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Julie S. Northup

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THE "SAME ACTOR INFERENCE" IN EMPLOYMENT DISCRIMINATION: CHEAP JUSTICE?

Julie S. Northup

Abstract: In *Proud v. Stone*, a 1991 age-related employment discrimination case, the Fourth Circuit established the evidentiary principle that a "strong inference" of nondiscrimination arises when the same person hires and then fires the plaintiff within a short period of time. This "same actor inference" has been adopted in varying degrees by six other circuits. Only the Third Circuit has expressly declined to recognize the hirer-firer relationship as more than evidence from which the trier of fact may draw a reasonable inference. Courts invoking the "inference" have extended its applicability far beyond the original context so as to permit theoretically an inference of nondiscrimination in virtually any set of hire-fire circumstances. In practice, courts have tended to treat hirer-firer identity as evidence subordinate or supplemental to other evidentiary and policy considerations. Nonetheless, mention of the hirer-firer connection almost always accompanies, and in some instances appears to ensure, a pro-employer outcome. This Comment argues that the same actor principle's expansion jeopardizes the efficacy of federal anti-discrimination law. Without clear limitations, the erratic and unthinking application of the "same actor inference" will discourage plaintiffs with valid complaints from coming forward and may permit employers to discriminate without adverse consequences.

"[A]n inference is a working tool, not a synonym for proof."[1]

"Procedure by presumption is always cheaper and easier than individualized determination . . . . But the Constitution recognizes higher values than speed and efficiency."[2]

Employment discrimination cases are often notable for the absence of direct evidence. Instead, both plaintiffs and defendants typically present circumstantial evidence from which the trier of fact must infer whether an adverse employment action was improperly motivated.[3] The U.S. Supreme Court has developed a three-part framework to facilitate the analysis of such circumstantial evidence.[4]

Into this already complicated evidentiary formula, the Fourth Circuit has inserted yet another ingredient, holding in *Proud v. Stone*[5] that a "strong inference" of nondiscrimination arises when the same person

1. Personnel Adm'r v. Feeney, 442 U.S. 256, 279 n.25 (1979).

2. Stanley v. Illinois, 405 U.S. 645, 656–57 (1972).

3. *See, e.g.*, *Feeney*, 442 U.S. at 282 ("[S]ince reliable evidence of subjective intentions [of discrimination] is seldom obtainable, resort to inference based on objective factors is generally unavoidable.").

4. *See infra* Part I.B.

5. 945 F.2d 796 (4th Cir. 1991).

both hires and fires the plaintiff.[6] This "same actor"[7] or "same decisionmaker"[8] doctrine has been considered by eight circuits and adopted to some extent by seven.[9] Courts have most frequently noted hirer-firer identity to support the affirmation of summary judgments for employers in cases involving alleged discriminatory termination. Beyond this commonality, however, there has been substantial circuit-by-circuit variation as to if, when, and how the "same actor" connection should be triggered.

Part I of this Comment places the "same actor inference" in context by examining the standards and interrelationships of federal anti-discrimination legislation, inferences, and presumptions. Part II traces the evolution of the "same actor inference," in theory and in practice, from its adoption in 1991 through its current application. Part III finds that the same actor doctrine has been extended dangerously far beyond its original parameters and urges restraint in its future application.

I. ANATOMY OF AN EMPLOYMENT DISCRIMINATION SUIT

A. *Statutory Bases for Federal Employment Discrimination Claims*

The "same actor inference" typically arises when a plaintiff alleges employment-related discriminatory treatment in violation of one of three federal anti-discrimination statutes. The oldest of these statutes, Title VII of the Civil Rights Act of 1964,[10] prohibits discrimination by covered employers on the basis of race, color, religion, gender, or national origin, in the absence of a defense. The 1967 Age Discrimination in Employment Act (ADEA)[11] provides similar anti-discrimination

6. *Id.* at 797–98.

7. Richard T. Seymour & Barbara Berish Brown, *Equal Employment Law Update,* 14-280 (BNA Spring 1997); Douglas L. Williams, *Burdens of Proof in Disparate Treatment After* Hicks, CB03 ALI-ABA 89, 93 (1996).

8. 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 609 (3d ed. 1996). The inference has also been referred to as the "same actor defense." *See, e.g.*, Jay W. Waks & John Roberti, *When Hirer Does Firing*, Nat'l L.J., Sept. 9, 1996, at B4.

9. *See* cases cited *infra* note 69.

10. 42 U.S.C. §§ 2000e–2000e-17 (1994). The "same actor inference" could also arise under § 1981, which prohibits race discrimination, *inter alia*, in employment contracts. 42 U.S.C. § 1981 (1994); *see also* Goodman v. Lukens Steel Co., 482 U.S. 656, 670 (1987) (Brennan, J., concurring in part and dissenting in part). Although two cases alleging Title VII race discrimination have also alleged § 1981 violations, the "same actor inference" was only raised in discussing Title VII claims. *See* Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167–68 (6th Cir.), *amended by* 97 F.3d 833 (6th Cir. 1996); Jiminez v. Mary Washington College, 57 F.3d 369, 378 (4th Cir. 1995).

11. 29 U.S.C. §§ 621–634 (1994).

protections for employees aged forty and over, and the 1991 Americans with Disabilities Act (ADA)[12] prohibits discrimination on the basis of disability.

B. Standards for Proving Discriminatory Treatment

In *McDonnell Douglas Corp. v. Green*,[13] the U.S. Supreme Court established a methodology for analyzing circumstantial evidence of discriminatory treatment[14] that has been used, with some modifications, in a variety of contexts, including Title VII,[15] ADA,[16] and ADEA[17] cases.[18] The Court significantly refined or explained the *McDonnell Douglas* analytical framework in two subsequent cases, *Texas Department of Community Affairs v. Burdine*[19] and *St. Mary's Honor Center v. Hicks*.[20]

The *McDonnell Douglas* framework involves three basic steps. The plaintiff must first establish a prima facie case.[21] The requisites vary with the type of adverse action alleged. In discharge situations,[22] generally the plaintiff must prove that he or she (1) is a member of a protected group,

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12. 42 U.S.C. §§ 12201–12213 (1994).

13. 411 U.S. 792 (1973).

14. This Comment is restricted to "disparate treatment" scenarios involving allegations of intentional discrimination against protected groups. It does not address "disparate impact" situations, in which the implementation of facially neutral policies adversely affects protected groups.

15. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); *McDonnell Douglas*, 411 U.S. 792.

16. *See, e.g.*, Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997).

17. Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993) (stating that *McDonnell Douglas* created a "proof framework applicable to ADEA"). *But see* O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996) (observing that U.S. Supreme Court has "never had occasion to decide whether that application of the Title VII rule [variation of *McDonnell Douglas* framework] to the ADEA context is correct, but since the parties do not contest that point, we shall assume it").

18. The Equal Employment Opportunity Commission (EEOC), the federal agency charged with implementing employment anti-discrimination legislation, considers *McDonnell Douglas* applicable to Title VII, ADA, and ADEA. EEOC: Enforcement Guidance on St. Mary's Honor Ctr. v. Hicks, 405 Fair Empl. Prac. Cas. (BNA) 7175, 7175 n.2 (1994).

19. 450 U.S. 248 (1981).

20. 509 U.S. 502.

21. *Id.* at 506; *Burdine*, 450 U.S. at 252–53; *McDonnell Douglas*, 411 U.S. at 802.

22. Most disparate treatment employment discrimination suits involve alleged discriminatory termination. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 984 (1991); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 Mich. L. Rev. 2229, 2285 (1995). Plaintiffs have alleged discriminatory discharge in more than three of every four published circuit cases in which the "same actor" principle has been considered. *See infra* Part III.B.3.

(2) was performing satisfactorily at the time of discharge, (3) was discharged, and (4) was replaced with a person from outside the protected group.[23] Once the plaintiff establishes a prima facie case, a burden not intended to be onerous,[24] the defendant must respond by articulating a legitimate, nondiscriminatory reason for its questioned actions.[25] The defendant's burden at this step is also light; all that is necessary is admissible evidence sufficient to permit a trier of fact to find in the defendant's favor.[26] If the defendant produces a justification, the plaintiff must persuade the trier of fact that the proffered reason is a pretext for discrimination.[27] The *Hicks* Court made clear that to succeed at trial, the plaintiff must prove not only that the defendant's proffered reason is false, but also that the true reason was intentional discrimination.[28] Circuits disagree, however, as to whether a plaintiff must prove intentional discrimination as well as pretext at the summary judgment stage.[29]

Courts are not required to adhere strictly to the *McDonnell Douglas* structure in evaluating employment discrimination claims.[30] The *Hicks* Court noted that a factfinder may have sufficient evidence to proceed directly to the "ultimate factual issue" of intentional discrimination after the first two steps of *McDonnell Douglas* have been completed.[31]

23. Mark A. Rothstein et al., *Employment Law* 186 (1994). These requirements are flexible. For example, even though white persons technically do not belong to a statutorily protected group, Title VII prohibits racial discrimination in employment against white persons. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). In ADEA cases, the fact that a replacement was substantially younger than the plaintiff is a more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside of the protected class of persons over forty years old. O'Connor v. Consolidated Coin Caterers Corp., 116 S. Ct. 1307, 1310 (1996).

24. *Burdine*, 450 U.S. at 253.

25. *Hicks*, 509 U.S. at 506–07; *Burdine*, 450 U.S. at 254; *McDonnell Douglas*, 411 U.S. at 802.

26. *Hicks*, 509 U.S. at 507; *Burdine*, 450 U.S. at 255 & n.9.

27. *Hicks*, 509 U.S. at 507–08; *Burdine*, 450 U.S. at 253; *McDonnell Douglas*, 411 U.S. at 804. A "pretext" is an explanation that is unworthy of credence. *Burdine*, 450 U.S. at 256.

28. *Hicks*, 509 U.S. at 515.

29. For a discussion of various circuit interpretations, see Thomas Duley, *Summary Judgment and Title VII After* Hicks: *How Much Evidence Does It Take To Make an Inference?*, 28 U.C. Davis L. Rev. 261, 279–84 (1994); Tim D. Gray, *Employment Discrimination: Summary Judgment and Rule 301 After* St. Mary's Honor Center v. Hicks, 15 Miss. C. L. Rev. 217, 236 (1993); Jody H. Odell, Case Comment, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and Its Application to Summary Judgment*, 69 Notre Dame L. Rev. 1251, 1269 (1994).

30. *See Hicks*, 509 U.S. at 519 (noting that *McDonnell Douglas* scheme was not intended to be "rigid, mechanized, or ritualistic"). *But see id.* at 506 (stating that scheme established "an order for the presentation of proof").

31. *Id.* at 519.

Accordingly, some circuits have opted to dispense with the *McDonnell Douglas* formalities and proceed directly to the "bottom line," requiring direct or circumstantial evidence of discriminatory motive.[32]

C. The Role of Inferences and Presumptions in Employment Discrimination

The framework established in *McDonnell Douglas Corp. v. Green*[33] incorporates three distinct yet overlapping evidentiary tools: mandatory presumptions, permissive presumptions, and reasonable inferences. Inferences and presumptions are evidentiary practices that allow the finding of a particular fact or facts ("inferred" or "presumed" facts) when other facts ("basic" or "predicate" facts) are established.[34] A "conclusive presumption" requires the factfinder to infer the presumed facts, regardless of the presence or absence of rebuttal evidence,[35] whereas a "mandatory presumption" requires the factfinder to infer the presumed facts only if the party against whom the presumption is held fails to produce rebuttal evidence.[36] A "permissive presumption" allows, but does not compel, the trier of fact to infer the presumed facts from the basic facts without placing any burden on the party against whom the presumption is held.[37] A "reasonable inference" permits the factfinder to draw any rational conclusion from the evidence as a whole, with no allocation of burdens.[38]

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32. *See* Sime v. Trustees of Cal. State Univ. & Colleges, 526 F.2d 1112, 1114 (9th Cir. 1975) (explaining that *McDonnell Douglas* does not mandate going through three-step "judicial minuet"). The Fourth Circuit has referred to this alternative approach as one applying "ordinary principles of proof." Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996); *see also* Malamud, *supra* note 22, at 2237 (advocating abandonment of *McDonnell Douglas* framework in favor of "holistic" factfinding endorsed by *Hicks* Court).

33. 411 U.S. 792 (1973).

34. *Hicks*, 509 U.S. at 506–07; Francis v. Franklin, 471 U.S. 307, 314 (1985); County Court v. Allen, 442 U.S. 140, 157 (1979). *See generally* Michael H. Graham, *Handbook of Federal Evidence* § 301.6 (4th ed. 1996); *McCormick on Evidence* § 342 (John William Strong ed., 4th ed. 1992).

35. Graham, *supra* note 34, § 301.6; *McCormick on Evidence*, *supra* note 34, § 342.

36. Graham, *supra* note 34, § 301.6; *McCormick on Evidence*, *supra* note 34, § 342; *see also* Fed. R. Evid. 301 (providing that presumption in federal civil actions imposes on party against whom it is directed burden of going forward with evidence to meet or rebut presumption).

37. *Francis*, 471 U.S. at 314; *Allen*, 442 U.S. at 157; Graham, *supra* note 34, § 301.7; *McCormick on Evidence*, *supra* note 34, § 342.

38. Graham, *supra* note 34, § 301.7; *McCormick on Evidence*, *supra* note 34, § 342 (labeling such inference "rational inference").

Inferences and presumptions play a large role in the *McDonnell Douglas* analysis.[39] Establishing a prima facie case creates a mandatory presumption of discrimination, shifting the burden of production to the defendant.[40] The defendant's articulation of a legitimate non-discriminatory reason for the adverse employment action serves to rebut the presumption.[41] Thereafter, the trier of fact may infer from the evidence used to establish the plaintiff's prima facie case, together with its belief that the defendant's proffered reason was pretextual, that discrimination did or did not occur.[42] This process is equivalent to the evaluation of a permissive presumption or permissive inference. Alternately, the factfinder may infer from the evidence as a whole that discrimination did or did not motivate the adverse employment action,[43] a process equivalent to drawing a reasonable inference.[44]

The role of a "strong inference" within this framework is not clear. The U.S. Supreme Court has used the phrase "strong inference" only a few times in the employment discrimination arena.[45] It is difficult to determine from the opinions whether the Court sees a "strong inference" as requiring a burden-shifting process.[46] The use of the phrase by the circuits suggests both mandatory and permissive interpretations.[47]

39. For a general discussion of the implications of inferences and presumptions in employment discrimination, see Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 Vand. L. Rev. 1205, 1221–23 (1981).

40. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

41. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); *Burdine*, 450 U.S. at 254.

42. *Hicks*, 509 U.S. at 511.

43. *Id.*

44. *See generally* Computer Identics Corp. v. Southern Pac. Co., 756 F.2d 200, 204 (1st Cir. 1985) (noting that inferences may be drawn from reasoning process or deduced as logical consequence of evidence).

45. *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 279 n.25 (1979) (remarking that "a strong inference that the adverse effects were desired can reasonably be drawn" when legislation creates inevitable or foreseeable adverse effect on identifiable group).

46. In non-employment contexts, the U.S. Supreme Court's use of "strong inference" more clearly suggests the creation of a rebuttable presumption. *See, e.g.*, Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 701 (1983) (noting that evidence of "strong inference of impermissible motive" created by employer conduct may be used to draw reasonable inference "even if employer comes forward with a nondiscriminatory explanation for its actions"); Rose v. Mitchell, 443 U.S. 545, 593 (1979) (finding failure ever to choose black grand jury foreperson created "strong inference of intentional racial discrimination, shifting the burden to the State" to rebut inference).

47. *See, e.g.*, Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 893 (7th Cir. 1996) (observing that court must take "particular care in evaluating employer's evidence" when "plaintiff has produced direct evidence supporting a strong inference" of discriminatory retaliation); Mangold v. California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995) (holding that age-related remarks, in

II. EVOLUTION OF THE "SAME ACTOR INFERENCE"

A. *Origination of the Principle:* Proud v. Stone

The "same actor" principle was first introduced by the Fourth Circuit in *Proud v. Stone*,[48] an ADEA case. Plaintiff Proud was hired on the basis of a written application sent to a U.S. Army division in Germany.[49] The hiring official selected him over six younger applicants for the position of Chief Accountant. Proud's date of birth, indicating that he was sixty-eight years old, was noted on his employment application. When Proud arrived in Germany, he agreed to assume temporarily the responsibilities of an accounting technician who had recently resigned.[50] Proud was terminated six months later. The hiring official's stated reason for terminating Proud related largely to dissatisfaction with Proud's performance of the accounting technician duties.[51]

The district court granted the Army's motion for dismissal at the close of the presentation of the plaintiff's evidence at trial.[52] The district court found that Proud failed to present a prima facie case of discriminatory termination under the *McDonnell Douglas* analysis[53] because his performance at the time of discharge did not meet the employer's legitimate expectations.[54] In addition, the district court found no evidence of discrimination, noting, among other evidence, that Proud's age was the same at hiring and firing.[55] On appeal, the Army cited an Eleventh Circuit decision suggesting that hirer-firer identity decreases the likelihood of discrimination.[56]

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combination with "other substantial evidence, created a strong inference of intentional discrimination").

48. 945 F.2d 796 (4th Cir. 1991).

49. *Id.* at 796. Defendant Stone was Secretary of the Army and was sued in that capacity. *Id.*

50. *Id.*

51. *Id.* at 797.

52. *Id.*

53. *See supra* notes 21–29 and accompanying text (discussing *McDonnell Douglas* framework).

54. Brief for Appellee at 9, *Proud* (No. 90-2443).

55. *Id.*

56. *Id.* at 13–14 (citing Rosenfield v. Wellington Leisure Prods., Inc., 827 F.2d 1493, 1497 (11th Cir. 1987) (stating that although fact that plaintiff was hired at age 51 and fired at age 53 "would seem to negate" age discrimination claim, jury could have discounted that factor in reaching verdict for plaintiff because hirer and firer were not same individual); Bilotti v. Franklin Mint, Inc., 27 Fair Empl. Prac. Cas. (BNA) 1031, 1035 (E.D. Pa. 1981) (remarking that since employer hired plaintiff at age 40, "it is just not consistent with reason and common sense" to find age discrimination "several months later").

The appellate court agreed that the hirer-firer relationship was significant. In affirming the district court, the Fourth Circuit expressed thinly-veiled annoyance at "recurrent" allegations of discrimination by former employees who have been hired and fired by the same individual.[57] Quoting from a *Stanford Law Review* article, the court stated:

> One is quickly drawn to the realization that "[c]laims that employer animus exists in termination but not in hiring seem irrational." From the standpoint of the putative discriminator, "[i]t 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."[58]

The court adopted the article's premise as a basis for an even more broad doctrine: "[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."[59]

In making this determination, the court focused on the "bottom line" of intentional discrimination rather than strictly adhering to the *McDonnell Douglas* framework, reasoning that strict adherence to proof schemes should not interfere with early resolution of the "ultimate question."[60] Nonetheless, the court continued, should the *McDonnell Douglas* framework be used, the hirer-firer inference would be appropriate at the pretext stage of the analysis.[61]

The court argued that use of the inference would benefit both employers and older employees.[62] The expedited dismissal of unfounded allegations would promote the interests of the ADEA by overcoming employer reluctance, due to fear of litigation, to hire older persons.[63] Although the court allowed that "egregious" facts might still prove discrimination or pretext, the court doubted that such evidence would be

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57. *Proud*, 945 F.2d at 796.

58. *Id.* at 797 (citing Donohue & Siegelman, *supra* note 22, at 1017). The footnote accompanying Donohue and Siegelman's assertion provides examples of discriminatory terminations despite hirer-firer identity, but dismisses them as unlikely. Donohue & Siegelman, *supra* note 22, at 1017 n.106.

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

60. *Id.* at 798.

61. *Id.*

62. *Id.*

63. *Id.* (citing Donohue & Siegelman, *supra* note 22, at 1024).

offered very frequently.[64] Foreshadowing the future breadth of the doctrine, the court concluded that "employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."[65]

B. Expansion of the "Same Actor" Doctrine

The "same actor" principle's applicability was quickly extended. Since the 1991 decision in *Proud v. Stone*, virtually every subsequent Fourth Circuit decision has expanded in some significant way upon the doctrine's original parameters.[66] Starting in 1992, other circuits began to incorporate the *Proud* reasoning in their decisions.[67] Their adaptations of the rule in many instances also expanded its original boundaries.[68] The following analysis summarizes thirty published decisions in circuits that have considered the "same actor" principle, dating from *Proud* in 1991 through October 1997.[69]

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64. *Id.*

65. *Id.*

66. *See, e.g.*, Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994) (extending *Proud* inference to ADA context, strengthening terminology to "strong presumption" as well as "strong inference"); Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993) (extending *Proud* inference to reduction-in-force situation, affirming summary judgment for employer).

67. Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 785 (1996); Rand v. CF Indus., Inc., 42 F.3d 1139, 1147 (7th Cir. 1994); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174–75 (8th Cir. 1992).

68. *See, e.g.*, *Bradley*, 104 F.3d at 270 (extending same actor inference to any discrimination plaintiff); *Buhrmaster*, 61 F.3d at 464 (holding that short period of time between hiring and firing was not essential element of same actor inference, and extending same actor inference to all protected classes).

69. Faruki v. Parsons S.I.P., Inc., 123 F.3d 315, 321 n.6 (5th Cir. 1997); Madel v. FCI Mktg., Inc., 116 F.3d 1247, 1253 (8th Cir. 1997); Miller v. Citizens Sec. Group, Inc., 116 F.3d 343, 348 (8th Cir. 1997); Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997); Grossmann v. Dillard Dep't Stores, Inc., 109 F.3d 457, 459 (8th Cir. 1997); *Bradley*, 104 F.3d at 270–71; Jacques v. Clean-up Group, Inc., 96 F.3d 506, 512 (1st Cir. 1996); Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167–68 (6th Cir.), *amended by* 97 F.3d 833 (6th Cir. 1996); Hartsel v. Keys, 87 F.3d 795, 804 n.9 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1337 (8th Cir. 1996); *CSC Logic*, 82 F.3d at 658; Haun v. Ideal Indus., Inc., 81 F.3d 541, 546 (5th Cir. 1996); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996); EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996); Wolf v. Buss (Am.) Inc., 77 F.3d 914, 923–24 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); O'Bryan v. KTIV Television, 64 F.3d 1188, 1192–93 (8th Cir. 1995); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995); *Buhrmaster*, 61 F.3d at 463; Jiminez v. Mary Washington College, 57 F.3d 369, 378 (4th Cir. 1995); Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); *Rand*, 42 F.3d at 1147; Serben v. Inter-City Mfg. Co., 36 F.3d 765, 766 (8th Cir. 1994); *Tyndall*, 31

1. *Protected Class*

Although most cases noting the hirer-firer[70] link—roughly two of three[71]—have involved alleged age discrimination, as was the case in *Proud*, various circuits have steadily added other classes of discrimination plaintiffs. In 1994, the doctrine was extended to ADA cases.[72] The next year, the principle was employed in Title VII gender, race, and national origin discrimination contexts.[73] The rule's application was extended to all statutorily protected groups that same year.[74]

2. *Nature of Decisionmaker and Plaintiff Identity*

While originally restricted to situations in which the same person did the hiring and firing, the requirement for direct relationships between the hirer, the firer, and the employee has been significantly loosened. The Fourth Circuit has indicated that hirer-firer identity is satisfied if the

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F.3d at 214; Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 513 (4th Cir. 1994); *Mitchell*, 12 F.3d at 1318; *LeBlanc*, 6 F.3d at 847; Brown v. Stites Concrete, Inc., 994 F.2d 553, 568 (8th Cir. 1993) (en banc) (Loken, J., dissenting); Johnson v. Group Health Plan, Inc., 994 F.2d 543, 548 (8th Cir. 1993); *Lowe*, 963 F.2d at 174; *Proud*, 945 F.2d at 797–98. These 30 cases resulted from a Westlaw search of post-*Proud* decisions using the keywords "same actor," "same decisionmaker," "discrim!," "Proud v. Stone," and "Tyndall," supplemented by circuit-by-circuit searches using the keywords "same," "discrim!," and case names of prior decisions within each circuit. The author conducted the last set of searches on November 4, 1997; related cases published on Westlaw after that date are not included in this analysis.

70. In this analysis, the term "hirer-firer" includes individuals who have previously hired or promoted plaintiffs and later laid off, terminated, or failed to promote plaintiffs.

71. Of 30 cases in which the same actor relationship has been considered, the relationship has been raised under the ADEA in 18 cases, Title VII in seven, the ADA in two, both the ADEA and Title VII in two, and both the ADA and Title VII in one. ADEA cases include *Madel*, 116 F.3d 1247; *Miller*, 116 F.3d 343; *Grossmann*, 109 F.3d 457; *Rothmeier*, 85 F.3d 1328; *CSC Logic*, 82 F.3d 651; *Haun*, 81 F.3d 541; *Wolf*, 77 F.3d 914; *O'Bryan*, 64 F.3d 1188; *Waldron*, 56 F.3d 491; *Rand*, 42 F.3d 1139; *Serben*, 36 F.3d 765; *Birkbeck*, 30 F.3d 507; *Mitchell*, 12 F.3d 1310; *LeBlanc*, 6 F.3d 836; *Stites Concrete*, 994 F.2d 553; *Johnson*, 994 F.2d 543; *Lowe*, 963 F.2d 173; and *Proud*, 945 F.2d 796. Title VII cases include *Nieto*, 108 F.3d 621; *Thurman*, 90 F.3d 1160; *Evans*, 80 F.3d 954; *Our Lady of Resurrection Med. Ctr.*, 77 F.3d 145; *Amirmokri*, 60 F.3d 1126; *Buhrmaster*, 61 F.3d 461; and *Jiminez*, 57 F.3d 369. *Jacques*, 96 F.3d 506, and *Tyndall*, 31 F.3d 209, are ADA cases; *Faruki*, 123 F.3d 315, and *Hartsel*, 87 F.3d 795, involve both Title VII and ADEA claims; and *Bradley*, 104 F.3d 267, involves both Title VII and ADA claims.

72. *See Tyndall*, 31 F.3d at 214; *see also* Harvey Basil, Current Developments in the Law, 4 B.U. Pub. Int. L.J. 482, 487 (1995) (explaining how same actor inference has affected outcome of *Tyndall* and other ADA cases).

73. *Amirmokri*, 60 F.3d 1126 (national origin); *Buhrmaster*, 61 F.3d 461 (gender); *Jiminez*, 57 F.3d 369 (race and national origin).

74. *Buhrmaster*, 61 F.3d at 464. A year later, the Ninth Circuit similarly found the rule applicable to any "discrimination plaintiff." *Bradley*, 104 F.3d at 270.

same *company* was involved in both decisions.[75] The Fourth Circuit has further suggested that a direct relationship between the individual hirer and the plaintiff is not necessary to establish the inference so long as the firing official has hired *others* in the plaintiff's protected class.[76] The Fifth and Eighth Circuits have applied the rule when there have been multiple decisionmakers or when there has been ambiguity as to whether the same individual was involved in both actions.[77]

3. *Nature of Adverse Employment Action*

Three in four decisions citing or applying the *Proud* inference—twenty-three of thirty cases—have involved alleged discriminatory terminations such as that claimed in *Proud*.[78] About one-third of these claims (eight) disputed the employers' assertions that the terminations were necessitated by economic downturns or reductions-in-force.[79] In 1996, the hirer-firer relationship was raised in failure-to-promote circumstances[80] as well as in a failure-to-hire situation in which the

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75. *Amirmokri*, 60 F.3d at 1130; *see also Wolf*, 77 F.3d at 923–24.

76. *Birkbeck*, 30 F.3d at 513.

77. Nieto v. L&H Packing Co., 108 F.3d 621, 623 (5th Cir. 1997). Although Nieto had disputed the identity of the hirer and firer, *see* Brief for Appellant at 11, *Nieto* (No. 96-50419), the employer argued that "corporate decisions are often made by management *groups*." *Id.* at 21; *see also* Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174 (8th Cir. 1992) (considering evidence that "same people" or "same company officials" hired and fired plaintiff in less than two years "compelling . . . in light of the weakness of the plaintiff's evidence otherwise"). *But see* Madel v. FCI Mktg., Inc., 116 F.3d 1247, 1253 (8th Cir. 1997) (declining to infer nondiscrimination when derogatory comments made by plaintiff's supervisor could have influenced employer's decision to fire plaintiff).

78. Faruki v. Parsons S.I.P., Inc., 123 F.3d 315, 321 n.3 (5th Cir. 1997); *Madel*, 116 F.3d at 1253; Miller v. Citizens Sec. Group, Inc., 116 F.3d 343, 348 (8th Cir. 1997); *Nieto*, 108 F.3d at 624; Grossmann v. Dillard Dep't Stores, Inc., 109 F.3d 457, 459 (8th Cir. 1997); *Bradley*, 104 F.3d at 270–71; Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1337 (8th Cir. 1996); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996); Haun v. Ideal Indus., Inc., 81 F.3d 541, 546 (5th Cir. 1996); EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996); *Wolf*, 77 F.3d at 923–24; O'Bryan v. KTIV Television, 64 F.3d 1188, 1192–93 (8th Cir. 1995); *Buhrmaster*, 61 F.3d at 463; Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Rand v. CF Indus., Inc., 42 F.3d 1139, 1147 (7th Cir. 1994); Serben v. Inter-City Mfg. Co., 36 F.3d 765, 766 (8th Cir. 1994); Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 214 (4th Cir. 1994); *Birkbeck*, 30 F.3d at 513; Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1318 (4th Cir. 1993); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Johnson v. Group Health Plan, Inc., 994 F.2d 543, 548 (8th Cir. 1993); *Lowe*, 963 F.2d at 174.

79. *CSC Logic*, 82 F.3d 651; *Haun*, 81 F.3d 541; *Wolf*, 77 F.3d 914; *Waldron*, 56 F.3d 491; *Serben*, 36 F.3d 765; *Birkbeck*, 30 F.3d 507; *Mitchell*, 12 F.3d 1310; *LeBlanc*, 6 F.3d 836.

80. Hartsel v. Keys, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996); *Amirmokri*, 60 F.3d 1126.

plaintiff had formerly been employed as a casual worker.[81] That same year, the First Circuit considered hirer-firer identity in evaluating an ADA failure-to-accommodate charge.[82]

4. *Hire-Fire Interval*

The interval between the hiring and firing decisions, required by the original *Proud* decision to be "relatively short,"[83] or "several months,"[84] has, in many instances, been years rather than months,[85] and in one case exceeded seven years.[86] The identified interval between hiring, transfer, or promotion and the adverse employment action was less than one year in only ten of the thirty cases,[87] and two decisions failed to note a time interval.[88] The Sixth Circuit has held that a short period of time between hiring and firing is not essential, at least in cases in which the plaintiff's class does not change between the two events.[89]

5. *Presumptive Implications*

Evidence concerning hirer and firer identity, when recognized, has been labeled differently among the various circuits and within circuits

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81. Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160 (6th Cir.), *amended by* 97 F.3d 833 (6th Cir. 1996).

82. Jacques v. Clean-up Group, Inc., 96 F.3d 506 (1st Cir. 1996).

83. Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). Proud's hire-fire interval was just over four months. *Id.* at 796–97.

84. *Id.* at 796.

85. *See, e.g.*, Grossmann v. Dillard Dep't Stores, Inc., 109 F.3d 457 (8th Cir. 1997) (four years); Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996) (four-plus years).

86. Petition for a Writ of Certiorari at 2–3, Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 785 (1996) (No. 95-6699). However, Buhrmaster had been promoted three years before termination. *Id.* at 3. In failure-to-promote cases, some courts have measured the interval from the date of a prior promotion by the same official. *See, e.g.*, Hartsel v. Keys, 87 F.3d 795, 804 n.9 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997).

87. Madel v. FCI Mktg., Inc., 116 F.3d 1247 (8th Cir. 1997); *Jacques*, 96 F.3d 506; Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160 (6th Cir.), *amended by* 97 F.3d 833 (6th Cir. 1996); *Hartsel*, 87 F.3d 795; Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996); EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145 (7th Cir. 1996); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126 (4th Cir. 1995); Serben v. Inter-City Mfg. Co., 36 F.3d 765 (8th Cir. 1994); Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993); *Proud*, 945 F.2d 796.

88. Faruki v. Parsons S.I.P., Inc., 123 F.3d 315 (5th Cir. 1997); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994).

89. *Buhrmaster*, 61 F.3d at 464 (applying presumption despite seven-year hire-fire interval). However, the court acknowledged that the strength of the inference varies according to the hire-fire interval. *Id.*; *cf. Hartsel*, 87 F.3d at 804 n.9 ("The passage of time between those two [promotion and failure-to-promote] events is a relevant factor in weighing the inference . . . ." (citation omitted)).

over time. The same actor principle has been alternately termed an "inference,"[90] "strong inference,"[91] "powerful inference,"[92] "compelling" inference,[93] "presumption,"[94] and "strong presumption."[95] The First and Eighth Circuits, while not expressly adopting either an inference or a presumption, have referred to *Proud* and its progeny in considering the evidence as a whole.[96] The Third Circuit considered the rule in dicta but declined to recognize the link as other than evidence from which a reasonable inference might be drawn.[97]

In practice, the impact of hirer-firer evidence has ranged from pivotal to secondary. The hirer-firer connection constituted the "focus" of the *Proud* court's "ultimate question" discussion.[98] Should the *McDonnell Douglas* paradigm be used, the *Proud* court continued, hirer-firer identity would be central in establishing the employer's non-discriminatory motive during the "pretext" analysis.[99] In subsequent Fourth Circuit cases, the linkage sometimes has served to supplement other evidence,[100] and sometimes has been central to the court's determination.[101]

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90. *Buhrmaster*, 61 F.3d at 463, 464 n.3 (permitting jury instructions as to "inference" of nondiscrimination but declining to address propriety of addressing inference as "strong"); Rand v. CF Indus., Inc., 42 F.3d 1139, 1147 (7th Cir. 1994) (identifying hirer-firer link as among "inferences that remain"); *see also Hartsel*, 87 F.3d at 804 n.9 (referring to *Buhrmaster*'s endorsement of "an inference of a lack of discriminatory animus"); *Our Lady of Resurrection Med. Ctr.*, 77 F.3d at 152 (noting recognition of "an inference" in *Rand* and observing that "same hirer/firer inference has strong presumptive value").

91. Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996); *Mitchell*, 12 F.3d at 1318; *Proud*, 945 F.2d at 798. The *Bradley* defendant had advocated adoption of a "powerful inference." Brief for Appellee at 22, *Bradley* (No. 95-56003).

92. *Evans*, 80 F.3d at 959.

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

94. Brown v. CSC Logic, Inc., 82 F.3d 651, 658 n.25 (5th Cir. 1996) (noting "the existence of the *Proud* presumption, coupled with the insufficiency of the evidence available to rebut that presumption").

95. Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 215 (4th Cir. 1994).

96. LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174 (8th Cir. 1992).

97. Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995) (citing approvingly Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant at 22–23, *Waldron* (No. 94-5282)). Ironically, the EEOC's Office of Federal Operations has itself recognized a "strong inference." Graham v. Brown, No. 01943193, 1995 WL 618999, at *6 (E.E.O.C. Oct. 17, 1995); Aguiar v. Browner, No. 01942356, 1995 WL 80049, at *6 (E.E.O.C. Feb. 22, 1995) (citing Burnison v. Department of Veterans Affairs, No. 01920638 (E.E.O.C. Aug. 27, 1992)).

98. *Proud*, 945 F.2d at 797–98.

99. *Id.* at 798.

100. *See, e.g.*, Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996) (noting "powerful inference . . . in addition" to observations that plaintiff's allegations were not corroborated or supported); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir.

A circuit-by-circuit examination reveals a comparable inconsistency in weighing the significance of the hirer-firer relationship, apparently unrelated to the formal label the circuit has given the hirer-firer connection. In most instances, the connection has been raised only during or after consideration of other evidence.[102] Words such as "in addition,"[103] "also,"[104] "moreover,"[105] "finally,"[106] or "furthermore"[107] indicate that the connection serves a supplemental function.[108] In contrast, the Ninth Circuit has followed *Proud*'s example by raising the inference prior to the discussion of any other evidence.[109] The first Eighth Circuit opinion raising the connection suggested that hirer-firer identity tipped the scale:

> The evidence that plaintiff claims is inconsistent with defendant's proffered justification is thin, but perhaps sufficient, all other things being equal, to defeat a motion for directed verdict. In the present case, however, all other things were not equal. *The most important fact* here is that plaintiff was a member of the protected age group

1995) (noting hirer-firer association while pointing out weakness of plaintiff's proffered evidence); Jiminez v. Mary Washington College, 57 F.3d 369, 381 (4th Cir. 1995) (pointing out "plethora of information" on which defendant based its justification as compared with plaintiff's "grossly insubstantial" evidence); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 512–13 (4th Cir. 1994) (stating—after noting weakness of plaintiff's evidence and defendant's "undisputed" evidence of economic hardship—that company's "hiring practices make a finding of pretext even less plausible"); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1318 (4th Cir. 1993) (finding conclusion of nondiscrimination "fortified" by inference).

101. Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 214 (4th Cir. 1994) (asserting that court "must focus" on hirer-firer identity in evaluating whether age was one motivating factor).

102. *See, e.g.*, Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167–68 (6th Cir.) (finding that inference raised by hirer-firer identity was rebutted by "the sum of the evidence"), *amended by* 97 F.3d 833 (6th Cir. 1996); Hartsel v. Keys, 87 F.3d 795, 802, 804 (6th Cir. 1996) (raising identity of person who promoted plaintiff in past and did not promote her more recently after noting plaintiff's "extremely subjective and vague allegations" and "overwhelming" evidence of her lack of qualifications), *cert. denied*, 117 S. Ct. 683 (1997); Haun v. Ideal Indus., Inc., 81 F.3d 541, 546 (5th Cir. 1996) (insisting on considering "evidence as a whole"); *Waldron*, 56 F.3d at 496 n.6 (noting agreement with EEOC that hirer-firer identity "is simply evidence like any other").

103. *Tyndall*, 31 F.3d at 211.

104. *Thurman*, 90 F.3d at 1167; Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996).

105. Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1337 (8th Cir. 1996).

106. EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996); O'Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995).

107. Wolf v. Buss (Am.) Inc., 77 F.3d 914, 923–24 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996).

108. *See* Miller v. Citizens Sec. Group, Inc., 116 F.3d 343, 348 (8th Cir. 1997) (observing that "conclusions are further reinforced" by hirer-firer evidence); Rand v. CF Indus., Inc., 42 F.3d 1139, 1147 (7th Cir. 1994) (noting hirer-firer link as among "the inferences that remain").

109. Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270 (9th Cir. 1996).

> both at the time of his hiring and at the time of his firing, and that the same people who hired him also fired him.[110]

This treatment contrasts sharply with the Eighth Circuit's focus on the evidence as a whole elsewhere in the same case.[111]

6. *Litigation Phase and Outcome*

The *Proud* court raised the same actor inference in affirming a directed verdict for the employer issued after the employee had had an opportunity to present his case.[112] In subsequent cases, appellate courts have employed the doctrine in the contexts of summary judgments,[113] bench decisions,[114] jury verdicts,[115] and jury instructions.[116]

More than three-fourths of the decisions in which the hirer-firer relationship has been considered (twenty-three of thirty cases) had pro-employer outcomes.[117] Nearly two-thirds of the pro-employer decisions

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110. Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174 (8th Cir. 1992) (emphasis added).

111. *Id.* at 175 (finding it "simply incredible, *in light of the weakness of plaintiff's evidence otherwise*, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later") (emphasis added). The court has used or noted this line of reasoning in *Miller*, 116 F.3d at 348, *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1337 (8th Cir. 1996), and *O'Bryan*, 64 F.3d at 1192.

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

113. *See, e.g.*, Mitchell v. Data Gen. Corp., 12 F.3d 1310 (4th Cir. 1993) (affirming summary judgment for employer).

114. *See, e.g.*, Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995) (reversing district court judgment for employee). On appeal, the defendant criticized the district court's failure to recognize *Proud*'s applicability. Opening Brief of Appellants at 16–17, *Jiminez* (No. 94-1776 (L), 94-1802).

115. *See, e.g.*, Jacques v. Clean-up Group, Inc., 96 F.3d 506 (1st Cir. 1996) (affirming district court's upholding of jury judgment for employer); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507 (4th Cir. 1994) (affirming district court's judgment as matter of law that overturned jury verdict in employees' favor).

116. Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 785 (1996).

117. Miller v. Citizens Sec. Group, Inc., 116 F.3d 343 (8th Cir. 1997); Nieto v. L&H Packing Co., 108 F.3d 621 (5th Cir. 1997); Grossmann v. Dillard Dep't Stores, Inc., 109 F.3d 457 (8th Cir. 1997); Bradley v. Harcourt, Brace & Co., 104 F.3d 267 (9th Cir. 1996); *Jacques*, 96 F.3d 506; Hartsel v. Keys, 87 F.3d 795 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 683 (1997); Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996); Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996); Evans v. Technologies Applications & Serv. Co., 80 F.3d 954 (4th Cir. 1996); EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145 (7th Cir. 1996); Wolf v. Buss (Am.) Inc., 77 F.3d 914 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126 (4th Cir. 1995); *Buhrmaster*, 61 F.3d 461; *Jiminez*, 57 F.3d 369; Rand v. CF Indus., Inc., 42 F.3d 1139 (7th Cir. 1994); Serben v. Inter-City Mfg. Co., 36 F.3d 765 (8th Cir. 1994); Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209 (4th Cir. 1994); *Birkbeck*, 30 F.3d 507; *Mitchell*, 12 F.3d 1310; LeBlanc v. Great Am. Ins. Co., 6 F.3d 836 (1st Cir. 1993); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173 (8th

(fifteen of twenty-three) affirmed summary judgments.[118] Of the seven pro-employee decisions, three affirmed bench or jury verdicts for the employee,[119] and four reversed grants of summary judgment in favor of the employer.[120] All opinions in the First, Fourth, Seventh, and Ninth Circuits that raised the hirer-firer connection resulted in pro-employer outcomes.[121] Four of the seven pro-employee decisions were issued by the Eighth Circuit, and one each was issued by the Third, Fifth, and Sixth Circuits.[122]

III. OVEREXTENSION OF THE SAME ACTOR DOCTRINE

The steady expansion of each of the various facets of the original "same actor inference" suggests that, if unchecked, the hirer-firer relationship could be recognized to discredit plaintiffs' discrimination claims in virtually every hire-fire situation. Theoretically, an employee who was within any protected group at the time he or she was hired, who remained with the company for an indefinite period of time, and who then alleged discriminatory treatment could find the standard of proof significantly altered in the employer's favor. Indeed, in theory the employee's allegations would be suspect if anyone else in the company had ever hired anyone else in the employee's protected group.

Despite the potential for misuse of hirer-firer evidence under the ever-expanding "same actor" standards, courts in practice generally have considered a host of other factors. Such factors may include evidence of performance problems,[123] evidence that the hirer belonged to the same

Cir. 1992); *Proud*, 945 F.2d 796. In *Faruki v. Parsons S.I.P., Inc.*, 123 F.3d 315 (5th Cir. 1997), the court's decision was pro-employer for two of three claims.

118. *Faruki*, 123 F.3d 315 (affirming summary judgment for employer against two of three claimants); *Miller*, 116 F.3d 343; *Nieto*, 108 F.3d 621; *Bradley*, 104 F.3d 267; *Hartsel*, 87 F.3d 795; *Rothmeier*, 85 F.3d 1328; *CSC Logic*, 82 F.3d 651; *Evans*, 80 F.3d 954; *Our Lady of Resurrection Med. Ctr.*, 77 F.3d 145; *Wolf*, 77 F.3d 914; *Amirmokri*, 60 F.3d 1126; *Rand*, 42 F.3d 1139; *Tyndall*, 31 F.3d 209; *Mitchell*, 12 F.3d 1310; *LeBlanc*, 6 F.3d 836.

119. Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160 (6th Cir.), *amended by* 97 F.3d 833 (6th Cir. 1996); Haun v. Ideal Indus., Inc., 81 F.3d 541 (5th Cir. 1996); Brown v. Stites Concrete, Inc., 994 F.2d 553 (8th Cir. 1993).

120. Madel v. FCI Mktg., Inc., 116 F.3d 1247 (8th Cir. 1997); O'Bryan v. KTIV Television, 64 F.3d 1188 (8th Cir. 1995); Waldron v. SL Indus., Inc., 56 F.3d 491 (3d Cir. 1995); Johnson v. Group Health Plan, Inc., 994 F.2d 543 (8th Cir. 1993).

121. *See* cases cited *supra* note 117.

122. *See* cases cited *supra* notes 119–20.

123. *See, e.g.*, *Amirmokri*, 60 F.3d at 1130 (pointing to plaintiff's "mediocre" performance ratings).

protected group as the employee,[124] evidence that the plaintiff's replacement was also a member of the protected group,[125] and evidence substantiating the employer's claimed economic difficulties.[126] Other factors that may be even more predictive of case outcomes include the composition and proclivities of the particular panel or court;[127] the court's predisposition to granting summary judgment, particularly in employment discrimination situations;[128] the court's evidentiary standard for summary judgment in employment discrimination cases;[129] and the degree to which the court defers to employer business judgment.[130] Given the multiplicity of other considerations, in most cases the role of the "same actor inference" in practice has been essentially limited to that of a permissive presumption, or even a reasonable inference, supplemental to other evidentiary or policy considerations. Nonetheless, there remain instances in which hirer-firer identity assumes significantly greater and arguably undeserved attention, triggering a mandatory presumption, if not a conclusive presumption, of nondiscrimination. Because the potential harm resulting from applying the same actor principle far outweighs its usefulness, the doctrine should be abandoned or limited to its original parameters.

A. *The Same Actor Principle Should Be Abandoned*

Perhaps because of its simplicity and appeal to "common sense," courts have been quick to apply the *Proud* doctrine in ever-widening circumstances, apparently without fully contemplating the ramifications of such an expansion. A more critical evaluation of the same actor

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124. *See, e.g.*, Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996).

125. *See, e.g.*, Nieto v. L&H Packing Co., 108 F.3d 621, 623–24 (5th Cir. 1997).

126. *See, e.g.*, LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993).

127. Author and practitioner Paul Grossman has commented that "[p]racticing management law in the Fourth Circuit is like dying and going to heaven." Paul Grossman, Remarks at Pacific Coast Labor and Employment Law Conference, Seattle, Wash. (May 16, 1997) (notes on file with *Washington Law Review*).

128. Some circuits apply special standards for evaluating summary judgment motions in employment discrimination cases. *See, e.g.*, Stewart v. Rutgers, State Univ., 120 F.3d 426, 431 (3d Cir. 1997) (holding that summary judgment standard "is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues") (citing Robinson v. PPG Indus., Inc., 23 F.3d 1159, 1162 (7th Cir. 1994)).

129. *See supra* note 29.

130. Several courts have emphasized that they do not serve as "super personnel departments" and as such are not charged with second-guessing business decisions. *See, e.g.*, Wolf v. Buss (Am.) Inc., 77 F.3d 914, 920 (7th Cir.), *cert. denied*, 117 S. Ct. 175 (1996); *LeBlanc*, 6 F.3d at 847.

doctrine reveals that it was founded on an unsubstantiated assumption and that its mushrooming application must be stopped.

1. *The Presumed Fact of Nondiscrimination Is Not Consistent with Experience*

Numerous examples of situations can be cited in which discrimination has been found despite hirer-firer identity.[131] Many specific patterns of discrimination could occur despite hirer-firer identity, including discrimination associated with "grooming" of other employees, circumstantial changes, emerging attitudes of hiring officials, and masked hirer-firer identity.[132]

a. *Grooming*

The Third and Eighth Circuits have recognized that an employer may hire an older person with the intention of retaining the person only temporarily.[133] The expertise and experience of the older person could be used to "groom" a younger person to take over the job. The older person is, in essence, both hired and fired because of age, contrary to law.

b. *Circumstantial Changes*

An employee's relationship with the hiring official may change over time such that the official's decisions are motivated by impermissible animus. For example, the hiring official may discover a "plus" factor contributing to a discriminatory decision, such as a female employee is pregnant[134] or has small children.[135] The hiring official may object to

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131. *See, e.g.*, Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1167–68 (6th Cir.), *amended by* 97 F.3d 833 (6th Cir. 1996); Haun v. Ideal Indus., Inc., 81 F.3d 541, 544 (5th Cir. 1996).

132. These examples are limited to the termination context.

133. Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Johnson v. Group Health Plan, Inc., 994 F.2d 543, 548 (8th Cir. 1993) (declining to impose inference due to credibility of using employee's experience during transition period and then terminating her because of age). At oral argument, Waldron's attorney used President Clinton's then-recent appointment of independent counsel Lloyd Cutler as an example of how employers might use an older person "to get the house in order while they're grooming younger people.... He's a valuable 'temp'.... The employer doesn't want to bring a 25-year-old on, and they don't feel bad about hiring someone just for a short term, because they're old; they're lucky to have a job at all, from their point of view." Telephone Interview with Alice W. Ballard, Partner, Samuel & Ballard, Philadelphia, Pa. (Apr. 25, 1997).

134. A similar "sex-plus" situation occurred in *UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (finding employer's policy of excluding fertile women from jobs exposing them to lead to be facially discriminatory).

aggressive behavior by a female or a person of color that would be tolerated or even lauded if demonstrated by males or white employees.[136] The hiring official may tolerate an employee in an entry-level position but object to the employee's insistence on being considered for promotional opportunities and terminate or constructively terminate the employee as an alternative to promotion.[137] In these situations, the employee or the hiring official's perception of the employee changes over time, creating unforeseen dynamics.

c. Emerging Discriminatory Attitude of a Hiring Official

A hiring official can develop an aversion to a particular group that was unrecognized to the official at the time of hire. This is most probable when the hiring official has not employed many persons from that protected group in the past. For example, a hiring official may willingly hire an older person or a female with younger children, but then make generalizations based on unsatisfactory experiences with those individuals that convince the hiring official never to hire "one of them" again.[138] In that manner, a differential standard emerges for people within the disfavored group. It is ironic that Proud, whose situation generated the same actor inference, was hired sight unseen. A reasonable trier of fact could find that the hiring official's age-related prejudices toward Proud only emerged after the two had met and worked together.[139] The

135. Such a "sex-plus" circumstance occurred in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (holding that gender discrimination may exist where employer barred employment of women with pre-school children).

136. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 234–35, 240 n.6 (1989) (noting employer resistance to female aggressiveness countering gender stereotypes may constitute "mixed motive" discrimination); *see also* Ian Ayres & Peter Siegelman, *The Q-Word as Red Herring: Why Disparate Impact Liability Does Not Induce Hiring Quotas*, 74 Tex. L. Rev. 1487, 1514 (1996) (remarking that in such cases of "role-based" discrimination, workers failing to play "assigned" roles on job could be subjected to discriminatory firing).

137. *See* Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160 (6th Cir.) (holding that failure to permanently hire employee employed as casual worker was discriminatory), *amended by* 97 F.3d 833 (6th Cir. 1996); Brief of Appellant at 15–16, Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126 (4th Cir. 1995) (No. 94-2529) (imploring court not to extend doctrine to promotion scenario because many employers hire women or minorities for lower-level positions but deny advancement because of management bias).

138. *See* Brief of the EEOC as Appellant at 21, EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145 (7th Cir. 1996) (No. 95-2302) (discussing difficulty of ensuring "fair and unbiased treatment throughout the tenure of employment where daily interactions may exacerbate underlying biases").

139. Proud's attorney has observed, "You may hire a black person, an older person, but it doesn't register until you shake hands with them [that you'd rather not be working with them] .... [Hiring

possible attitudinal shifts call into doubt the conclusion that the hirer and firer were "the same" in any sense meaningful to the "same actor" analysis.

d. Masked Lack of Identity of Hirer and Firer

When a hiring decision is made because of pressure from management or from legal authorities, the hiring official does not have the discretion essential to be the true "decisionmaker."[140] The requirement to make neutral decisions is less obvious once the hiring has been completed; a hiring official may feel that it is easier to dismiss a person from a disfavored group, particularly if the official is simultaneously hiring members of the same group. For example, a hiring official compelled by corporate or government policy to *hire* persons from protected classes may not perceive the same pressures not to *fire* an individual discriminatorily if that person has been "on the books" for some time.[141] In like manner, the hiring official may hire someone to fulfill affirmative action goals or to avoid a discrimination suit, but then fire that individual because the worker does not conform to requirements the employer imposes only on workers in that group.[142] Similarly, when upper management instructs someone to fire an individual based on its own discriminatory animus, the firing official is not the true decisionmaker.[143] A firing official may also make a decision impermissibly based on perceived customer or coworker discomfort rather than his or her own

is] a different decision [from firing], with different factors." Telephone Interview with Michael J. Kator, Of Counsel, Kator & Scott, Washington, D.C. (Apr. 19, 1997).

140. *See* Reply Brief of the EEOC as Appellant at 16, 18, *Our Lady of Resurrection Med. Ctr.* (No. 95-2302) (observing that "an employer may hire a member of a minority group in part due to legal or institutional incentives and then hold that person to a higher standard of performance during the course of employment," and that "legal and institutional incentives for hiring... may temporarily overcome bias toward certain groups").

141. This example is not dissimilar from one offered in the original article on which *Proud* relied. Donohue & Siegelman, *supra* note 22, at 1017 n.106 (conjecturing that employers wanting to "look good" on EEOC report might hire employees and later fire them).

142. Donohue terms such employees "coerced hires." Telephone Interview with John J. Donohue III, Professor, Stanford Law School (Oct. 20, 1997). Waldron's attorney similarly observed that "[i]n race situations, the employer may say, 'We'll give you a chance, but we know you're going to blow it.'" Telephone Interview with Alice W. Ballard, Partner, Samuel & Ballard, Philadelphia, Pa. (Apr. 25, 1997).

143. This interesting twist on corporate influence was raised in *Haynes v. Shoney's, Inc.*, No. 89-30093-RV, 1993 WL 19915 (N.D. Fla. Jan. 25, 1993), in which hiring officials were allegedly pressured by corporate policies to *fire* persons of color. *See* Steve Watkins, *Racism du Jour at Shoney's*, in *Foundations of Employment Discrimination Law* 135–39 (John J. Donohue III ed., 1997).

animus.[144] In all such instances, the lack of true identity of the hiring and firing decisionmakers renders the same actor principle unsuitable.

2. *The Same Actor Construct Was Derived from an Unvalidated Assumption*

The unsettled validity of the assumption on which the same actor principle is based calls into question its widespread adoption. One of the two co-authors of the article to which the *Proud* court referred in announcing the same actor inference confirmed that the statement quoted in the opinion was not based on empirical evidence.[145] Since the publication of the original article, the co-authors have acknowledged that prejudice can undermine the rationality of employment decisions.[146] Other commentators have come to similar conclusions.[147] In light of the questionable validity of the inference, courts should doubt the wisdom of its continued application.

144. *See, e.g.*, Lam v. University of Hawai'i, 40 F.3d 1551, 1560 n.13 (9th Cir. 1994) (observing that existence of third party preferences for discrimination does not justify discriminatory hiring practices); Platner v. Cash & Thomas Contractors, Inc., 908 F.2d 902, 905 n.5 (11th Cir. 1990) (noting that employer may not illegally discriminate simply because urged or pressured by third party); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385, 386, 389 (5th Cir. 1971) (holding that customer preference for female flight attendants does not constitute bona fide occupational qualification under Title VII). *But see* EEOC v. University of Texas Health Science Ctr., 710 F.2d 1091, 1096–97 (5th Cir. 1983) (holding age limitation for campus police to be bona fide occupational qualification because of ability to relate to youthful offenders).

145. Telephone Interview with John J. Donohue III, Professor, Stanford Law School (Oct. 20, 1997). In preparing for the article cited by the *Proud* court, Donohue and Siegelman primarily relied on a random sample of employment discrimination cases on file in selected federal courts. Their research focused on explaining a broad pattern of employment discrimination cases (and in particular, the dramatic shift from failure-to-hire cases to discharge cases) rather than exploring the relationship between the presence of discrimination and the identity of hirers and firers, which could not be addressed with the empirical data at hand. *Id.*

146. *See, e.g.*, *Foundations of Employment Discrimination Law*, *supra* note 143 (presenting, *inter alia*, excerpts of interdisciplinary research and commentary concerning the nature of prejudice); Ayres & Siegelman, *supra* note 136, at 1513–14 (noting phenomenon of "consequential animus," in which preference of discriminatory employer to inflict harm on disfavored groups can lead employer to hire and then fire workers from those groups because that would be more hurtful than not hiring them at all).

147. *See, e.g.*, Susan D. Clayton & Faye J. Crosby, *Justice, Gender, & Affirmative Action* (1992) (discussing socio-psychological aspects of gender discrimination); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317 (1987) (discussing socio-psychological aspects of race discrimination).

3. *The Principle as Expanded Is Vulnerable to Abuse*

When an unprincipled employer is aware of the legal ramifications of the same actor construct, artificial identity can be easily created.[148] Employers, once made aware of the *Proud* principle, will (and should) take hirer-relationships into account when contemplating termination decisions.[149] Such advice may lead an unscrupulous employer to create seeming hirer-firer identity when in fact there is none, a strategy that might well pass muster with a court ignorant of the details of the decisionmaking process. There is a serious potential that employers will manipulate the "facts" and then use the inference to mask a discriminatory motive.[150]

4. *The Post-*Hicks *Analytical Framework Provides Ample Opportunity for the Trier of Fact To Draw Inferences from Evidence of Hirer-Firer Identity*

The "same actor inference," established prior to *St. Mary's Honor Center v. Hicks*,[151] has outlived its usefulness. The *Hicks* Court emphasized that the factfinder may decide "the ultimate question" based on the evidence as a whole.[152] Moreover, the *Hicks* Court made clear that at trial the factfinder is under no obligation to render a pro-plaintiff judgment if the plaintiff substantiates pretext but not discrimination.[153] The factfinder's virtually unlimited ability to draw any reasonable inferences from the overall evidence obviates the need to create

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148. *See* Elissa Delano Dorfsman, Waldron v. SL Indus., Inc.: *Toward an Age of Enlightenment in Cases of Age Discrimination*, 6 Temp. Pol. & Civ. Rts. L. Rev. 173, 185 (1997) (noting employer's ability "to manipulate, redefine, reorganize, dismantle, and resurrect pieces of itself"); *cf.* Ellen M. Martin, *Dispositive Motions in Federal Employment Discrimination Cases*, C780 ALI-ABA 859, 873 (1993) ("When counsel is consulted before the decision is made, counsel has the rare chance to shape the facts and create the record before litigation is commenced. This is an excellent opportunity to plan for summary judgment....").

149. *See, e.g.*, Perkins Coie, *Ninth Circuit Rejects Discrimination Claim Because Same Manager Hired, then Fired Employee*, Washington Employment Law Letter, Vol. 4, No. 1, at 1 (Feb. 1997) (observing that *Bradley* decision is "instructive" to employers who would "be wise to examine precisely who the hiring and firing decisionmakers were"); Waks & Roberti, *supra* note 8, at B4 (advising "attorneys for both plaintiffs and defendants" to "heed the importance of the same-actor inference when preparing their cases").

150. *Cf.* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988) (noting temptation for employers to adopt "surreptitious" quota systems to avoid discrimination litigation).

151. 509 U.S. 502 (1993).

152. *Id.* at 518–19.

153. *Id.* at 519.

evidentiary constructs that draw attention to particular sets of facts.[154] The defendant is free to argue the hirer-firer identity along with other evidence of nondiscrimination,[155] but the hirer-firer relationship should not have priority over other types of evidence in this process.

5. *The Principle's Application Presents Serious Definitional and Procedural Concerns*

The varied interpretations of the original hirer-firer rule, and particularly the interchangeability of inferences and presumptions, provide opportunities for defense attorneys to play fast and loose with evidentiary terminology and procedure. One defendant has pointed to *Proud* and its progeny as "an abundance of case law finding that when the individual responsible for the alleged discriminatory act is the same individual who hired or promoted plaintiff, *there is insufficient evidence* of discriminatory intent."[156] Defendants have argued to the Fourth and Fifth Circuits that discrimination is impossible as a matter of law when there is hirer-firer identity.[157]

While district courts have apparently not permitted such extreme interpretations of the *Proud* principle, some published decisions suggest the very real potential for further devolution of the "inference" into a conclusive presumption of nondiscrimination, particularly in cases that are not reviewed by appellate courts. For example, one district court has held that hirer-firer identity creates "an *assumption* that age discrimination was not the motive behind the termination."[158] Another has interpreted the principle to mean that "the [*McDonnell Douglas*] proof scheme *does not apply* where adverse action is taken against

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154. *See* Brief of the EEOC as Amicus Curiae in Support of Plaintiff-Appellant at 22, Waldron v. SL Indus., Inc., 56 F.3d 491 (3d Cir. 1995) (No. 94-5282) (arguing that no justification for creating formal inference existed "at least since *Hicks*, because the factfinder is free to draw whatever reasonable inferences it chooses from the overall context of the evidence").

155. *Id.*

156. Eslinger v. United States Cent. Credit Union, 866 F. Supp. 491, 498 (D. Kan. 1994) (emphasis added). In light of other evidence presented, the court disagreed that the fact of promoter-firer identity automatically made the plaintiff's claim irrational. *Id.* at 499.

157. Brief of Appellees/Cross-Plaintiffs at 21, Nieto v. L&H Packing Co., 108 F.3d 621 (5th Cir. 1997) (No. 96-50419); Opening Brief of Appellants at 17, Jiminez v. Mary Washington College, 57 F.3d 369 (4th Cir. 1995) (No. 94-1776 (L), 94-1802).

158. Walker v. Southern Holdings, Inc., 934 F. Supp. 197, 199 (M.D. La. 1996) (emphasis added). An assumption is a fact that is conceded or taken for granted, independent of the establishment of any basic fact. Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Federal Rules of Evidence* § 5124 (1977).

recently hired employees within the protected age group."[159] Such conclusory interpretations are inappropriate and should be curbed.[160]

6. *The Principle as Expanded Discourages Legitimate Grievances*

Perhaps the most disturbing consequence of the increased recognition and use of the same actor rule is that it potentially discourages plaintiffs with legitimate grievances from pursuing relief because of a perception that any hirer-firer connection will destroy their case. The frequent invocation of the *Proud* principle may already have had a chilling effect on plaintiffs in the Fourth Circuit.[161] This outcome is not surprising in light of the *Proud* court's stated intention to use the principle to reduce the number of "meritless but costly" employment discrimination cases brought to trial.[162] As the *Stanford Law Review* article on which the Fourth Circuit relied in announcing the rule observed, "if discrimination victims never sue, then employers have no economic incentive to comply."[163] Such a consequence would seriously undermine federal anti-discrimination legislation.

B. *Alternately, the Same Actor Principle Should Be Restricted to Its Original Parameters*

The widespread adoption of the "same actor" doctrine has been accompanied by unrelenting expansion of its initial boundaries, seemingly unaccompanied by thoughtful consideration of the potential consequences.[164] If the doctrine is invoked at all, its application should be carefully limited.[165]

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159. Gemmell v. Fairchild Space & Defense Corp., 813 F. Supp. 1152, 1156 n.3 (D. Md. 1993), *aff'd*, 37 F.3d 1493 (4th Cir. 1994) (emphasis added).

160. *Cf.* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 356 (1995) (correcting some circuit courts' use of evidence justifying employee dismissal acquired after-the-fact as conclusory evidence that ADEA relief should be barred). The U.S. Supreme Court denied a petition for certiorari on the same actor issue in 1996. Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 785 (1996).

161. The plaintiff's attorney in *Proud* indicated that such resignation is already occurring in the Fourth Circuit. Telephone Interview with Michael J. Kator, Of Counsel, Kator & Scott, Washington, D.C. (Apr. 19, 1997) (observing that when opposing counsel on the defense side call him and tell him they are citing *Proud v. Stone*, "I know it's over").

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

163. Donohue & Siegelman, *supra* note 22, at 1023.

164. *See supra* Part II.

165. The Eighth Circuit could serve as a model of restraint. While surpassing the Fourth Circuit in the number of published cases noting a hirer-firer link, *see* cases cited *supra* note 69, the court has

1. *The Same Actor Principle Should Be Raised Only in Age Discrimination Situations*

The same actor inference is particularly inapposite in gender, race, and disability discrimination cases.[166] The hiring and firing factors for these groups are arguably more complex than those for age-related decisions. Pressures to hire a diverse workforce are more likely to be focused on racial and gender differences than on age heterogeneity.[167] In addition, race and gender biases may be more deeply ingrained than age-related prejudices because the boundaries of race and gender are more apparent; since everyone ultimately grows old, there is not a perceived "we-they" detachment underlying and fueling prejudices.[168] A disability may not be immediately apparent at the hiring stage, particularly in light of the ADA's general prohibition of pre-employment inquiries concerning disabilities; in such cases, the employer would not be aware of the protected status at the time of hiring, thus rendering the doctrine inapplicable.[169] Moreover, many disabilities may worsen over time, requiring adjustments in an employer's statutory duty to accommodate that do not exist with other protected groups.[170]

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limited the principle in several important respects: restricting it to ADEA cases, generally considering the hirer-firer relationship only as a supplement to other evidence, and in one instance declining to mention it despite criticism from the dissent. *See* Brown v. Stites Concrete, 994 F.2d 553, 568 (8th Cir. 1993) (en banc) (Loken, J., dissenting). Of nine published Eighth Circuit decisions, four have been favorable to the employee, and five have been pro-employer. *See* cases cited *supra* notes 117–20 and accompanying text.

166. For arguments that age discrimination differs from "classic" discrimination, see generally Richard A. Posner, *Aging & Old Age* 358–63 (1995), and Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA's Unnatural Solution*, 72 N.Y.U. L. Rev. 780 (1997); *see also* Shager v. Upjohn Co., 913 F.2d 398, 406 (7th Cir. 1990) (Posner, J.) (expressing perplexity "that the middle-aged should be thought an oppressed minority requiring the protection of federal law").

167. *See, e.g.*, Reply Brief of the EEOC as Appellant at 17, EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145 (7th Cir. 1996) (No. 95-2302) (distinguishing age and race contexts).

168. *See* Brief of the EEOC as Appellant at 21, *Our Lady of Resurrection Med. Ctr.* (No. 95-2302) (noting "the historic dimensions and depth of racial prejudice in American society").

169. *See* Susie v. Apple Tree Preschool & Child Care Ctr., Inc., 866 F. Supp. 390, 397 (N.D. Iowa 1994) (rejecting *Tyndall*'s extension of inference to ADA claims).

170. *Id.* (noting that such vicissitudes can "minimiz[e], if not eliminat[e], the force of the inference of non-discrimination").

2. *The Same Actor Principle Should Be Raised Only When There Is Personal Identity Between the Hirer and the Firer*

Extension of the same actor inference to the employer in general, or to groups of hiring officials, would virtually preclude all post-hire adverse employment decisions, essentially eviscerating the entire anti-discrimination framework. Thus, for example, an employer who hires a woman and then later makes an adverse employment decision because she does not fit impermissible gender stereotypes—circumstances found to be discriminatory by the U.S. Supreme Court[171]—could merit a presumption of nondiscrimination.[172] Defendants in several cases in which the Court has found discrimination have pointed to past hiring of individuals from the protected group as evidence of nondiscrimination.[173] The Court has declined to accord presumptive value to this information. The circuits should follow suit.

3. *The Same Actor Principle Should Be Raised Only When There Is a Hire-Fire Interval of Less than One Year*

Many circumstances can change over time that can give an employer either a reason or an ability to discriminate.[174] In such circumstances, the passage of time undermines the inferential value of any hirer-firer connection. The maintenance of a "relatively short" hire-fire interval would also align the doctrine more closely with the concept of a traditional probation period.[175]

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171. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

172. For further discussion of stereotypical thinking, see generally Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995), and Federal Glass Ceiling Comm'n, *Good for Business: Making Full Use of the Nation's Human Capital* (1995).

173. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978) (stating that, although district court was entitled to consider workforce racial mix in determining motivation, such evidence was insufficient to "conclusively" demonstrate that employer's actions were not motivated by discrimination); *see also* Petition for a Writ of Certiorari at 18, Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 785 (1996) (No. 95-6699) (noting that "[t]he fact that ante-bellum plantation owners voluntarily utilized millions of black workers on their lands obviously would not give rise to a 'strong inference' that no racial mistreatment occurred during the era of chattel slavery").

174. *See supra* notes 134–37 and accompanying text.

175. *See* Peter B. Broida, *A Guide to Merit Systems Protection Board Law & Practice* ch. I (1997) (discussing one-year probationary period for federal employees); Eng Seng Loh, *Employment Probation as a Sorting Mechanism*, 47 Indus. & Labor Rel. Rev. 471 (1994) (quoting (Bureau of Nat'l Affairs, *Ind. Rel. Guide: Seniority & Working Conditions* 54,404 (1981) (finding that 90% of union contracts contained probationary periods ranging from 30 days to six months)).

4. *The Same Actor Principle Should Be Restricted to Termination Cases*

The extension of the same actor principle to failure-to-promote contexts is similarly flawed. Hiring a person from a disfavored group at a lower level within the organization is significantly different from selecting that individual for a higher-level position. The most obvious example is the "glass ceiling" acknowledged for women.[176] Further, the inference of nondiscrimination would automatically apply to any non-hiring decision in a company or organization having only one decisionmaker.[177]

5. *The Same Actor Principle Should Not Be Accorded Mandatory Presumptive Status*

Since *Texas Department of Community Affairs v. Burdine*,[178] there has been no question that the employee maintains the burden of persuasion in an employment discrimination case.[179] However, reference to the hirer-firer link as a "strong presumption" or "strong inference" rather than a "reasonable inference" or "permissive presumption" can function to make the plaintiff's burden more exacting than is either intended or necessary. It is particularly inappropriate at the prima facie step, where the U.S. Supreme Court has held that the burden is not onerous.[180] At the pretext stage, provided that the plaintiff has presented evidence to discredit the defendant's justification, hirer-firer identity should be granted no more weight than other evidence.[181]

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176. *See generally* Federal Glass Ceiling Comm'n, *supra* note 172. The Commission found that although women comprise 40% of managers in large companies, they constitute fewer than 10% of senior executive positions. *Id.* at 151. Less than 2% of senior-level male managers are African-American, Asian, and Hispanic. *Id.* at 9; *see also* Lindemann & Grossman, *supra* note 8, at 35 (noting that plaintiffs faced with "same decisionmaker" inference might argue that employer willing to hire persons in protected groups in entry-level jobs may discriminate in promotions "to preserve a glass ceiling").

177. *See* Petition for a Writ of Certiorari at 22, *Buhrmaster* (No. 95-6699) (stating that same actor presumption would have practical effect of nullifying Congress's extensions of nondiscrimination coverage to smaller firms).

178. 450 U.S. 248 (1981).

179. *Id.* at 253.

180. *Id.*

181. *See* Reply Brief of the EEOC as Appellant at 19, EEOC v. Our Lady of Resurrection Med. Ctr., 77 F.3d 145 (7th Cir. 1996) (No. 95-2302); *see also* Brief of the EEOC as Appellant at 22, *Our Lady of Resurrection Med. Ctr.* (No. 95-2302) (arguing that "evidence of the same hirer/firer is

6. *The Same Actor Inference Should Not Be Invoked in the Summary Judgment Context*

Invoking an inference or permissive presumption in the summary judgment context usurps the role of the jury and deprives the plaintiff of a full opportunity to show why the "same actor inference" is inappropriate in a particular case. At summary judgment, the court should refrain from determining credibility, weighing evidence, or drawing legitimate inferences from the facts, as those are jury functions.[182] Evaluating whether the facts justify or rebut an inference or presumption constitutes weighing evidence, a quintessential jury function.[183]

Furthermore, summary judgment is not appropriate if a reasonable trier of fact could find for the nonmoving party based on the record taken as a whole.[184] The "rationality" on which the Fourth Circuit based the same actor inference is undermined by the fact that even seemingly "rational" decisions may be based on impermissible (and often irrational) prejudices. Thus, a reasonable trier of fact *could* find discrimination despite hirer-firer identity. For the same reasons, the same actor relationship should not be used to justify a judgment as a matter of law unless the plaintiff has produced no prima facie case and/or evidence of pretext from which a reasonable jury could find discrimination. A realistic appreciation of the nature of prejudice, combined with acknowledgment of patterns typical when discrimination has been found in spite of hirer-firer identity, should prevent the court from prematurely cutting off the presentation of evidence.

Finally, raising the same actor principle at summary judgment is inappropriate because inferences are to be drawn in favor of the nonmoving party.[185] Bringing up a "strong inference" *against* the nonmoving party violates the spirit and the letter of summary judgment procedure.

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simply evidence like any other on the ultimate question of discrimination and should not be accorded presumptive value").

182. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986).

183. *See* Petition for a Writ of Certiorari at 19, Buhrmaster v. Overnite Transp. Co., 61 F.3d 461 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 785 (1996) (No. 95-6699) (contending that "deciding what factual inferences should be drawn from [hirer-firer] circumstances is a role conferred by the Seventh Amendment on a jury").

184. *Liberty Lobby*, 477 U.S. at 252; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

185. *Matsushita*, 475 U.S. at 587; Fed. R. Civ. P. 56.

The inference should never suffice in itself to prove non-discrimination. To allow it to do so would place inordinate weight on a single piece of evidence, creating in effect a conclusive presumption. Such treatment permits the court to dismiss a case without allowing the plaintiff a full opportunity to show why the inference is not reasonable given his or her specific circumstances. As the Supreme Court of Iowa observed in declining to adopt the rule:

> To apply such a wooden rule in an area where each case is factually distinct would effectively grant every employer a grace period at the beginning of each employee's tenure during which the employer could freely discriminate with no fear of sanctions. This we choose not to do. Questions of fact and credibility of witnesses . . . are more properly answered by the jury, and as long as they are supported by substantial evidence, we will not set them aside.[186]

IV. CONCLUSION

The "same actor inference" originated out of a stated concern for expediting dismissal of meritless employment discrimination claims. Its unrestricted application, however, can lead to dismissal of valid claims as well. The most disturbing outcome of the doctrine's growing acceptance is the potential for simultaneously encouraging employers to discriminate without fear of repercussion while discouraging plaintiffs from bringing valid claims. Courts invoking the inference should be aware of the dangers inherent in its continuous expansion and apply it, if at all, with caution.

186. Vaughan v. Must, Inc., 542 N.W.2d 533, 539 (Iowa 1996).