discrimination based on the protected class status, such as sex.[141] If the plaintiff successfully makes a prima facie case in the first stage, the burden shifts to the defendant employer to present a legitimate, non-discriminatory reason for the adverse actions taken against the employee.[142] If the employer satisfies this

DICTIONARY 342 (10th ed. 2014). The comparison allows the courts to infer that the differential treatment was based on the plaintiff's protected class, which makes the prima facie case for discrimination. Cuevas v. Am. Express Travel Related Servs. Co., 256 F. App'x 241, 243 (11th Cir. 2007).

138. Williams & Bornstein, *supra* note 8, at 188.

139. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973); *see also* Carter v. Dayton Rogers Mfg. Co., 543 F. Supp. 2d 1026, 1033 (D. Minn. 2008).

140. *See McDonnell Douglas Corp.*, 411 U.S. at 802.

141. *See id.*

142. *Id.*

burden, the burden shifts back to the employee to demonstrate that the non-discriminatory reason offered by the employer was mere pretext for discrimination.[143] The first two stages of the *McDonnell-Douglas* analysis are relatively easy for the parties to satisfy.[144] As a result, most of the legal battle takes place in the third stage of analysis, in which the plaintiff must show that the employer's reasons for taking the adverse action are mere pretext for discrimination.[145] This stage is also where the same-actor inference comes into play.[146]

2. *The Same-Actor Inference*

The same-actor inference was first articulated in 1991 by the Fourth Circuit.[147] In 1985, Warren Proud was fired from his job less than five months after having been hired.[148] Proud brought suit for age discrimination under the Age Discrimination in Employment Act (ADEA).[149] The court ruled that, because Proud had been fired by the same man who hired him in the first place, age could not have been a motivating factor in Proud's termination.[150] The court reasoned that "it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."[151] The court believed, in other words, that an individual with a particular prejudice would express that prejudice at every opportunity; the fact that he or she did *not* express that prejudice at a particular time in the past must mean that he or she does not hold the prejudice at all and could not have discriminated in the present.[152]

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143. *Id.* at 804.

144. *See* Natasha Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 366 (2010).

145. *Id.* at 365.

146. *Id.*

147. Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 UTAH L. REV. 255, 256 (1999) (citing Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991)).

148. *Proud*, 945 F.2d at 796–97.

149. *Id.* at 797; *see also* 29 U.S.C. § 633a (2012).

150. *Proud*, 945 F.2d at 797.

151. *Id.* (quoting John J. Donohue & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1017 (1991)).

152. *See id.*

The *Proud* court then articulated the same-actor inference: "[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."[153] This inference comes into play in the third stage of the *McDonnell-Douglas* analysis described above.[154] The plaintiff argues that the explanation the employer has offered for the adverse employment action is merely pretextual and that the action was instead motivated by discrimination.[155] The same-actor evidence brought by the defendant employer creates a "strong inference that the employer's stated reason for acting against the employee is not pretextual,"[156] and the plaintiff must overcome this inference.

The *Proud* court's original articulation of the same-actor inference was relatively narrow; it only applied to cases in which there was a hiring and a firing, the hirer and the firer were the same actor, the target of the hiring and firing was the same person, and the firing took place a short time after the hiring.[157] This confluence of factors represents a limited subset of potential discrimination cases. In *Proud*, the "relatively short time span" between hiring and termination was under six months.[158] Since *Proud*, courts have expanded this time span considerably and used the same-actor inference in cases in which seven years passed between hiring and termination.[159] Subsequent courts have also applied the same-actor inference to cases in which the adverse employment action was not termination.[160] One example is *Richmond v. Johnson*, in which the plaintiff was denied a promotion by the same supervisor who had promoted her approximately one

153. *Id.*

154. Martin, *supra* note 144, at 365.

155. *Id.* at 365–66.

156. *Proud*, 945 F.2d at 798.

157. *See id.* at 797; Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1134 (2008).

158. *Proud*, 945 F.2d at 797.

159. Bryant & Bales, *supra* note 147, at 274; Martin, *supra* note 157, at 1135; *see, e.g.*, Adreani v. First Colonial Bankshares Corp., 154 F.3d 389, 392 (7th Cir. 1998); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995).

160. *See, e.g.*, Bryant & Bales, *supra* note 147, at 273–74.

year earlier.[161] Shortly before denying plaintiff the promotion, the plaintiff's supervisor asked her, "[W]hat? Are you pregnant?"[162] Despite this evidence of discrimination, the circuit court determined that the plaintiff's evidence of pretext and discrimination did not overcome the same-actor inference, and the court upheld summary judgment for the employer.[163] Thus, although the *Proud* court initially envisioned a narrow set of circumstances under which the same-actor inference would apply, courts have continued to broaden the same-actor principle nearly beyond recognition. Particularly troubling is the way courts have expanded the principle to situations that do not involve the same actor doing the hiring and firing.[164] Indeed, the name "same-actor inference" seems a misnomer given its current usage by courts. The next sections will analyze the ways in which the same-actor inference has been expanded in scope and its various uses in FRD cases.[165]

3. Extensions of the Same-Actor Inference

The same-actor inference originally applied only to situations in which—across a positive employment action (i.e., hiring) and an adverse action (i.e., firing)—there was only one actor and one target.[166] Since *Proud*, courts have broadened the scope of the inference considerably, so that different actors and different targets of actions may be involved.[167] The remainder of this section will discuss cases that involve (1) the same actor taking both the positive employment action and the adverse action, but toward different targets; (2) multiple actors taking actions toward the same target; and (3) an actor and a target who belong to the same protected class. Although the same-actor inference now takes many different forms,[168] the same underlying logic and fundamental

161. Richmond v. Johnson, No. 96-6329, 1997 WL 809962, at *1 (6th Cir. Dec. 18, 1997).

162. *Id.*

163. *Id.* at *2.

164. *See* Martin, *supra* note 157, at 1136.

165. Although *Proud* was an age discrimination case, courts also apply same-actor reasoning in sex discrimination cases. *See, e.g.*, Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995).

166. Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).

167. *See* Martin, *supra* note 157, at 1133–34.

168. Sometimes courts do not explicitly state that they are utilizing the same-

misunderstandings of how stereotyping and discrimination operate underlie each of these versions of the same-actor inference.

a. Same Actor, Different Target

The first extension of the same-actor inference involves cases in which the same actor takes a positive employment action toward, and an adverse action against, two employees of the same protected class. This might occur, for example, when a supervisor promotes one employee of a particular protected class and terminates another employee in that class.[169] In this case, the court might infer that because the supervisor promoted the first employee, the supervisor must not harbor any discriminatory animus toward the protected class, and the termination of the second employee must not have been motivated by discrimination. Another example might involve a supervisor who fires one employee and replaces him or her with an employee from the same protected class.[170]

Tom Hayden is one example of a plaintiff whose FRD case under Title VII was inappropriately disposed of in summary judgment when the court extended the same-actor inference in this way.[171] When Hayden requested FMLA leave to care for his wife and newborn baby, a human resources officer questioned his request, stating, "It's very strange that we have a male manager request that amount of time off[;] we have never had that before."[172] Hayden's request for leave was initially granted, but he was fired one week later.[173] Hayden's employer then replaced him with another man.[174] Hayden sued under both the FMLA and Title VII, but his Title VII claim was defeated.[175] The court declared that because Hayden was replaced by another man, a member of the same protected class, he could not make a case for sex discrimination under Title VII.[176]

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actor inference or an extension of it. *See, e.g.*, Hayden v. Garden Ridge Mgmt., LLC, Civil Action No. 4:08cv172, 2009 WL 5196718, at *5 (E.D. Tex. Dec. 22, 2009).

169. *See, e.g., id.*

170. *See* Martin, *supra* note 157, at 1137.

171. *See Hayden*, 2009 WL 5196718, at *5.

172. *Id.* at *4.

173. *Id.* at *1.

174. *Id.* at *5.

175. *Id.* at *3, *5.

176. *Id.* at *3.

The court granted summary judgment on the Title VII claims for Hayden's employer.[177]

The human resource manager's comment in this case strongly suggests that Hayden was fired because he did not fit in with prescriptive stereotypes that push men to devote all of their time to the workplace and leave domestic work to women. However, the court felt that this evidence could not overcome the strong presumption that, because Hayden's employer hired a man, the employer simply was not prejudiced against men and would not terminate a man on the basis of sex discrimination.[178] This misguided understanding of discrimination relies on the faulty logic that an individual who discriminates against members of a particular class does so in every situation; it fails to recognize the highly context-dependent nature of stereotyping and discrimination. Contrary to the *Hayden* court's view, taking adverse employment actions against the subset of men who have caregiving responsibilities is sex discrimination. Hayden should have had the opportunity to present his case at trial.

b. Multiple Actors, Same Target

The second extension of the same-actor inference involves cases in which multiple actors take positive and adverse actions against the same target employee.[179] This might happen, for example, in a workplace with a relatively large managerial team, where multiple supervisors have input into decisions about the employees.[180] A typical case of this type usually involves a committee of supervisors, only one of which has taken a positive action toward the employee, or a supervisor that gets input about the employer's performance from another colleague.[181] A court in this case might

177. *Id.*

178. *Id.* ("According to the uncontroverted evidence, Plaintiff was replaced by another male . . . so he cannot show he was replaced by someone outside his protected class, and his gender discrimination claim therefore fails.").

179. Martin, *supra* note 157, at 1136.

180. *See id.*

181. *See, e.g.*, Wofford v. Middletown Tube Works, Inc., 67 F. App'x 312, 318 (6th Cir. 2003) ("[T]he fact that the same . . . group of people did both the hiring and firing . . . is strong evidence that there was no discrimination involved . . . ."); Sreeram v. La. State Univ. Med. Ctr.–Shreveport, 188 F.3d 314, 317 (5th Cir. 1999) (discussing review by committee); Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997) (discussing conversations between supervising officers regarding

infer that because at least one supervisor has taken a positive action toward the employee, the group of supervisors as a whole must not have been motivated by discrimination in its adverse action. This view implicitly regards the multiple supervisors who had input into the employee's fate as one actor; if at least one of those supervisors behaved in a non-discriminatory way in the past, the courts are skeptical that any of the supervisors would engage in discrimination in the present.

Dr. Suha Sreeram is one plaintiff whose FRD case was dismissed when the court relied on this type of logic.[182] Dr. Sreeram was the only woman in her surgical residency cohort, and she was expelled from the residency program after completing three years.[183] Despite the fact that Dr. Sreeram scored very high on objective measures of performance, such as exams, her Residency Review Committee felt that she had difficulties in other areas, such as decisively applying her knowledge to diagnose patients.[184] Evidence of gender stereotyping and FRD against Dr. Sreeram abound in this case. One of the doctors on the Committee, Dr. McDonald, repeatedly asked Dr. Sreeram whether her perceived deficiencies were "cultural."[185] In Dr. McDonald's deposition, he explained that he meant that he felt Indian women were "not as assertive as their American counterparts," and that he "wondered if a part of this problem was not a lack of assertiveness, that she did not act independently and assertively in her day-to-day work."[186] Another doctor on the Committee, Dr. Spires, "testified that he had concerns about why women would put themselves through a surgical residency, especially if they are planning on having children."[187] He stated:

> [T]hey're constantly tired, and they don't have time to put on their makeup and put on clothes and do a lot of the things girls need to do, and it[']s difficult. . . . [I]f she got particular pleasure and was particularly efficient in surgery . . . I'm sure she could find a way to work children

an employee's performance); Jean-Baptiste v. K-Z, Inc., 442 F. Supp. 2d 652, 664 (N.D. Ind. 2006) (discussing a "mosaic" of workplace hostility).

182. *See Sreeram*, 188 F.3d at 314.

183. *Id.* at 316–17.

184. *Id.* at 317, 319.

185. *Id.* at 319 n.1.

186. *Id.*

187. *Id.*

> and a two career marriage, and that sort of thing out okay.[188]

In analyzing this evidence, the court focused on the fact that one of the doctors on the Committee (Dr. McDonald) had granted Dr. Sreeram's request to stay in the residency program for an additional year after the Committee had recommended her expulsion.[189] Despite the fact that only one member of the committee had taken this favorable employment action toward Dr. Sreeram, and despite the fact that this member had himself made sexist comments, the court found that this was "overwhelming evidence corroborating defendants' non-discriminatory rationale."[190] The court dismissed the egregiously sexist statements as "stray remarks" that could not overcome the presumption of non-discrimination stemming from this same-actor evidence,[191] and it affirmed summary judgment for Dr. Sreeram's employer.[192]

The remarks about Dr. Sreeram's culture and inability to be assertive are clear examples of descriptive stereotyping[193] of women in the workplace; Dr. McDonald felt that women (of certain national origins) simply were not agentic and assertive enough to be doctors, and he perceived Dr. Sreeram's performance through this lens.[194] The comments about Dr. Sreeram's ability to have children and complete a surgical residency[195] are clear examples of prescriptive stereotypes[196] that demand that women prioritize caregiving over their careers. It is not even clear from the record whether Dr. Sreeram had children or planned to have children;[197]

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188. *Id.*

189. *Id.* at 321.

190. *Id.* at 320. Notably, the court also relegated all of this evidence of discrimination to a footnote instead of presenting these facts in the body of the opinion. *See id.* at 322 n.1.

191. *Id.* at 320.

192. *Id.* at 322.

193. *See supra* notes 41–49 and accompanying text.

194. *Sreeram*, 188 F.3d at 319 n.1.

195. *Id.*

196. *See supra* notes 50–58 and accompanying text.

197. *See Sreeram*, 188 F.3d at 316–17. *But cf.* Original Brief on Behalf of Plaintiff/Appellant at 15, Sreeram v. La. State Univ. Med. Ctr.–Shreveport, 188 F.3d 314 (5th Cir. 1999) (No. 97-31183), 1998 WL 34085800, at *15 (noting that Dr. Spires asked Dr. Sreeram "why she wanted to be a surgeon if she was going to have children"). It is important to note, however, that Dr. Spire's question assuming Dr. Sreeram would have children is no indication in the record of Dr. Sreeram's actual decision to have children. If anything, such a question without

Dr. Spires simply assumed that because Dr. Sreeram was a woman, she would be too consumed by family concerns to fully devote herself to her job. Unfortunately, this evidence of descriptive and prescriptive stereotyping was not enough to overcome the presumption that because a single doctor on the Committee had delayed Dr. Sreeram's expulsion,[198] he must not have harbored any sex-based prejudice, and the rest of the Committee must therefore have acted without prejudice as well.[199]

c. *Actor and Target in the Same Protected Class*

The third extension of the same-actor inference involves cases in which the actor is a member of the same protected class as the target employee.[200] This might occur, for example, if a female manager terminates a female employee, or a male supervisor denies a male employee parental leave. In this situation, some courts infer that the actor could not hold any discriminatory animus toward members of his or her own protected class and that the actor's adverse action could not therefore be motivated by discrimination. This presumption is frequently employed in sex discrimination cases under Title VII.[201] However, social psychological research has established that both men and women are capable of engaging in stereotyping, prejudice, and

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further factual findings suggests that Dr. Spire was in fact employing gender stereotypes.

198. *See Sreeram*, 188 F.3d at 321 ("Dr. McDonald . . . granted [Sreeram's] request to stay in the program for another year despite . . . recommendation[s] that her residency be terminated.").

199. *See id.* at 321–22.

200. *See, e.g.*, Martin, *supra* note 157, at 1137–38.

201. *See, e.g.*, James v. Verizon, 792 F. Supp. 2d 861, 869–70 (D. Md. 2011) ("'[P]roof that the decision-maker is a member of the same protected class as Jackson weakens any possible inference of discrimination.'" (quoting Jackson v. Sch. Bd. of Richmond, No. 99-CV-642, 2000 WL 34292578, at *7 (E.D. Va. Mar. 15, 2000))); Vernon v. A & L Motor Sales, No. 07-1508, 2009 WL 866851, at *5 (W.D. Pa. Mar. 30, 2009) ("[T]hat Plaintiff was hired by a woman, fired by a woman and replaced by a woman belies the notion that the circumstances surrounding her termination were discriminatory."); Aceto v. Town of Bloomfield, Civil No. 3:04CV01977(AWT), 2006 WL 1405579, at *5 (D. Conn. May 19, 2006) ("A well-recognized inference against discrimination exists where the person who participated in the allegedly adverse decision is also a member of the same protected class.") .

discrimination against other members of their genders.[202] Thus, there is no empirical basis for the assumption that discrimination has not occurred, simply because the actor and target are members of the same protected class.

The same-actor inference has evolved significantly since its original conception in *Proud*,[203] becoming "fully entrenched in workplace [discrimination] law."[204] Courts now rely on the same-actor inference in FRD cases that involve a wide variety of circumstances.[205] Every circuit now uses some form of the same-actor inference in discrimination cases,[206] notwithstanding the fact that this type of inference appears to conflict with the United States Supreme Court's ruling in *Reeves v. Sanderson Plumbing Products, Inc.*[207] The circuits do not all give the same-actor inference equal weight, but in the majority of circuits, the same-actor inference amounts to an "insurmountable challenge" for a large number of plaintiffs.[208] Indeed, the *Proud* court

> was not simply holding that the fact that the same person who made the decision to fire Mr. Proud had earlier made the decision to hire him was *probative* of whether Mr. Proud's age influenced the firing decision and

202. *See generally* Peter Glick & Susan Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 AM. PSYCHOL. 109 (2001); John T. Jost & Aaron Kay, *Exposure to Benevolent Sexism and Complementary Gender Stereotypes: Consequences for Specific and Diffuse Forms of System Justification*, 88 J. PERSONALITY & SOC. PSYCHOL. 498 (2005).

203. *See generally* Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (articulating the same-actor inference: "[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer").

204. *See, e.g.*, Martin, *supra* note 157, at 1121.

205. *See, e.g.*, Hayden v. Garden Ridge Mgmt., LLC, Civil Action No. 4:08CV172, 2009 WL 5196718, at *5 (E.D. Tex. Dec. 22, 2009); *see also* Miller, *supra* note 12, at 360–61.

206. Martin, *supra* note 157, at 1128.

207. 530 U.S. 133, 148 (2000); *see* Martin, *supra* note 144, at 379–80. *See generally* Charles F. Thompson, Jr., *Juries Will Decide More Discrimination Cases: An Examination of* Reeves v. Sanderson Plumbing Products, Inc., 26 VT. L. REV. 1, 41–42 (2001) (predicting, seemingly incorrectly, that the *Reeves* decision would cause courts to stop relying on shortcuts such as the same-actor inference to dismiss discrimination cases on summary judgment).

208. Martin, *supra* note 157, at 1121.

> was therefore admissible to disprove discriminatory motivation. Rather, the Fourth Circuit in [*Proud*] found this fact is *so* probative that it relieved the court of the need to examine any of the other evidence bearing on the issue of discriminatory motivation.[209]

In contrast to the *Proud* court's view, social psychological evidence regarding stereotyping and discrimination calls into question whether same-actor evidence is at all probative in the context of FRD cases.[210] The next Part will analyze the ways in which evidence from social psychology challenges the use of the same-actor inference in FRD cases.

4. *The Same-Actor Inference Has Been Invalidated by Social Psychological Evidence*

As discussed above, the faulty logic underlying the same-actor inference is that if an individual harbors prejudice against a protected class, he or she will engage in discrimination against members of that class at every opportunity.[211] Courts frequently infer from past incidents of non-discrimination against a particular class that discrimination must not have occurred in the present situation.[212] However, decades of social psychological research make clear that this is simply not how stereotyping and discrimination operate.[213] The fact that a party appears not to have discriminated at one point in the past is not evidence of a lack of discriminatory motive in the present. Parts (a) through (d) in the remainder of this section will discuss how each of the four versions of the same-actor inference (the original same-actor inference and its three variations) are called into question by social psychological findings.

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209. Krieger & Fiske, *supra* note 64, at 1044 (emphasis added) (citations omitted).

210. *See supra* Part III.B.

211. *See supra* Part III.A.1–4.

212. *See supra* Part III.A.1–3.

213. *See* Erik J. Girvan & Grace Deason, *Social Science in Law: A Psychological Case for Abandoning the "Discriminatory Motive" Under Title VII*, 60 CLEV. ST. L. REV. 1057, 1091–92 (2013) (stating that the assumptions underlying the same-actor inference are flawed); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1314–16 (1998) (pointing out that the same-actor inference is flawed because it is "simply not how discrimination works"); *see also supra* Part III.B.

a. Same Actor, Same Target

When an actor takes a positive employment action toward an employee before the same actor takes an adverse action toward that employee, courts impose a strong presumption that the adverse action was not motivated by discriminatory animus.[214] However, social psychological research has revealed many reasons why an actor may have hired or promoted the employee in the first place, none of which weaken the inference that the adverse action was discriminatory.[215]

First, the circumstances surrounding an employee's family responsibilities sometimes can change during employment. Recall that descriptive stereotypes about women as lacking in agency, competence, and commitment are sometimes triggered when a woman announces she is pregnant or activates maternal concepts in some other way.[216] In *Richmond v. Johnson,* for example, the plaintiff was denied a promotion not long after her supervisor mistakenly thought she was pregnant.[217] It is perfectly plausible, given the social psychological findings, that Richmond's supervisor believed that she may soon become pregnant, and he therefore began to view her as less competent and committed than he did before. This theory would easily explain why that same supervisor had promoted Richmond one year earlier, before the possibility of pregnancy had been raised.[218]

Second, even in circumstances in which the employee already has family responsibilities at the start of his or her employment, it can be the case that the supervisor deems the employee fit for some positions within the company and not others. If this belief is based on stereotypes about the proper roles of men and women, this kind of conduct is FRD.[219] For example, in *Lust v. Sealy, Inc.,* the plaintiff's supervisor passed her over for a promotion because he assumed that because she had children, she would not be

214. *E.g.,* Richmond v. Johnson, No. 96-6329, 1997 WL 809962, at *2 (6th Cir. Dec. 18, 1997); Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).

215. *See supra* Part II.B.2.

216. *See* Heilman, *supra* note 41, at 658.

217. *Richmond,* 1997 WL 809962, at *1.

218. *See id.*

219. Williams & Bornstein, *supra* note 8, at 171 (defining FRD as discrimination against an individual because of his or her real or perceived caregiving responsibilities).

interested in a job position that required her to relocate.[220] The supervisor was willing to hire Lust for a certain type of job, but later failed to promote her to a different job on the basis of his own gender stereotypes. This is a clear example of how an actor's previous hiring of an employee in no way indicates that the actor's subsequent adverse actions are non-discriminatory.

Third, social psychological research makes clear that discrimination is context dependent.[221] The fact that an actor engages in non-discrimination in the first instance does not mean that the second instance is non-discriminatory. It could be the case that structural constraints made it difficult for the actor to discriminate the first time around.[222] For example, depending on which employees are being considered for a promotion and what their qualifications are, it might be obvious that the actor is discriminating on the basis of sex and potential family responsibilities. There may not be individuating information that the actor can rely on to mask the discriminatory nature of the choice.[223]

Research has also demonstrated that engaging in non-discriminatory behavior may sometimes *increase* the probability that an individual discriminates in the future.[224] After a supervisor has expressed disagreement with sexist statements, or hired or promoted an employee with family responsibilities, the supervisor may feel morally credentialed and become more likely to engage in subsequent discrimination against the same employee.[225] Supervisors may even engage in non-discriminatory behavior at first in order to strategically build up moral credentials and subjectively free themselves to engage in discrimination later.[226]

220. Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).

221. *See supra* Part II.B.2.

222. *See* Hilton & von Hippel, *supra* note 35, at 255–56; Kunda & Spencer, *supra* note 67, at 538, 540.

223. *See* Darley & Gross, *supra* note 70, at 28; Hodson et al., *supra* note 70, at 469; Snyder et al., *supra* note 68, at 2303–04.

224. *See supra* Part II.B.2. *See generally* Monin & Miller, *supra* note 89, at 37 (suggesting that "a decision that favors one minority member (even if it is totally deserved) is sufficient to liberate people to act on an attitude (often based mainly on prejudice) that is detrimental for other minority members").

225. *See* Effron et al., *supra* note 95, at 928; Kouchaki, *supra* note 96, at 713; Monin & Miller, *supra* note 89, at 35.

226. *See* Merritt et al., *supra* note 98, at 774–76.

Finally, the research establishes that it takes cognitive, physical, and self-regulatory resources to inhibit otherwise habitual discriminatory responses.[227] It could be the case that a supervisor is able to inhibit discriminatory responses the first time he or she takes an action regarding the employee, but operates under cognitive load or reduced self-regulatory resources the second time.[228] This example would easily explain why the same supervisor discriminated against the employee only in the most recent case.

Taken together, the social psychological research on stereotyping and discrimination makes clear that discrimination is a context-dependent process. The fact that a supervisor took a positive action toward a given employee in the past is simply not evidence that his or her subsequent adverse action against the employee was non-discriminatory.

b. Same Actor, Different Target

When an actor takes a positive action toward one member of a protected class and an adverse action toward another member of the same class, courts impose a strong presumption that the adverse action was not motivated by discriminatory animus.[229] However, social psychological research reveals many reasons why a supervisor might treat one member of the protected class favorably; this treatment does not weaken the inference that the adverse action against the other member of the class was discriminatory. First, it could be the case that members of the same class differ in their family responsibilities. Recall *Hayden v. Garden Ridge Management, LLC*, for example, in which the plaintiff was fired shortly after he requested FMLA leave to take care of his newborn baby.[230] The court inferred that because another man replaced Hayden, Hayden's employer clearly did not harbor prejudice against men.[231] The research indicates, however, that penalties for men who engage in caregiving behavior are based in prescriptive

227. *See supra* Part II.B.2.

228. *See, e.g.*, Martell, *supra* note 105, at 1950; Perry et al., *supra* note 106, at 638; Sczesny & Kühnen, *supra* note 108, at 18.

229. *See, e.g.*, Hayden v. Garden Ridge Mgmt., LLC, Civil Action No. 4:08CV172, 2009 WL 5196718, at *7 (E.D. Tex. Dec. 22, 2009). For a discussion of *Hayden*, see *supra* Part III.A.3.a.

230. *Hayden*, 2009 WL 5196718, at *1.

231. *Id.* at *5.

stereotypes about the proper role of men in the workplace.[232] Terminating men who violate gender norms by engaging in caregiving and hiring men who adhere to these norms is FRD.[233]

Second, the research establishes that discrimination is context dependent. The fact that an actor treats one member of a protected class favorably does not mean that conduct toward a second member is non-discriminatory. For example, people sometimes strategically make use of stereotypes and engage in discrimination depending on their motivations in a given situation.[234] It is perfectly plausible that an individual who holds stereotypes and prejudices about individuals with family responsibilities might inhibit discriminatory conduct when properly motivated to do so. Conversely, the motivation to restore self-esteem, to give just one example, might lead a supervisor to denigrate one member of a protected class.[235] Research on moral credentials might also explain this situation. A supervisor who has treated one member of a protected class favorably might feel morally credentialed enough to discriminate against another member.[236]

Finally, social psychological research on priming indicates that stereotyping and discrimination can vary over time as a function of what concepts the individual is exposed to in the immediate environment. A supervisor who is primed with stereotypical portrayals regarding a protected class may temporarily become

232. CENTER FOR WORKLIFE LAW, *supra* note 25, at 20–21; Williams & Tait, *supra* note 38, at 865–69.

233. *See* Berdahl & Moon, *supra* note 61, at 358–59 ("Men who violated traditional gender roles by actively caring for children outside the home, in contrast, experienced more workplace mistreatment than men who did not actively care for children."); Coltrane et al., *supra* note 40, at 297–98 ("[M]en who opt for a 'daddy track,' by choosing flexible work trajectories suffer lower long-term earning."); Rudman & Mescher, *supra* note 40, at 335–36 ("[M]ale leave requesters suffered feminity stigma, such that perceivers judged them as weaker and more communal . . . ."); Vandello et al., *supra* note 40, at 315–16 ("[M]anagers are most likely to grant flextime to men who seek flexible arrangements specifically for the purpose of advancing their careers (as opposed to child caregiving).").

234. *See, e.g.*, Kunda et al., *supra* note 82, at 295; *see also* Sinclair & Kunda, *supra* note 82, at 1340.

235. *See, e.g.*, Kunda et al., *supra* note 82, at 295; *see also* Sinclair & Kunda, *supra* note 82, at 1340.

236. *See* Effron et al., *supra* note 95, at 928; *see also* Kouchaki, *supra* note 96, at 713; Monin & Miller, *supra* note 89, at 35.

more likely to discriminate against members of that class.[237] This priming could lead the supervisor to treat one member of the class favorably but, in a different situation, to discriminate against another member of the class. Despite being context sensitive, this type of discrimination would still be rooted in the stereotypes and prejudices that existed in the supervisor's cognitive structure. Taken together, social psychological research on stereotyping and discrimination makes clear that a supervisor's positive treatment of one member of a protected class does not render all conduct toward other members of that class non-discriminatory.

c. Multiple Actors, Same Target

When an organization with multiple actors takes a positive action toward an employee and then later takes an adverse action against that employee, courts impose a strong presumption that the adverse action was not motivated by discriminatory animus.[238] Courts assume that if the employee received favorable treatment in the past, it is unlikely that the employee has been discriminated against, even when multiple actors are involved in decision making regarding the employee. For example, in *Sreeram*, one member of the plaintiff's Residency Review Committee granted Dr. Sreeram's request to complete an additional year of residency when the Committee recommended expulsion.[239] That same committee then expelled Dr. Sreeram the next year.[240] Because the final decision to expel Dr. Sreeram included the doctor who had previously delayed her expulsion, the court presumed that that doctor (and by extension, the rest of the Committee) must not have acted on the basis of sex and family responsibilities discrimination.[241] This reasoning is faulty for the obvious reason that even if the member of the Committee who had previously acted positively toward Dr. Sreeram had acted without prejudice (which seems unlikely in Dr. Sreeram's case), that member might have been pressured or outvoted by the rest of the Committee the following year. The one

237. *See* Rudman & Borgida, *supra* note 117, at 510–11.

238. Sreeram v. La. State Univ. Med. Ctr.–Shreveport, 188 F.3d 314, 320–21 (5th Cir. 1999).

239. *Id.* at 317. For a discussion of *Sreeram*, see *supra* Part III.A.3.b.

240. *Sreeram*, 188 F.3d at 317.

241. *Id.* at 321.

member's non-discrimination in no way indicates that other Committee members acted without discrimination.[242]

Furthermore, social psychological research reveals many reasons why an employee might receive different treatment from a group of supervisors at different times—favorable treatment on some occasions does not weaken the inference that an adverse action against the employee was discriminatory.[243] Research indicates that the workplace can impose structural constraints on discriminatory behavior.[244] A supervisor who inhibits discrimination against an employee in one situation—for example, by giving the employee a promotion—may simply do so because the circumstances surrounding the decision are such that discrimination would be obvious.[245] This inhibited discrimination would not weaken the inference that a different supervisor on a different day engaged in discrimination against the same employee. Research on moral credentialing also makes clear that this process can operate at the group level.[246] A supervisor whose organization has treated a member of a protected class favorably in the past may feel morally credentialed by proxy and become more likely to discriminate against the employee.[247] Thus, there is no basis for the assumption that when an employee has received favorable treatment from some actors in an organization, all conduct toward that employee from all actors is non-discriminatory.

242. Other courts have recognized that non-biased supervisors and decision makers can be influenced by other biased actors within the company. *See, e.g.*, EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 478 (10th Cir. 2006) (finding possible discrimination where the manager who decided to terminate the plaintiff did not know that the plaintiff was black, but relied exclusively on information provided by the plaintiff's immediate supervisor, who allegedly harbored racial bias); Griffin v. Wash. Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998) (asserting that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence"); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (finding discriminatory animus where a hiring committee's decision to discharge a worker was "tainted" by the supervisor's bias).

243. *See supra* Part II.B.2.

244. *See supra* Part II.B.2.

245. *See* Darley & Gross, *supra* note 70, at 27–28; *see also* Hodson et al., *supra* note 70, at 469; Snyder et al., *supra* note 68, at 2303–04.

246. *See supra* Part II.B.2.

247. *See* Kouchaki, *supra* note 96, at 713.

d. Actor and Target in the Same Protected Class

Courts impose a strong presumption that the adverse action was not motivated by discriminatory animus when an actor takes an adverse action toward a member of the same protected class as the actor.[248] Courts assume that individuals could not harbor negative stereotypes or engage in discrimination against their own group. However, social psychological research reveals many reasons why a supervisor might discriminate against a member of his or her own protected class. In the context of sex discrimination in particular, there is significant evidence from social psychology that both men and women can endorse traditional gender roles.[249] It could be the case that the employee has not lived up to the supervisor's stereotypes about what is proper behavior for members of their class.[250] The research indicates that penalties for men and women who have family responsibilities are based in prescriptive stereotypes about the proper roles of men and women.[251] Penalizing a member of one's own class for violating these gender norms is quite common, and it constitutes FRD.[252]

Taken together, the social psychological research on FRD, and stereotyping and discrimination more broadly, establishes that discrimination is a context-dependent process. The fact of an actor's non-discrimination in one situation (or shared membership

248. *See, e.g.*, James v. Verizon, 792 F. Supp. 2d 861, 869–70 (D. Md. 2011); Vernon v. A & L Motor Sales, Civ. Action No. 07-1508, 2009 WL 866851, at *5 (W.D. Pa. Mar. 30, 2009); Aceto v. Town of Bloomfield, Civ. No. 3:04CV01877(AWT), 2006 WL 1405579, at *5 (D. Conn. May 19, 2006); Jackson v. Sch. Bd. of Richmond, No. 99–CV–642, 2000 WL 34292578, at *7 (E.D. Va. Mar. 15, 2000). *But see* Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 574 (6th Cir. 2003) (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998)) ("[T]he idea that one member of a group is unlikely to discriminate against another member of the same group . . . has been explicitly rejected by the Supreme Court in the context of race and sex discrimination.").

249. *See supra* note 202 and accompanying text.

250. *E.g.*, Johnson v. Zema Sys. Corp., 170 F.3d 734, 744–45 (7th Cir. 1999); *see also* Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1160 (8th Cir. 2003); Marchioli v. Garland Co., No. 5:11–CV–124(MAD/ATB), 2011 WL 1983350, at *2–3 (N.D.N.Y. May 20, 2011).

251. *Cultural Schemas*, *supra* note 27, at 220–22.

252. *See generally, e.g.*, Berdahl & Moon, *supra* note 61; Coltrane et al., *supra* note 40; Fuegen et al., *supra* note 44; Heilman, *supra* note 41; Heilman & Okimoto, *supra* note 46; Rudman & Mescher, *supra* note 40; Vandello et al., *supra* note 40.

in a protected class) is simply not evidence that the actor's current conduct is nondiscriminatory. In some cases, an act of nondiscrimination can even make it *more* likely that the individual will discriminate in the future.[253] There is no basis for the same-actor inference in empirical reality, and same-actor evidence is minimally probative in an FRD case.

B. The Same-Actor Inference Has Caused Significant Harm in FRD Jurisprudence

Not only is same-actor evidence not particularly probative in determining whether an adverse action was motivated by FRD, the same-actor inference is unduly prejudicial to plaintiffs in FRD cases. Given that the purpose of Title VII is to eliminate discrimination based on sex and other classifications,[254] the use of the same-actor inference in FRD cases is difficult to justify. As of 2008, "[e]very federal circuit had adopted some form of the same-actor" inference.[255] In circuits that use the same-actor inference in its most restrictive forms, same-actor evidence leads to a strong inference against discrimination, creating what amounts to a nearly irrebuttable presumption that most plaintiffs cannot overcome.[256] In the circuits that use the same-actor inference in more moderated forms, courts tend to consider same-actor evidence holistically alongside other evidence.[257] Taken together, it is no wonder that the federal courts are perceived as increasingly hostile venues for employment discrimination plaintiffs.[258] The remainder of this section will analyze the damage that the same-actor inference causes in the context of FRD jurisprudence.

253. *See, e.g.*, Gordijn et al., *supra* note 111, at 212; Monin & Miller, *supra* note 89, at 39–40.

254. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).

255. *See* Martin, *supra* note 157, at 1128.

256. *Id.*

257. *Id.* at 1129.

258. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 750 (2012); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 112 (2011).

1. *The Same-Actor Inference Leads to the Dismissal of Meritorious Cases at Summary Judgment*

The use of the same-actor inference during the summary judgment stage of an FRD case is extremely prejudicial to the plaintiff. Even when a plaintiff meets his or her burden under the *McDonnell-Douglas* framework during this stage by presenting evidence of pretext, the same-actor inference allows the court to dismiss the plaintiff's claim.[259]

a. *Curtailing Discovery*

Under the *McDonnell-Douglas* framework, a plaintiff must present evidence that whatever non-discriminatory reason the employer gave for taking the adverse action is mere pretext.[260] When plaintiffs are able to present some evidence of pretext and discrimination during the summary judgment stage, their cases should proceed to trial to be heard by a jury. Unfortunately, even when a plaintiff is able to present evidence of pretext and discrimination, the same-actor inference allows the court to dismiss the plaintiff's claim.[261] Some have argued that although the same-actor inference is meant to be a rebuttable presumption at its strongest, it amounts to an irrebuttable presumption during summary judgment.[262] Very few plaintiffs can marshal the evidence they need to overcome this presumption, particularly when they have not begun or completed discovery. Without discovery, access to evidence is severely asymmetrical in an employment discrimination case. The employer has access to records of everything the plaintiff ever did, all email communications that took place within the organization with regard to the plaintiff, all

259. Donald & Pardue, *supra* note 258, at 758.

260. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973) ("In sum, respondent should have been allowed to pursue his claim under § 703(a)(1). If the evidence on retrial is substantially in accord with that before us in this case, we think that respondent carried his burden of establishing a prima facie case of racial discrimination and that petitioner successfully rebutted that case. But this does not end the matter. On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application.").

261. Donald & Pardue, *supra* note 258, at 758.

262. Ross B. Goldman, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533, 1559 (2007); Martin, *supra* note 144, at 379.

records relating to other employees who may be used as comparators, and more. Except in rare cases, plaintiffs are unlikely to have access to anything more than their own pay stubs and their memories of conversations they had in the workplace. When the same-actor inference is used during the summary judgment stage before discovery has been completed, the evidentiary burden on plaintiffs is raised to the highest point possible at a time when plaintiffs have the least evidence to work with. The result is that courts "effectively grant immunity to employers when same actors are involved."[263]

b. Blurring the Roles of Judge and Jury

Not only does the same-actor inference create such a high evidentiary barrier to plaintiffs during summary judgment as to constitute near immunity for employers, it allows courts to play a role that many regard as improper during the summary judgment stage. Some argue that the same-actor inference "gives courts the opportunity to weigh the plaintiff's and defendant's respective cases and find for the defendant based on one discrete fact rather than acknowledge factual disputes from the whole of the proof presented."[264] This fact weighing is particularly problematic in the summary judgment stage, when facts are supposed to be considered in the light most favorable to the non-moving party.[265] The use of the same-actor inference during summary judgment effectively strips a plaintiff of his or her right, as the non-moving party, to have factual disputes reasonably resolved in his or her

263. Martin, *supra* note 144, at 380.

264. Donald & Pardue, *supra* note 258, at 758; *see also* Stone, *supra* note 258, at 113. Scholars have identified

> an "anti-plaintiff effect," whereby employment discrimination plaintiffs appear to be systemically disadvantaged by judicial skepticism toward the plausibility of what they are alleging.
>
> This effect is manifest in the "shortcut" doctrines that premise often lethal inferences against employment discrimination plaintiffs on simplistic caricatures of the mechanics of human behavior and workplace dynamics. A "shortcut," as the term is used in this Article, may be defined as a label or inference that proxies for reasoned analysis. Shortcuts unfairly skew toward a defendant's case by permitting or compelling a trier to make unwarranted assumptions or to attach undue significance to a single fact or facet of a case.

Id. (citations omitted).

265. Scott v. Harris, 550 U.S. 372, 378 (2007).

favor.[266] Instead of taking the existing evidence of pretext at face value and determining that a reasonable jury could find for the plaintiff, many courts use the same-actor inference to effectively nullify the evidence the plaintiff has presented and dispose of the case.[267] The courts thus invade the fact-finding territory of the jury[268] and "wrongly deny plaintiffs the statutory right to a jury verdict."[269]

For example, in *Haynes v. Gernsbacher's, Inc.*, the plaintiff was hired as a showroom sales manager by Harold Gernsbacher.[270] On one occasion, Haynes asked to speak to Gernsbacher about her position, and he replied, "as long as it doesn't have to do with money, because all you women want is money."[271] A few months later, Haynes underwent surgery to remove her ovaries and took four weeks of medical leave from work.[272] The day Haynes returned to work, Gernsbacher terminated her and then replaced her with a man.[273] Furthermore, Gernsbacher did not follow the company's own policy on using progressive discipline before terminating an

266. Martin, *supra* note 144, at 382. *See generally* Donald & Pardue, *supra* note 258 (discussing "the federal judiciary's attitude towards employment discrimination plaintiffs and how that perceived hostility is manifested, particularly at the summary judgment state of litigation").

267. *See, e.g.*, Sreeram v. La. State Univ. Med. Ctr.–Shreveport, 188 F.3d 314, 320 (5th Cir. 1999).

> Even after indulging in every reasonable inference in favor of the Dr. Sreeram, we find that the record is so suffused with evidence that the Dr. Sreeram was unqualified, that no rational trier of fact could conclude that Dr. Sreeram was terminated for any reason other than her deficiencies as a surgeon. Thus, we find that Dr. Sreeram did not present evidence sufficient to create a genuine issue of material fact as to whether the legitimate, non-discriminatory reason for Dr. Sreeram's termination proffered by appellees was pretextual.

Id.

268. Martin, *supra* note 144, at 378; *see also* Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003) (rejecting a mandatory presumption of non-discrimination based on same-actor evidence because it is inconsistent "with the requirement that, in considering a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party").

269. Goldman, *supra* note 262, at 1560.

270. Haynes v. Gernsbacher's, Inc., No. 4:01-CV-594-A, 2002 WL 1783905, at *1 (N.D. Tex. July 31, 2002).

271. *Id.*

272. *Id.* at *2.

273. *Id.*

employee.[274] The court ruled that because Gernsbacher had both hired and fired Haynes, Haynes's evidence of pretext was not strong enough to overcome the court's strong inference of non-discrimination.[275] Certainly a reasonable jury could find that Gernsbacher engaged in discrimination, given Gernsbacher's comment about women, the fact that he fired her the day she returned from reproduction-related medical leave, the fact that he violated his company's own termination policy, and the fact that he replaced Haynes with a male employee. However, the court invaded the fact-finding territory of the jury, weighed the evidence on its own, and brushed aside this entire body of evidence in favor of the solitary fact that the man who terminated Haynes was the one who had hired her in the first place.

Another case, *DeJarnette v. Corning Inc.*, demonstrates that this same problem can occur as part of a judgment as a matter of law, which, for our purposes, uses the same standard of review as summary judgment.[276] In *DeJarnette*, the plaintiff was hired as a probationary employee and was terminated before she could be instated as a full-time employee.[277] DeJarnette was hired by Kathy Schrock, who knew that DeJarnette was pregnant at the time and said that this would not be a problem for employment.[278] DeJarnette received mediocre evaluations from her direct supervisor during her probationary employment period and was eventually terminated.[279] Throughout the pleadings and into trial, Corning's alleged reasons for terminating DeJarnette were inconsistent,[280] and DeJarnette offered several forms of evidence to establish that her job performance was better than Corning

274. *Id.* at *4.

275. *Id.* at *3–4.

276. *See* 133 F.3d 293, 297 (4th Cir. 1998) (stating that the court would "examine the evidence in the light most favorable to DeJarnette, the nonmoving party," that the motion "should be granted with respect to an issue if there is no legally sufficient evidentiary basis for a reasonable jury to find for [the nonmoving] party[,]" and that the court "may not weigh the evidence, pass on the credibility of the witnesses, or substitute [its] judgment of the facts for that of the jury" (internal quotation marks omitted) (citing Brown v. CSX Transp., Inc., 18 F.3d 245, 248 (4th Cir. 1994))).

277. *Id.* at 295–96.

278. *Id.*

279. *Id.* at 296.

280. *Id.* at 300 (Murnaghan, J., dissenting).

asserted.[281] The jury eventually found that DeJarnette was discriminated against on the basis of her pregnancy, and it awarded her substantial damages.[282]

The appellate court, in reviewing Corning's motion for judgment as a matter of law, overturned the jury's verdict and dismissed DeJarnette's case.[283] The court asserted that because some of the same actors were involved in DeJarnette's hiring and termination, the same-actor inference applied.[284] The court concluded that DeJarnette's evidence of pretext was simply not enough to overcome the presumption that because somebody at Corning knew that DeJarnette was pregnant at the time she was hired, no reasonable jury could find that her termination was discriminatory.[285] The court's reliance on the same-actor inference in this case is particularly striking, because not only did the court invade the fact-finding domain of the jury and weigh the credibility of various pieces of evidence on its own,[286] but it did so after the jury had already decided in favor of DeJarnette.[287]

As these examples illustrate, it is unreasonably difficult for FRD plaintiffs to have their cases decided by juries. The same-actor inference raises the evidentiary bar extremely high for plaintiffs at a point in litigation when they have the least access to the evidence they need.[288] The same-actor inference also allows judges to

281. *Id.* at 299 (majority opinion).

282. *Id.* at 297.

283. *Id.* at 300.

284. *Id.* at 298. The majority's use of the same-actor inference in this case is even more problematic than usual due to the fact that, as the dissent correctly pointed out, the majority fudged the facts significantly on this point; it is not at all clear that the same people were involved in DeJarnette's hiring and termination. *Id.* at 300 (Murnaghan, J., dissenting) ("Reliance *sua sponte* by the majority on *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991), for the proposition that hiring and firing by the same individual constitutes an inference of non-discrimination is not justified. Schrock did the hiring, Breznay the firing.").

285. *Id.* at 298 (majority opinion).

286. *Id.* at 300 (Murnaghan, J., dissenting) (citing Taylor v. Home Ins. Co., 777 F.2d 849, 854 (4th Cir. 1985); Abasiekong v. City of Shelby, 744 F.2d 1055, 1059 (4th Cir. 1984)) ("The issue of credibility of the witnesses is not for us. DeJarnette, as the non-moving party, was entitled to the benefit of 'every legitimate inference' in her favor. That is especially true where determinations of motive and causation are critical." (quoting Duke v. Uniroyal, Inc., 928 F.2d 1413, 1419 (4th Cir. 1991))).

287. *Id.*

288. *See supra* Part III.B.1.a–b.

circumvent the normal summary judgment standards and enter summary judgment for an employer even when a reasonable jury could find for the plaintiff.

2. *The Same-Actor Inference Causes Meritorious Cases to Lose at Trial*

For those plaintiffs in FRD cases who proceed to trial and have their cases decided by juries, the same-actor inference continues to be prejudicial enough to outweigh any minimal probative value it may have.[289] It is no accident that the same-actor inference presents such a high evidentiary barrier to plaintiffs; the *Proud* court made clear that the same-actor inference was designed to dispose of plaintiffs' discrimination cases in high numbers.[290] Once an employer brings same-actor evidence, it establishes a strong presumption that its non-discriminatory motives for taking an adverse action against the plaintiff are non-pretextual under the *McDonnell-Douglas* framework.[291] The plaintiff can attempt to offer evidence showing that the employer's motives are in fact pretextual, but, as the *Proud* court stated, "in most cases . . . such evidence will not be forthcoming."[292] Furthermore, courts that use the strongest forms of the same-actor inference have not articulated what kind of evidence it would take for a plaintiff to overcome this evidentiary burden.[293]

Among the judiciary, the same-actor inference allows judges "to proxy monolithic assumptions for the individualized reasoned analyses mandated by the relevant antidiscrimination legislation."[294] Among jurors, the same-actor inference causes serious problems because it encourages members of the lay public to rely on faulty assumptions about human psychology that do not comport with social psychological science.[295] The same-actor inference leads fact-finders to substitute a holistic analysis of the entire body of evidence with overly simplistic, inaccurate beliefs about how discrimination operates, and the inference causes some courts to

289. Martin, *supra* note 144, at 392–93.
290. Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991).
291. *Id.*
292. *Id.*
293. Martin, *supra* note 144, at 367.
294. Stone, *supra* note 258, at 111.
295. *See* Krieger & Fiske, *supra* note 64, at 1039–53.

give disproportional weight to one piece of minimally probative evidence that favors the employer.

3. The Same-Actor Inference Creates Perverse Incentives for Employers

In addition to the problems caused by the same-actor inference during litigation, the same-actor inference doctrine also does harm outside of the courtroom by creating perverse incentives for employers to engage in conduct that undermines anti-discrimination law. First, the same-actor inference creates near immunity for employers who hire individuals in a protected class.[296] The same-actor inference affords employers "protection in the event they decide to rid the workplace of individuals in protected categories under Title VII."[297] This near immunity seems to be no accident. When the *Proud* court first articulated the same-actor inference, it explained that "employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."[298] It is possible, for example, that workplaces that hire women with children could use the inference to place an inordinate amount of weight on that fact, rather than having to present evidence of non-discrimination against the plaintiff. This problem may be particularly severe in FRD cases, because they are typically sex-plus[299] cases in which the protected class is sometimes ambiguous and can be misidentified by the courts.[300]

Second, the same-actor inference defies the purpose of Title VII and other anti-discrimination laws by allowing employers to abdicate their responsibility to address unequal employment opportunities. The purpose of Title VII is not merely to provide remedies to employees who have been wronged, but to eliminate the problem of employment discrimination in the United States.[301]

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296. Martin, *supra* note 157, at 1122.

297. *Id.*

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

299. *See generally* Wendi Barish, *"Sex-Plus" Discrimination: A Discussion of* Fisher v. Vassar College, 13 HOFSTRA LAB. & EMP. L.J. 239, 240–41 (1995) (discussing the definition and types of sex-plus discrimination).

300. *See, e.g.*, Hayden v. Garden Ridge Mgmt., L.L.C., Civil Action No. 4:08CV172, 2009 WL 5196718, at *5 (E.D. Tex. Dec. 22, 2009) (assessing the individual's claims based solely on the individual's gender rather than assessing the individual's family responsibility as the core of the discrimination).

301. *See, e.g.*, Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 528 (1999)

The availability of the same-actor inference in defense of discrimination cases "exonerates employers from their responsibility to address structural and cultural barriers to workplace equality, forces within the employers' control and which often they employ strategically for business reasons."[302]

The use of the same-actor inference in FRD cases is problematic at any stage. It prevents plaintiffs from conducting much needed discovery, allows judges to improperly blur the roles of judge and jury during summary judgment, places disproportionate weight on a single piece of minimally probative evidence at trial, and encourages employers not to make efforts to prevent employment discrimination in the first place.

IV. THE SAME-ACTOR INFERENCE SHOULD BE ABOLISHED IN FRD CASES UNDER TITLE VII

The same-actor inference should be abolished from all FRD cases under Title VII. Same-actor evidence is minimally probative at best and is highly prejudicial to FRD plaintiffs. Furthermore, eliminating the same-actor inference would not be difficult for courts to do. It would simply require that the courts adhere to the same summary judgment and evidentiary standards that they use in other Title VII cases not involving same-actor issues. Given how simple it would be to make this reform, it may seem unnecessary to lay out a detailed case for this proposal. However, because the same-actor inference is so "fully entrenched in workplace [discrimination] law,"[303] with the majority of the circuits using its "most potent form" to create barriers for plaintiffs,[304] it is clearly necessary to make the case for its elimination.

("Dissuading employers from implementing programs or policies to prevent workplace discrimination is directly contrary to Title VII's prophylactic purposes."); Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1110 (1983) ("[A] central purpose of Title VII is to prevent employers from treating individual workers on the basis of sexual or racial group characteristics."); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) ("The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.").

302. Martin, *supra* note 157, at 1122.

303. *Id.* at 1121.

304. *Id.*

A. *What Eliminating the Same-Actor Inference Would Entail*

Under a system in which the same-actor inference was not available, FRD plaintiffs would present whatever evidence they had to make a prima facie case under the *McDonnell-Douglas* framework. During summary judgment, a plaintiff would need to show that he or she belonged to a protected class under Title VII, met the employer's legitimate expectations for job performance, suffered an adverse employment action, and that the circumstances gave rise to the inference that this action was based on sex.[305] It would not be particularly difficult for most plaintiffs to make a prima facie case if their claims had merit. Because the plaintiff would typically be the non-moving party in a motion for summary judgment, courts would consider the facts in the light most favorable to the plaintiff.[306] Same-actor evidence (i.e., the names of those who made positive and adverse employment decisions regarding the plaintiff) might arise in the course of explaining the timeline of events, but courts would refrain from using this information as evidence of non-discrimination, and it would not raise the evidentiary burden for the plaintiff. If the employee were able to make a prima facie case for discrimination, the employer defendant would offer evidence of a non-discriminatory motive for the adverse action.[307] This motive would not be particularly difficult to supply either, as most employers can point to some shortcoming of their employees when pressed to do so. Finally, in the third stage of the *McDonnell-Douglas* framework, the plaintiff would present some evidence that the non-discriminatory reason offered by the employer was mere pretext for discrimination.[308] This stage would be more difficult for the employee because employers often do not leave paper trails evidencing their discriminatory motives. However, if the plaintiff could offer just enough evidence that a reasonable jury could find pretext, he or she would satisfy the *McDonnell-Douglas* burden-shifting framework and the judge would deny the motion for summary judgment.[309]

305. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); *Hayden*, 2009 WL 5196718, at *5.

306. Scott v. Harris, 550 U.S. 372, 378 (2007).

307. *McDonnell Douglas Corp.*, 411 U.S. at 802.

308. *Id.* at 804.

309. *See, e.g.*, Meier v. Noble Hospitality, Inc., 197 F. Supp. 2d 1178, 1184 (S.D. Iowa 2001).

At trial, the plaintiff would make his or her case for discrimination to the jury. It would be advisable for the plaintiff to move in limine to exclude same-actor evidence,[310] so that jurors could not make improper inferences of non-discrimination from the fact that, for example, the same individual promoted and then fired the plaintiff. In many (albeit, not all) cases, it would not be difficult to exclude this evidence; the employer could simply testify about the circumstances surrounding the positive employment decision without naming the people behind that decision. Furthermore, if the employer had been taking appropriate steps to prevent discrimination in the workplace, it would have plenty of other, more probative, pieces of evidence to offer.

If the court deemed it improper or impracticable to exclude same-actor evidence, the plaintiff could consider asking for a jury instruction advising the jury that the same-actor evidence should not create a presumption of non-discrimination. However, this instruction should not be considered a viable alternative to outright exclusion. Jury instructions not to consider certain types of evidence have been found to be fairly ineffective, and may serve only to draw attention to the evidence in question.[311] The plaintiff could also consider offering expert social psychological testimony to explain to the jury why an incident of non-discrimination in the past is not evidence of non-discrimination in the present. Such testimony may help to prevent jurors from using same-actor reasoning on their own or implicitly applying a same-actor inference to raise the evidentiary bar for the plaintiff. Ideally, the jury would weigh all of the evidence presented by both parties and make its own determinations of credibility. The important point is that if same-actor evidence is present at trial, it would be regarded, at most, as just one minor piece of evidence within the whole body of evidence.

It should be clear from this description of an FRD case that eliminating the same-actor inference would not be a groundbreaking move on the part of the courts. Litigating FRD cases without the same-actor inference would simply bring these

310. *See* Martin, *supra* note 144, at 392. For example, a plaintiff could move to exclude same-actor evidence under Federal Rule of Evidence 403, on the grounds that the risk of unfair prejudice to the plaintiff substantially outweighs the probative value of the evidence. *See* FED. R. EVID. 403.

311. *E.g.*, Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1864–65 (2001).

cases in line with other Title VII cases in which there is no same-actor situation.[312] Given the significant problems that the same-actor inference causes in FRD litigation, the minimally probative value of same-actor evidence, and the simplicity of the necessary reform, it is difficult to justify the courts' continued use of the same-actor inference.

B. Benefits of Eliminating the Same-Actor Inference

The potential benefits of eliminating the same-actor inference from FRD cases under Title VII are enormous. First, by eliminating this barrier during the summary judgment stage, plaintiffs will be less likely to have their cases dismissed before they have even completed discovery. Removing the presumption at the summary judgment stage is extremely important given the significant disadvantage plaintiffs experience in accessing evidence. Before discovery is complete, plaintiffs are much more likely to defeat a motion for summary judgment under the standard *McDonnell-Douglas* analysis when the only requirement is some credible evidence of pretext and discrimination, rather than when the same-actor inference is imposed. If courts no longer imposed nearly irrebuttable presumptions of non-discrimination during this phase, they would no longer "effectively grant immunity to employers when same actors are involved."[313]

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312. *See, e.g.*, Eslinger v. U.S. Cent. Credit Union, 866 F. Supp. 491, 498–99 (D. Kan. 1994). The court reasoned:

> Defendant argues that plaintiff cannot, and has not, met her burden to produce evidence indicating that U.S. Central's explanation for her termination is a pretext for unlawful gender discrimination because Mr. Bell, the individual who eliminated her position, is the same individual who promoted plaintiff . . . while she was pregnant with her second child. . . .
>
> . . . However, . . . [c]onsidering the evidence as a whole, the court believes there to be sufficient evidence from which a reasonable jury could conclude that gender played a role in the decision to terminate plaintiff. Giving plaintiff the benefit of all reasonable inferences flowing from the evidence presented, to which she is entitled upon a motion for summary judgment, the court is compelled to find in her favor. The court cannot conclude, as a matter of law, that there is an absence of evidence in support of plaintiff's claim.

Id.

313. Martin, *supra* note 144, at 380.

Second, eliminating the same-actor inference would force courts to play a more appropriate role during the summary judgment stage, rather than invading the fact-finding territory of the jury.[314] Using the same-actor inference during summary judgment, courts "weigh the plaintiff's and defendant's respective cases and find for the defendant based on one discrete fact rather than acknowledge factual disputes from the whole of the proof presented."[315] The use of the same-actor inference thus strips plaintiffs of their right, as the non-moving party, to have factual disputes reasonably resolved in their favor.[316] Although some argue that the same-actor inference helps courts to eliminate frivolous claims during summary judgment and reduce their caseloads,[317] the reality is that cases with merit are too often being disposed of this way.[318] Congress enacted Title VII in order to reduce employment discrimination,[319] and courts cannot simply recite inferences in order to abdicate their responsibility to provide remedies for victims of discrimination. Without the ability to use the same-actor inference to impose significant evidentiary burdens on FRD plaintiffs, courts would no longer be able to dispose of plaintiffs' cases during summary judgment in spite of the existence of adequate evidence to support a finding of discrimination from a reasonable jury.

Third, without the availability of the same-actor inference and the near immunity that it provides, employers may be incentivized to take more effective steps to prevent discrimination in the workplace. Although more social psychological research is needed on the types of structural workplace factors that decrease FRD in

314. *See* Goldman, *supra* note 262, at 1560–62; Martin, *supra* note 144, at 377–78.

315. Donald & Pardue, *supra* note 258, at 758; *see also* Stone, *supra* note 258, at 113.

316. Martin, *supra* note 144, at 382. *See generally* Donald & Pardue, *supra* note 258, at 753–54.

317. *See* Bryant & Bales, *supra* note 147, at 279; Goldman, *supra* note 262, at 1556.

318. *See* Goldman, *supra* note 262, at 1560.

319. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 528 (1999); Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1110 (1983) (citing City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 720–21 (1978)); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

employment,[320] there exists a significant body of best practices that employers could implement to reduce discrimination. The Center for WorkLife Law, for example, offers a list of best practices for employers interested in reducing the risk of FRD.[321] These practices include conducting meaningful training for supervisors, addressing FRD in official anti-discrimination policies, conducting periodic self-audits of employment practices, holding managers accountable for their decisions, establishing flexibility policies and supporting employees who use them, and more.[322] As social psychologists reveal more and more ways to reduce FRD—even subtle, less-than-conscious forms of FRD—in the workplace, it will become easier for employers to take affirmative steps to reduce discrimination.[323] Eliminating the same-actor inference from FRD cases will eliminate what is currently a major disincentive to take these steps.

Fourth, eliminating the same-actor inference from the trial setting will make it more likely that fact-finders will holistically analyze the entire body of evidence, rather than placing disproportionate emphasis on a single piece of minimally probative evidence. As it now stands, once courts announce that the employer has earned a strong presumption of non-discrimination, any evidence short of a "smoking gun" written document admitting that the company's reasons for the adverse action were pretextual is unlikely to defeat the same-actor inference.[324] Without the same-actor inference, fact-finders can examine the entire body of evidence in concert. Elimination of the inference and evidence to that effect would not significantly reduce the amount of evidence available to the employer. Employers could present all of the evidence that would be relevant in any other discrimination case not involving a same-actor issue; this might include comparator evidence, statistical or other pattern-and-practice evidence, evidence of non-discrimination policies and training efforts, evidence of company self-audits to reduce discrimination, evidence regarding the availability of flexibility policies, and evidence to support the employer's non-discriminatory reason for taking the

320. *See* Miller, *supra* note 12, at 362.

321. *See* Univ. of Cal. Hastings Coll. of the Law, *Best Practices*, CENTER FOR WORKLIFE L., http://worklifelaw.org/frd/more-on-frd/for-employers/best-practices (last visited Dec. 2, 2014).

322. *Id.*

323. *See* Miller, *supra* note 12, at 373.

324. *See* Martin, *supra* note 157, at 1129.

adverse action. In fact, the more an employer makes efforts to put in place the best practices discussed above (thus fulfilling the primary purpose of Title VII[325]), the more evidence it would have in support of its claim of non-discrimination. In short, employers would not be significantly prejudiced by the exclusion of same-actor evidence, as they would still have access to the full range of evidence with probative value regarding non-discrimination. Fact-finders should be given the opportunity and the obligation to holistically review the body of evidence from each party and draw inferences from the totality of the circumstances.

The final benefit of eliminating the same-actor inference is that this reform would bring FRD law more in line with the empirical realities of human behavior. The same-actor inference relies on extremely faulty reasoning regarding how stereotyping and discrimination operate, and the result has been a system of anti-discrimination law that is hostile to those who suffer discrimination.[326] When judges' folk theories of human behavior align with empirical reality, they are equipped to make decisions that further justice and the goals of public policy. By eliminating the same-actor inference from FRD cases under Title VII, we can begin to "close the gap between folk and scientific theories of the person"[327] in the law and bring FRD jurisprudence more in line with the original goals of Title VII.

Some scholars advocate simply removing the same-actor inference from the summary judgment stage and continuing to use it in trial.[328] Although this solution would ameliorate some of the harms caused by the same-actor inference in FRD cases, it would leave many problems unsolved. This approach would not change the fact that at trial, fact-finders could place disproportionate emphasis on a single piece of minimally probative evidence. It would not change the fact that the evidentiary burden on plaintiffs would be raised to an unreasonable degree. It would not do much

325. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999); Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1110 (1983) (O'Connor, J., concurring); Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

326. Donald & Pardue, *supra* note 258, at 750; *see also* Stone, *supra* note 258, at 112.

327. Tyler & Jost, *supra* note 126, at 808.

328. *See* Donald & Pardue, *supra* note 258, at 762–63. *See generally* Goldman, *supra* note 262.

to increase employers' incentives to take actions that would prevent discrimination in the workplace. It would certainly not change the empirical reality that evidence of an actor's non-discriminatory act in the past is simply not evidence of non-discrimination in the present. Thus, although removing the same-actor inference from the summary judgment stage and allowing plaintiffs to present their cases to a jury is an important step in the right direction, it simply does not go far enough to eliminate many of the harms that the same-actor inference causes. The same-actor inference should be eliminated altogether from FRD cases under Title VII.

V. CONCLUSION

FRD in the workplace is a major problem in today's society, and it plays an important role in the gender disparities that persist despite major legal reforms. Both men and women who are victims of FRD deserve legal relief. Social psychological research on stereotyping and discrimination has shed light on how dynamic and context dependent these processes are. In particular, this body of research makes clear that a single act of non-discrimination in the past is no indication that an individual will not discriminate in the future.

Unfortunately, the same-actor inference allows courts to infer that because an individual took a positive action toward an employee in the past, the individual's present actions are not discriminatory in nature. Despite the fact that this presumption flies in the face of decades of empirical knowledge from social psychology, courts continue to use it to dispose of meritorious FRD cases. Courts impose extremely high evidentiary burdens on plaintiffs at a time when they have the least access to evidence, they invade the territory of the jury by evaluating and weighing evidence during summary judgment, they cause unfair prejudice to plaintiffs in trial by leading fact-finders to place disproportional weight on a single fact, and they create incentives for employers not to take steps to reduce discrimination in accordance with Title VII. The same-actor inference should be eliminated altogether from FRD cases under Title VII. Not only would this reform be remarkably simple to implement, it would also bring FRD jurisprudence more in line with both the goals of Title VII and the empirical reality of how discrimination operates. By eliminating the same-actor inference from FRD litigation, judges can adopt an empirically grounded social psychological understanding of FRD, develop a

body of law that reflects the realities of gender roles in modern society, and provide the kind of justice to FRD plaintiffs that Title VII is meant to provide.