NOTE

PUTTING PRETEXT IN CONTEXT: EMPLOYMENT DISCRIMINATION, THE SAME-ACTOR INFERENCE, AND THE PROPER ROLES OF JUDGES AND JURIES

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INTRODUCTION

TITLE VII of the Civil Rights Act of 1964 ("the 1964 Act") prohibits employers from discriminating against potential and current employees on the basis of race, sex, color, religion, and national origin.[1]

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[1] 42 U.S.C. §§ 2000e to 2000e–17 (2000). The statute reads in pertinent part:

> It shall be an unlawful employment practice for an employer—
> 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, condi-

Since 1964, lower federal courts, the Supreme Court, and Congress have worked to clarify the manner in which Title VII claims should be litigated, placing particular emphasis on the creation and evolution of an elaborate burden-shifting scheme that now permeates nearly all aspects of federal employment discrimination litigation. In 1991, Congress amended Title VII by passing the Civil Rights Act of 1991 ("the 1991 Act"), further delineating the ways that Title VII claims should be litigated. Perhaps most significantly, the 1991 Act also ensured that employment discrimination plaintiffs have a statutory right to a damages remedy, and, consequently, a right to a jury trial under the Seventh Amendment.

In *McDonnell Douglas Corp. v. Green*, the Supreme Court established a three-part system for litigating Title VII claims.[2] First, the plaintiff must make a prima facie case of discrimination.[3] Assuming the plaintiff meets this initial burden, the defendant then has the burden to produce a "legitimate, nondiscriminatory reason" for the adverse employment decision.[4] Finally, if the defendant satisfies its burden of production, the burden shifts back to the plaintiff to show pretext,[5] which requires the plaintiff to establish that the nondiscriminatory explanation offered by the employer was, in fact, a "cover" or "pretext" and that discrimination was the real motivation behind the employment decision. In response to the increase in federal claims brought under Title VII as amended in 1991, and facing the often fact-dependent nature of these cases, federal courts have tended to focus their attention largely on the question of pretext. As subsequent Parts of this Note suggest, issues related to pretext have proven to be the most important, and as such, they consistently appear across the employment discrimination landscape.

> tions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> 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.

Id. § 2000e–2(a).

[2] 411 U.S. 792, 802–04 (1973); see also infra Section I.B.

[3] *McDonnell Douglas*, 411 U.S. at 802.

[4] Id.

[5] Id. at 804.

The manner in which questions of pretext intersect with the burden-shifting framework has led lower courts to apply broad per se rules in employment discrimination cases. The "same-actor" inference, first asserted by a federal appellate court in 1991, offers an important example of this trend.[6] In its most basic form, the same-actor inference states that where the same person hires an employee and then later fires that employee, it is illogical and irrational to impute a discriminatory motive to the decision to fire. To take a simple example, assume that a store manager hires a female employee. Some time later, that same manager fires the female employee and hires a male for the same position, after which the female brings a Title VII sex discrimination claim against the employer. Courts applying the same-actor inference would hold that a store manager who harbored discriminatory animus toward females would not have hired a female employee in the first place, and therefore it could not be reasonably inferred that the decision to fire her was based on an unlawful discriminatory motive. Consequently, the plaintiff's claim would be dismissed, most often at summary judgment.

Since the first articulation of the same-actor inference, a well-defined circuit split has emerged on the question of *who* should determine the effect of same-actor facts on the disposition of a given case. On one side are those courts that apply the inference at summary judgment and describe it as having some version of "strong presumptive value." Other courts, in contrast, have abstained from applying the inference themselves, instead preserving for the jury the decision of how to weigh same-actor facts.

Same-actor cases arise in claims brought under Title VII as well as the Age Discrimination in Employment Act ("ADEA").[7] The

[6] Proud v. Stone, 945 F.2d 796 (4th Cir. 1991).

[7] 29 U.S.C. §§ 621–634 (2000). The ADEA reads in pertinent part:

> It shall be unlawful for an employer—
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> 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> 2) to limit, segregate, or classify his employees 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 age; or
>
> 3) to reduce the wage rate of any employee in order to comply with this chapter.

Id. § 623. The ADEA applies only to individuals age forty or older. Id. § 631(a).

statutes are conceptually linked because the ADEA was born out of a report that was mandated by Title VII[8] and contains similar language to that used by Congress in Title VII.[9] With respect to burdens of proof, federal courts have consistently applied the burden-shifting scheme developed in Title VII cases to claims brought under the ADEA.[10] Even more specifically, several federal circuit courts of appeals have expressly determined that the logic and applicability of the same-actor inference apply equally to cases brought under Title VII and the ADEA.[11] Therefore, this Note treats Title VII and the ADEA as interchangeable statutes, and the analysis and criticism of the same-actor inference as detailed in subsequent Parts of this Note do not assign any relevance to the statute under which the plaintiff brought his or her claim. However, because Title VII is the seminal federal employment discrimination statute, and because the ADEA is based on Title VII, the majority of the descriptive statutory explanations in this Note focus on Title VII.[12]

[8] See H.R. Rep. No. 90-805, at 1–2 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213, 2214 (explaining that § 715 of the 1964 Act commanded the Secretary of Labor to report on the problem of age discrimination in employment); see also H.R. Rep. No. 102-40, pt. 2, at 4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 697 (noting that the ADEA was "modeled after, and [has] been interpreted in a manner consistent with, Title VII").

[9] See supra note 1.

[10] See, e.g., O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996) (acknowledging that multiple circuit courts of appeals have applied some version of the *McDonnell Douglas* framework in ADEA cases and then proceeding itself to analyze the ADEA claim under that same framework); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998) ("This circuit has adopted a variation of the test articulated by the Supreme Court for Title VII claims in *McDonnell Douglas Corp. v. Green* for cases arising under the ADEA.") (internal citations omitted); Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 233–34 (4th Cir. 1991) (similar). For more on the burden-shifting scheme of Title VII, see infra notes 41–54 and accompanying text.

[11] See, e.g., EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996) ("We see no reason why th[e same-actor] inference . . . should not apply in race discrimination cases as well [as age discrimination cases]."); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995) ("An individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class. This general principle applies regardless of whether the class is age, race, sex, or some other protected classification.").

[12] To be sure, different issues are presented by claims of age discrimination as compared to claims of race, sex, or religious discrimination. Courts that apply the same-actor inference, however, do so regardless of whether the substantive liability is governed by Title VII or the ADEA. Therefore, for the purposes of this Note, the differ-

Legal academics have paid surprisingly little attention to the manner in which courts employ the same-actor inference. Although one recent and compelling article does argue that the same-actor inference seems inconsistent with the nature of human behavior,[13] few scholars have written recently or exhaustively on the question of whether the same-actor inference is properly applied by the judge or, instead, by the jury. Moreover, many (though not all) of those who have written on the subject have expressed at least reluctant support for the notion that the inference is often properly applied by courts to dismiss plaintiffs' claims of discrimination.[14]

This Note seeks to join the debate by contending that the same-actor inference is *never* proper when applied by the court to award judgment for the defendant-employer. Importantly, however, this Note does not disagree with the intuitive appeal of the inference, and as such, it does not take issue with a defendant's attempt to persuade the factfinder to infer nondiscrimination from same-actor facts. Instead, my argument is limited solely to the assertion that same-actor facts are simply evidence from which a juror may or may not infer discrimination. Such facts *do not*, however, justify a court in allowing summary judgment or a directed verdict for the employer.

This Note proceeds in three Parts. Part I offers a detailed analysis of Title VII, with particular attention paid to the original statute, the amendments made to it by the Civil Rights Act of 1991,

ences between the two statutes are not relevant to the question of who should apply the same-actor inference in a given case.

[13] See Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 Cal. L. Rev. 997, 1039–52 (2006).

[14] See, e.g., Anne Laurie Bryant & Richard A. Bales, Using the Same Actor "Inference" in Employment Discrimination Cases, 1999 Utah L. Rev. 255, 257 (arguing that the same-actor inference, properly construed, justifies a court in requiring plaintiffs to meet a higher standard of proof than they otherwise would have to meet); Marlinee C. Clark, Discrimination Claims and "Same-Actor" Facts: Inference or Evidence?, 28 U. Mem. L. Rev. 183, 208 (1997) (recognizing the problematic nature of the inference but nonetheless concluding that "the reasoning behind the adoption of an inference is convincing"). But see Julie S. Northup, The "Same Actor Inference" in Employment Discrimination: Cheap Justice?, 73 Wash. L. Rev. 193, 221 (1998) (concluding that the courts should "be aware of the dangers inherent" with the inference and "apply it, if at all, with caution").

and the ways in which Title VII cases are bifurcated into separate liability and remedial phases. The Part then examines the burden-shifting framework that has come to define the manner in which Title VII and ADEA cases are litigated. Part II offers a descriptive explanation of the same-actor inference through case summaries, revealing a well-defined circuit split on the issue of whether the court or the jury should be charged with determining the importance of same-actor facts in a particular case. Part III offers a three-pronged criticism of the same-actor inference as it is applied by courts to allow summary judgment or a directed verdict for an employer. First, it contextualizes the same-actor inference into the larger world of employment discrimination litigation, emphasizing the ways in which lower federal courts attempt to create and then apply broad rules in discrimination cases and how the Supreme Court often reverses those initiatives, mandating instead that each case must be decided on its own facts. Second, it contends that Supreme Court precedent, congressional intent, and the Federal Rules of Civil Procedure strongly suggest that the jury, rather than the court, should be charged with determining the evidentiary import of same-actor facts. Finally, it asserts that courts wrongly invoke a higher burden of proof in same-actor cases than is justified by the statute or allowed by the Supreme Court.

I. TITLE VII

A. Statutory Overview

Title VII prohibits employers from discriminating against any individual with respect to the terms or conditions of employment "because of such individual's race, color, religion, sex, or national origin."[15] From 1964 until 1991, the Supreme Court regularly construed Title VII as placing a heavy burden on plaintiffs seeking recovery for their claims of intentional employment discrimination. Specifically, the Court interpreted the "because of" requirement to mean something between but-for causation and "play[ing] any part in an employment decision."[16] Furthermore, even if a plaintiff could establish that an employer considered unlawful factors in

[15] 42 U.S.C. § 2000e–2(a) (2000).
[16] Price Waterhouse v. Hopkins, 490 U.S. 228, 237–38 (1989).

making an employment decision, employers nonetheless could avoid liability upon showing "by a preponderance of the evidence that [they] would have made the same [employment] decision" absent any unlawful discriminatory considerations.[17]

The lead case in this regard was *Price Waterhouse v. Hopkins*.[18] Hopkins brought a Title VII claim of sex discrimination against her employer, Price Waterhouse, alleging that the firm impermissibly considered her sex as a factor in denying her a promotion to partner. In support of her claim, Hopkins introduced evidence that several members of the partnership committee denied her the promotion, at least in part, because she was too "macho," she "overcompensated for being a woman," and because she could benefit from "a course at charm school."[19] Instead of denying those comments, Price Waterhouse responded by suggesting that, considerations of sex notwithstanding, it had entirely legitimate reasons for not promoting Hopkins to partner, including her being too abrasive, impatient, harsh with the staff, and brusque.[20] In their effort to reconcile the vagaries and complexities of the "because of" standard, a plurality of Supreme Court Justices offered a compromise rule:

> when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.[21]

In essence, the Court allowed employers to avoid liability for considering unlawful criteria such as sex or race in making employment decisions so long as they could prove that they would have made the same decision absent any unlawful consideration. Such cases came to be known as "mixed–motive" cases.[22]

In 1991, Congress amended Title VII and changed the standard by which plaintiffs' claims were to be evaluated. The 1991 Act was

[17] Id. at 258.
[18] 490 U.S. 228 (1989).
[19] Id. at 235.
[20] Id. at 234–35.
[21] Id. at 258.
[22] See, e.g., Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003).

the result of Congress's dissatisfaction with much of the Supreme Court's Title VII case law. Congress specifically stated that one of the 1991 Act's purposes was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."[23] Included among these "recent decisions of the Supreme Court" was *Price Waterhouse*.[24] As one Congressman noted during the debates over the 1991 Act, "intentional discrimination is so repugnant in our society that there ought to be some kind of remedy, even if it is a limited remedy, to those who can prove intentional discrimination, even if it is an injunction to prevent intentional discrimination occurring in the future."[25] Toward this end, Congress lightened the evidentiary burden on plaintiffs by requiring them to show only that race, color, sex, religion, or national origin was "a motivating factor" for any employment practice.[26] In so doing, Congress rejected the Court's holding in *Price Waterhouse*, and today a plaintiff in Hopkins's position undoubtedly would prevail on the issue of liability. An employer's "same decision anyway" defense, no longer a shield to liability, presently functions only to limit the remedies available to a plaintiff.[27]

A second, and perhaps the most important, amendment inaugurated by the 1991 Act was Congress's decision to allow Title VII plaintiffs suing on the basis of sex or religious discrimination to re-

[23] Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071, 1071; see also Landgraf v. USI Film Prods., 511 U.S. 244, 250 (1994).

[24] See H.R. Rep. No. 102-40, pt. 2, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 695 ("Section 5 of the [1991] Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal."); see also H.R. Rep. No. 102-40, pt. 1, at 45 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 583 ("The effectiveness of Title VII's ban on discrimination . . . has been severely undercut by the recent Supreme Court decision in *Price Waterhouse v. Hopkins*.").

[25] 137 Cong. Rec. 14,415 (1991) (statement of Rep. Schiff).

[26] 42 U.S.C. § 2000e–2(m) (2000).

[27] Id. § 2000e–5(g)(2)(B). This provision provides that when an employer establishes that it would have made the same employment decision absent any unlawful considerations, the court may grant declaratory or injunctive relief along with attorneys' fees and costs but that damages, admission, reinstatement, hiring, promotion, or payment are not authorized in such a situation. The effect of § 2000e–2(m) and § 2000e–5(g)(2)(B) is to create a bifurcated system of litigating Title VII claims. The first stage, governed by § 2000e–2(m), relates to liability. Only if the plaintiff wins on this issue does the litigation proceed to that of remedies, which is governed by § 2000e–5(g)(2)(B).

cover compensatory and punitive damages from employers, in addition to the already-available forms of equitable relief.[28] This amendment also had the necessary effect of allowing plaintiffs a trial by jury, as required by the Seventh Amendment to the Constitution.[29]

As logic suggests and the legislative history of the 1991 Act confirms, the decision to allow Title VII plaintiffs an award of damages, and the right to a jury trial, was deliberate.[30] One Congressman argued that "the right to trial by jury as a general concept in our society was considered so important by the Framers of the Constitution that they included it in the Bill of Rights, in the seventh amendment."[31] Furthermore, because victims of discrimination on the basis of race and color could recover damages and had a right to trial by jury under 42 U.S.C. § 1981, it was primarily women (as well as victims of religious discrimination) who were disproportionately disadvantaged by not having access to juries and by not being allowed to recover damages. Noting this, one Senator argued that "the Constitution has been waived too long

[28] 42 U.S.C. § 1981a(a)(1) (2000). Section 1981a(b)(3) makes the amount a plaintiff can recover contingent on the number of employees that a defendant employs, with a maximum recoverable amount of $300,000. Section 1981a authorizes damages and jury trials only for victims of intentional discrimination on the basis of sex, religion, or sexual harassment. 42 U.S.C. § 1981a(a)(1). Victims of discrimination on the basis of race, color, and national origin had long been entitled to a jury trial and damages under 42 U.S.C. § 1981(a). The Supreme Court extended the protection of § 1981 to cover discrimination on the basis of ancestry. See St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987). The Civil Rights Act of 1991 amended § 1981 to apply it to private as well as public employers, 42 U.S.C. § 1981(c) (codifying the rule of *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968)), and by broadly construing the scope of the statute. See 42 U.S.C. § 1981(b).

[29] The Seventh Amendment requires that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const. amend. VII. The 1964 Act did not authorize jury trials in large part because of a fear that discrimination would taint the jury and effectively nullify the statute. See Karen W. Kramer, Note, Overcoming Higher Hurdles: Shifting the Burden of Proof After *Hicks* and *Ezold*, 63 Geo. Wash. L. Rev. 404, 440 n.254 (1995).

[30] See H.R. Rep. 102-40, pt. 1, at 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 603 ("An unfair preference exists in federal civil rights law. Current civil rights laws permit the recovery of unlimited compensatory and punitive damages in cases of intentional race discrimination. No similar remedy exists in cases of intentional gender or religious discrimination.") (italics omitted). In addition to concerns of fairness, that same report also notes a congressional recognition of the deterrent effect that a damages remedy would have on employers. Id. at 69–70.

[31] 137 Cong. Rec. 14,416 (1991) (statement of Rep. Schiff).

and one too many times for American women" and that "if a serial killer can have a right to a jury trial . . . certainly a woman who cannot get a job has a right to a jury trial if she is discriminated against."[32] Finally, yet another Senator articulated the prevailing belief regarding the importance of authorizing damages, and thus jury trials, under Title VII:

> Title VII fails to address the needs of victims who do not wish to return to their jobs, who suffer medical and psychological harm, or who suffer out-of-pocket expenses because of the harassment from their employers. The need for damages for all victims of intentional discrimination is clear, and a bill that does not provide for that is really unfair.[33]

As those comments make clear, the decision to allow victims of discrimination on the basis of sex, religion, or sexual harassment to recover damages and to have a trial by jury, and thus to be treated similarly to victims of discrimination on the basis of race, was deliberate. As this Note addresses in Part III, Congress's emphasis on the right to jury trials has profound implications for lower courts' efforts to use the same-actor inference to dismiss claims of intentional employment discrimination.

A third implication of the 1991 Act, as interpreted by the Supreme Court, was that it allowed plaintiffs to prove intentional employment discrimination through the use of either direct or circumstantial evidence.[34] The 1991 Act requires plaintiffs to "demonstrate[] that race, color, sex, religion, or national origin was a motivating factor for the adverse employment decision."[35] Justice Thomas, writing for a unanimous Court in *Desert Palace, Inc. v. Costa*, explained that "[o]n its face, the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence."[36] Further, recognizing "the utility of circumstantial evidence in discrimination cases,"[37] the Court asserted that "[t]he reason for treating circumstantial and direct evidence

[32] 137 Cong. Rec. 28,448–49 (1991) (statement of Sen. Mikulski).
[33] 137 Cong. Rec. 27,012 (1991) (statement of Sen. DeConcini).
[34] See Desert Palace, Inc. v. Costa, 539 U.S. 90, 92 (2003).
[35] 42 U.S.C. § 2000e–2(m) (2000).
[36] 539 U.S. 90, 98–99 (2003).
[37] Id. at 99–100.

alike is both clear and deep rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"[38] The Court also noted that the law more generally does not differentiate between the weight or value that must be accorded to direct or circumstantial evidence.[39] Therefore, based on these factors, the Court expressly held that "no heightened showing is required under § 2000e–2(m)."[40]

B. Burdens

In addition to matters pertaining to the underlying substantive liability, the Supreme Court also has been consistently attentive to the task of devising and refining an appropriate burden structure for organizing and litigating Title VII cases. In *McDonnell Douglas Corp. v. Green*, the Court established what remains today the principal template for the allocation of burdens.[41] Under *McDonnell Douglas*, a plaintiff has the burden of production to establish a prima facie case of discrimination. To meet this burden, she can show that (1) she is a member of a minority group, (2) she applied and was qualified for a job for which the employer was hiring, (3) she was rejected despite being qualified for the job, and (4) the employer continued seeking applicants with qualifications similar to hers.[42] As the Court subsequently explained, this burden is not meant to be "onerous."[43] Rather, it is meant to create an organized

[38] *Id.* at 100 (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)).

[39] *Id.* (internal citations omitted).

[40] *Id.* at 101. In reaching its decision, the Court noted that the Civil Rights Act of 1991 requires plaintiffs to "demonstrate" that race, color, sex, religion, or national origin was a motivating factor in the employment decision. The 1991 Act defined "demonstrate" to mean both the burden of production as well as the burden of persuasion. 42 U.S.C. § 2000e(m) (2000). The Court reasoned that because Congress did not include a requirement that a plaintiff meet the burden of § 2000e–2(m) with direct evidence but did specifically define the term "demonstrate," Congress must have intended not to impose an elevated burden on a plaintiff relying on circumstantial evidence. See *Desert Palace*, 539 U.S. at 99; see also infra notes 136–41 and accompanying text.

[41] 411 U.S. 792 (1973).

[42] *Id.* at 802.

[43] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

method whereby a plaintiff can prove that actions taken by an employer, if unexplained, permit an inference of discrimination.[44]

Once the plaintiff meets this initial requirement, the burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the adverse employment decision.[45] Like the plaintiff's initial burden, the defendant's burden is meant to be light and is one of production only.[46] The plaintiff, then, is left with the burden of proving that the employer's offered reason is pretext for discrimination.[47]

Because both the plaintiff's and the defendant's initial burdens are so easily met (they are burdens of production only), the burden will often shift back to the plaintiff to prove that the defendant's proffered non-discriminatory motives were pretext. It is not sur-

[44] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (explaining that a plaintiff's prima facie case under *McDonnell Douglas* "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors").

[45] *McDonnell Douglas*, 411 U.S. at 802. In *Burdine*, the Supreme Court explained that the defendant's production of a legitimate, nondiscriminatory reason "destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." 450 U.S. at 255 n.10. Therefore, where the plaintiff establishes a prima facie case and the defendant offers *no* legitimate reason for the employment decision, the plaintiff is entitled to an inference of discrimination. In practice, however, because the defendant's burden is one of production only, it will assert a nondiscriminatory reason for the employment decision. Consequently, on a practical level, the plaintiff's prima facie case on its own seldom will warrant an inference of discrimination.

[46] *Burdine*, 450 U.S. at 254–55 (explaining that the defendant "need not persuade the court that it was actually motivated by the proffered reasons" but instead must only show "a genuine issue of fact as to whether it discriminated against the plaintiff"); see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993) (asserting that "by producing *evidence* (whether ultimately persuasive or not) of nondiscriminatory reasons, [defendants] sustained their burden of production").

[47] *McDonnell Douglas*, 411 U.S. at 804. Since 1973, the Supreme Court has refined and clarified the *McDonnell Douglas* framework. First, the Court explained that the ultimate burden of proof on the issue of discrimination always rests with the plaintiff. *Burdine*, 450 U.S. at 253 ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."). Second, the Court asserted that because whites too can recover under Title VII, a plaintiff need not show that he is a racial minority. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 279–80 (1976). Third, the Court clarified that the burden-shifting rules apply to all types of employment discrimination claims, such as refusal to promote and wrongful termination. See, e.g., Ash v. Tyson Foods, 546 U.S. 454, 454 (2006) (discussing *McDonnell Douglas* framework in the context of a failure to promote an employee); *St. Mary's Honor Ctr.*, 509 U.S. at 506–07 (applying the *McDonnell Douglas* framework in the context of an employee firing).

prising, then, that the vast majority of Title VII disparate treatment cases turn on the issue of pretext. Consequently, the Supreme Court has been presented with multiple opportunities to refine the requirements that a plaintiff must meet in order to successfully show pretext. For example, in *St. Mary's Honor Center v. Hicks*, the Court considered a case in which the plaintiff had met his burden of production to establish a prima facie case and the defendant offered multiple legitimate, nondiscriminatory reasons that the plaintiff subsequently discredited.[48] The district court, as the finder of fact, entered judgment for the defendant, reasoning that the plaintiff, while discrediting the employer's offered reasons, had failed to show that these reasons were pretext *for discrimination*.[49] The United States Court of Appeals for the Eighth Circuit reversed, holding that the plaintiff was entitled to judgment as a matter of law because, after disproving all of the defendant's explanations, the "defendants were in no better position than if they had remained silent, offering no rebuttal to an established inference that they had unlawfully discriminated against plaintiff on the basis of his race."[50] The Supreme Court reversed, holding that a plaintiff's prima facie case, combined with the successful discrediting of the defendant's offered reason, permits *but does not compel* judgment for the plaintiff.[51] The plaintiff, therefore, is entitled to have his case decided by the jury.

In *Reeves v. Sanderson Plumbing Products*, the Court confronted a similar situation and reached a similar result.[52] In *Reeves*, the plaintiff presented a prima facie case of age discrimination under *McDonnell Douglas* as well as evidence that discredited the defendant's legitimate, nondiscriminatory reason for the adverse employment decision. The plaintiff won at trial, but the Fifth Circuit reversed because the plaintiff, despite probably having offered sufficient evidence to support a favorable verdict, nonetheless was not entitled to judgment because he had failed to prove that the offered reason was pretext *for discrimination*.[53] The Supreme Court

[48] 509 U.S. 502 (1993).
[49] Hicks v. St. Mary's Honor Ctr., 756 F. Supp. 1244, 1252 (E.D. Mo. 1991).
[50] Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 492 (8th Cir. 1992).
[51] *St. Mary's Honor Ctr.*, 509 U.S. at 511.
[52] 530 U.S. 133 (2000).
[53] Reeves v. Sanderson Plumbing Prods., 197 F.3d 688, 694 (5th Cir. 1999).

reversed the Fifth Circuit, holding that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination."[54] Both *Reeves* and *St. Mary's Honor Center*, then, explicitly recognize the important role of the factfinder in making the ultimate determination regarding liability for discrimination. As Section III.A of this Note further analyzes, these cases also exemplify how the Supreme Court repeatedly reverses lower courts' efforts at creating and applying broad rules, insisting instead that each case be decided on its own facts.

II. THE SAME-ACTOR INFERENCE

The first case to apply the same-actor inference to dismiss a plaintiff's employment discrimination claim was *Proud v. Stone*.[55] *Proud* concerned an ADEA action brought by Warren Proud, who at age 68 applied for a position with the Army's accounting division. Six other applicants, ranging in age from 28 to 63, also applied for the job. The supervisor, Robert Klauss, compared all of the applicants and subsequently hired Proud. Two weeks later one of the other employees resigned and Proud offered to assume her responsibilities temporarily, despite the fact that this job required different knowledge and skills than the job for which he was hired originally. Soon thereafter, Klauss grew dissatisfied with Proud's work on this other job. He initiated multiple counseling sessions and repeatedly informed Proud of his frustration. Approximately three months later, Klauss requested that Proud be discharged, noting specifically that Proud failed to meet deadlines, failed to follow directions, prepared incomplete and inaccurate documents, and performed at a level below expectations. Proud's position remained unfilled until a 32-year-old employee was hired for the job.[56]

Proud then filed suit in district court, asserting that his discharge was the result of age discrimination. More specifically, Proud argued that (1) he was never assigned the duties for which he was hired, (2) he was replaced by someone much younger than he, (3) he received inadequate training for the job, especially considering

[54] *Reeves*, 530 U.S. at 147 (quoting *St. Mary's Honor Ctr.*, 509 U.S. at 511).
[55] 945 F.2d 796 (4th Cir. 1991).
[56] Id. at 796–97.

that he was fired for underperforming in a position for which he was not hired, (4) he was criticized for following standard accounting practices, and (5) similarly situated younger employees who committed the same errors were not terminated.[57] The district court allowed the defendant's motion to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

The Fourth Circuit affirmed, contending that it would "seem irrational" for an individual to discriminate in firing but not in hiring.[58] Further, the court emphasized that within a span of six months, the plaintiff was hired and fired by the same individual. More concretely, it reasoned that "in 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] The court located the relevance of the same-actor inference in the pretext stage of the *McDonnell Douglas* framework, writing that the same-actor inference "creates a strong inference that the employer's stated reason for acting against the employee is not pretextual."[60] While the plaintiff still must be afforded the opportunity to show pretext, "employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."[61] As Section III.B of this Note develops, the underlying premise of the same-actor inference, that of the rational actor, is far less certain than *Proud* makes it appear.[62]

Following *Proud*, other circuits have dealt with the same-actor inference in one of two principal ways. Several courts have attached some version of "strong presumptive value" to the infer-

[57] Id. at 797.

[58] Id.

[59] Id. (emphasis added). In a later passage, the court likewise referred to the same-actor inference as "powerful." Id. at 798.

[60] Id.

[61] Id. The rationale of *Proud* is often cited by other circuits as they determine whether to apply the same actor inference. See, e.g., Antonio v. Sygma Network, 458 F.3d 1177, 1183 (10th Cir. 2006) (announcing an intention to join the circuits that follow *Proud* in applying the same-actor inference); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1442–43 (11th Cir. 1998); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 463 (6th Cir. 1995) ("The Fourth Circuit's opinion in *Proud v. Stone* best explains the rationale for the same actor inference.").

[62] See infra notes 128–32 and accompanying text.

ence and have used it to dismiss plaintiffs' claims.[63] In contrast, other courts have assigned no presumptive value to the inference but instead allow a jury the unimpeded autonomy to weigh the inference as they see fit.[64] In order to fully elucidate the rationale underlying these differing analyses, Sections II.A and II.B of this Note describe four specific cases and the reasoning applied by courts in their decision whether to apply the same-actor inference to dismiss plaintiffs' claims.

A. "Strong Presumptive Value"

In *Coghlan v. American Seafoods Co.*, the Ninth Circuit applied the same-actor inference to affirm a district court decision allowing summary judgment for the defendant.[65] American Seafoods employed James Coghlan as a master of one of its fishing vessels, the *Victoria Ann*. Because the company once was owned by a Norwegian parent corporation, it had a management board comprised primarily of native Norwegians. In 1998, American Seafoods was forced to reduce its fleet and to lay off many of its employees. Inge Andreassen, the Vice President of Operations and a native Norwegian, decided to retain Coghlan as a vessel master and transferred him to the *Katie Ann*. In 2000, however, continuing pressure on the business caused Andreassen to demote Coghlan from master on the *Katie Ann* to the position of mate on yet another vessel, the

[63] See, e.g., *Antonio*, 458 F.3d 1177 ("[The] 'same actor' evidence gives rise to an inference . . . that no discriminatory animus motivated the employer's actions."); Grady v. Affiliated Cent., 130 F.3d 553, 560 (2d Cir. 1997) (describing the same-actor inference as a factor that "strongly suggest[s] that invidious discrimination was unlikely"); Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996) ("We therefore hold that where the same actor is responsible for both the hiring and the firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."); Brown v. CSC Logic, 82 F.3d 651, 658 (5th Cir. 1996) (citing the rationale of *Proud* and expressing approval of the same actor inference). The Seventh Circuit seems to have adopted a more ambivalent posture. Compare EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996) ("The same hirer/firer inference has strong presumptive value.") with Johnson v. Zema Sys. Corp., 170 F.3d 734, 745 (7th Cir. 1999) (noting various circumstances in which the same-actor inference does not yield a presumption of nondiscrimination).

[64] See *Williams*, 144 F.3d at 1443; Waldron v. SL Indus., 56 F.3d 491, 496 n.6 (3d Cir. 1995); see also infra Section II.B.

[65] 413 F.3d 1090 (9th Cir. 2005).

American Dynasty. Despite this demotion in rank, Coghlan received a pay raise and saw the change as a desirable one. In this new capacity, Coghlan served under the direct authority of master Kristjan Petursson, a native of Iceland.

During the fall of 2001, Petursson was forced to take time away from his job. Rather than appoint Coghlan as the substitute master, however, Andreassen instead promoted a fellow Norwegian to the post. Later that year, Andreassen grew dissatisfied with the worsening performance of the *American Dynasty*. After consulting with fellow management team members—including Americans—Andreassen removed Coghlan from the ship, demoted Petursson, and hired an employee of Norwegian descent as the *American Dynasty*'s new master. Around the same time, Andreassen removed the American masters of two other vessels and replaced them with native Norwegians.

After being removed, Coghlan was offered the position as mate of the *Katie Ann* (the vessel on which he had served previously as the master). Believing that he should have been appointed as the master of the *Katie Ann* instead, Coghlan declined the position. He then filed suit in federal court, alleging that he was discriminated against on the basis of national origin in violation of Title VII. He supported his claim by pointing to three allegedly discriminatory actions taken by the defendant: (1) on the two occasions that Petursson was absent from the *American Dynasty*, Andreassen appointed a Norwegian instead of Coghlan as temporary master, despite the fact that Coghlan was more qualified, (2) in the fall of 2001, Andreassen removed Coghlan from the *American Dynasty*, and (3) Andreassen ultimately offered Coghlan the position of mate, rather than master, of the *Katie Ann*. The trial court granted summary judgment for the defendant, and Coghlan subsequently appealed to the Ninth Circuit.

In affirming summary judgment for the employer, the Ninth Circuit offered an analysis that conflicts with *Desert Palace* and operates to heighten, drastically, the bar over which plaintiffs must pass to survive summary judgment. The court began by emphasizing the difference between a discrimination claim grounded in direct evidence and one supported only by evidence that is circumstantial.[66]

[66] Id. at 1094–96.

The court defined direct evidence as evidence that, if believed, proves discrimination without the need for presumption or inference.[67] Circumstantial evidence, on the other hand, is evidence that proves discrimination only with the assistance of inference.[68] Notably, the court then proceeded to clarify the relationship between the type of evidence offered and the burden on the plaintiff, asserting that

> [t]he distinction between direct and circumstantial evidence is crucial, because it controls the amount of evidence that the plaintiff must present in order to defeat the employer's motion for summary judgment. Because direct evidence is so probative, the plaintiff need offer "very little" direct evidence to raise a genuine issue of material fact. But when the plaintiff relies on circumstantial evidence, that evidence must be "specific and substantial" to defeat the employer's motion for summary judgment.[69]

After determining that Coghlan had presented only circumstantial evidence (thus making his burden more difficult to meet), the court then turned its attention to the same-actor inference.

Citing its own precedent, the court explained that where the same individual both hired and fired an employee, there is a strong inference of nondiscrimination.[70] The court mandated that the same-actor inference must be taken into account by a court on a summary judgment motion.[71] Essentially creating a new burden for plaintiffs to meet, the court ruled that a plaintiff in Coghlan's position (that is, one who alleged discriminatory animus supported by circumstantial evidence in a same-actor case) could survive summary judgment only upon "muster[ing] the *extraordinarily strong showing* of discrimination necessary to defeat the same-actor inference."[72] Stated differently, the plaintiff's burden in such a situation

[67] Id. at 1095 (internal citations omitted).
[68] Id.
[69] Id. (internal citations omitted).
[70] Id. at 1096 (citing Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996)). In a later passage in *Coghlan*, the court specified that the logic of the same-actor inference applies to situations where an employee is offered a less desirable job opportunity as well as situations regarding hiring and firing. Id.
[71] Id. at 1098.
[72] Id. at 1097 (emphasis added).

is "especially steep."[73] Applying this standard, the court held that Coghlan's circumstantial evidence of discrimination was not "sufficient to meet the burden imposed by the same-actor inference."[74] The court then affirmed summary judgment for the defendant.[75]

In *Lowe v. J.B. Hunt Transport*, the Eighth Circuit applied the same-actor inference in a similar fashion.[76] At age 51, James Lowe was hired by the defendant for the position of terminal manager. Two years later, Lowe was fired by the same individuals who had hired him. After being terminated, Lowe filed suit under the ADEA. The trial court applied the *McDonnell Douglas* burden-shifting framework. During trial, Lowe successfully presented his prima facie case of discrimination.[77] The defendant then explained that Lowe was fired because of the falsification of a petty cash report. Lowe attempted to persuade the court that the company's offered reason for the employment decision was pretextual, arguing specifically that (1) the shortage in the petty-cash fund was small, (2) he was not accused of having taken the money himself, (3) his performance ratings had been good, (4) less severe methods of discipline were available to the employer, and (5) a similarly situated employee was disciplined, not fired.[78] At the close of the evidence, the trial court issued a directed verdict for the defendant and Lowe appealed.

The Eighth Circuit's decision to affirm the directed verdict was based almost entirely on the same-actor inference,[79] but here the

[73] Id. at 1096.

[74] Id. at 1100.

[75] Id. at 1101. To be sure, the court did not base its holding *exclusively* on the existence of the same-actor inference. Id. at 1098–1100 (addressing each of the plaintiff's allegations of discrimination in turn). Though it may not have been dispositive on its own, the same-actor inference factored heavily into the court's decision in that it raised the bar that the plaintiff had to meet in order to survive summary judgment.

[76] 963 F.2d 173 (8th Cir. 1992).

[77] Id. at 174 (noting that "[h]ere, a *prima facie* case was presented.").

[78] Id.

[79] Id. at 174–75. This court did address the merits of the plaintiff's claim. Specifically, the court reasoned that (1) the company had the right to fire Lowe despite the fact that the amount of missing money was small, (2) Lowe's generally good employment ratings were irrelevant because he was fired for a specific act, not his general employment record, (3) Lowe was terminated for violating a company policy, which is an appropriate grounds for termination, and (4) the "similarly situated" fellow employee was not caught falsifying records but rather with using the company computer to send personal messages. Id. at 175.

court applied the inference in a way even more punishing to the plaintiff than did the *Coghlan* court. Specifically, the Eighth Circuit affirmed the lower court even after admitting that but for the same-actor inference, the plaintiff likely would have defeated the defendant's motion for a directed verdict:

> 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 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. . . . It is 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.[80]

In its summation of the case, the court identified the same-actor inference as a factor that was "fatal to his claim."[81]

B. Purely a Matter for the Jury

In stark contrast to the above courts, the Eleventh Circuit held in *Williams v. Vitro Services Corp.* that the import of the same-actor inference is properly considered by the jury rather than the court.[82] J.R. Williams was hired in 1961 as a mission support coordinator for Vitro Services Corporation. In 1982, he was terminated as part of a reduction in force ("RIF"). Two years later, at age 49, Williams was rehired and subsequently promoted by Vitro; ultimately, however, he was terminated pursuant to another RIF. Williams then filed suit under the ADEA, and the court entered summary judgment for the defendant, concluding that Williams had failed to rebut the legitimate, nondiscriminatory reason that Vitro claimed supported the decision to fire him.[83]

[80] Id. at 174–75 (internal citations omitted) (emphasis added).
[81] Id. at 175.
[82] 144 F.3d 1438 (11th Cir. 1998). The factual and analytical summary that follows concerns only those issues raised in the case that relate to the same-actor inference.
[83] Id. at 1440.

On appeal, Williams contended that he had presented sufficient evidence from which a jury could reasonably conclude that Vitro's decision to fire him was intentional and unlawful age discrimination. Specifically, Williams asserted that (1) he had been told by the company president that the company needed to find a way to get older workers to retire to save jobs for younger employees, (2) he was asked to sign a form waiving any future claim of age discrimination against Vitro and that no other employee had ever been asked to sign such a waiver, and (3) he was told by a Vitro manager that he "should have seen [being fired] coming."[84] In its defense, Vitro asserted the same-actor inference.[85]

The Eleventh Circuit declined to presume nondiscrimination from same-actor facts. Adhering to its precedent of allowing discrimination plaintiffs to survive summary judgment upon the presentation of a prima facie case of discrimination plus evidence of pretext, the court determined that it would be "inconsistent with our precedent to require a plaintiff in 'same actor' cases not only to show pretext but, in addition, to present further evidence to overcome a special inference created by the 'same actor' evidence."[86] In clear contrast to the language and rationale of *Proud*, *Coghlan*, and *Lowe*, the court held that the same-actor inference "is a permissible—not a mandatory—inference *that a jury may make*" in determining whether the employer was motivated by discriminatory animus.[87] As the court clearly explained,

> we conclude that "same actor" evidence of the sort introduced in this instance constitutes evidence that a jury may consider in deciding the ultimate issue of intentional discrimination. Evidence that the same actor both hired and fired the plaintiff, in some circumstances, may help to convince a jury that the defendant's

[84] Id. at 1444.

[85] Id. at 1442. Specifically, the company explained that the president of Vitro was responsible for (1) Williams's termination, (2) rehiring him after the first RIF (knowing that the plaintiff was over 40 years old at the time), (3) promoting him, (4) at least implicitly approving his continued employment with Vitro before the corporate decision to impose the second RIF, and (5) firing Williams pursuant to the second RIF. Vitro then submitted to the court that the same-actor inference as applied to these facts amounted to a presumption that Williams was not terminated on account of his age. Id.

[86] Id. at 1443 n.4.

[87] Id. at 1443 (emphasis added).

> proffered legitimate reasons for its decision are worthy of belief; it is the province of the jury rather than the court, however, to determine whether the inference generated by "same actor" evidence is strong enough to outweigh a plaintiff's evidence of pretext.[88]

The court, after finding that the plaintiff had offered sufficient evidence from which a reasonable jury could find discrimination, reversed the order of summary judgment for the employer.[89]

In *Waldron v. SL Industries*, the Third Circuit similarly declined to invoke the same-actor inference to dismiss a plaintiff's claim of discrimination.[90] In 1986, Reed Waldron was terminated from his position with SL Industries as a consequence of a corporate reorganization. Two years later, at age 61, Waldron was rehired. After a period of job shuffling among employees at the corporation, Waldron ultimately was given the title of industrial market manager. In 1991, after approximately three years at this position, Waldron was discharged at age 63. His supervisor justified the decision to fire him on two grounds: (1) his job had been eliminated and his former duties were being distributed into two other positions, and (2) he was not ideal for the job because he failed to pursue certain key accounts. The ultimate decision to fire Waldron was approved by the president of the company.

Thereafter, a 32-year-old employee named Ed Brown was promoted into one of the two new positions created after the dissolution of Waldron's old job. The company never filled the other new position, however, and within six months the company had recombined the two new jobs back into the one job that Waldron held before he was fired. Brown then had exactly the same job that Waldron had recently held, but from which he had been fired. Waldron sued the company under the ADEA arguing that he was terminated on account of his age.[91]

One of the defendant's principal arguments, both at trial and on appeal, relied expressly on the same-actor inference. Specifically, the company contended that because Waldron was 61 years old

[88] Id.
[89] Id. at 1444.
[90] 56 F.3d 491 (3d Cir. 1995).
[91] Id. at 493.

when rehired and 63 1/2 years old when he was fired, a strong inference existed that discrimination was not a motivating factor in the employment decision. The Third Circuit rejected this argument, reasoning instead that any inferential force that may exist should be determined by a jury rather than the court. Quoting an amicus curiae brief submitted by the EEOC, the court explained,

> where, as in *Proud*, the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. But this is simply evidence like any other and should not be accorded any presumptive value.[92]

In a direct affront to *Proud*, the court recognized that it was plausible that the company rehired Waldron for a period of time sufficient to train a younger employee, and, once the training period was finished, then fired Waldron. On account of that possibility, the court explained that the same-actor inference, even if accepted as in *Proud*, would be inapplicable to the facts of the case.[93]

III. CRITICISMS OF THE USE OF THE SAME-ACTOR INFERENCE AT SUMMARY JUDGMENT

This Part presents a three-pronged criticism of the use of the same-actor inference to justify summary judgment or a directed verdict for an employer. First, the same-actor inference is analogous to several other broad per se rules that lower federal courts have attempted to apply to discrimination cases; the Supreme Court has repeatedly reversed these efforts. Second, the same-actor inference necessarily requires courts to engage in the weighing of evidence and its credibility—endeavors that exceed the scope of summary judgment authority granted by the Federal Rules of Civil Procedure. Third, the same-actor inference relies heavily on treating plaintiffs with direct and circumstantial evidence differently, a policy that conflicts with Supreme Court precedent and the language of Title VII.

[92] *Id.* at 496 n.6.

[93] *Id.* On this same theme, one can readily imagine several circumstances where the same person could make a favorable and then an adverse employment decision regarding an employee and yet still be motivated by discriminatory animus. For a thoughtful list of such situations, see Northup, supra note 14, at 210–13.

A. The Same-Actor Inference in Context

Statistics show that plaintiffs filed approximately twice as many federal employment discrimination lawsuits in 2005 (16,930) as in 1990 (8,273), the year immediately prior to the enactment of the 1991 Civil Rights Act.[94] Two notable and related observations flow from this empirical evidence, both of which are relevant to understanding the legal landscape within which courts and individuals operate. First, out of a concern for judicial economy, already-busy federal district and appellate courts face an underlying pressure to craft and apply rule-like presumptions and inferences, often to defeat and deter plaintiffs' claims. Second, and as a result of this docket pressure, plaintiffs are at the mercy of those rules even though each individual plaintiff remains otherwise unburdened by the vast increase in employment discrimination litigation. There is, therefore, a very definite schism between courts and plaintiffs. Typically, lower federal courts attempt to deal with this divergence of interests by establishing and applying broad inferences that act like rules, the consequence of which is usually (though not always) to enter judgment for the employer. In almost every instance, however, the Supreme Court (which, incidentally, controls its own docket and remains largely immune from increased litigation) has reversed those decisions and instead required that each case be heard and decided on its own facts. Four examples illustrate this point.

First, prior to the Supreme Court's ruling in *Reeves v. Sanderson Plumbing Products*,[95] several circuit courts of appeals held that a plaintiff needed to establish that the employer's offered reason for the adverse employment decision was pretext *for discrimination* and that otherwise, summary judgment for the defendant was required as a matter of law.[96] In *Reeves*, however, the Supreme Court

[94] Admin. Office of the U.S. Courts, Judicial Facts & Figures Table 4.4, http://www.uscourts.gov/judicialfactsfigures/Table404.pdf (last visited Apr. 11, 2007).

[95] 530 U.S. 133 (2000).

[96] See, e.g., Reeves v. Sanderson Plumbing Prods., 197 F.3d 688, 692 (5th Cir. 1999) ("To establish pretext, a plaintiff must prove not only that the employer's stated reason for its employment decision was false, but also that age discrimination 'had a determinative influence on' the employer's decision-making process.") (internal citations omitted); Fisher v. Vassar Coll., 114 F.3d 1332, 1339 (2d Cir. 1997) ("[A] Title VII plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext *for discrimination*."); Theard v. Glaxo, Inc., 47 F.3d 676, 680 (4th Cir. 1995)

reversed these decisions, explaining that plaintiffs can survive summary judgment solely by establishing that the defendant's offered reason was pretext *simpliciter*:

> [p]roof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.[97]

In so holding, the Court reversed a per se rule applied by lower federal courts (that is, the rule that plaintiffs automatically lose when they do not show pretext *for discrimination*), instead mandating that a plaintiff *must* survive summary judgment and *can* prevail at trial by discrediting the employer's proffered reason. The effect of this holding was to expand the duty and discretion of the jury in finding (or not finding) intentional discrimination.

A second example of this trend concerns the ADEA and situations in which one worker older than forty is fired and replaced by another worker also over age forty. In *O'Connor v. Consolidated Coin Caterers Corp.*, the Fourth Circuit held that the plaintiff could not prevail on his ADEA claim because he was not replaced by another employee outside of the protected class (aged forty and older).[98] More specifically, the court reasoned that under the *McDonnell Douglas* framework, a plaintiff must establish as a facet of his prima facie case that he was replaced by an individual outside of the protected class.[99] Where a plaintiff over forty was replaced by another employee also over forty, the plaintiff could not make out the required prima facie case and, therefore, his claim would fail. The Supreme Court unanimously reversed.[100] Writing

(explaining that the plaintiff must prove both that the offered reason was pretext and that the real motive was unlawful discrimination); Woods v. Friction Materials, 30 F.3d 255, 260 (1st Cir. 1994) ("[T]he claimant must prove *both* that the employer's articulated reason is false, and that discrimination was the actual reason for its employment action.").

[97] *Reeves*, 530 U.S. at 147–48.

[98] 56 F.3d 542 (4th Cir. 1995).

[99] Id. at 546.

[100] O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).

for the Court, Justice Scalia explained that the only relevant question for ADEA purposes was whether an employee over forty lost his job on account of his age, *not* whether he lost his job to another employee also in the protected class: "[b]ecause it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case."[101] After *Consolidated Coin*, therefore, courts can no longer dispense with plaintiffs' ADEA claims solely on the grounds that the replacement employee was also over forty years old. Instead of applying this rule as a means of efficiently dismissing plaintiffs' claims, courts instead must address these cases by examining them on their own facts.

In similar fashion, in *Swierkiewicz v. Sorema, N.A.*, the Supreme Court—again unanimously—reversed a Second Circuit rule which required a plaintiff to plead specific facts in her complaint sufficient to establish the required *McDonnell Douglas* prima facie case.[102] The Second Circuit affirmed the heightened pleading requirement required by the district court on the theory that assertions of nationality and evidence of one age-related comment by the employer, combined with simple allegations of national origin and age discrimination, are legally insufficient to raise an inference of discrimination.[103] In reversing the Second Circuit, the Court began its analysis by clarifying that "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement."[104] The Court then noted that a plaintiff with direct evidence of discrimination need not assert the *McDonnell Douglas* prima face case at all.[105] Then, in language foreshadowing its decision in *Desert Palace*, the Court wrote that it "seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered."[106]

[101] Id. at 312.

[102] 534 U.S. 506, 508 (2002).

[103] Swierkiewicz v. Sorema, N.A., 5 F. App'x 63, 64–65 (2d Cir. 2001). The Sixth Circuit had adopted a similar rule. See Jackson v. City of Columbus, 194 F.3d 737, 752 (6th Cir. 1999).

[104] *Swierkiewicz*, 534 U.S. at 510.

[105] Id. at 511.

[106] Id. at 511–12. It is perhaps not surprising, given the emphasis on direct and circumstantial evidence, that Justice Thomas authored the opinions in *Swierkiewicz* and

Despite the fact that the above three examples may suggest that the Supreme Court is more pro-plaintiff while lower federal courts tend to be more pro-employer, that is not always true. For example, the Eighth Circuit ruled in *Hicks v. St. Mary's Honor Center* that a plaintiff who discredited all of the defendant's offered reasons for the employment decision was entitled to judgment as a matter of law.[107] As the Court explained, "when all legitimate reasons [for the adverse employment action] have been eliminated . . . it is more likely than not the employer . . . based [its] decision on an impermissible consideration such as race."[108] This pro-plaintiff per se rule, however, was reversed by the Supreme Court in *St. Mary's Honor Center v. Hicks*.[109] The Court held that a plaintiff who discredits all of the employer's offered reasons for the adverse employment decision *permits but does not compel* judgment for the plaintiff, as a contrary rule "ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'"[110] Like the previous three examples, the effect of this Supreme Court ruling is to require lower courts to hear and adjudicate each case on its own facts.

The same-actor inference, and the manner in which it is used by courts, is analogous to these other examples of broadly applied per se rules that were subsequently overturned by the Supreme Court. In substance if not in form, what would properly be treated as a rebuttable inference instead operates as an irrebuttable presumption. A wrongful discharge plaintiff with circumstantial evidence of discrimination, who was hired and fired by the same person, will lose unless he can rebut the inference of nondiscrimination that courts assign to such same-actor cases. In almost every case, however, a plaintiff will not be able to rebut the same-actor presumption of nondiscrimination. As *Proud* itself makes clear,

> [w]hile we can imagine egregious facts from which a discharge in this [same-actor] context could still be proven to have been dis-

Desert Palace. See supra notes 36–40 and accompanying text. Incidentally, the Court also grounded its holding in the liberal pleading framework of Federal Rule of Civil Procedure 8(a)(2). Id. at 512.

[107] 970 F.2d 487, 492 (8th Cir. 1992).

[108] Id. at 493 (quoting Furnco Constr. Corp. v. Waters, 438 U.S 567, 577 (1978)).

[109] 509 U.S. 502, 511 (1993).

[110] Id. (internal citations omitted).

> criminatory, it is likely that the compelling nature of the inference arising from facts such as these will make cases involving this situation amenable to resolution at an early stage.[111]

Indeed, in jurisdictions that follow *Proud*, it is hard to imagine how a plaintiff, armed with circumstantial evidence of wrongful discrimination in a same-actor case, could successfully surmount the same-actor inference at summary judgment. In the context of employment discrimination litigation, the same-actor inference operates as a per se rule. In this way, courts that dismiss plaintiffs' claims on account of the same-actor inference act in a way contrary to the implicit mandate of the Supreme Court that such broadly applicable per se rules are misplaced in employment discrimination litigation.

B. Questions of Credibility Belong to the Jury

One may wonder what drives lower federal courts, despite repeated reversals by the Supreme Court, to define and apply broadly applicable rules to employment discrimination cases. A plausible, indeed likely, explanation is that lower courts are responding to the intense and real pressures of a crowded docket from which the Supreme Court, by virtue of its *cert* jurisdiction, is largely immune. Perhaps as a consequence, lower federal courts seem amenable to efforts to dismiss cases on summary judgment, often, though not always, in favor of defendant-employers. The use of the same-actor inference in this effort, however, causes courts to exceed the summary judgment authority vested in them by the Federal Rules of Civil Procedure as well as to run afoul of Supreme Court summary judgment jurisprudence.[112] The clear impact of this is, of course, to wrongly deny plaintiffs the statutory right to a jury verdict.

It is worth reiterating here that the principal amendment to Title VII made by the 1991 Act was to allow Title VII plaintiffs to recover damages, thus triggering the Seventh Amendment right to a

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

[112] While the same-actor inference tends to be relevant during summary judgment, the argument set forth in this Section is equally applicable to directed verdicts and judgments notwithstanding the verdict, as the standard is equivalent. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986).

jury trial.[113] Indeed, this change was in keeping with a long-standing and deeply held belief in the importance of the Seventh Amendment, described by Justice Scalia as "Congress's response to one of the principal objections to the proposed Constitution raised by the Anti-Federalists during the ratification debates: its failure to ensure the right to trial by jury in civil actions in federal court."[114]

While one might expect that, as a consequence of this revision, the percentage of employment discrimination cases going to trial would have increased, in fact statistics show both that *fewer* cases are disposed of at trial and that the employer wins the vast majority of cases resolved pre-trial.[115] Plaintiffs fare even worse on appeal. According to one study, when an employer wins at trial and the ruling is appealed, those judgments are reversed less than six percent of the time; when the plaintiff wins at trial, however, the judgment is reversed nearly forty-four percent of the time.[116]

Though Congress intended discrimination plaintiffs to be entitled to jury trials,[117] statistical evidence suggests that plaintiffs seldom get to a jury and that even when plaintiffs do win at trial, those verdicts are often upset on appeal. It seems clear, therefore, that the systemic litigation posture of employment discrimination cases is tremendously hostile toward plaintiffs.[118] Indeed, the same-actor inference falls squarely within this broad pattern, as the invocation of the inference by courts like *Proud* almost uniformly leads

[113] See supra notes 28–33 and accompanying text.

[114] Gasperini v. Ctr. for Humanities, 518 U.S. 415, 450 (1996) (Scalia, J., dissenting).

[115] See John Golmant, Statistical Trends in the Disposition of Employment Discrimination Cases, *reprinted in* 20 Empl. Discrimination Rep. (BNA) No. 18, at 602–03 (Apr. 30, 2003); see also 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 (1993).

[116] Kevin M. Clermont & Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments, 2002 U. Ill. L. Rev. 947, 957.

[117] 42 U.S.C § 1981a(a)(1) extended the right to jury trials to those Title VII plaintiffs who were not previously granted this right by 42 U.S.C. § 1981. The ADEA expressly provides for the right to a jury trial. 29 U.S.C. § 626(c)(2) (2000). The Civil Rights Act of 1991 also extended the right to jury trial to plaintiffs suing under the Americans with Disabilities Act. 42 U.S.C § 1981a(a)(2).

[118] For more information, including statistics, supporting the conclusion that plaintiffs seldom prevail in employment discrimination litigation, see Wendy Parker, Lessons in Losing: Race Discrimination in Employment, 81 Notre Dame L. Rev. 889 (2006).

to judgment for the employer. Same-actor cases, however, *never* present proper justification for dismissing a plaintiff's claim.

Summary judgment is properly reserved for only those instances where there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[119] In evaluating a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[120] In plain language, summary judgment is appropriate only when the nonmovant has failed to present any evidence that would allow a reasonable inference favorable to that party. If, after construing all of the evidence and inferences in favor of the nonmovant, there is still no genuine issue of a material fact, summary judgment is warranted. In *Celotex Corp. v. Catrett*, the Supreme Court explained that summary judgment is appropriate only when the nonmovant "fails to make a showing sufficient to establish the *existence* of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[121] An employment discrimination plaintiff "bears the burden of proof" on the issue of pretext; therefore, the plaintiff who presents evidence showing the existence of that fact (that is, evidence of pretext) should, under *Celotex*, survive summary judgment.

In deciding motions for summary judgment, courts should be cautious to avoid weighing the strength and credibility of the evidence. As the Supreme Court has explained, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."[122] This admittedly opaque distinction is crucial for same-actor analysis, because courts that dismiss plaintiffs' claims of discrimination on account of the same-actor inference cannot help but do so after weighing the credibility of the evidence.

This Note has previously described the mechanics of the *McDonnell Douglas* burden-shifting framework applicable in employment discrimination cases.[123] It should be recalled that the third

[119] Fed. R. Civ. P. 56(c).
[120] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).
[121] 477 U.S. 317, 322 (1986) (emphasis added).
[122] *Liberty Lobby*, 477 U.S. at 255.
[123] See supra notes 41–54 and accompanying text.

and most important stage of that framework requires the plaintiff to show that the defendant's proffered reason for the adverse employment decision was pretextual. Absent any showing of pretext, the plaintiff loses as a matter of law. It is not obvious, therefore, why a court needs to invoke the same-actor inference as a way of holding that the plaintiff failed to show pretext. If the plaintiff truly produced no evidence of pretext, a court would be able to reach the same determination (that is, summary judgment for the employer) without any resort to—or reliance on—the same-actor inference.

I am aware that claims of "*never*" invite attempts to disprove my argument by offering even one hypothetical example where the rule would not apply. The argument offered in this Section, however, can withstand such efforts because it turns on a question of law, not individual facts. That is, no set of facts allows courts to award summary judgment because of the same-actor inference. Courts may, of course, enter judgment for the employer for want of a plaintiff's showing of pretext. Therefore, courts must be using (and indeed, as the cases suggest, are using) the same-actor inference to justify summary judgment only once they have weighed the plaintiff's evidence of pretext against the defendant's evidence of nondiscrimination. It is that weighing, which occurs in *all Proud*-like cases, that *always* contravenes courts' authority under Federal Rule of Civil Procedure 56(c). It is on that ground that I rest the rather strong claim that the same-actor inference is *never* properly used by courts to award judgment for the employer.

In *Lowe*, the Eighth Circuit dismissed the plaintiff's claim in a same-actor case for want of a pretextual showing, despite the admission that, but for the same-actor inference, the plaintiff in fact *had* shown evidence of pretext.[124] In making that determination, the Eighth Circuit weighed the evidence presented by the plaintiff against the evidence offered by the defendant, added in the presumptive force of the same-actor inference, and dismissed the claim. That case is perhaps the quintessential example of a court going beyond the black-letter law of summary judgment to weigh

[124] Lowe v. J.B. Hunt Transp., 963 F.2d 173 (8th Cir. 1992); see also supra notes 76–81 and accompanying text.

the evidence, make determinations of credibility, and dismiss the action.

The Fourth Circuit in *Proud* seems to have taken much the same approach.[125] There, the court affirmed judgment for the employer both on account of same-actor facts and because "the evidence of his enumerated job deficiencies in a supervisory position makes any inference of discriminatory animus unwarranted."[126] The court, somewhat surprisingly, paid no attention to the plaintiff's five-pronged argument showing pretext. Rather, the court created and relied on the same-actor inference to infer an absence of discrimination. *Proud* was not a case in which the plaintiff failed to produce evidence of discrimination. On the contrary, it was a case in which the court weighed the evidence presented by the plaintiff against the same-actor inference (and the defendant's evidence) before concluding that no reasonable inference of discrimination could be found in favor of the plaintiff.[127]

Reading a stronger presumption of nondiscrimination into a same-actor fact pattern wrongly extends the presumption of nondiscrimination beyond the scope at which it should lie. When courts reason that it is irrational for the same person to hire a member of a protected class and then fire that person on account of discriminatory animus, they grant too much to the employer. In the age context, for example, it may be perfectly rational for an employer to hire an older worker in order for him to train a younger employee, only to fire the older worker once the training

[125] Proud v. Stone, 945 F.2d 796 (4th Cir. 1991); see also supra notes 55–62 and accompanying text.

[126] *Proud*, 945 F.2d at 798.

[127] *Proud v. Stone* is not the only time that the Fourth Circuit has taken an aggressive approach to summary judgment. In *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 784 (4th Cir. 1998), the plaintiff brought a civil rights action under 42 U.S.C. § 1983 for a violation of the Fourth Amendment prohibition against the use of excessive force. The plaintiff presented evidence, in the form of three witnesses, to the effect that he was unarmed and nondangerous. Id. at 786. The officers presented evidence that the plaintiff was in fact armed and dangerous. Id. at 785. The court awarded summary judgment to the officers in part on the theory that the plaintiff's witnesses were too far away from the incident to have reliably seen what occurred (they were, in reality, across the street). Id. at 787–88. Judge Michael dissented, arguing in part that the majority violated basic "hornbook law" when they "impermissibly displace[d] the role of the jury by weighing the credibility of the [defendant's] deposition testimony against the affidavits of the three eyewitnesses." Id. at 791.

has been completed. Alternatively, a manager of a fast food chain may be in a hurry to hire anyone who can cook hamburgers, only to fire that person on account of his race when another employee of a preferred race shows interest in the job.[128] It is, therefore, wrong for courts to say that no reasonable inference could be found for a plaintiff in a same-actor employment discrimination case and to consequently allow summary judgment for the employer.

Proud and cases like it premise the use of the same-actor inference on the idea that a rational person would not knowingly hire a member of a protected class and then fire that person on account of her protected status. Indeed, it is this very insight which allows courts to determine a lack of dispute regarding the material fact of discrimination. It is not clear, however, that racism, sexism, or any other kind of discrimination necessarily correlates with rational decisionmaking. Indeed, discriminatory motivations often cause individuals to act in ways that may not be predictable or otherwise rational.[129] As Professors Krieger and Fiske note, "small changes in a situation, or in a person's subjective interpretation of that situation, can lead to surprising changes in the person's behavior."[130] If that is true, then the premise of lack of rationality which underlies the holding of *Proud* and its progeny is a misplaced consideration, as it may bear no relation to the existence of discriminatory motivation on the part of the employer. The Seventh Circuit has recognized the imprecise nature of *Proud*'s theory of rationality, noting that "[t]he psychological assumption underlying the same-actor inference may not hold true on the facts of the particular case" because,

[128] One may contend that the transaction costs of firing an employee just because of race are too high, and consequently employers would not pursue such a course of action. While this contention may have merit in certain circumstances, it is highly fact- and context-dependent, and it is therefore inappropriate for resolution at summary judgment. The example of a fast food restaurant hiring unskilled laborers is indicative of that point. One might rationally imagine that the transaction costs in firing a line cook, when another candidate is ready and willing to assume that role, are minimal given the combination of such factors as relatively easy training and numerous qualified potential applicants. In this way, it may in fact be rational, or at least not irrational, for the same person to hire and fire an employee in a protected class.

[129] For a compelling article that presents a psychological perspective on the issue of irrationality and discrimination, see Charles R. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

[130] Krieger & Fiske, supra note 13, at 1040.

among other reasons, "an employer might be unaware of his own stereotypical views" at the time of hiring.[131]

It is also reasonable to believe that an employer's discriminatory motivation may not be so strong as to prevent him from hiring a member of a protected class yet be more than strong enough to justify what might otherwise be a premature decision to fire the employee. Indeed, given the vast psychological research regarding people's reactions and feelings regarding race and discrimination, it is illuminating that no court has cited any empirical evidence for the contention that discriminatory sentiment is a linear phenomenon that consistently exists or fails to exist in the mind of a given individual. Courts rest too comfortably on *Proud*'s theory of rationality when they allow summary judgment or a directed verdict for the employer on account of same-actor facts.

Finally, it is improper for courts to invoke the same-actor inference to allow summary judgment for the employer because the existence of intentional discrimination in a given case is a pure question of fact—it is not a question of law, nor is it a mixed question of law and fact.[132] More generally, a finding of intentional discrimination turns on intent, and "[t]reating issues of intent as factual matters for the trier of fact is commonplace."[133] Because questions of fact are reserved for the finder of fact, and because juries are fact-finders, courts usurp the juries' authority when they find facts, assess the credibility of the evidence, and allow summary judgment for an employer—and this is precisely what happens in same-actor cases.

C. Direct and Circumstantial Evidence

As an initial matter, it is improbable that any court would use the same-actor inference to dismiss a plaintiff's claim where the plaintiff presents the court with direct evidence of discrimination. On facts similar to those in *Price Waterhouse*,[134] for example, no

[131] Johnson v. Zema Sys. Corp., 170 F.3d 734, 745 (7th Cir. 1999).

[132] Pullman-Standard v. Swint, 456 U.S. 273, 285, 288 (1982); see also Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) ("[A] finding of intentional discrimination is a finding of fact . . . .").

[133] *Swint*, 456 U.S. at 288.

[134] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); see also supra notes 18–22 and accompanying text.

court would ignore the blatantly discriminatory notes of the partnership committee and dismiss the plaintiff's claim just because those on the partnership committee were also responsible for hiring the plaintiff. Therefore, to the extent that courts think it is proper to dismiss claims because of the same-actor inference, they do so only where the plaintiff presents circumstantial evidence of discrimination. This distinction between direct and circumstantial evidence, and how courts treat one as compared to the other, thus becomes a necessary and central component of the same-actor analysis. Indeed, the Ninth Circuit rested its decision in *Coghlan* entirely on these grounds: "Because direct evidence is so probative, the plaintiff need offer 'very little' direct evidence to raise a genuine issue of material fact. But when the plaintiff relies on circumstantial evidence, that evidence must be 'specific and substantial' to defeat the employer's motion for summary judgment."[135]

When compared with the language of Title VII and Supreme Court case law, it is apparent that *Coghlan* and cases like it were wrongly decided. First, Title VII requires plaintiffs to "demonstrate[] that race, color, religion, sex, or national origin was a motivating factor for any employment practice."[136] In another section of the statute, Congress defined "demonstrates" to mean that the plaintiff must meet the burdens of production and persuasion.[137] In contrast to Congress's decision to define precisely the term "demonstrates," no such specific effort was made to address the standard of proof applicable to a plaintiff's burdens. Given that discrimination lawsuits are civil in nature, and because Congress was silent on the issue, the traditional civil standard of proof by a preponderance of the evidence applies. This is true regardless of whether the plaintiff presents direct or circumstantial evidence of discrimination. In *Desert Palace*,[138] the Supreme Court construed the statute in this way, noting that Congress's failure to write a heightened standard of proof into the statute "is significant, for Congress has been unequivocal when imposing heightened proof

[135] Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1095 (9th Cir. 2005) (internal citations omitted); see also supra notes 65–75 and accompanying text.

[136] 42 U.S.C. § 2000e–2(m) (2000).

[137] Id. § 2000e(m).

[138] Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003); see also supra notes 34–40 and accompanying text.

requirements in other circumstances, including in other provisions of Title 42."[139] The "specific and substantial" standard applied by the *Coghlan* court to same-actor cases where the plaintiff presents circumstantial evidence clearly contravenes this directive.

In a more general way, *Coghlan* also errs by treating direct and circumstantial evidence differently. A unanimous Supreme Court in *Desert Palace* made that point clear. Justice Thomas noted the "utility of circumstantial evidence in discrimination cases" and explained that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep rooted."[140] He observed that (1) circumstantial evidence may often be more compelling than direct evidence, (2) circumstantial evidence is sufficient for a criminal conviction, despite the fact that a much higher standard of proof (beyond a reasonable doubt) is required, and (3) juries are regularly instructed by the court that the law does not distinguish between circumstantial or direct evidence on either weight or value.[141] Based on this reasoning, the Court definitively held that Title VII requires no heightened showing by a plaintiff relying on circumstantial evidence.[142] The *Coghlan* court was, therefore, misguided when it assigned different standards of proof to plaintiffs who present direct as compared to circumstantial evidence of discrimination.

The Eighth Circuit's decision in *Lowe v. J.B. Hunt Transport*[143] is equally flawed, and for the same reasons. The court was candid that, but for the same-actor inference, the plaintiff likely would have survived the directed verdict on the basis of the prima facie case plus evidence of pretext. The court, however, granted the employer's motion for directed verdict because the plaintiff failed to provide additional evidence of pretext sufficient to rebut the presumption of nondiscrimination generated by the same-actor inference. The court's holding, like that of the *Coghlan* court, contravenes the implicit premise of both Title VII and *Desert Palace* that no such heightened showing is required.

[139] *Desert Palace*, 539 U.S. at 99.
[140] Id. at 100.
[141] Id.
[142] Id. at 101.
[143] 963 F.2d 173 (8th Cir. 1992); see also supra notes 76–81 and accompanying text.

Two related points further illustrate the reasons why courts should refrain from applying the same-actor inference to dismiss plaintiffs' claims of discrimination. First, the same-actor inference allows employers to effectively circumvent Title VII by purposefully structuring their hiring and firing processes such that most every adverse employment decision will be subject to the same-actor inference. Furthermore, a less cynical perspective would recognize that there are entirely legitimate business reasons for employers to structure themselves such that the same individual makes all of the personnel decisions, so that even non-nefarious employers will find themselves protected by the same-actor inference. By ensuring to the maximum extent possible that the same individual makes all of the hiring and firing decisions, most plaintiffs seeking to sue for discriminatory discharge will face a nearly impermeable barrier to success.

Second, it is equally true that plaintiffs will seldom have anything but circumstantial evidence of discrimination. Forty-three years after the passage of Title VII, employers are no doubt wise to the pitfalls that occur when employment decisions are made pursuant to unlawfully discriminatory motives. This means not only that employers are less likely to discriminate but also that when they do, they are more likely to conceal the discriminatory motive behind the veil of a "legitimate, nondiscriminatory reason."

The combination of these two points means that discrimination plaintiffs will almost always face the same-actor inference, and they will do so armed only with circumstantial evidence. That plaintiffs will almost always lose in such situations was recognized by the Fourth Circuit in *Proud*. As that court explained, "[t]he plaintiff still has the opportunity to present countervailing evidence of pretext, but in most cases involving this situation, such evidence will not be forthcoming. In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."[144]

It is worth repeating that no court would employ the same-actor inference to dismiss a plaintiff's claim on summary judgment where that plaintiff had direct evidence of discrimination. Therefore, as both *Coghlan* and *Lowe* make clear, the additional burden levied

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

on plaintiffs in same-actor cases applies only where plaintiffs rely on circumstantial evidence of discrimination. The *Lowe* court further admitted that enough circumstantial evidence was presented to survive a motion for a directed verdict, *but for* the same-actor inference. This elevated burden that results from the same-actor inference, and which is relevant only in circumstantial cases, is inconsistent with the rationale of Title VII and *Desert Palace*, both of which mandate that direct and circumstantial evidence be treated alike. Because plaintiffs almost always will have only circumstantial evidence, and because employers almost always will be able to invoke the same-actor defense, it is not an exaggeration to conclude that plaintiffs will seldom, if ever, be able to recover under a theory of wrongful discharge.

CONCLUSION

Since 1991, the same-actor inference has been used by some lower federal courts to dismiss plaintiffs' claims of discrimination, mostly at summary judgment but also through directed verdicts. This practice is misguided.

First, courts have, in effect, created a broadly applicable per se rule whereby plaintiffs with circumstantial evidence of discrimination in same-actor cases will lose. This rule is analogous to other efforts at crafting and applying similar rules to employment discrimination claims, virtually all of which have been reversed by the Supreme Court. The Court has mandated instead that the role of the jury in determining whether intentional and unlawful discrimination motivated an adverse employment decision should be preserved.

Second, a court's entry of judgment for the employer based on the same-actor inference is improper because it necessarily requires courts to weigh the evidence and to make decisions regarding the credibility of that evidence. Such decisions go beyond the authority granted to courts by Federal Rule of Civil Procedure 56, especially given that the Supreme Court's guidance on that rule specifically reserves to the jury the power to make such credibility determinations. Furthermore, even if such decisions were properly made by the court at summary judgment, decisions that rest on the same-actor inference are nonetheless improper because the ra-

tional-actor theory on which they rely is not nearly as sure-footed as those courts contend or assume.

Third, those courts that assign "strong presumptive value" to same-actor facts contravene both congressional intent as well as Supreme Court precedent. Because the same-actor inference is only relevant where plaintiffs have circumstantial evidence of discrimination, and because the inference raises the bar for such plaintiffs, *Proud*-like courts in effect require a more substantial showing of discrimination in cases of circumstantial evidence than in cases with direct evidence. Congress neither required nor intended such a disparity.

The extent of the presumptive or inferential effect that may arise from same-actor facts should be left for the jury to determine. Such a system would properly vindicate the primary goals of the 1991 Act, preserve the province and role of the jury, and prevent employers from easily circumventing the protections that Title VII and the ADEA afford to discrimination plaintiffs. Further, the burden on plaintiffs with direct and circumstantial evidence would be equalized, and courts would be more guarded in their use of summary judgment to dismiss claims of discrimination. In all of these ways, the underlying purpose of federal employment discrimination statutes—providing plaintiffs with meaningful protection against discrimination in employment—would be more consistently effectuated and protected. To reach that goal, it must be juries, not judges, who determine whether same-actor facts justify a finding of nondiscrimination.