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CO-WORKER EVIDENCE IN COURT

SANDRA F. SPERINO*

ABSTRACT

This symposium explores ways to empower workers. Many employment laws rely on workers filing private rights of action to enforce the underlying substantive law. Unfortunately, when workers file these claims in court, courts often do not allow them to rely on evidence from their co-workers. While courts regularly allow employers to submit co-worker evidence of a plaintiff's poor performance or lack of qualifications, they often diminish or exclude a plaintiff's co-worker evidence that the plaintiff performed well or possessed desired qualifications. This Article identifies and explores this evidentiary inequality. It argues that efforts to empower workers must include the power to support one another in litigation and that courts should be careful about rejecting plaintiffs' co-worker evidence, while relying on similar evidence offered by employers.

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I. INTRODUCTION

In discrimination cases, both employers and workers try to rely on evidence from co-workers. Employers often use co-worker evidence to support their litigation narrative. Workers try to rely on co-worker testimony to show discrimination. It would be logical to assume that this evidence would be treated the same way by courts, but this is not the case. Courts often allow employers to use co-worker evidence to defend a case, while excluding or diminishing similar evidence offered to support a worker's case.

This evidentiary inequality occurs frequently when the parties dispute whether the plaintiff performed her job well or whether she was qualified for a new job or a promotion. Courts will often allow the employer to offer evidence from co-workers that the plaintiff engaged in misconduct, performed her work poorly, or was not qualified. At the same time, courts often exclude or diminish evidence from co-workers that shows the plaintiff did not engage in the alleged misconduct, performed her work well, or was qualified for the contested job.[1]

This Article provides a comprehensive picture of how the courts view co-worker evidence related to worker performance and qualifications. It documents the existing evidentiary inequality.[2] This evidentiary inequality related to co-worker evidence is relatively well hidden for several reasons.

First, there is no single, overarching evidentiary doctrine related to co-worker evidence. Courts exclude or include co-worker evidence through several doctrines, which facially appear to be disconnected. At times, no doctrine is at play, and the evidentiary equality only emerges by analyzing the conclusions courts reach about particular evidence offered by the parties.

Second, courts do not always identify people using generic words like co-worker or supervisor. Instead, they often use titles that are specific to the particular employer or refer to workers with their names. Finding the evidentiary inequality often means reading the facts of each case in detail to determine each person's status in relation to the underlying facts.

Third, in some cases, it is nearly impossible to tell what evidence the plaintiff actually offered because the courts only generally describe the evidence. For example, a court might state that the plaintiff submitted a particular person's "opinion" about the plaintiff's performance without describing in detail who the co-worker is and the subject of the co-worker's testimony.[3] The only way to see the pattern is to read the facts of hundreds of cases to determine from whom the worker or the employer obtained evidence and what evidence each party presented to the court.

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1. *See* cases cited in Section II, *infra*.
2. This Article is part of a larger project to explore this problem. *See* Sandra F. Sperino, *Evidentiary Inequality* (manuscript on file with the author).
3. Brice v. Joule Inc., No. 00-1068, 2000 WL 1225542, at *2 (4th Cir. July 31, 2000).

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Finally, the evidentiary inequality related to co-worker evidence is not uniform. The concept analyzed in this Article is a propensity and not a universal norm. Counterexamples abound.[4] Nonetheless, the overall trajectory of the cases favors employers and not workers.

Importantly, judges may not be aware of the differing ways the judiciary as a whole is treating co-worker evidence. In many cases, a judge will have co-worker evidence from one party, but not the other. Thus, in any given case, an individual judge may not see how co-worker evidence is being treated differently, even if that particular judge treats co-worker evidence differently across multiple cases.

This Article advocates for more transparency related to co-worker evidence, especially in the summary judgment context. At the summary judgment stage, the Federal Rules of Civil Procedure instruct judges to make all reasonable inferences from a given fact in favor of the non-moving party.[5] Judges routinely make inferences against the plaintiff when the employer moves for summary judgment. Not only are judges routinely making inferences against the worker (the non-moving party) at summary judgment, they are also failing to apply the same inferences to the employer's evidence that they apply to the worker's evidence. In many cases judges will cite the summary judgment standard early in their opinion, and the standard performs little to no work as the judges analyze the cases before them.

One way to effectuate transparency is to infuse employment discrimination law with a statement rule identifying the propensity and requiring judges to reflect about whether they treat evidence appropriately. At the summary judgment stage, the statement rule would reiterate the appropriate legal standard, emphasizing in which party's favor inferences should be drawn. It would discourage judges from excluding or diminishing the plaintiff's evidence at the summary judgment stage, except in limited circumstances.[6] For each piece of evidence that favors the plaintiff, the statement rule could require the district court to fully describe the plaintiff's evidence. If the judge excludes or diminishes the evidence, the statement rule would require the court to explain how its decision is consistent with the procedural juncture of the case. Similarly,

4. *See, e.g.*, Hubbell v. FedEx SmartPost, Inc., 933 F.3d 558, 570 (6th Cir. 2019) (relying on co-worker testimony that some of disciplinary writeups were unjustified); Rogers v. Medline Indus., Inc., No. 1:17CV118-HSO-RHW, 2019 WL 402361, at *2 (S.D. Miss. Jan. 31, 2019) (allowing evidence of past good and bad performance). The purpose of this article is not to criticize the outcomes in specific cases. Instead, it is to demonstrate a propensity of courts to allow co-worker evidence when it favors the employer and to disfavor similar evidence when it favors the plaintiff. As with almost everything else in discrimination law, counterexamples abound.

5. FED. R. CIV. P. 56(a).

6. *See* Sandra F. Sperino, *Evidentiary Inequality* (manuscript on file with the author). For example, an affidavit submitted in favor of the plaintiff might be excluded if the information contained within it is not based on personal knowledge.

if the judge draws inferences in favor of the defendant, it should be required to justify why such inferences comport with the summary judgment standard.

Section II discusses the federal discrimination statutes, common evidentiary paths parties use to prove or defend discrimination claims, and the role of summary judgment in them. Section III shows how courts regularly allow defendants to rely on co-worker evidence, but do not allow plaintiffs to rely on similar evidence. Section IV advocates a path forward that recognizes the evidentiary inequality and requires courts to transparently reconcile their views on co-worker evidence with the discrimination statutes' right to jury trial and the Federal Rules of Civil Procedure.

II. THE DISCRIMINATION STATUTES, RECURRING EVIDENTIARY PATHS, AND SUMMARY JUDGMENT

A. *The Discrimination Statutes*

Federal employment discrimination law is primarily grounded in four statutes: Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and 42 U.S.C. § 1981.[7] Title VII is the cornerstone federal employment discrimination statute. Title VII prohibits an employer from discriminating against a worker because of race, sex, national origin, color, or religion.[8] Title VII's main operative provision consists of two subparts. Under the first subpart, it is an unlawful employment practice for an employer to do the following: "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"[9] Under Title VII's second subpart, it is unlawful for an employer to do the following:

> (2) 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 race, color, religion, sex, or national origin.[10]

These two subparts form the foundation of Title VII's text.[11] The ADEA contains similar main language,[12] and the ADA contains similar concepts,

7. 42 U.S.C. § 2000e-2(a) (2010) (Title VII's primary operative provisions); 29 U.S.C. § 623(a) (2006) (same for ADEA); 42 U.S.C. § 12112(a) & (b) (2009) (same for ADA).

8. 42 U.S.C. § 2000e-2(a).

9. 42 U.S.C. § 2000e-2(a)(1).

10. 42 U.S.C. § 2000e-2(a).

11. Congress amended Title VII in 1991. However, this does not change the fact that the foundational text of Title VII is contained in 42 U.S.C. § 2000e-2(a).

12. 29 U.S.C. § 623(a).

although not always stated in the same language.[13] Section 1981 does not use similar language; however, the courts have often used the same frameworks to analyze disparate treatment claims under section 1981 and Title VII.[14] Under each of these statutory regimes, a plaintiff has a right to jury trial under certain circumstances.[15]

Under the federal discrimination statutes, a plaintiff often tries to prove that the employer took certain actions "because of" an individual's protected trait, such as race, sex, or age.[16] Although there are many different ways for a plaintiff to make this showing, many plaintiffs proceed under an individual disparate treatment theory. In individual disparate treatment cases, a plaintiff or a small group of plaintiffs tries to show that an employer took a negative action against them because of their protected trait.[17] Although the statutes do not require proof of intent or animus, plaintiffs proceeding on a disparate treatment theory often rely on such evidence.

This Article will focus on disparate treatment cases because plaintiffs frequently proceed under this theory of discrimination. The courts have created a series of frameworks to evaluate disparate treatment cases. These frameworks are not contained within the discrimination statutes but play an important role in how courts analyze discrimination cases. If a plaintiff proceeds under a disparate treatment theory, many courts will analyze the case by first determining the type of evidence the plaintiff possesses, often dividing that evidence between what the courts call "direct evidence" and "circumstantial evidence."[18]

13. 42 U.S.C. § 12112.

14. *See, e.g.*, Kim v. Nash Finch Co., 123 F.3d 1046, 1056 (8th Cir. 1997); *but see* Comcast v. Nat'l Ass'n of African-American Owned Media, 589 U.S. 1,1 (2020) (holding that a plaintiff is required to establish "but for" cause in Section 1981 cases).

15. 42 U.S.C. § 1981a(c) (2006); 29 U.S.C. § 626(c) (2006). Plaintiffs are not entitled to a jury trial in all instances. For example, a jury trial is not available for disparate impact claims under Title VII. 42 U.S.C. § 1981a(a), (c). The ADEA's federal sector provision does not provide a jury trial. *Lehman v. Nakshian*, 453 U.S. 156, 168 (1981); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 357 (2013).

16. 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623(a). The ADA uses slightly different causal language and describes in greater detail how disability discrimination might occur. 42 U.S.C. § 12112(a) & (b). Section 1981 does not use similar language; however, the courts have often used the same frameworks to analyze claims under section 1981 and Title VII. *See, e.g.*, *Kim*, 123 F.3d at1056; *but see Comcast*, 589 U.S. at 1 (holding a plaintiff is required to establish "but for" cause in Section 1981 cases).

17. *See* Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368 (2009) (comparing disparate treatment with other theories).

18. *See generally* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011) (providing an overview and critique of the frameworks); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 92–93 (2003) (rejecting the difference between direct and circumstantial evidence in certain Title VII cases); Ortiz v. Werner Enters., Inc., 834 F.3d 760, 763 (7th Cir. 2016) (critiquing the rigid use of frameworks).

When evaluating discrimination cases, a plaintiff can prevail by presenting direct evidence that her protected trait caused an outcome. Direct evidence is evidence that proves discrimination without inference.[19] For example, if a supervisor told a woman that he did not promote her because women do not make good managers, this would be direct evidence of discrimination. The supervisor's statement directly connects the plaintiff's sex with the negative outcome. The employer will be liable for employment discrimination, unless a defense or affirmative defense applies.

In contrast, circumstantial evidence relies on inferences.[20] Most modern discrimination cases rely on circumstantial evidence of discrimination. The courts often use the *McDonnell Douglas* framework to evaluate disparate treatment cases with circumstantial evidence.[21] *McDonnell Douglas* is a three-part, burden-shifting framework.[22] It is one way to establish a discrimination claim.

The test begins with a multipart first step, called the prima facie case. In the *McDonnell Douglas* case itself, the Supreme Court held that the plaintiff could establish the prima facie case by:

> [s]howing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[23]

The Supreme Court cautioned, however, that the facts required to establish a prima facie case will necessarily vary, depending on the factual scenario of the underlying case.[24] The Supreme Court has stated on numerous occasions that the prima facie case is not supposed to be onerous.[25]

After the plaintiff establishes this prima facie case, a rebuttable presumption of discrimination arises.[26] The analysis then proceeds to the second step of *McDonnell Douglas*. After a plaintiff makes a prima facie showing, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason

19. *See, e.g.*, Rojas v. Florida, 285 F.3d 1339, 1342 n.2 (11th Cir. 2002) (per curiam); *see also* Martinez v. Cracker Barrel Old Country Store, Inc., 703 F.3d 911, 914–15 (6th Cir. 2013).

20. *See, e.g.*, Caskey v. Colgate-Palmolive Co., 535 F.3d 585, 593 (7th Cir. 2008).

21. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

22. For in-depth treatment of this framework, see Sandra F. Sperino, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN DISCRIMINATION LAW (Bloomberg).

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

24. *Id.*

25. *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354 (2015); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

26. O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 311–12 (1996).

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for the allegedly discriminatory decision or action, thereby rebutting the presumption.[27] If the employer does this, the inquiry proceeds to the third step.

In the third step, the plaintiff may prevail by showing that the employer's stated reason is pretext or by producing other evidence to establish the employer took the negative action because of a protected trait.[28] If the plaintiff establishes pretext, a factfinder may infer from the evidence of pretext that the employer discriminated because of a protected trait. In the third step, the plaintiff may succeed "by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[29] As one court noted,

> the plaintiff may attempt to meet this burden with (1) evidence establishing her prima facie case; (2) evidence attacking the employer's proffered explanation; and (3) any further evidence that may be available to the plaintiff, "such as independent evidence of discriminatory statements or attitudes on the part of the employer."[30]

Some courts primarily rely on the direct evidence method or the *McDonnell Douglas* framework to evaluate disparate treatment cases.[31] Some courts have expressed concern that the proof structure dichotomy encourages courts to view the plaintiff's case in a piecemeal fashion, rather than as a coherent whole.[32] In *Ortiz v. Werner Enterprises, Inc*., the Seventh Circuit worried that the trial court judge first separated direct evidence and indirect evidence, then evaluated only the direct evidence under the direct evidence framework and viewed the indirect evidence through *McDonnell Douglas*. By doing this, the trial court failed to determine whether the combined direct evidence and circumstantial evidence might establish that the employer discriminated against the plaintiff. The Seventh Circuit noted that the legal standard for proving an individual disparate treatment case,

> is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and

27. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802.

28. *Id.* at 804.

29. *Texas Dep't of Cmty. Affairs*, 450 U.S. at 256.

30. Simpson v. Leavitt, 437 F. Supp. 2d 95, 101 (D.D.C. 2006).

31. Rodriguez v. Eli Lilly & Co., 820 F.3d 759, 764 (5th Cir. 2016); *see also* Henry v. Spectrum, L.L.C., 793 F. App'x 273, 276 (5th Cir. 2019); Grose v. Mnuchin, No. 18-5746, 2019 WL 7603383, at *3 (6th Cir. Sept. 27, 2019); Gress v. Temple Univ. Health Sys., 784 F. App'x 100, 104 (3d Cir. 2019).

32. Ortiz v. Werner Enters., Inc., 834 F.3d 760, 763 (7th Cir. 2016).

irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect."[33]

B. A Recurring Evidentiary Path

A plaintiff can try to establish discrimination through a variety of evidentiary paths, and employers similarly may defend cases through various forms of evidence. Although there is not one predominant set of evidence that workers and employers invoke in discrimination cases, cases often rely on evidence related to the plaintiff's work performance or qualifications. In some cases, the performance and qualifications of other similarly situated workers is relevant. This evidence is often contested by the parties.

This evidence can play a role at each stage of the *McDonnell Douglas* analysis. In many cases, a plaintiff establishes the fourth factor of the prima facie case by showing comparator evidence: that the employer treated her differently than other similarly situated workers outside her protected class.[34] Comparator evidence plays a prominent role in discrimination cases. If a factfinder believes that the employer treated a person differently because of a protected trait, this evidence alone can establish discrimination. Employers will often contend that a plaintiff cannot establish the *McDonnell Douglas* prima facie case because the plaintiff cannot present evidence of a similarly situated employee that the employer treated differently.[35] Comparator evidence relies heavily on evaluating the plaintiff's job performance, qualifications, or misconduct with that of other employees.

At the second step of *McDonnell Douglas*, the employer presents a non-discriminatory reason to justify its action against the plaintiff. Employers often defend cases by presenting evidence of the plaintiff's poor performance, misconduct, or lack of qualifications.

The central insight from *McDonnell Douglas* is that a plaintiff can establish discrimination by showing that an employer's articulated reason for its action

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33. *Id.* at 765.

34. *See, e.g.*, Tukay v. United Airlines, Inc., 708 F. App'x 922, 923 (9th Cir. 2018); McKinney v. Office of Sheriff of Whitley Cty., 866 F.3d 803, 807 (7th Cir. 2017). For a critique of this doctrine, see Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 761 (2011).

35. A plaintiff is not required to establish a similarly situated comparator to establish the prima facie case. The federal circuits employ various tests to determine whether a party can rely on comparator evidence. The Seventh Circuit has noted that the plaintiff and the comparator "need not be identical in every conceivable way"; rather, they must be "'directly comparable' to the plaintiff 'in all material respects.'" Skiba v. Illinois Cent. R.R. Co., 884 F.3d 708, 723 (7th Cir. 2018) (quoting Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012)). The Sixth Circuit has stated that comparators must be "nearly identical." Brown v. Metropolitan Gov't of Nashville & Davidson Cty., 722 F. App'x 520, 527–28 (6th Cir. 2018). However, the Sixth Circuit has also reasoned: "plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment." Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998). For purposes of this Article, the particular test used by the circuit is not important.

was a pretext for discrimination.[36] In other words, an employee is not required to produce "smoking gun" evidence to prove discrimination. Instead, a plaintiff might be able to prevail if the employer's reasons for its action do not make sense, are not credible, or otherwise seem fishy. A plaintiff can use comparator evidence to establish that the employer's reason is pretextual. An employer may counter plaintiff's pretext evidence by showing that it treated other employees similarly.[37]

For example, if an employer fires an older worker for missing work three times but does not fire a younger worker with the same number of absences, a factfinder might conclude that the employer fired the older worker because of her age. Similarly, an employer might offer comparator evidence to help establish that it did not discriminate against the worker. In our example, if the employer fired a younger employee for missing three days of work and also fired an older worker for missing three days of work, the employer might offer this evidence of similar treatment to establish that it did not discriminate. Both plaintiffs and employers rely on comparator evidence in discrimination cases, and this comparator evidence often depends on evidence related to the work performance of the plaintiff and other workers.[38]

Evidence from co-workers may be useful to both the plaintiff and the employer. Co-workers often possess information about evidence related to the plaintiff's work performance and the performance of other similarly situated workers; whether the employer had a particular policy and consistently enforced it; and whether the plaintiff or others possessed certain traits or skills.

Before continuing, a brief terminology note is necessary. In discrimination cases, courts often draw a line between the actions of supervisors and the actions of non-supervisors. In *Vance v. Ball State University*, the Supreme Court defined the term "supervisor."[39] The Court held that an employee is a "supervisor" for purposes of agency analysis when the person has the power to take a tangible employment action against the complaining employee.[40] Tangible employment

36. 411 U.S. at 804. In *McDonnell Douglas* itself, the Court noted that the facts required to prove a prima facie case will necessarily vary, depending on the case. *Id.* at 802 n.13. In subsequent cases, the Court further considered how the *McDonnell Douglas* test would operate. *Texas Dep't of Cmty. Affairs*, 450 U.S. at 253; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993).

37. Comparator evidence may be used in other ways. For example, under Title VII, an employer can reduce its damages if it can show it would have made the same decision even if it did not consider the protected trait. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2) (2010). Comparator evidence may help the employer establish this affirmative defense.

38. 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2) (2006).

39. 570 U.S. 421, 431 (2013).

40. *Id.* at 431. In dicta, the Court also noted that employers might try to insulate themselves against automatic liability by vesting the authority to make tangible employment actions to only a narrow band of employees "Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies." *Id.* at 447.

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action means to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[41] Courts often refer to non-supervisors as co-workers, even though using the word "co-worker" in this sense is confusing because it is not fully consistent with how many people use the term. In a colloquial sense, the word co-worker often means that two workers share a similar role or level within the larger organization.

When this Article uses the term co-worker, it means it in the legal sense of the word as it is used in modern, employment discrimination cases. A co-worker is any person who cannot take a tangible employment action against an employee. Examples of people who might fall within this way of defining "co-worker" include, among others, the plaintiff's peers, the plaintiff's subordinates, the plaintiff's former supervisors, and human resource employees who cannot take tangible employment actions.[42]

C. Summary Judgment

Summary judgment is an important procedural juncture in many discrimination cases. Litigants have a right to a jury trial under the federal discrimination statutes, at least under certain circumstances.[43] Under the federal rule governing summary judgment, a claim may be dismissed only if no reasonable jury could find in favor of the non-moving party.[44] In most employment discrimination cases, the employer is the entity requesting summary judgment. In such cases, the judge is supposed to assume the evidence that the plaintiff presents is true and to draw all reasonable inferences in favor of the worker.[45] Any disputed facts are read in the plaintiff's favor for purposes of summary judgment. Most of the time when judges rule on summary judgment motions, they rule on a paper record and never actually see or hear the parties' witnesses.

In some cases, a judicial grant of summary judgment in the employer's favor is not controversial. For example, if the plaintiff does not timely file her discrimination claim, it would be appropriate for the court to grant summary

41. *Id.* at 431.

42. It is not necessary here to determine whether a supervisor also includes those to whom the employer has effectively delegated authority, even when it has not officially granted it. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761–62 (1998).

43. 42 U.S.C. § 1981a(c); 29 U.S.C. § 626(c). Plaintiffs are not entitled to a jury trial in all instances. For example, a jury trial is not available for disparate impact claims under Title VII. 42 U.S.C. § 1981a(a), (c). The ADEA's federal sector provision does not provide a jury trial. *Lehman v. Nakshian*, 453 U.S. 156, 168 (1981); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 357 (2013).

44. FED. R. CIV. P. 56(a).

45. *See, e.g.*, Blue v. Lopez, 901 F.3d 1352, 1357 (11th Cir. 2018).

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judgment. The plaintiff does not technically possess a claim, and having a jury decide that fact is not necessary.

In many cases, however, the parties heavily contest the facts. Congress has decided that the proper entity to resolve these factual disputes in intentional discrimination cases is the jury. Some judges have emphasized the importance of allowing cases go to trial when the parties contest the facts because judges usually live "in a narrow segment of the enormously broad American socio-economic spectrum," and they generally lack "current real-life experience."[46] They emphasize how employment discrimination cases "are factually complex, deal with state-of-mind issues, are typically proved circumstantially, and are rarely uncontested."[47]

The practice of summary judgment in federal court often does not comport with the ground rules established in Rule 56 or with Congress's expressed desire that plaintiffs are entitled to a jury trial.[48] Instead, many judges are making powerful choices in how they view the evidence submitted by the parties. They often permit defendants to rely on evidence from co-workers when the evidence supports the defense. However, they often exclude or diminish the importance of co-worker evidence when the evidence would support the plaintiff's case.

III. CO-WORKER EVIDENCE

Courts often allow employers to present co-worker evidence to support their case. However, they often diminish or refuse to consider similar co-worker evidence when plaintiffs offer the co-worker evidence to support their cases.

A. Co-Worker Evidence for Employers

Unsurprisingly, courts regularly allow employers to use co-worker testimony to support the employer's claim that plaintiffs engaged in misconduct, performed their work poorly, or did not possess the necessary skills for a particular job. Courts allow employers to offer evidence of a plaintiff's mistakes or poor job performance from prior supervisors.[49] Courts also regularly allow

46. Gallagher v. Delaney, 139 F.3d 338, 342–43 (2d Cir. 1998).

47. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113 (2012).

48. *See* FED. R. CIV. P. 56.

49. *See, e.g.*, Seastrand v. U.S. Bank N.A., No. 19-4091, 2020 WL 1909065, at *3 (10th Cir. Apr. 20, 2020) (allowing evidence from former supervisor of plaintiff's poor judgment); Sims v. MVM, Inc., 704 F.3d 1327, 1337 (11th Cir. 2013); Moorer v. Baptist Mem'l Health Care Sys., 398 F.3d 469, 490 (6th Cir. 2005) (relying on a memorandum that described plaintiff's prior work deficiencies); Ralser v. Hudson Grp. (HG) Retail, LLC, No. CV 19-1359, 2020 WL 94878, at *9 (E.D. La. Jan. 8, 2020) (noting unfavorable performance review by the plaintiff's former supervisor); Robertson v. Riverstone Communities, LLC, No. 1:17-CV-2668-CAP-JKL, 2019 WL 4399492, at *4 (N.D. Ga. May 28, 2019), report and recommendation adopted, No. 1:17-CV-02668-CAP, 2019 WL 3282991 (N.D. Ga. July 22, 2019) (discussing performance review from former supervisor); Nagpal v. Holder, 750 F. Supp. 2d 20, 27 (D.D.C. 2010) (relying on reviews

employers to rely on evidence of plaintiff's poor performance or misconduct from non-supervisory co-workers.[50] Courts regularly consider plaintiff's past performance reviews when offered by the employer to establish the plaintiff's poor performance or lack of skills or qualifications.[51]

In many instances, the courts appear to allow a supervisor or other employee to present affidavits or other documents conveying the thoughts or opinions of co-workers.[52] Courts routinely allow employers to offer co-worker evidence about poor performance or misconduct through the testimony of supervisors.[53] For example, in one case, the court allowed a supervisor to present an affidavit that "[she] heard numerous staff members complain that [the plaintiff] was lazy, not performing her work and that she continuously made errors"[54]

Courts rely on co-worker evidence even when that evidence or the way that the court describes the evidence is vague about what happened. For example, courts allow co-worker evidence about the general perceived conduct or

from multiple prior supervisors and many not related to challenged action); Ratcliff v. Exxonmobil Corp., No. CIV.A. 01-2618, 2002 WL 1315625, at *5 (E.D. La. June 13, 2002) (stating that hiring decisionmakers relied on opinions of plaintiff's former supervisors).

50. Gant v. Genco I, Inc., 274 F. App'x 429, 434 (6th Cir. 2008) (noting numerous complaints from co-workers); Vasser v. SaarGummi Tennessee, LLC, No. 1:18-CV-00083, 2019 WL 8013869, at *3 (M.D. Tenn. Dec. 2, 2019), report and recommendation adopted, No. 1:18-CV-00083, 2020 WL 428941 (M.D. Tenn. Jan. 28, 2020) (noting complaints from co-workers); Jeffrey v. Thomas Jefferson Univ. Hosps., Inc., No. CV 17-0531, 2019 WL 2122989, at *1 (E.D. Pa. May 14, 2019); Clark v. New York State Office of State Comptroller, No. 1:09-CV-716 GLS/CFH, 2014 WL 823289, at *3 (N.D.N.Y. Mar. 3, 2014) (noting numerous complaints from co-workers); Bielich v. Johnson & Johnson, Inc., 6 F. Supp. 3d 589, 612 (W.D. Pa. 2014) (relying on co-worker and customer complaints); Georgy v. O'Neill, No. 00-CV-0660(FB), 2002 WL 449723, at *1 (E.D.N.Y. Mar. 25, 2002) (co-worker complaints).

51. *See, e.g.*, Ralser v. Hudson Grp. (HG) Retail, LLC, No. CV 19-1359, 2020 WL 94878, at *9 (E.D. La. Jan. 8, 2020) (noting unfavorable performance review by the plaintiff's former supervisor); *Nagpal*, 750 F. Supp. 2d at 27 (relying on reviews from multiple prior supervisors and many not related to challenged action).

52. *Moorer*, 398 F.3d at 490 (discussing a memorandum about the plaintiff's job deficiencies including customer complaints and staff communication issues); Bush v. Dictaphone Corp., 161 F.3d 363, 366 (6th Cir. 1998) (allowing corporate decisionmakers to file affidavits about what they had been told about the plaintiff from unnamed employees); *Vasser*, No. 1:18-CV-00083, 2019 WL 8013869, at *3 (noting complaints from co-workers). In addition, in many cases, courts describe the evidence in a way that makes it nearly impossible to determine how the employer presented the evidence.

53. *See* cases discussed in previous footnote.

54. Baffa v. STAT Health Immediate Med. Care, P.C., No. 11-CV-4709 JFB GRB, 2013 WL 5234231, at *2 (E.D.N.Y. Sept. 17, 2013) (affidavits from co-workers were also presented in the case).

disposition of the plaintiff. Thus, courts allow evidence that co-workers thought the plaintiff was "lazy,"[55] "rude,"[56] or used an "angry tone."[57]

At times, the way that the courts describe the co-worker evidence is so vague that it is not clear what evidence was submitted. Instead, the only thing that is clear is that the evidence supports the employer's case and not the worker's case. For example, in one case a plaintiff alleged that his employer terminated him in 2000 because of his age and sex.[58] The Third Circuit affirmed the trial court's grant of summary judgment in favor of the employer. When doing so, the court noted that several unidentified former supervisors had noted the plaintiff's poor performance since 1992.[59] The court did not describe the evidence presented by the plaintiff, did not provide the names of the former supervisors, did not provide the substance of the former supervisors' criticism, or discuss how plaintiff's past performance issues related to the case before the court.

Examples of the co-worker evidence upon which courts rely is helpful to understanding the evidentiary mismatch described in this article. The report and recommendation in *Philpot v. Blue Cross Blue Shield of Georgia*, shows how a court will allow a defendant to use co-worker evidence of a plaintiff's alleged poor performance from numerous co-workers, across a wide swath of time, and without explaining how the co-worker evidence relates to the contested employment action.[60] Often the judge refers to the co-worker evidence in such a vague way that it is impossible to determine how the defendant presented the evidence and what the evidence actually showed.

In *Philpot*, the plaintiff alleged that the employer fired her in 2006 because of her race and in retaliation for complaining about race discrimination.[61] The magistrate judge recommended that the district court judge grant the employer's motion for summary judgment. Without explaining why, the magistrate judge described plaintiff's alleged performance problems beginning in 2002.[62] The judge explained how two co-workers complained about the plaintiff's conduct without explaining what the plaintiff allegedly had done or how it related to her

55. *Id.*

56. Thome v. Young Men's Christian Ass'n of Greater Houston Area, 786 F. App'x 462, 463 (5th Cir. 2019) (providing almost no details about complaint, other than conclusions that the plaintiff was rude and disrespectful); Kho v. New York & Presbyterian Hosp., 344 F. Supp. 3d 705, 715 (S.D.N.Y. 2018).

57. Jeffrey v. Thomas Jefferson Univ. Hosps., Inc., No. CV 17-0531, 2019 WL 2122989, at *1 (E.D. Pa. May 14, 2019).

58. Silver v. Am. Inst. of Certified Pub. Accountants, 212 F. App'x 82, 85 (3d Cir. 2006).

59. *Id.*

60. Philpot v. Blue Cross Blue Shield of Georgia, No. 1:07-CV-0657-RWS-LTW, 2008 WL 11407269, at *1 (N.D. Ga. July 14, 2008), report and recommendation adopted, No. 1:07-CV-0657-RWS, 2008 WL 11407343 (N.D. Ga. Aug. 29, 2008).

61. *Id.* at *1.

62. *Id.* at *2.

termination.[63] The judge continued by explaining problems that another person (Dr. Robert McCormack) had with the plaintiff's written work product in 2003 and 2004.[64] In 2005, the employer changed the plaintiff's job duties, along with the duties of other employees in her department. The employer presented evidence that the person who was responsible for reassigning the plaintiff's job duties did so, in part, because of input from Dr. McCormack and another individual, but did not describe the substance of the input.[65] The plaintiff complained that the reassignment was discriminatory.[66]

The judge continued by explaining that another co-worker complained about the plaintiff's conduct toward the co-worker. The judge did not identify the co-worker, the substance of the co-worker's complaint, or how it related to the plaintiff's termination.[67] The judge then recounted evidence of an audit of the plaintiff's work completed by a co-worker and reported that the co-worker found the plaintiff's work to be "poor."[68] The judge continued by describing other evidence of plaintiff's performance deficiencies from her supervisor. The magistrate judge relied significantly on co-worker evidence to support the recommendation to grant summary judgment in favor of the employer.

In *Isbell v. Baxter Healthcare, Corp.*, the district court judge granted summary judgment on the plaintiff's claim that she was terminated because she complained about harassment.[69] The plaintiff contested the co-worker evidence offered by the defendant, arguing that it lacked a proper foundation. In granting summary judgment, the court relied on testimony from plaintiff's supervisor. The supervisor testified that "sometime in 2013" another individual (Seema Sondhi) told the supervisor that Sondhi's team members found meetings with the plaintiff to be "a waste of time" and "unproductive."[70] The supervisor was not able to report which team members felt this way but the supervisor could recall other general complaints from unspecified individuals.[71] The supervisor also testified about a number of other more specific complaints, from a number of different co-workers.[72]

Taken together, *Philpot* and *Isbell* show that courts allow employers to heavily rely on co-worker evidence related to the plaintiff's job performance, even when the evidence is vague and comes from individuals who are not the plaintiff's supervisor.

63. *Id.* at *2.
64. *Id.* at *3.
65. *Philpot*, No. 1:07-CV-0657-RWS-LTW, 2008 WL 11407269, at *3.
66. *Id.*
67. *Id.* at *4.
68. *Id.* at *5.
69. 273 F. Supp. 3d 965, 977 (N.D. Ill. 2017).
70. *Id.* at 971.
71. *Id.*
72. *Id.*

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B. *Courts Often Exclude or Diminish Co-Worker Evidence*

In many discrimination issues, the plaintiff tries to counter the employer's evidence by showing that the plaintiff did not engage in the alleged misconduct, that her work performance was good, or that she possessed the skills the employer claimed she lacked. One way that a plaintiff can establish pretext under the *McDonnell Douglas* framework is to show that the employer's articulated reason is not credible.[73] In discrimination cases, courts will often exclude or diminish the significance of plaintiff's co-worker evidence.

Courts routinely exclude or diminish plaintiff's evidence from co-workers or former supervisors that the plaintiff performed her job well.[74] This occurs even when the evidence of good performance is documented in the employer's performance review records[75] and when the evidence contains facts about why and how the plaintiff performed well.[76] At times, courts refuse to consider evidence that a plaintiff has a long history of favorable performance under one supervisor and then faces immediate poor performance reviews by a new supervisor who is in a different protected class.[77] Courts will prohibit the plaintiff from offering testimony from co-workers that the plaintiff was not

73. Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 143 (2000). Lower courts have complicated the pretext doctrine. For additional coverage of this topic, see Sandra F. Sperino, MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN DISCRIMINATION LAW, ch. 7 (Bloomberg); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 314 (2010); D. Wendy Greene, *Pretext Without Context*, 75 MO. L. REV. 403 (2010);
The Honorable Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503–04 (2008).

74. *See, e.g.*, Dinda v. CSC Gov't Sols. LLC, No. 2:17-CV-03171-DCN, 2019 WL 3244186, at *5 (D.S.C. July 19, 2019); Lindeman v. Saint Luke's Hosp. of Kansas City, 899 F.3d 603, 606–07 (8th Cir. 2018) (diminishing importance of reviews by prior supervisors); Davis v. Nissan N. Am., Inc., 693 F. App'x 182, 184 (4th Cir. 2017) (finding evidence of good job performance by the plaintiff is not relevant when it came from coworkers and former supervisors); Weinerth v. Martinsville City Sch. Bd., No. 4:17-CV-00067, 2019 WL 2181931, at *9 (W.D. Va. May 20, 2019) (review from prior supervisor was not relevant).

75. Bolton v. Sprint/United Mgmt. Co., 220 F. App'x 761, 765 (10th Cir. 2007); Carroll v. Office Depot, Inc., No. 2:13-CV-00414-AKK, 2015 WL 1487098, at *1 (N.D. Ala. Mar. 30, 2015).

76. Dinda v. CSC Gov't Sols. LLC, No. 2:17-CV-03171-DCN, 2019 WL 3244186, at *5 (D.S.C. July 19, 2019); *see also* Rojas v. Florida, 285 F.3d 1339, 1343 (11th Cir. 2002) (per curiam) (rejecting argument that differences in performance evaluation establish pretext by emphasizing that "[d]ifferent supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider important").

77. *Carroll*, No. 2:13-CV-00414-AKK, 2015 WL 1487098, at *1. *But see* Kelly v. U.S. Steel Corp., No. 2:11-CV-00193, 2012 WL 5467759, at *2 (W.D. Pa. Nov. 9, 2012) (allowing this kind of evidence).

responsible for performance issues claimed by the defendant or evidence about how well the plaintiff performed her job.[78]

When co-worker evidence supports the plaintiff, courts often diminish it by labeling it as an "opinion"[79] or as "irrelevant."[80] One court described plaintiffs' co-worker evidence as "close to irrelevant" and as having no probative value.[81] At times, courts characterize the evidence presented by the plaintiff's co-workers as merely expressing their opinion about the plaintiff's work performance, even when the evidence presented does more than express a general opinion.[82]

In some cases, it is nearly impossible to tell what evidence the plaintiff actually offered because the courts only generally describe the evidence.[83] For example, a court might state that the plaintiff submitted a co-worker's "opinion" about the plaintiff's performance without describing in detail who the co-worker is and the subject of the co-worker's testimony.[84] In one case, the Fourth Circuit held that the plaintiff could not try to support her claim that she performed her job well using "statements allegedly made by her co-workers."[85] The court did not describe what statements the co-workers made or in what format the plaintiff tried to present the co-worker evidence.

In case after case, courts diminish the evidence of plaintiff's good performance when that evidence comes from former supervisors and co-workers.[86]

Plaintiffs also have difficulty presenting evidence that the employer did not apply its procedures in the same way to people in different protected classes. In one case alleging race, age, and national origin discrimination case, a plaintiff provided affidavits from his former supervisor and former project manager.[87]

78. Martin v. Health Care & Ret. Corp., 67 F. App'x 109, 113–14 (3d Cir. 2003); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1124 (7th Cir. 1994); Brenner v. City of New York Dep't of Educ., 132 F. Supp. 3d 407, 419 (E.D.N.Y. 2015).

79. *See, e.g.*, *Brenner*, 132 F. Supp. 3d at 419; McKinley v. Skyline Chili, Inc., No. 1:11-CV-344, 2012 WL 3527222, at *6 (S.D. Ohio Aug. 14, 2012); Stevens v. Del Webb Communities, Inc., 456 F. Supp. 2d 698, 729 (D.S.C. 2006).

80. Bart-Williams v. Exxon Mobil Corp., No. 1:16-CV-1338-GBL-TCB, 2017 WL 4401463, at *10 (E.D. Va. Sept. 28, 2017).

81. Davis v. Nissan N. Am., Inc., 693 F. App'x 182, 184 (4th Cir. 2017).

82. *Anderson*, 13 F.3d at 1124.

83. *See, e.g.*, *Davis*, 693 F. App'x at 184 (describing plaintiff as presenting the "opinions" of his coworkers and former supervisors without otherwise describing the evidence).

84. *See, e.g.*, *Davis*, 693 F. App'x at 184; Brice v. Joule Inc., 229 F.3d 1141 (4th Cir. 2000).

85. Hawkins v. PepsiCo, Inc., 203 F.3d 274, 280 (4th Cir. 2000).

86. Cornelius v. City of Columbia, No. CA 3:08-2508-CMC-PJG, 2010 WL 1258009, at *3 n.9 (D.S.C. Mar. 26, 2010) (noting that evaluations from co-workers and former supervisors were not relevant); Frazier v. Doosan Infracore Int'l, Inc., No. 1:09-CV-0187-TCB-JFK, 2011 WL 13161996, at *13 (N.D. Ga. Jan. 20, 2011), report and recommendation adopted, No. 1:09-CV-187-TCB, 2011 WL 13162052 (N.D. Ga. Feb. 24, 2011).

87. Abioye v. Sundstrand Corp., 164 F.3d 364, 368 (7th Cir. 1998).

The plaintiff claimed these affidavits demonstrated "the process utilized to evaluate his performance was different from the process used to evaluate white employees; that young, white engineers were brought in to replace him; that a white engineer had failed on a major project without reprimand; and that engineers in other groups received reassignment" when the plaintiff did not.[88] Without providing the text of the affidavits or even a general description of what information the affidavits conveyed, the Seventh Circuit affirmed the trial court's decision to strike major portions of the affidavit. The court characterized portions of the affidavits as "merely conjecture based on rumor" and noted that these individuals could not speculate on the employer's motives for taking an action.[89] The district court opinion likewise contains almost no detail about the excluded material.[90]

In co-worker evidence cases, it is common for courts to use language to try to diminish the plaintiff's co-worker evidence. For example, in one case, a worker alleged that he was demoted based on his race.[91] The plaintiff alleged that because he was black he was given less support and held to different performance standards than white employees.[92] In support of his claim, he offered an affidavit from a co-worker stating that the person who demoted the plaintiff had called the co-worker a "n*****" at work.[93] Despite this evidence, the court granted summary judgment in favor of the employer. The court diminished the co-worker affidavit by calling it "bare bones" and saying it consisted of one sentence "claiming that [the supervisor] called the coworker a 'n*****' while both were at work."[94] However, given what the affidavit was trying to convey, it is unclear what else the affidavit needed to contain to be relevant. The court then stated that no inference of discrimination could be drawn in the plaintiff's case from the co-worker evidence.

C. Juxtaposing Cases

The evidentiary inequality for co-worker evidence is easiest to see by juxtaposing how courts view similar co-worker evidence within the same case. These cases show that judges often routinely allow co-worker evidence to support the employer and do not allow the plaintiff to rely on similar evidence.

In one case, *Coleman v. Schneider Elec. USA, Inc.*, the plaintiff alleged that her employer refused to promote her because of race and sex.[95] The trial court granted summary judgment in favor of the employer, and the Fourth Circuit

88. *Id.*
89. *Id.*
90. *Abioye*, No. 96 C 50038, 1997 WL 795850, at *3, aff'd, 164 F.3d 364 (7th Cir. 1998).
91. Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 300 (6th Cir. 2016).
92. *Id.* at 300–01.
93. *Id.* at 302.
94. *Id.*
95. 755 F. App'x 247, 249 (4th Cir. 2019).

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affirmed the trial court in a per curiam opinion. The employer asserted that it did not promote the plaintiff to a trainer position because her communication skills were not sufficient. The Fourth Circuit described the co-worker evidence presented as follows:

> A former manager had previously informed Coleman that her communication skills needed improvement, and after working with Coleman, her new manager developed a similar opinion. While another former supervisor found that Coleman performed her training tasks adequately, the hiring manager was entitled to form a different opinion of Coleman's capabilities.[96]

As demonstrated by this passage, both the plaintiff and the defendant wanted to rely on inferences from the plaintiff's former supervisor. Notice how the court treated the evidence. The evidence from a former supervisor that the plaintiff's communication skills needed improvement bolstered the employer's reason for refusing to promote the plaintiff, and the court appears to view that evidence favorably in support of the employer's motion for summary judgment. However, the court diminished the evidence from another supervisor that the plaintiff has trained employees adequately in the past. The co-worker evidence that supports the employer is relevant and probative, but the contradictory evidence is not, with little explanation from the court.

The way the court treated this evidence is especially surprising because the court appears to ignore another inference the plaintiff tried to draw. The plaintiff tried to show that she had trained employees in the past, but that the person who obtained the position did not have such experience.[97] The plaintiff tried to argue that the employer hired a less qualified individual for the position by showing that she had training experience and the person selected did not. However, both the district court and the appellate court appear to ignore this argument, emphasizing a narrow concept of pretext. In the courts' view, the only opinion that matters is the opinion of the decisionmaker, and the only co-worker evidence viewed favorably is evidence that supports the employer's position.

In *Anderson v. Baxter Healthcare Corp.*, the employer claimed that it fired the plaintiff after several performance related issues.[98] The plaintiff presented evidence from a co-worker that these incidents were not the plaintiff's fault and not his area of responsibility. Both the district court and the Seventh Circuit rejected this evidence as relevant to the plaintiff's claim.[99] However, in the same

96. *Id.*

97. Coleman v. Schneider Elec. USA, Inc., No. CV 8:15-2466-HMH-KFM, 2018 WL 706333, at *8 (D.S.C. Feb. 5, 2018), aff'd, 755 F. App'x 247 (4th Cir. 2019).

98. 13 F.3d 1120, 1121 (7th Cir. 1994).

99. *Id.* at 1124–25; Anderson v. Baxter Healthcare Corp., No. 90 C 6953, 1992 WL 233938, at *3 (N.D. Ill. Sept. 15, 1992).

case, the district court relied on evidence from the same co-worker that the plaintiff had other performance problems.[100]

In another case, a plaintiff alleged that a police department refused to promote her into several positions because of her sex.[101] The employer asserted that one of the reasons it did not promote the plaintiff is that her supervisors had concerns about her ability to supervise others.[102] Strangely, the court noted that it was "undisputed" that the plaintiff did not possess the ability to supervise other employees well. Throughout the opinion, the court favorably described evidence from the plaintiff's former supervisors about her lack of ability.[103] However, the plaintiff presented evidence from a former supervisor and a subordinate indicating that the plaintiff worked well with others and attested to her ability to supervisor others.[104] Without discussing this evidence in detail, the court simply noted that this evidence did not create a question of fact.

Similarly, in *Stevens v. Del Webb Communities, Inc.* the plaintiff tried to offer evidence from co-workers that "she was pleasant" and was a "team player." [105] The court held that these co-workers' opinions were not relevant to the case. However, in the very next paragraph, the court states that the plaintiff had performance problems and that these were evidenced by complaints from the plaintiff's co-workers.[106] The co-worker evidence that favored the plaintiff was irrelevant opinion, but the court treated the co-worker evidence that favored the employer as uncontested fact.

IV. A PATH FORWARD

This Article demonstrates a propensity for courts to rely on co-worker evidence when it supports the employer and to exclude or diminish similar evidence when it supports the plaintiff. This section explores ways that courts can recognize the evidentiary inequality and implement mechanisms to prevent it from happening.

As shown throughout this Article, it is not clear whether judges are aware of evidentiary inequality related to co-worker evidence. In many individual cases, this evidentiary inequality is relatively well hidden. In many cases, a judge is only evaluating co-worker evidence from the employer or the plaintiff. In these instances, it may be difficult for a judge to see the overall pattern.

100. *Anderson*, 1992 WL 233938, at *1 (the trial court refers to the same individual as a co-worker and also a supervisor without noting the discrepancy).

101. Christy v. Myrtle Beach, No. 4:09-CV-1428-JMC-TER, 2011 WL 4808193, at *17 (D.S.C. July 27, 2011), report and recommendation adopted in part, No. 4:09-CV-01428-JMC, 2011 WL 4808264 (D.S.C. Oct. 11, 2011).

102. *Id.* at *14.

103. *Id.* at *2, *14.

104. *Id.* at *17.

105. 456 F. Supp. 2d 698, 729 (D.S.C. 2006).

106. *Id.* at 730.

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There is no overarching evidentiary doctrine related to co-worker evidence. At times, no doctrine is at play, and the evidentiary equality only emerges by analyzing the conclusions courts draw about particular evidence offered by the parties. In other instances, courts exclude or include co-worker evidence through several doctrines, which facially appear to be disconnected. For example, courts sometimes dismiss co-worker evidence under evidentiary issues, such as hearsay or a lack of foundation.[107] Courts also diminish or exclude co-worker evidence that favors the plaintiff by narrowly defining pretext or relevance.[108] However, as discussed in Section II, the courts appear to apply these doctrines differently depending on whose case the co-worker evidence supports. Often, it is difficult to understand how the court is applying the doctrines because the court does not describe the plaintiff's evidence in sufficient detail.

However, after reviewing hundreds of cases, it is possible to identify several mechanisms that serve as tell-tale signs of evidentiary inequality related to co-worker evidence. As discussed in Section III.B., courts often describe the plaintiff's evidence in vague and conclusory ways. Each time a court does this, there is an opportunity to stop and reflect whether the conclusory label is warranted. One word that plays a large role in evidentiary inequality is the word "opinion." Whenever a court indicates that co-worker evidence is merely an opinion, the court is often diminishing the evidence and making powerful judgments about the plaintiff's evidence. Similarly, the same phenomenon often occurs when judges make sweeping statements about the plaintiff's co-worker evidence without describing the actual evidence. For example, when a judge states that a plaintiff's co-worker evidence is irrelevant, without discussing the evidence and why it lacks relevance, it is often a sign of evidentiary inequality.[109]

These words are not universally a sign that something is amiss. There are times when the plaintiff submits evidence that is not admissible or relevant. The problems occur when judges make sweeping, categorical statements about all the evidence submitted from a particular person without describing the evidence.

An example is helpful. Imagine that the plaintiff submits an affidavit from a co-worker. The affidavit simply states, "I believe the supervisor treated the plaintiff differently because of her sex." The affidavit provides no further details.

107. *Compare* Ashley v. S. Tool Inc., 201 F. Supp. 2d 1158, 1164 (N.D. Ala. 2002), aff'd, 62 F. App'x 318 (11th Cir. 2003) (statements to employee by other workers was hearsay) *with* Bush v. Dictaphone Corp., 161 F.3d 363, 366 (6th Cir. 1998) (statements by co-workers to another individual that plaintiff was abusive and unstable were not hearsay); *see also, e.g.*, Harrison v. Formosa Plastics Corp. Texas., 776 F. Supp. 2d 433, 441 (S.D. Tex. 2011) (expressing concerns about foundation and hearsay); Duncan v. Thorek Mem'l Hosp., 784 F. Supp. 2d 910, 921 (N.D. Ill. 2011) (discussing hearsay).

108. *See, e.g.*, Davis v. Nissan N. Am., Inc., 693 F. App'x 182, 184 (4th Cir. 2017).

109. *See id.* (describing plaintiff as presenting the "opinions" of his coworkers and former supervisors without otherwise describing the evidence).

Such an affidavit is properly excluded because it is conclusory and does not convey how the affiant has personal knowledge about the material conveyed in the affidavit. However, a slightly different affidavit could not properly be construed as merely an opinion. If the affidavit contains the factual basis for the belief, along with why the affiant possesses personal knowledge of those facts, then the judge cannot properly dismiss the affidavit as conclusory or merely an opinion. The summary judgment standard demands that judges distinguish the first kind of affidavit from the second. Both plaintiffs and defendants deserve for courts to consider their evidence seriously. This does not occur when a court simply labels evidence as an "opinion" or as "vague," without documenting why those labels are warranted. These labels serve as a tell-tale sign of evidentiary inequality.

Another way to identify evidentiary inequality is to look for categorical statements about certain kinds of evidence. Many courts reason that evidence from co-workers and former supervisors are never relevant to establishing a plaintiff's claim.[110] For example, one court noted, "feedback from coworkers and third parties is irrelevant if those individuals were not the decision makers in an employee's termination."[111] However, such statements sweep too broadly and exclude too much of the plaintiff's evidence.

Employment discrimination claims are highly contextual, and the Supreme Court has reiterated on multiple occasions that context matters.[112] It is correct that in some cases, evidence from a co-worker is not sufficient standing alone to allow the case to proceed to trial. Imagine a case where the employer presents evidence that it fired the plaintiff after a series of documented problems with the plaintiff's work performance and multiple people testify that the plaintiff engaged in misconduct. The plaintiff presents one affidavit from a co-worker in a different department that simply states the co-worker's subjective belief that the plaintiff's work was "good." This case should not proceed to a jury trial, but the reason why has very little to do with the fact that the affidavit is offered by a co-worker. Given these facts, no reasonable jury could find discrimination.

110. Frazier v. Doosan Infracore Int'l, Inc., No. 1:09-CV-0187-TCB-JFK, 2011 WL 13161996, at *14 (N.D. Ga. Jan. 20, 2011), report and recommendation adopted, No. 1:09-CV-187-TCB, 2011 WL 13162052 (N.D. Ga. Feb. 24, 2011).

111. Many statements courts make about co-worker evidence reflect a narrow framing of the pretext inquiry in the *McDonnell Douglas* framework. This topic is beyond the scope of this Article. Bart-Williams v. Exxon Mobil Corp., No. 1:16-CV-1338-GBL-TCB, 2017 WL 4401463, at *11 (E.D. Va. Sept. 28, 2017).

112. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) (stating the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed"); *see also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006); Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 135 (2000) (analyzing the facts in detail).

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However, slight changes in the facts should lead to a different result. Imagine that a sixty-year old plaintiff gets a new thirty-year old supervisor. The supervisor fires the plaintiff after the supervisor claims the plaintiff made one relatively minor mistake. The worker files an age discrimination claim, and the employer moves for summary judgment. Three younger co-workers provide affidavits that the plaintiff's work performance was excellent and that she did not make the mistake claimed by the supervisor. Even though the plaintiff is relying on co-worker evidence, the court should deny the employer's motion for summary judgment in this case. The plaintiff is relying on several inferences to establish her case: the age difference between the plaintiff and the new supervisor, the supervisor firing the plaintiff for a relatively minor problem, and the supervisor accusing the plaintiff of making a mistake when there is evidence that she did not. All this evidence works together to make the case strong enough that a factfinder might find in favor of the plaintiff. A categorical rule diminishing or excluding co-worker evidence misses the many ways that co-worker evidence can properly support a plaintiff's claim.

Categorical rules and conclusory labels provide courts with a way of recognizing potential evidentiary inequality. On an individual basis, judges can use these signs to self-police instances where they might be treating evidence unequally. However, the judiciary can also engage in a more collective effort.

The judiciary can adopt statement rules to address evidentiary inequality. The statement rule would identify the propensity to undervalue plaintiffs' co-worker evidence and require judges to reflect on whether they are inappropriately excluding or diminishing this evidence. The statement rule would reiterate the appropriate legal standard at the summary judgment stage and emphasize that the summary judgment standard relates to fundamental principles like the right to a jury trial. In federal court, Rule 56 of the Federal Rules of Civil Procedure provides a mechanism for effectuating the plaintiff's right to a jury trial, while also allowing the courts to filter out claims that a jury would never find to be successful.[113]

The statement rule would remind judges that context matters and that there is no reason to summarily exclude a plaintiff's co-worker evidence. It would encourage a court to review all of the plaintiff's evidence in light of the summary judgment standard. The rule also should require the court to explain, in detail, the evidence offered by the plaintiff and discourage the trial court from using conclusory labels.

113. This is an idealized view of summary judgment. There is a large body of scholarly literature critiquing the way that judges rule on summary judgment motions. *See, e.g.*, Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007); *see generally* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–07 (1993).

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V. CONCLUSION

In discrimination cases, courts regularly rely on co-worker evidence that supports the employer and regularly diminish co-worker evidence that supports the plaintiff. This Article identifies this evidentiary inequality and calls for courts to guard against it. This call is especially important given the broader themes of this symposium relating to new forms of worker empowerment. Efforts to empower workers must include the power to support one another in litigation.[114]

114. For a comprehensive discussion of the role co-workers play in supporting one another see Naomi Schoenbaum, *Towards A Law of Coworkers*, 68 ALA. L. REV. 605, 607 (2017).