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Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products

Laina R. Reinsmith

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I. INTRODUCTION

Throughout the development of employment discrimination law, the United States Supreme Court has wrestled with the task of producing a suitable analytical framework, under which plaintiffs can attempt to prove their cases of disparate treatment by their

employers. An element of this task has been determining which types of evidence of discriminatory intent have probative value, and what effect that evidence should have on plaintiffs' and defendants' cases. In June 2000, the Supreme Court decided *Reeves v. Sanderson Plumbing Products*,[1] a case involving a disparate treatment claim brought by an employee alleging age discrimination by his employer in violation of the Age Discrimination in Employment Act (ADEA).[2]

Reeves represents the most recent step taken by the Supreme Court in its effort to clarify what a plaintiff must prove, using circumstantial evidence, in order to prevail on a claim of intentional employment discrimination.[3] In doing so, the *Reeves* Court also touched upon how evidence of remarks made in the workplace can assist plaintiffs in satisfying their burden of persuasion.[4] Thus, the *Reeves* opinion may be viewed as having two major impacts on employment discrimination law: (1) it clarified the evidentiary burden borne by a plaintiff in a disparate treatment case; and (2) it modified the Stray Remarks Doctrine[5] as it applies to such disparate treatment cases.[6]

This Note evaluates the current status of the Stray Remarks Doctrine in light of the Court's opinion in *Reeves*.[7] It additionally seeks to determine which types of discriminatory workplace remarks, if any, should have probative value, both in cases where the plaintiff produces direct evidence of discrimination, and also in cases where the plaintiff must prove his or her case by circumstantial evidence.

To complete this evaluation, this Note begins by providing an overview of plaintiffs' claims under the ADEA and under Title VII of the Civil Rights Act of 1964 (Title VII).[8] Parts II and III of this Note describe the elements of a disparate treatment claim and trace the Court's development of an analytical framework with

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1. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 138 (2000).
2. 29 U.S.C. §§ 621-634 (1994).
3. 530 U.S. at 138.
4. *Id.* at 150-54.
5. The Stray Remarks Doctrine was first articulated by Justice O'Connor in her concurring opinion in *Price Waterhouse v. Hopkins*. 490 U.S. 228, 277-78 (1989) (O'Connor, J., concurring). In general, under the Stray Remarks Doctrine, certain statements made by nondecisionmakers, or statements unrelated to a decisionmaking process, are not direct evidence of an employer's discriminatory motive. *Id.* The doctrine will be discussed at length later in this Note. *See infra* Parts V, VI.
6. 530 U.S. at 150-54.
7. *Id.*
8. 42 U.S.C. §§ 2000e to 2000e-16 (1994).

which plaintiffs may prove these claims. In Part IV, this Note focuses on the Court's decision in *Reeves*, particularly noting the clarifications that the Court made regarding the respective burdens placed on both plaintiffs and defendants in disparate treatment suits.[9] This Note continues on in Part V to discuss the development of the Stray Remarks Doctrine and its application by lower federal courts in employment discrimination cases. Finally this Note explores the status of the Stray Remarks Doctrine in light of the Court's opinion in *Reeves*[10] and questions what part, if any, of this doctrine should still be considered good law.

II. MAKING A CASE UNDER TITLE VII AND THE ADEA

A. An Overview of Title VII and the ADEA

Employment discrimination suits occupy an expanding portion of federal court dockets. Typically brought under Title VII,[11] the majority of these cases allege discrimination based on race, color, sex, religion, or national origin.[12] Moreover, a growing number of employment discrimination suits today also allege violations of the ADEA.[13]

Title VII makes it unlawful for employers,[14] labor organizations, and employment agencies to discriminate against employees[15] and applicants on the basis of their race, color, sex, religion, and

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9. 530 U.S. at 134-55.

10. *Id.* at 154-55.

11. §§ 2000e to 2000e-16.

> It shall be 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, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Id. § 2000e-2(a)(1).

12. ROBERT BELTON & DIANE AVERY, EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 30, 69 (6th ed. 1999).

13. The Equal Employment Opportunity Commission (EEOC), charged with enforcement of Title VII and the ADEA, reported in 1982 that age discrimination administrative complaints constitute the fastest growing group of claims with which it deals. *See* Vihstadt, *Congressional Update*, 5 BIFOCAL 8 (1984).

14. "The term 'employer' means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day . . . ." 42 U.S.C. § 2000e(b) (1994) (emphasis added).

15. Title VII defines "employees" in a circular way: an "employee" is "an individual employed by an employer." *Id.* § 2000e(f). The Supreme Court stated that courts should presume that Congress, referring to employees, meant "the conventional master-servant relationship as understood by common-law agency doctrine." Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 322-23 (1992) (quoting Cmty. for Creating Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989)).

national origin.[16] Enacted in 1964, and amended most recently in 1991, Title VII was designed by Congress to achieve equality of employment opportunities and to eliminate discriminatory impediments to that equality.[17] In passing Title VII, Congress did not intend, however, to "command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group."[18]

Similarly, the ADEA, enacted in 1967, and substantially amended in 1974 and 1978,[19] prohibits employers,[20] labor unions, and employment agencies from participating in employment discrimination on the basis of age.[21] The goal of the ADEA, as set forth in its *Statement of Findings and Purpose*, is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[22] Under the ADEA, it is unlawful for an employer "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."[23] In order to be protected under the

16. § 2000e-2(a)(1).

17. *See* Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971); *see also* Patrick M. Edwards, Casenote, *Proof of Employer Pretext Does Not Entitle Employee to a Decision Without Further Proof of Discrimination*, St. Mary's Honor Center v. Hicks, 71 U. DET. MERCY L. REV. 693 (1994).

18. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (quoting *Griggs*, 401 U.S. at 430-31).

19. While Congress was developing the Civil Rights Act of 1964, proposals were made to include age in the list of prohibited criteria set forth in the Title VII provision. *See* 110 CONG. REC. 2,596-99 (1964). Although Congress eventually decided not to include age as a protected class under Title VII, it did direct the Secretary of Labor to conduct a study on the nature and extent of age discrimination in the workplace. The Secretary conducted the study, and after its completion, recommended that legislation be passed to prevent such age-based discrimination. A bill was submitted in 1967, and the ADEA was passed that same year. *See* 110 CONG. REC. 9,911-13, 13,490-92 (1964) (discussing proposed amendments); Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 1964 U.S.C.C.A.N. (78 Stat.) 287, 316 (superseded by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 10, *reprinted in* 1972 U.S.C.C.A.N. (86 Stat. 11, 132); *see also The Older American Worker—Age Discrimination in Employment*, Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964 (1965).

20. In order to constitute an "employer" covered under the ADEA, the employer must have at least twenty employees. *See* 42 U.S.C. § 2000e(b) (1994) (defining employer).

21. For an excellent overview of the intricacies of the ADEA, see generally Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other than Age Exception*, 66 B.U. L. REV. 155 (1986).

22. 29 U.S.C. § 621(b) (1994).

23. 29 U.S.C. § 623(a)(1) (1994).

ADEA, the employee[24] must be over the age of forty.[25] To be sure, an employer does not automatically violate the ADEA if he terminates or demotes an employee for insufficient cause, merely because the employee is older than forty years of age.[26] Indeed, as the Seventh Circuit noted, "The statute is not a guarantee of tenure for the older worker."[27] That said, it is reasonable to question which conduct and decisions do trigger liability for the employer under the ADEA and Title VII.

B. Choosing a Claim: Disparate Impact or Disparate Treatment

If protected employees believe that they have been discriminated against by their employers on the basis of their race, color, sex, religion, or national origin, the employees have two types of allegations that they may bring against the employers under Title VII: a disparate impact claim or a disparate treatment claim.[28] A disparate treatment claim alleges that an employer intentionally discriminated against the plaintiff, whereas a disparate impact claim alleges that although the employer did not intentionally discriminate, its employment practices result in a disparate impact on the class to which the plaintiff belongs. Most cases alleging violations of the ADEA, are brought under the disparate treatment theory of discrimination.[29] Relying on the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, circuit courts have split over whether a plaintiff who feels he has been the target of age discrimination may also bring a disparate impact claim under the ADEA.[30]

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24. In *Robinson v. Shell Oil Co.*, the Supreme Court held that the term "employee" covers a former employee who brings a claim of discrimination against his former employer. 519 U.S. 337, 346 (1997).

25. 29 U.S.C. § 631(a) (1994).

26. *See* Shager v. Upjohn Co., 913 F.2d 398, 401-02 (7th Cir. 1990) (holding that evidence of employer's discriminatory intent offered by plaintiff was sufficient to defeat employer's motion for summary judgment).

27. *Id.* at 401.

28. *See* H. Lane Dennard, Jr. and Kendall L. Kelly, *Price Waterhouse: Alive and Well Under the Age Discrimination in Employment Act*, 51 MERCER L. REV. 721, 735-43 (2000) (discussing judicial application of the ADEA).

29. The Supreme Court in *Hazen Paper Co. v. Biggins*, stated that "[t]he disparate treatment theory is of course available under the ADEA, as the language of that statute makes clear." 507 U.S. 604, 609 (1993).

30. *Id.* at 618 (Kennedy, J., concurring) ("[N]othing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII . . . ."). Several circuits have rejected the applicability of the disparate impact theory in ADEA cases. *See, e.g.*, Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union, 53 F.3d 135, 138-39 (6th Cir. 1995); EEOC v. Francis W. Parker Sch., 41 F.3d 1073, 1080 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142

1. Disparate Impact Claims: Violations Absent Discriminatory Motive

A plaintiff who chooses to bring a disparate impact claim must demonstrate that his or her employer's particular employment policies produce a statistically significant disparate impact on a protected class[31] to which the plaintiff belongs.[32] Such a disproportionate adverse impact may constitute a violation of Title VII, if the factfinder concludes that the employment decision was not otherwise justifiable, regardless of whether the employer intended to discriminate.[33] The idea behind the disparate impact doctrine is that employment practices that systematically disadvantage members of a certain group should not be acceptable unless the employer can justify the practices by a showing of "business necessity."[34]

2. Disparate Treatment Claims: Proving Discriminatory Intent

The more common allegation brought by plaintiffs in ADEA and Title VII cases against their employers is the disparate treatment claim.[35] Under such a claim, a plaintiff must establish that the employer intentionally discriminated against him or her because he or she is a member of the protected class (i.e., over forty years of age).[36] The primary distinction between a disparate treatment claim and a disparate impact claim is that in order to estab-

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(1995). Other appellate courts have continued to apply the disparate impact theory in ADEA cases even after *Hazen Paper*. *See, e.g.*, Smith v. City of Des Moines, 99 F.3d 1466, 1470 (8th Cir. 1996); Mangold v. Cal. Pub. Util. Comm'n, 67 F.3d 1470, 1474 (9th Cir. 1995).

31. A protected class is a group of individuals for whom a statute expressly provides protection. *See* BELTON & AVERY, *supra* note 12, at 48.

32. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (holding that neutral employment policies with adverse impacts could run afoul of Title VII, regardless of whether plaintiff is able to establish discriminatory intent on the part of the employer, so long as plaintiff can establish, usually through statistical evidence, a disparate impact upon the protected group to which plaintiff belongs). For a lengthy discussion of disparate impact cases, see Tracy E. Higgins & Laura A. Rosenbury, *Discrimination and Inequality Emerging Issues Agency, Equality, and Antidiscrimination Law*, 85 CORNELL L. REV. 1194, 1205-08 (2000) (emphasizing the decline of the disparate impact doctrine in federal employment discrimination law).

33. For a more detailed discussion of the disparate impact theory, under which a plaintiff may bring an employment discrimination claim, see Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 630-32 (1997).

34. For a discussion of what satisfies a showing of "business necessity," see Contreras v. City of L.A., 656 F.2d 1267, 1275-84 (9th Cir. 1982), *cert. denied*, 455 U.S. 1021 (1982).

35. *See* Higgins & Rosenbury, *supra* note 32, at 1205.

36. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000). "When a plaintiff alleges disparate treatment, 'liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision.' " *Id.* (quoting Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

lish a disparate treatment claim, the plaintiff must demonstrate that a discriminatory intent or animus[37] motivated the employer to make the disputed employment decision.[38] That is, in a disparate treatment claim, the plaintiff's age, race, sex, etc. must have "actually played a role in the employer's decisionmaking process and had a determinative influence on the outcome."[39] The discriminatory reason need not be the *sole* reason for the decision.[40] The protected trait, however, must have been a *motivating factor*[41] for the decision; it must have actually played a role in the decisionmaking process and had a determinative influence on the outcome in order for the adverse decision to constitute an act of disparate treatment.[42]

C. Establishing a Discriminatory Treatment Claim

The task of proving an employer's discriminatory animus, which is required in disparate treatment claims, often proves to be quite difficult for plaintiffs. They may choose to establish their cases of discriminatory treatment in one of two ways: either through the presentation of direct evidence of discriminatory motive, or, more commonly, by weaving together pieces of indirect, or circumstantial, evidence of discrimination by their employers.[43]

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37. The term "animus" refers to "intention; disposition; design; will." BLACK'S LAW DICTIONARY 87 (6th ed. 1990). Thus, an employer's discriminatory animus is the discriminatory intention behind the employer's actions.

38. In disparate treatment cases, "[p]roof of discriminatory motive is critical . . . . Proof of discriminatory motive . . . is not required under a disparate impact theory." *See* BELTON & AVERY, *supra* note 12, at 63 (citing Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)).

39. *Reeves*, 530 U.S. at 141.

40. *See id.*

41. When this Note characterizes the discriminatory reason as a motivating factor in an employment decision, it follows Justice Brennan's statement: "In saying that [for example, age] played a motivating part in a employment decision," this means that if the employer were asked what its reasons were at the moment of the decision, and if the employer answered truthfully, then one of the reasons given for the decision would be that the employee or applicant was too old. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

42. *See* Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996).

43. The type of evidence the plaintiff possesses to prove his or her case dictates the approach that a court must take in analyzing the disparate treatment claim. If a plaintiff has direct evidence of an employer's discriminatory motive, then the case is analyzed under an analytical framework formulated by the Supreme Court in *Price Waterhouse*. The Court in *Price Waterhouse* held that in direct evidence cases (later known also as "*Price Waterhouse* cases"), by presenting direct evidence of discriminatory animus, a plaintiff may shift the burden of persuasion to the defendant. 490 U.S. at 271. This shift requires the defendant to convince the factfinder that it would have reached the same employment decision but for the presence of discriminatory motivation. *Id.* This *Price Waterhouse* framework is distinct from the *McDonnell Douglas* framework discussed in detail later in this Note. *See infra* Part III.

1. Using Direct Evidence

In a plaintiff's ideal situation, she will have direct evidence that her employer fired her, demoted her, or refused to hire her because of her age, race, sex, etc.[44] The question of what constitutes direct evidence in an employment discrimination case has prompted much debate among courts[45] and legal scholars,[46] and the U.S. Supreme Court has handed down no clear definition of direct evidence.[47] Based upon case law and commentary, however, one may conclude that certain statements made by an employer to an employee would constitute direct evidence of discriminatory motive.[48] For example, if during an interview in which plaintiff *A* sought a position from employer *X* the employer told the plaintiff, "I would hire you, but I am not going to because you are Hispanic," this statement would likely constitute direct evidence of the employer's motivation for the decision. Employer *X* has made clear to the plaintiff, through his statement, that his intent is to refuse to hire plaintiff *A because of* her race. If, in a case against employer *X*, plaintiff *A* presented evidence of the employer's statement, and the factfinder found the direct evidence to be reliable, then the evidence

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44. Plaintiffs with direct evidence have a greater chance of proving their cases than those who must rely on circumstantial or indirect evidence. *See* BELTON & AVERY, *supra* note 12, at 67.

45. *See, e.g.*, Wright v. Southland Corp., 187 F.3d 1287, 1288, 1293 (11th Cir. 1999) (indicating that "the proper legal analysis in employment discrimination cases . . . has been further complicated by the indiscriminate use of the term 'direct evidence,' " which has resulted in "substantial confusion" in the courts and has "baffled courts and commentators for some time"). The Eleventh Circuit ultimately defined "direct evidence" as "evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic." *Id.* The First Circuit also discussed the many attempts by jurists to define precisely "direct evidence." *See* Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 582-84 (1st Cir. 1999). In its analysis, the *Fernandes* court outlined three approaches taken by different courts: first, the "classic" position (which holds that direct evidence signifies "evidence which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence"); second, the "animus plus" position (which defines "direct evidence" as "evidence . . . that (1) reflect[s] directly the alleged discriminatory animus and (2) bear[s] squarely on the contested employment decision"); and third, the "animus" position (which concludes that "as long as the evidence . . . is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision"). *Id.* at 582.

46. *See, e.g.*, Robert Belton, *Mixed-Motive Cases in Employment Discrimination Law Revisited: A Brief Updated View of the Swamp*, 51 MERCER L. REV. 651, 662-63 (2000). In a section entitled, "The Meaning of 'Direct Evidence,' " Professor Belton outlines the competing definitions of direct evidence that the courts have developed, concluding that the term's meaning is "murky." *Id.*

47. For a thorough discussion of the conflicting theories of what constitutes direct evidence in employment discrimination cases, see *id.* and see also Michael J. Zimmer, *Chaos or Coherence: Individual Disparate Treatment Discrimination and the ADEA*, 51 MERCER L. REV. 693, 694-713 (2000).

48. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 228; *Fernandes*, 199 F.3d at 583-84.

would prove the fact of discrimination without a need for inference or conjecture on the part of the factfinder.[49] Just as one can conclude that certain remarks made by employers would undoubtedly constitute direct evidence, by relying on Supreme Court and lower federal court decisions, one can also be sure that other kinds of discriminatory workplace remarks certainly cannot be characterized as direct evidence.[50] The probative value of such indirect "stray remarks" will be discussed at length later in this Note.[51]

While ideal for plaintiffs attempting to prove their cases, admissions of discrimination by employers are rare.[52] Indeed, employers are hesitant about revealing any unlawful and discriminatory motivations to those they are discriminating against.[53] As Professor Ann McGinley has surmised, this fact may stem from increased sophistication among modern employers that includes an awareness of the legal ramifications of discriminatory actions.[54] Alternatively, it may be derived simply from a facet of human nature that seeks to hide discriminatory feelings because voicing such views in considered socially unacceptable.[55]

Regardless of why employers are not to reveal their discriminatory intent, very few cases exist in which a plaintiff has been able to establish such clear and uncontested evidence of discriminatory motive.[56] The dilemma thus arises as to how a plaintiff may prove the element of discriminatory intent that is necessary to prevail in an employment discrimination suit if the employer has not overtly stated his or her discriminatory motive. The answer is

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49. *See* BELTON & AVERY, *supra* note 12, at 67.

50. *See infra* Parts V-VI.

51. *See id.*

52. "Few employers who engage in illegal discrimination, however, express their discriminatory tendencies in such a direct fashion." EEOC v. Pape Lift Co., 115 F.3d 676, 684 (9th Cir. 1997).

53. The Seventh Circuit explained that "[d]efendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it . . . ." Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

54. Professor Ann C. McGinley has made the argument that after the passage of the Civil Rights Act of 1964, discrimination became more subtle and overt racism became the exception, not the rule. *See* Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415, 448-49 (2000). Professor McGinley attributes this change in human behavior to employer's increased sophistication and knowledge about what types of behavior, if demonstrated in court, will trigger a plaintiff victory in an employment discrimination suit. *See id.*

55. *See* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 637 (2000) (asserting that "overtly racist and sexist comments are much less common in today's workplace").

56. "Plaintiffs in the vast majority of employment discrimination cases must rely on circumstantial evidence . . . ." BELTON & AVERY, *supra* note 12, at 67.

that the plaintiff must combine pieces of indirect, or circumstantial, evidence to design a "convincing mosaic of discrimination against the plaintiff."[57] Chief Judge Posner of the Seventh Circuit, in *Troupe v. May Department Stores*,[58] identified three types of circumstantial evidence: first, the most common type, "behavior toward or comments directed at employees in the protected group"; second, statistical data that an employer has systematically treated a protected class in an adverse way; and third, pretext evidence[59] that an employer's explanation for an employment decision is "unworthy of belief, a mere pretext for discrimination."[60]

2. Using Indirect or Circumstantial Evidence

The Supreme Court identified the proper evidentiary standards for proving disparate treatment claims using circumstantial evidence in *McDonnell Douglas Corp. v. Green*—a decision that has become the cornerstone of common law decisions on disparate treatment in employment situations.[61]

III. THE *MCDONNELL DOUGLAS* FRAMEWORK FOR CIRCUMSTANTIAL EVIDENCE CASES

In order to provide plaintiffs with a fair opportunity to prove intentional discrimination, despite the unavailability of direct evidence, the Court in *McDonnell Douglas* developed an analytical framework for proving discrimination[62] with circumstantial evi-

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57. Troupe v. May Dep't Stores Co., 20 F.3d 734, 737 (7th Cir. 1994). Chief Judge Posner wrote the opinion for the court, and thoughtfully analyzed the differences between direct and circumstantial evidence. *See id.* at 736-37.

58. *Id.*

59. "Pretext" refers to a showing that a stated reason is not truthful, but instead conceals the true reason. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). *Black's Law Dictionary* defines "pretext" as "ostensible reason or motive assigned or assumed as a color or cover for the real reason or motive." BLACK'S LAW DICTIONARY 1187 (6th ed. 1990). The pretext showing that a plaintiff may make in proving his or her case will be discussed at length later in the Note. *See infra* Part IV.

60. 20 F.3d at 736.

61. 411 U.S. 792, 806 (1973) (acknowledging the correct outcome reached by the Eighth Circuit Court of Appeals, but holding that the circuit court erred in its reasoning for the decision). The Supreme Court held that after the respondent had established his prima facie case of race discrimination under Title VII, and after the petitioner had articulated a legitimate, nondiscriminatory reason for the employment decision, the respondent should have been "afforded a fair opportunity to demonstrate that the petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application." *Id.* at 807.

62. *See* Belton, *supra* note 46, at 651-52.

dence.[63] According to the Court, its task in *McDonnell Douglas* was to clarify "the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964."[64] The plaintiff in *McDonnell Douglas*, a black male and civil rights activist, was laid off from his employment with McDonnell Douglas and denied reinstatement.[65] In his Title VII claim, the plaintiff insisted that McDonnell Douglas refused to rehire him because of his race, but the defendant claimed its refusal was based on the plaintiff's involvement in illegal civil rights activities.[66] The Court developed a framework to assist the factfinder in resolving factual disputes between two proffered, conflicting reasons for an employment decision.[67] Although the claim in *McDonnell Douglas*[68] arose under Title VII, lower federal courts apply the analytical framework developed in that case to claims arising under the ADEA as well.[69] This borrowed application is most often justified by the notion that "[t]he ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.' "[70] While the Supreme Court has not objected to lower courts' application of the *McDonnell Douglas* framework to ADEA cases, the Court has never definitively held that such application is correct.[71]

A. Step 1: The Plaintiff's Requirement to Establish a Prima Facie Case

According to the *McDonnell Douglas* framework, the first step a plaintiff must take toward proving a claim of intentional em-

63. 411 U.S. at 800-07. *See also* Dennard & Kelly, *supra* note 28, at 735 ("The *McDonnell Douglas* . . . framework was developed to 'compensate' for the fact that direct evidence may be difficult to supply in intentional discrimination cases.").

64. 411 U.S. at 793-94.

65. *Id.* at 794.

66. *See id.* at 796-97.

67. *See id.* at 800-07.

68. *See id.* at 792-807.

69. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) ("The Courts of Appeals, including the Fifth Circuit in this case, have employed some variant of the framework articulated in *McDonnell Douglas* to analyze ADEA claims that are based principally on circumstantial evidence."); *see also* Stokes v. Westinghouse Savannah River Co., 206 F.3d 420, 429 (4th Cir. 2000); Galabya v. N.Y. Bd. of Ed., 202 F.3d 636, 639 (2d Cir. 2000); Beaird v. Seagate Tech. Inc., 145 F.3d 1159, 1165 (10th Cir.), *cert. denied*, 525 U.S. 1054 (1998); Hindman v. Transkrit Corp., 145 F.3d 986, 990-91 (8th Cir. 1998); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

70. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995).

71. The Court in *O'Connor v. Consolidated Coin Caterers Corp.* stated that "[w]e have never had occasion to decide whether [the] application of [the *McDonnell Douglas* evidentiary framework] to the ADEA is correct, but . . . we shall assume it." 517 U.S. 308, 311 (1996).

ployment discrimination based upon circumstantial evidence is to establish a prima facie case of discrimination.[72] The four elements of an age discrimination prima facie case include:[73] (1) that the plaintiff was within the protected class under the ADEA because the plaintiff was at least forty years of age; (2) that the plaintiff was qualified for the position from which he or she was discharged; (3) that the plaintiff was discharged from his or her position; and (4) that the employer either filled the position, or sought or continued to seek applicants of the plaintiff's qualifications to fill the vacancy.[74]

B. Step 2: The Defendant's Burden to Articulate a Legitimate, Nondiscriminatory Reason

By successfully establishing all of the elements of the prima facie case, the plaintiff creates a presumption of intentional discrimination.[75] The burden then shifts to the employer to rebut the presumption by raising a genuine issue of fact, by "articulat[ing] some legitimate, non-discriminatory reason" for the employment decision.[76] For example, an employer may explain that a plaintiff was fired because he or she was excessively late to work.[77] Or, an employer may insist that a plaintiff's employment position was eliminated because the company determined that customers could be better served by reassigning plaintiff's responsibilities within the company.[78]

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72. *See* 411 U.S. at 802.

73. The specifications of the prima facie case will vary according to the particular factual circumstances surrounding each plaintiff's individual claim. For example, the elements of a prima facie case for a discharge claim under Title VII alleging race discrimination will vary from the elements of a prima facie case for a refusal to hire claim under the ADEA alleging age discrimination. *See id.* at 802 n.13.

74. *Id.* The *McDonnell Douglas* Court actually listed the four elements necessary to establish a prima facie case in a Title VII claim based on racial discrimination: "(i) tbat he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and tbe employer continued to seek applicants from persons of complainant's qualifications." *Id.*

75. *Id.*

76. *Id.* at 802.

77. *See* Clearwater v. Indep. Sch. Dist., 231 F.3d 1122, 1127 (8th Cir. 2000) (finding that defendant satisfied its burden by articulating that plaintiff "failed to comply with the district's requirement that all teachers be present in their classrooms when their students arrived at school" due to the fact that that plaintiff's "late arrivals over a period of more than two years are numerous and well-documented").

78. *See* Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 348-51 (6th Cir. 1998) (holding that defendant successfully articulated a legitimate reason for its decision to terminate the plaintiff when defendant offered that "plaintiff's position was eliminated due to the fact that

According to a post-*McDonnell Douglas* decision by the Court, *Texas Department of Community Affairs v. Burdine*, the burden on the defendant is only one of production, not one of persuasion.[79] Therefore, the defendant need only articulate a legitimate, nondiscriminatory reason for the decision; the employer need not persuade the factfinder that this truly was the reason for the decision.[80] Rather, the burden of persuasion at all times remains with the plaintiff to convince the factfinder that the employer made the decision because of a discriminatory motive.[81] If an employer fails to carry its burden of production by failing to articulate a nondiscriminatory and "legally sufficient" reason for the decision, the court must decide the case in favor of the plaintiff.[82]

This burden of production, however, is usually easy for the defendant to satisfy, as the defendant must only offer some nondiscriminatory reason, the validity or persuasiveness of which is not considered by the factfinder at this point in the trial.[83] The purpose for the burden shift, according to the Supreme Court, is to allow the defendant "to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[84]

C. Step 3: Demonstrating Pretext: What Must a Plaintiff Prove?

Once the employer successfully satisfies its burden of production, the plaintiff has the "opportunity to demonstrate pretext."[85] In doing so, the plaintiff must show, by a preponderance of the evidence, that the employer's articulated reason for the em-

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it was redundant with other positions at the Company and the Company's management wanted to distribute his quality assurance duties to [other Company employees]").

79. 450 U.S. 248, 253-56 (1981). The burden of production is "the obligation . . . to present evidence on the element at issue . . . of sufficient substance te permit the factfinder to act upon it." Robert Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1216 (1981). The burden of persuasion refers to "the risk of uncertainty about an element's resolution . . . . The party having the burden of persuasion on [a certain] element will lose if the factfinder's mind is in equipoise after he has considered all the relevant evidence." *Id.* at 1216.

80. *Burdine*, 450 U.S. at 254.

81. *Id.* at 256.

82. *Id.* at 255.

83. The defendant's burden to offer a nondiscriminatory reason is one of production. *See id.*

84. *Id.* at 255-56.

85. *Id.* According to the *Burdine* Court, the plaintiff may successfully establish pretext "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256.

ployment decision was not the true motivation—that the articulated reason is actually pretext for the employer's discriminatory animus.[86] Thus, after the defendant has articulated the legitimate reason, the plaintiff carries the burden of showing pretext. It is this burden on the plaintiff—what exactly satisfies a showing of pretext in order to prevail on his or her claim—that was, for many years after *McDonnell Douglas*, the subject of much dispute in the federal courts.[87]

The *Burdine* Court held that the burden on the plaintiff to show that the defendant's proffered reason was pretext "merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination."[88] Lower courts differed in their interpretations of the *Burdine* holding.[89] Two distinct interpretations emerged regarding what a plaintiff must prove in order to establish pretext and prevail on the claim: the Pretext-Only interpretation and the Pretext-Plus interpretation.[90]

1. Interpreting *Texas Department of Community Affairs v. Burdine*: Pretext-Only or Pretext-Plus?

a. The Pretext-Only View

Adopting the Pretext-Only view, some courts concluded that *Burdine* required judgment for the plaintiff once the factfinder determined that the employer's proffered reason was pretextual.[91] The

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86. *See, e.g.*, Smith v. Leggett Wire Co., 220 F.3d 752, 759 (6th Cir. 2000) ("The plaintiff may demonstrate that the defendant's explanation was merely pretext by showing (1) that the proffered reason had no basis of fact, (2) that the proffered reason did not actually motivate the termination, or (3) that the proffered reason was not sufficient to motivate tbe discharge." (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 133-55 (2000))).

87. *See infra* Part IV.

88. *Burdine*, 450 U.S. at 256.

89. For a thorough analysis of the post-*Burdine* circuit court decisions, see Terri L. Dill, St. Mary's Honor Center v. Hicks: *Refining the Burdens of Proof in Employment Discrimination Litigation*, 48 ARK. L. REV. 617, 627-31 (1995).

90. These terms have been assembled for the purpose of this Note from a variety of cases and articles on the subject. Pretext Only, Pretext-Plus, and (later) Permissible Pretext are not official terms, but are merely terms of art—shorthands used to describe three different approaches taken by courts.

91. *See e.g.*, Lopez v. Metro. Life Ins. Co., 930 F.2d 157, 161 (2d Cir. 1991) ("To show that the proffered reasons are a pretext, a plaintiff need not directly prove discriminatory intent. It is enough for the plaintiff to show that the articulated reasons were not tbe true reasons for the defendant's actions."); Siegel v. Alpha Wire Corp., 894 F.2d 50, 53 (3d Cir. 1990) ("To defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory animus, a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of

rationale behind this interpretation was that evidence that an employer gave a false reason, coupled with the probative value of the plaintiff's *prima facie* case of discrimination, necessarily implied that the employer lied about the reason for the decision in order to hide the true discriminatory intent.[92]

b. The Pretext-Plus View

Other courts, however, rejected the notion that an employer's false reason alone necessarily implies that the employer's true motivation was discriminatory in nature.[93] These courts, adopting the Pretext-Plus standard, read the language in the *Burdine* holding[94] as requiring the plaintiff to ultimately persuade the court not only that the employer's proffered reason was pretextual, but also that the employer's true motivation was to discriminate.[95] According to these courts, this conclusion could not be presumed, but must be proven by the plaintiff through additional evidence.[96]

2. *St. Mary's Honor Center v. Hicks*: Setting the Standard

In order to clarify whether a finding of pretext mandated a finding of discrimination, or whether the plaintiff must demonstrate affirmative evidence of discrimination in addition to showing pretext, the Supreme Court decided *St. Mary's Honor Center v.*

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credence."); Perez v. Curcio, 841 F.2d 255, 258 (9th Cir. 1988) ("As long as [plaintiff] has introduced some evidence from which a jury could believe [plaintiff's] explanation rather than the [employer's] explanation . . . the case must go to a jury."); Bishopp v. Dist. of Columbia, 788 F.2d 781, 789 (D.C. Cir. 1986) ("Defendant's explanation for its decision was unworthy of credence as a matter of law. Such a blatantly pretextual defense carries the seeds of its own destruction.").

92. *See supra* note 91 and accompanying text.

93. Courts applying the Pretext-Plus standard include the First, Fourth, and Fifth Circuits. *See* Hidalgo v. Overseas Condado Ins. Agencies, Inc., 120 F.3d 328, 335 (1st Cir. 1997) ("The [plaintiff] must elucidate specific facts which would enable a jury to find that the reason given [by the employer] was not only a sham, but a sham intended to cover up the employer's real motive: age discrimination." (citing Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 9 (1st Cir. 1988))); Walthon v. Bisco Indus., Inc., 119 F.3d 368, 370 (5th Cir. 1997) ("Plaintiff cannot succeed by proving only that the defendant's proffered reason is pretextual," but instead must demonstrate pretext " 'and that discrimination was the real reason' " (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993))); Theard v. Glaxo, Inc., 47 F.3d 676, 680 (4th Cir. 1995) (holding that to prevail on a disparate treatment claim, plaintiff must prove " '*both* that [the defendant's] reason was false *and* that discrimination was the real reason' ") (emphasis added) (quoting *Hicks*, 509 U.S. at 515).

94. 450 U.S. 248, 255-56 (1981).

95. *See supra* note 93 and accompanying text.

96. *See supra* note 93 and accompanying text.

Hicks.[97] Hicks, a halfway house corrections officer, brought a claim of racial discrimination against his employer, the Missouri Department of Corrections and Human Resources,[98] under Title VII, alleging that he was demoted and later fired because he was black.[99] Although the district court found that the plaintiff demonstrated that his employer's proffered reasons for discharging him were pretextual, it nonetheless held that the plaintiff failed to carry his ultimate burden of proving that the discharge was motivated by discrimination.[100] The Court of Appeals for the Eighth Circuit set aside the district court's decision and held that the plaintiff was entitled to judgment as a matter of law once he proved that all of the employer's proffered reasons were pretextual.[101] The Supreme Court ultimately decided the case in favor of the employer, reversing the Eighth Circuit, and holding that the plaintiff should not have been entitled to judgment as a matter of law.[102]

In deciding the case, the *Hicks* Court made two statements that raised more questions than they answered, and sparked much subsequent debate. First, the Court held that the "factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination."[103] Thus, "rejection of the . . . proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, and . . . '[no] additional proof of discrimination is required.' "[104] This statement appeared to follow the Pretext-Only line of reasoning—that the plaintiff may prove discrimination simply by presenting a prima facie case and showing that the employer's proffered reason was pretext.[105]

A few pages later in the opinion, however, the Court articulated the second, and arguably contradictory, statement that the employee must demonstrate "*both* that the reason [proffered by the

97. *Hicks*, 509 U.S. at 505-25 (holding that the trial court's rejection of an employer's asserted reasons for employment decisions made against a plaintiff does not entitle a plaintiff to judgment as a matter of law).

98. St. Mary's Honor Center is a halfway house operated by the Missouri Department of Corrections and Human Resources (MDCHR). After conducting an investigation of St. Mary's Honor Center, MDCHR made extensive personnel changes, resulting in a change of Hick's supervisors. It was after this personnel change occurred that the discrimination against Hicks allegedly began. *See id.* at 504-05.

99. *See id.*

100. *Id.* at 508.

101. *Id.*

102. *See id.* at 524-25.

103. *Id.* at 511.

104. *Id.*

105. *See infra* Part III.C.1.(a)

defendant] was false, *and* that discrimination was the real reason" for the employment decision.[106] This statement appeared to contradict the Pretext-Only theory, and seemed to insist that the plaintiff cannot successfully prove discrimination simply by showing pretext, but must instead provide additional affirmative evidence that "discrimination was the real reason."[107] The combination of the first and second statements failed to resolve the dispute among lower courts and provoked further disagreement between the circuit courts on the issue of what a plaintiff must demonstrate in order to prevail.[108] Indeed, the effectiveness of the *Hicks* decision as a means to resolve the circuit split was, at the time the decision was handed down, deemed to be "highly questionable."[109]

3. Interpreting *Hicks*: Permissible Pretext or Pretext-Plus?

As predicted, the lower court interpretations that followed *Hicks* were as equally divided as they had been following *Burdine*. Most courts,[110] as well as legal commentators and scholars,[111] agreed that the *Hicks* decision eliminated the Pretext-Only interpretation. Many of those analyzing the decision felt that the *Hicks* standard imposed an unwarranted heightened burden on plaintiffs to prove their disparate treatment cases. They argued that under *Hicks*, plaintiffs would be required to persuade the factfinder that intentional discrimination did, in fact, occur, with a showing of what essentially amounts to direct evidence of the employer's discriminatory motive.[112] Two primary interpretations resulted from *Hicks*. The first interpretation, the Permissible Pretext approach

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106. *Hicks*, 509 U.S. at 515 (emphasis added).

107. *Id.*

108. The Harvard Law Review Association found it "richly ironic that Justice Scalia [the author of the *Hicks* opinion], so often the champion of bright-line doctrines and simple rules, has in fact muddied the *McDonnell Douglas* doctrine by raising more questions than he purport[s] to answer." Harvard L. Rev. Ass'n, *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1593 (1996).

109. *Id.*

110. *See, e.g.*, Rothmeier v. Inv. Advisers, Inc., 85 F.3d 1328, 1334 (8th Cir. 1996) ("The Court [in *Hicks*] thus rejected the pretext-only position.").

111. *See, e.g.*, Julie Tang & Theodore M. McMillian, *Eighth Circuit Employment Discrimination Law:* Hicks *and its Impact on Summary Judgment*, 41 ST. LOUIS U. L.J. 519, 524 (1997) (indicating that the *Hicks* decision clarified that, contrary to the Pretext-Only theory, the factfinder's rejection of the employer's explanation for the employment decision "does not compel judgment for the plaintiff").

112. *See, e.g.*, Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMPLOYEE RTS. & EMP. POL'Y J. 37, 56 (2000) (discussing a general reluctance on the part of courts to find in favor of plaintiffs in employment discrimination suits).

adopted by several circuit courts, would permit, but not require, the factfinder to find for the plaintiff upon the plaintiff's establishment of a prima facie case, and a showing that the defendant's articulated reason for the decision was pretextual.[113] Meanwhile, courts adopting the second interpretation, the continuation of the Pretext-Plus standard, would not permit a verdict for the plaintiff unless the plaintiff offered additional affirmative evidence that the defendant provided a false pretextual reason to conceal his actual discriminatory intent.[114]

IV. *REEVES V. SANDERSON PLUMBING PRODUCTS*: CLEARING UP THE CONFUSION OVER THE PLAINTIFF'S EVIDENTIARY BURDEN

A. Factual and Procedural Background of Reeves

Finally, in *Reeves v. Sanderson Plumbing Products*, the Court once again entertained a case concerning "the amount of evidence necessary to sustain a jury's verdict that an employer unlawfully discriminated"[115] in order to clear up the controversy sparked by the *Hicks* decision.[116] The plaintiff, fifty-seven-year-old Roger Reeves, was employed by Sanderson Plumbing for forty years prior

113. *See* Combs v. Meadowcraft Plantation Patterns, Inc., 106 F.3d 1519, 1529 (11th Cir. 1997) ("We understand the *Hicks* Court to have been unanimous that disbelief of the defendant's proffered reasons, together with the prima facie case, is sufficient circumstantial evidence to support a finding of discrimination [and] to survive summary judgment."); EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 835 (6th Cir. 1997) ("The law allows a factfinder to infer intentional discrimination from proof of the prima facie case coupled with a disbelief of the proffered reason for the employer's action, but such an inference is not required."); Waldron v. SL Indus., Inc., 56 F.3d 491, 495 (3d Cir. 1995) ("If the plaintiff has pointed to evidence sufficient to discredit the defendant's proffered reasons, to survive summary judgment the plaintiff need not also come forward with additional evidence of discrimination beyond his or her prima facie case.").

114. *See* Smith v. First Union Nat'l Bank, 202 F.3d 234, 248 (4th Cir. 2000) ("[T]he plaintiff must . . . demonstrate that the employer's reason was mere pretext for retaliation by showing 'both that the reason was false and that discrimination was the real reason for the challenged conduct.' "); Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 689 (5th Cir. 1999) (overturning a jury verdict for the plaintiff, holding that petitioner had not introduced sufficient evidence to sustain the jury's verdict), *rev'd*, 530 U.S. 133 (2000); Lattimore v. Polaroid Corp., 99 F.3d 456, 457 (1st Cir. 1996) (holding that trial court should have granted defendant's motion for judgment as a matter of law because although the plaintiff demonstrated pretext, the plaintiff failed to show additional evidence of discriminatory intent as required under *Hicks* to send the case to the jury).

115. 530 U.S. at 137.

116. 509 U.S. 502, 515 (1993).

to being terminated from his employment in 1995.[117] Reeves filed a complaint against his employer, alleging that his termination was in violation of the ADEA because it was motivated by his age.[118]

At trial, after Reeves established his prima facie case of age discrimination under the ADEA, the defendant asserted that Reeves was discharged not because of his age, but as a result of his failure to maintain accurate attendance records.[119] In an effort to demonstrate that his employer's proffered reason was simply pretext, Reeves introduced evidence that he had, contrary to the employer's allegation, maintained all attendance records accurately.[120] Furthermore, Reeves insisted that Powe Chestnut, the company's director of manufacturing, "had demonstrated age-based animus in his dealings with" Reeves.[121]

The jury returned a judgment for Reeves, but the Court of Appeals for the Fifth Circuit reversed, holding that Reeves had failed to introduce sufficient evidence to sustain the jury's finding of discrimination.[122] The Fifth Circuit explained that while Reeves may have successfully demonstrated that his employer's articulated reason for the firing was pretextual, in order to justify a judgment in his favor, Reeves needed to present "sufficient evidence that his age motivated [the defendant's] employment decision."[123] In making this determination, the court scrutinized Reeves's additional circumstantial evidence of discrimination surrounding his discharge. The court specifically noted that age-based remarks[124] made by Chestnut "were not made in the direct context of Reeves's termination" and were therefore low in probative value.[125] On this basis, the appellate court concluded that Reeves did not present sufficient evidence for a jury to conclude the ultimate issue of discrimination.[126]

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117. *Reeves*, 530 U.S. at 137.

118. *See id.*

119. *See id.* at 137-38, 142-43.

120. *See id.* at 138, 144.

121. *Id.* at 138.

122. *See id.* at 138-39.

123. *Id.* at 139.

124. The remarks allegedly made by Chestnut were specifically, "You are so old, you must have come over on the Mayflower" and "you are too damn old to do your job." *Id.* at 151.

125. *Id.* at 152.

126. *See id.*

B. The Supreme Court's Reversal and Opinion

In a unanimous opinion, the Supreme Court reversed the decision of the Fifth Circuit, holding that the circuit court "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence."[127] Clearing up previous confusion stemming from its opinion in *Hicks*, the Court held that in order for the plaintiff to prevail, the trier of fact must disbelieve the employer's articulated reason: "[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."[128] In other words, the Court held that in order for a court to uphold a verdict for the plaintiff, the plaintiff must demonstrate pretext, but is not obligated to present additional affirmative evidence proving discrimination. The pretext is sufficient for a jury to reasonably infer the ultimate issue of discrimination because "the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' "[129] The Court was careful to emphasize that the standard is one of Permissible Pretext, rather than Pretext-Only.[130] A showing of pretext by the plaintiff in a disparate treatment case, thus, will *permit* a jury to find in favor of the plaintiff, but it will not require the jury to do so. Consequently, the Court directed lower federal courts that had previously adopted the Pretext-Plus standard to rethink the evidentiary burden for a plaintiff in a disparate treatment case.[131]

The Court did not precisely define, as a matter of law, the circumstances in which plaintiffs would be required to submit additional evidence beyond the prima facie case and showing of pretext in order to survive a defendant's motion. Justice Ginsburg, in her concurrence, pointed out the need for further specifications on this point.[132] The Court held, however, that the employer in *Reeves* should not have been entitled to judgment as a matter of law because after establishing pretext, Reeves introduced additional evi-

127. *Id.* at 146.

128. *Id.* at 146-47.

129. *Id.* at 147 (citing Wright v. West, 505 U.S. 277, 296 (1992)).

130. *See id.* ("[I]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.").

131. *Id.* at 147-48.

132. *Id.* at 154 (Ginsburg, J., concurring) ("[I]t may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law. I anticipate that such circumstances will be uncommon.").

dence that his employer "was motivated by age-based animus and was principally responsible for [Reeves's] firing."[133] This additional evidence came in the form of several statements made by Reeves's supervisor at Sanderson Plumbing Products.[134] It was the Court's treatment of these statements that may be characterized as the second major impact of the *Reeves* decision—a new approach to the so-called Stray Remarks Doctrine.

V. THE STRAY REMARKS DOCTRINE: ORIGINS, APPLICATIONS, AND INTERPRETATIONS

A. Origins of the Doctrine

While *Reeves* may have resolved the legal issue of the plaintiff's ultimate burden of proof in an employment discrimination claim, the decision left another question of law open to the interpretation of the lower federal courts. Although not explicitly noted in the decision, the question post-*Reeves* remains whether the Stray Remarks Doctrine, first outlined in Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*,[135] is still good law, as applied in disparate treatment cases where plaintiffs attempt to prove their cases by *indirect* evidence.

In the portion of her concurrence in *Price Waterhouse* that included a discussion of what does and does not constitute direct evidence of discrimination, Justice O'Connor contrasted direct evidence from what she characterized as "stray remarks in the workplace."[136] In what has come to be known as the Stray Remarks Doctrine, Justice O'Connor insisted a plaintiff's presentation of stray remarks—defined as "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself"—are not direct evidence.[137] Thus, Justice O'Connor reasoned, evidence of stray remarks cannot satisfy the plaintiff's initial burden of showing discriminatory intent on the part of the employer, sufficient to shift the burden of persuasion to the employer under

133. *Id.* at 151.

134. *See supra* note 124.

135. Price Waterhouse v. Hopkins, 490 U.S. 228, 277-79 (1989) (O'Connor, J., concurring). Justice O'Connor's concurrence has been described as "a trenchant, universally accepted example of what is not direct evidence: stray remarks . . . ." Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 581 (1st Cir. 1999).

136. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J., concurring).

137. *Id.*

the *Price Waterhouse* analytical framework.[138] In contrast, a clear showing by the plaintiff of workplace remarks that do rise to the level of direct evidence creates a presumption of intentional discrimination.[139] When faced with such a clear showing of direct evidence, it is reasonable for a court to place a higher burden on the employer. According to Justice O'Connor's concurrence, the issue of whether a remark may be characterized as direct evidence, or rather as "stray," turns upon who made the statement and the context in which the statement was made.[140]

In articulating her case of sex discrimination against her employer, Price Waterhouse, the plaintiff offered examples of sexist attitudes held by many Price Waterhouse partners through evidence of their statements made to her. These remarks indicated to her that "in order to improve her chances for partnership," she should " 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.' "[141] Other partners commented that the plaintiff was "macho," and advised her to "take a course at charm school."[142] Moreover, the plaintiff showed that such comments played a significant role in the decision to deny her a partnership position.[143] Justice O'Connor concluded that the remarks presented by the plaintiff were not "stray" in nature, and instead, constituted "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[144]

B. Justifications for the Doctrine: The Employer's Perspective

The purpose of the Stray Remarks Doctrine is to distinguish between two types of statements: (1) statements of a discriminatory nature that tend to show that a discriminatory attitude motivated the person who made the statement to make an imminent employment decision; and (2) statements of a discriminatory nature that were made in a workplace setting, but do not necessarily demonstrate that discrimination motivated an employer's particular decision.[145] Lower courts deduced from Justice O'Connor's concurrence that in order for a remark to constitute direct evidence of an em-

138. *Id.* For a description of the *Price Waterhouse* analytical framework, see *supra* note 43.
139. *Price Waterhouse*, 490 U.S. at 258.
140. *See id.* at 277 (O'Connor, J., concurring).
141. *Id.* at 235.
142. *Id.*
143. *See id.* at 251.
144. *Id.* at 277 (O'Connor, J., concurring).
145. *Id.*

ployer's discriminatory motive: (1) the remark must have been made by the decisionmaker, or by someone in a position of influence over the decisionmaker, within the scope of employment; (2) the remark must be related to the challenged employment decision; and (3) the remark must have been made in the context of the employment decision. That is, the plaintiff must demonstrate a causal link between the remark and the decision.[146]

The justification for the Stray Remarks Doctrine, from the employer's perspective, is ostensibly twofold. First, an employer should be able to make difficult employment decisions for whatever nondiscriminatory reasons he or she chooses. Second, the employer is under no legal obligation to feel personally a certain way about his or her employees, to promote sensitivity among employees, or to actively prohibit employees from exhibiting discriminatory behavior toward their coworkers.[147] The only statutory restriction on the employer is that he or she cannot allow discriminatory factors to motivate employment decisions.[148] Thus, under the Stray Remarks Doctrine, an employer should not be liable for intentional discrimination based upon remarks made by his or her employees or coworkers, if those employees or coworkers had no influence over the challenged employment decision.[149] Likewise, even if the employer himself made discriminatory comments in the past, as long as those comments were not made at, or close to, the time of the adverse employment decision, they should not indicate discriminatory motive.[150]

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146. *See, e.g.*, Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1330-32 (6th Cir. 1994); Turner v. N. Am. Rubber, Inc., 979 F.2d 55, 59 (5th Cir. 1992).

147. While Title VII prohibits discrimination with respect to the "terms, conditions, or privileges of employment," it clearly does not prohibit discriminatory attitudes, views, or thoughts themselves. 42 U.S.C. § 2000e-2(a)(1) (1994); *see also* Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motives Discrimination Claims*, 86 CORNELL L. REV. 899, 919 (2001) (arguing that "[o]nly when those [discriminatory] thoughts and attitudes constitute a 'motivating factor for any employment practice' may an employer be liable under Title VII").

148. *See* § 2000e-2(a)(1).

149. *See* Hunt v. City of Markham, 219 F.3d 649, 652 (7th Cir. 2000) (holding that "the fact that someone who is not involved in the employment decision . . . expressed discriminatory feelings is not evidence . . . [of] discriminatory motivation"); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 354 (6th Cir. 1998) ("In assessing the relevancy of a discriminatory remark, we look first at the identity of the speaker. An isolated discriminatory remark made by one with no managerial authority over the challenged personnel decisions is not considered indicative of age discrimination.").

150. *See, e.g.*, Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995) (holding that a threat of a racially discriminatory nature that was made fifteen years prior to the employer's decision to terminate the plaintiff's employment was so "tenuously related to the alleged discriminatory actions by supervisors many years later" that it constituted an irrelevant stray remark).

Defenders of the Stray Remarks Doctrine insist that plaintiffs should not be entitled to make "federal cases" of discrimination against their employers based merely on a few isolated remarks.[151] For example, the First Circuit expressed this view in *Gray v. New England Telephone & Telegraph Co.*,[152] finding that "[a] reasonable inference cannot be drawn from these isolated statements (made by a lower level management employee in a department which had nothing to do with the discharge decision many months before [the plaintiff] was fired) that age discrimination was a determinative factor in [the] decision to fire [the plaintiff]."[153] The Seventh Circuit articulated the fine distinction between stray and non-stray remarks in *Hunt v. City of Markham*.[154] This case involved four white police officers who sued the City of Markham, Illinois, alleging race and age discrimination by the minority-controlled municipal government in violation of both Title VII and the ADEA.[155] In evaluating the plaintiffs' evidence of certain comments made by city officials,[156] the *Hunt* court stated that "the fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the *decision* had a discriminatory motivation."[157] The court emphasized, however, that a different case exists when the decisionmakers themselves express discriminatory feelings "around the time of, and . . . in reference to, the adverse employment action complained of."[158] Under this situation, a trier of fact may infer "that the decision makers were influenced by those feelings in making their decision."[159] The Seventh Circuit eventually concluded that the remarks introduced into evidence by the plaintiffs were not "stray" because the mayor and city officials who made the remarks had considerable influence over the decisions of the city council, including the promotion of police officers, and thus, the plaintiffs.[160]

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151. *See* Gray v. New England Tel. & Tel. Co., 792 F.2d 251, 254-55 (1st Cir. 1986).

152. *Id.*

153. *Id.* at 255.

154. 219 F.3d at 651.

155. *See id.* at 651-52.

156. The plaintiffs' evidence included statements made by the Markham mayor and other black officials regarding the city's need to " 'get rid of all the old white police officers' " and comments directed to one of the plaintiffs, such as " 'when are you going to quit so we can bring these young black men up?' " and " 'it is the blacks' turn to self-govern in Markham, and if you are white, get out.' " *Id.* at 652.

157. *Id.*

158. *Id.*

159. *Id.* at 653.

160. *See id.*

C. Lower Courts' Expansion of the Stray Remarks Doctrine

In applying the Stray Remarks Doctrine to disparate treatment cases, several lower federal courts have expanded the doctrine in two ways: first, by applying it to cases in which the plaintiff presented the remarks as indirect, rather than direct, evidence; and second, by evaluating both whether the remarks constituted direct evidence, and whether the remarks had any value at all to the plaintiff's case.

1. Workplace Remarks as Indirect Evidence

Explicit remarks made by an employer and directed at an employee could be considered either direct or indirect evidence of discriminatory animus, depending on both the content of the remarks and the context in which the remarks were made.[161] Although the notion of stray remarks in the workplace was first introduced in a direct evidence case of discrimination (as a means of identifying evidence in the form of workplace statements which do not constitute direct evidence),[162] several courts have applied the Stray Remarks Doctrine to indirect evidence cases as well.[163] These courts evaluate workplace remarks offered as circumstantial evidence to *demonstrate pretext* (to prove that a discriminatory motivation was more likely than the alternative explanation offered by the defendant) in much the same way that Justice O'Connor evaluated such remarks in determining whether they constituted direct evidence.[164]

For instance, in *EEOC v. MCI Telecommunications Corp.*, the U.S. District Court for the Southern District of Texas, deciding a race discrimination claim brought under Title VII, held that the plaintiff's evidence of race discrimination was insufficient to dem-

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161. Price Waterhouse v. Hopkins, 490 U.S. 228, 277-79 (1989) (O'Connor, J., concurring).

162. *Id.*

163. *See, e.g.*, Wallace v. Methodist Hosp. Sys., 85 F. Supp. 2d 699, 711 (S.D. Tex. 2000) ("[A] workplace remark may be so deficient . . . as to be a stray remark wholly lacking in probative value even as 'indirect' evidence of discrimination." (citing Boyd v. State Farm Ins. Cos., 158 F.3d 326, 329-30 (5th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999))).

164. *See* Smith v. Leggett Wire Co., 220 F.3d 752, 759 (6th Cir. 2000); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (stating that "discriminatory comments . . . made by the key decisionmaker or those in a position to influence the decisionmaker" can be utilized by the plaintiff to establish pretext).

onstrate that the defendant's proffered reason[165] was pretext.[166] The court stated that the plaintiff's evidence amounted to nothing more than stray remarks, as the plaintiff failed to "establish a nexus between the statements made and the termination decision."[167] Thus, according to the Southern District of Texas, "[w]hen discriminatory comments are vague and remote in time and administrative hierarchy, they are no more than 'stray remarks,' insufficient to establish a *pretext* to discriminate."[168]

2. Are Workplace Remarks Probative at All?

Several lower courts, applying the Stray Remarks Doctrine to circumstantial evidence discrimination cases, have further expanded application of the doctrine to include the notion that certain discriminatory remarks are not relevant to a determination of unlawful intent, irrespective of how egregious those statements may be.[169] These courts have held that discriminatory remarks not made by the decisionmaker himself, or not made in direct relation to the employment decision, are not only not direct evidence of discrimination, but are also not probative of discrimination at all.[170] For example, in its decision in *Wallace v. Methodist Hospital System*, the U.S. District Court for the Southern District of Texas, applying rules articulated by the Fifth Circuit, concluded that if a workplace remark is deemed to be a "stray remark," then it is "wholly lacking in probative value even as 'indirect' evidence of discrimination."[171]

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165. MCI insisted that the plaintiff's termination was "based on her well-documented performance problems." 820 F. Supp. 300, 309 (S.D. Tex. 1993).

166. *Id.*

167. *Id.* at 310.

168. *Id.* at 309 (emphasis added) (citing Guthrie v. Tifco Indus., 941 F.2d 374, 379 (5th Cir. 1991), *cert. denied*, 503 U.S. 908 (1992)).

169. *See, e.g.*, Armstrong v. Lance, Inc., No. 93-1298, 1994 U.S. App. LEXIS 10225 (4th Cir. May 9, 1994). The Fourth Circuit held that racially disparaging remarks made by a supervisor/decisionmaker toward the plaintiff (repeatedly calling the plaintiff a "stupid nigger") were deemed to be irrelevant to the plaintiff's case, as the plaintiff had "failed to show any link between [the foregoing] statements and the [decisionmaker's] decision to terminate him." *Id.* at *5, 9.

170. *See, e.g.*, Wallace v. Methodist Hosp. Sys., 85 F. Supp. 2d 699, 701, 712-16 (S.D. Tex. 2000) (granting defendant's motion for judgment as a matter of law and determining that the remarks offered by the plaintiff had weak probative value).

171. *Id.* at 711. The *Wallace* court set out four criteria for determining if the remark in question had probative value: (1) whether the remarks "were related to the protected class of persons of which the plaintiff is a member"; (2) whether the remarks "were proximate in time to the employment decision at issue"; (3) whether the remarks "were made by an individual with authority over the employment decision at issue"; and (4) whether the remarks "were related to the

D. Critique of the Stray Remarks Doctrine and Its Application by Lower Courts

Critics of the Stray Remarks Doctrine assess both the doctrine itself and also the application and expansion of the doctrine by lower courts.

1. Critique of the Doctrine Itself

Critics of the Stray Remarks Doctrine most often attack two of the three criteria for what constitutes a nonstray remark: (1) the requirement that the remark must be made by the decisionmaker; and (2) the requirement that the remark be made in the direct context of the decisionmaking process.[172] Professor Anne Lawton discussed the fallacy of the first requirement in her recent article in the *Minnesota Law Review*.[173] As Professor Lawton indicates, the requirement that the remark must be made by the actual decisionmaker in order for it not to be "stray" "ignore[s] the impact of workplace attitudes on supervisory decisions."[174] Citing the "rational bias theory," Lawton surmises that " 'individuals who do not themselves hold negative prejudices may nonetheless 'rationally' choose to discriminate . . . if they believe those in power over them and their careers expect or approve of such behavior . . . .' "[175] Certainly, in Lawton's view, the trier of fact should consider discriminatory or biased remarks made by any employees or supervisors, in its determination of whether discrimination occurred, regardless of the position the speaker had in the decisionmaking process.[176] Thus, the decisionmaker requirement should not be applied formalistically. Rather, several factors should be considered, including the speaker's influence over the decisionmaking process and ability to bring about a particular adverse decision, and the capacity of the speaker, and others like him, to create a hostile work environment that could taint the judgment of the ultimate decisionmaker.

Lower courts vary on their willingness to admit evidence of discriminatory animus displayed by individuals who were not the actual decisionmaker of the adverse decision. Several of these

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employment decision at issue." *Id.* (citing Krystek v. Univ. of S. Miss., 164 F.3d 251, 256 (5th Cir. 1999); Brown v. CSC Logic, Inc., 82 F.3d 651, 655 (5th Cir. 1996)). *Id.*

172. *See infra* Part V.D.1.

173. Lawton, *supra* note 55, at 633-42.

174. *Id.* at 641.

175. *Id.* (quoting Susan Trentham & Laurie Larwood, *Gender Discrimination and the Workplace: An Examination of Rational Bias Theory*, 38 SEX ROLES 1, 2 (1998)).

176. *Id.*

courts have applied the decisionmaker requirement of the doctrine stringently, unwilling to admit evidence of any comments not made by the actual decisionmaker.[177]

Many other courts, however, have demonstrated leniency in their evaluation of the decisionmaker criterion, holding that supervisors who do not terminate the employee directly, but who recommend the termination, or who simply create a hostile work environment, may be considered a "decisionmaker" for the purposes of the Stray Remarks Doctrine.[178] For example, in *Shager v. Upjohn Co.*, the Seventh Circuit decided that remarks made by Mr. Lehnst, one of the company's district managers, demonstrated his age-based animosity toward the plaintiff.[179] Although the court determined that the company's decision to fire the plaintiff was ultimately made, not by Lehnst, but by a separate committee, the court found that as a result of Lehnst's recommendations to the committee, the committee was consequently acting on behalf of Lehnst's wishes.[180] As the court explained, the committee "acted as the conduit of Lehnst's prejudice—his cat's paw."[181] Thus, the decision of the

177. *See, e.g.*, Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 354 (6th Cir. 1998). The Sixth Circuit's interpretation of the Stray Remarks Doctrine in *Ercegovich* was discussed earlier in the Note. *See supra* note 149.

178. *See, e.g.*, EEOC v. Manville Sales Corp., 27 F.3d 1089, 1093-95 (5th Cir. 1994) (holding that "age-related comments by various supervisors of the plaintiff [will] support a finding of discrimination even though a higher level official made the final decision to terminate him"); Malarkey v. Texaco, Inc., 983 F.2d 1204, 1210 (2d Cir. 1993) (holding that statements made by nondecisionmakers were properly received "because they showed tbe pervasive corporate hostility towards [plaintiff] and supported her claim that she did not receive a promotion due to her employer's retaliatery animus"); Shager v. Upjohn Co., 913 F.2d 398, 406 (7th Cir. 1990) (holding that employer is responsible for district manager's "violation of the Act by virtue of the [district manager's] status as an agent acting within the scope of his authority, even though the [district manager's] conduct was willful and unauthorized"); Lockhart v. Westinghouse Credit Corp., 879 F.2d 43, 54 (3d Cir. 1989) (insisting that "[w]hen a major company executive speaks, 'everybody listens' in the corporate hierarchy"); Miles v. M.N.C. Corp., 750 F.2d 867, 875 (11th Cir. 1985) (holding that a racial slur made by a supervisor who was "closely involved in the hiring evaluations" was admissihle); Cline v. Roadway Express, Inc., 689 F.2d 481, 488 (4th Cir. 1982) (finding that plaintiff was discharged under a general hiring policy that was discriminatory, as demonstrated by manager's remarks).

179. *Shager*, 913 F.3d at 400. The comments included statements that "[t]hese older people don't much like or much care for us baby boomers, but there isn't much they can do about it" and "the old guys know how to get around things." *Id.*

180. *See id.* at 405.

181. *Id.* Several other circuits have adopted Judge Posner's "cat's paw" theory when analyzing workplace remarks uttered by individuals other than the official decisionmaker. *See, e.g.*, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000); Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718, 725 (8th Cir. 1998); Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997); Delli Santi v. CNA Ins. Cos., 88 F.3d 192, 200 n.11 (3d Cir. 1996).

committee was effectively motivated by age-based discrimination.[182] *Shager* is thus an example of the court finding that remarks made by an individual who was not technically the decisionmaker were not "stray" in nature.[183]

Critics of the Stray Remarks Doctrine also object to what they consider the needlessness of the requirement that a nonstray remark must be made in the context of the decisionmaking process.[184] As Professor Robert Brookins emphasizes, courts that dismiss the probative value of noncontextual statements are "misguided."[185] Decisionmakers who make racist, sexist, or age-based statements outside the office are still motivated by those attitudes and that mindset in the workplace, even if they do not make similar explicit statements there.[186] As Linda Hamilton Krieger asserts in her application of cognitive psychology to disparate treatment theory, discriminatory attitudes do not necessarily manifest themselves at the moment of decisionmaking.[187] Rather, stereotypes and prejudices shape "bias decisionmaking long before the 'moment of decision.' "[188] In the words of Professor Brookins, "[C]ommon sense suggests that one whose sexist attitude is strong enough to trigger explicit, public, sexist statements outside the decisionmaking arena will hardly leave that attitude at the door when making employment decisions . . . within that secluded arena."[189] Such an argument, as made by Professor Brookins, necessarily turns on the assumption that discriminatory remarks are not made in vacuums, but are, instead, manifestations of underlying discriminatory attitudes.[190]

Professor Lawton, relying on this assumption, questions the direct context requirement, stating that "it is unclear why racist remarks, even when removed in time from the adverse employment decision, are not probative of the employer's intent."[191] For Lawton,

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182. *Shager*, 913 F.2d at 405.

183. *Id.*

184. *See infra* notes 185-97 and accompanying text.

185. Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 114 (1995).

186. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1211 (1995) (arguing that a flaw in the theory of disparate treatment discrimination lies in the assumption, under that theory, that discrimination is motivational, rather than cognitive).

187. *Id.*

188. *Id.*

189. Brookins, *supra* note 185, at 111-12.

190. *Id.* at 114 (asserting that "sexist statements are . . . the spawn of sexist attitudes").

191. Lawton, *supra* note 55, at 638.

concluding that statements not made in direct context of a decision lack probative value assumes that an individual's discriminatory attitudes have changed somehow between the time a remark was made and the time the decision was made.[192] Such a change in attitude is, after all, unlikely, based upon the persistence of stereotypes in our society.[193]

Just as the lower courts vary in the stringency with which they apply the decisionmaker requirement, some courts apply the direct context requirement less rigorously than do other courts.[194] For example, the Fifth Circuit, in *EEOC v. Manville Sales Corp.*, adopted a more lenient application of the requirement, holding that even if a long period of time elapses from the moment a remark was made until the moment when the adverse decision was made, this duration does not suggest that the remark is irrelevant.[195] Indeed, according to the court, the period may indicate "a pattern of discriminatory comments," and as such, evidence of any remark is "directly relevant to showing the existence of discriminatory motive on the part of [the employer]."[196] While the court conceded that the amount of time that had passed might be pertinent to the weight that should be given the evidence, that determination should be made by the trier of fact; it is not for the court to decide at the summary judgment phase.[197]

2. Critique of Lower Courts' Application and Expansion of the Doctrine

Several legal theorists view the application by many lower courts of the Stray Remarks Doctrine to circumstantial evidence cases[198] as an unwarranted expansion of the language articulated by Justice O'Connor in *Price Waterhouse*.[199] Professor Ann McGinley, assessing the refusal by many lower courts to consider

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192. *See id.*

193. *See* Patricia G. Devine & Andrew J. Elliot, *Are Racial Stereotypes Really Fading? The Princeton Trilogy Revisited*, 21 PERSONALITY & SOC. PSYCHOL. BULL. 1139, 1147 (1995) (noting the difficulty for individuals of "breaking the prejudice habit" due to the ingrained nature of stereotypes).

194. *See, e.g.*, EEOC v. Manville Sales Corp., 27 F.3d 1089, 1094 (5th Cir. 1994); *cf.* Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984) (holding that the district court erred in admitting statements, made by the employer over a period of several years, that were unrelated to the plaintiff).

195. 27 F.3d at 1094.

196. *Id.*

197. *See id.*

198. *See supra* Part V.

199. 490 U.S. 228, 277-79 (1989) (O'Connor, J., concurring).

discriminatory remarks as circumstantial evidence to prove pretext, characterized such an interpretation of the doctrine as a "distortion of Justice O'Connor's statement in *Price Waterhouse* that applies only to the creation of an inference of discrimination."[200]

Professor Lawton, agreeing with Professor McGinley, emphasized in her recent article that Justice O'Connor did not state in *Price Waterhouse*[201] that stray remarks were "not probative of intent in circumstantial evidence cases" where a jury may, based upon the totality of the plaintiff's evidence, reach an inference of discrimination.[202] Rather, Justice O'Connor limited her discussion of stray remarks to those remarks that do not constitute direct evidence, and therefore, cannot create a presumption of intentional discrimination.[203] Despite commentary by legal scholars such as Professors McGinley and Lawton, several lower federal courts, prior to the *Reeves*[204] decision, continued to determine that certain remarks, discriminatory in nature, were legally irrelevant to the ultimate determination that a plaintiff had successfully proved his or her case of intentional discrimination by an employer.[205]

E. The Supreme Court's Treatment of "Stray Remarks" in Reeves

In *Reeves*, the Supreme Court addressed the probative value of remarks allegedly made by the plaintiff's supervisor, and identified the role that evidence of such remarks should play in proving pretext and the ultimate issue of intentional discrimination.[206] At trial, Reeves testified that on one occasion, his supervisor, Chestnut, said to him that "he was so old he must have come over on the Mayflower," and that, on another occasion, the supervisor remarked that Reeves was "too damn old to do his job."[207] Reviewing the trial court's admission of the statements, the Fifth Circuit held that the plaintiff's evidence of his employer's age-based comments, despite its "potentially damaging nature," constituted "stray remarks" because it was clear that these comments "were not made in the direct context of Reeves's termination."[208] Thus, the Fifth Circuit deter-

200. McGinley, *supra* note 54, at 476.
201. 490 U.S. at 277-79 (O'Connor, J., concurring).
202. Lawton, *supra* note 55, at 636.
203. *Price Waterhouse*, 490 U.S. at 277-79 (O'Connor, J., concurring).
204. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 137-54 (2000).
205. *See supra* notes 151-160 and accompanying text.
206. 530 U.S. at 151-54.
207. *Id.* at 151.
208. *Id.* at 152-53.

mined that due to the fact that the plaintiff failed to demonstrate a causal link between the remarks and the decision to fire Reeves, the remarks were considered "stray" and could not assist the plaintiff in establishing pretext.[209]

The Supreme Court criticized the Fifth Circuit's evaluation and insisted that in light of the "additional evidence that Chestnut was motivated by age-based animus and was principally responsible for petitioner's firing," there was sufficient evidence for a jury to find that the employer had intentionally discriminated.[210] Thus, the Court's opinion suggests that even if remarks are not made in the direct context of the employment decision, they still should be given weight in assessing discriminatory animus.[211]

VI. THE STRAY REMARKS DOCTRINE AFTER *REEVES*

A. Interpreting the Court's Opinion

The *Reeves* decision reemphasized that in order to demonstrate pretext successfully, a plaintiff does not need to proffer affirmative, direct evidence of the employer's discriminatory motive.[212] Furthermore, the Court suggested that in an effort to show pretext, a plaintiff may provide evidence of discriminatory remarks made by his or her employer, even if those remarks were not made in the direct context of the decisionmaking process.[213] The Court, through its holding in *Reeves*, appears to be instructing lower courts to relax their application of the Stray Remarks Doctrine, particularly the second requirement that a nonstray remark must be made in the direct context of the employment decision.[214] Furthermore, *Reeves* indicates that a reasonable trier of fact may *infer* intentional discrimination if the plaintiff establishes the prima facie case and demonstrates pretext through presentation of circumstantial evidence, including evidence of discriminatory remarks.[215]

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209. *See id.*

210. *Id.* at 151.

211. *See id.* at 152-53. Professor Stuart L. Bass also emphasizes this point. *See* Stuart L. Bass, Reeves v. Sanderson: *United States Supreme Court Attempts to Clarify Plaintiff's Burden in 'ADEA' Claims*, 105 COM. L.J. 275, 283-84 (2000).

212. 530 U.S. at 146-47 ("The factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993))).

213. *See id.* at 152-53.

214. *See id.*

215. *Id.* at 153-54.

Thus, post-*Reeves*, it is no longer appropriate for a court to "substitute its judgment concerning the weight of the evidence for the jury's" and grant an employer's motion for summary judgment, or motion for judgment as a matter of law, if the plaintiff has demonstrated pretext using evidence of discriminatory remarks, even if those remarks were not made when the adverse decision was made.[216]

The Supreme Court did not clarify how connected a remark should be to a decision in order for it to be considered evidence critical to the plaintiff's case, rather than stray. Consequently, it remains unclear an employer's whether remarks made several months or several years prior to an employment decision will have any probative value to the plaintiff's showing of pretext. But, it seems from the *Reeves* opinion that in a disparate treatment case, the probative value of any age-based, sexist, or racist remarks will be determined by the trier of fact, irrespective of when those remarks were made in relation to the challenged employment decision.[217]

Because the individual making the discriminatory remarks in *Reeves* was the actual decisionmaker,[218] the Court did not address whether the other key requirement of the Stray Remarks Doctrine—that a nonstray remark must be made by the decisionmaker himself—should also be applied less stringently. It will consequently be up to the Supreme Court, in deciding a future disparate treatment case, to clarify that point.[219]

*B. How the Lower Courts Have Applied the Doctrine Post-*Reeves

Since the Court handed down its decision in *Reeves*, the First, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have commented on the current status of the Stray Remarks Doctrine in disparate treatment cases.[220] Most circuit courts have continued to apply the Stray Remarks Doctrine to disparate treatment cases in much the same way that they did prior to the *Reeves* decision.[221] For

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216. *Id.* at 152-53.

217. *See id.*

218. *See id.* at 152 (finding that Reeves introduced evidence that Chestnut, who made the discriminatory comments, "was the actual decisionmaker behind his firing," because Chestnut was married to the owner who made the "formal decision to discharge [Reeves]").

219. This Note argues *infra* Part VI.C that it would be reasonable for the Supreme Court to allow juries to evaluate evidence of remarks made by nondecisionmakers.

220. *See infra* notes 221-31 and accompanying text.

221. *See, e.g.*, Cervantes v. Wal-Mart Stores, Inc., No. 00-1058, 2001 U.S. App. LEXIS 63, at *11 (10th Cir. Jan. 3, 2001) (evidence of "racially hostile remark" presented by plaintiff "appears

example, in *Epstein v. Loyola University Medical Center*, the Seventh Circuit held that "stray remarks unrelated to the decision to terminate and made by non-participants in the decision do not serve as evidence of discriminatory intent to establish pretext."[222]

The Fifth Circuit, however, reviewing another age discrimination case brought under the ADEA,[223] and evaluating the probative value of discriminatory remarks directed at the plaintiff,[224] insisted that "in light of the Supreme Court's admonition in *Reeves*, our pre-*Reeves* jurisprudence regarding so-called 'stray remarks' must be viewed cautiously."[225] The Fifth Circuit in that case, *Russell v. McKinney Hospital Venture* held that evidence of a decisionmaker's discriminatory remarks, coupled with the plaintiff's prima facie case and additional evidence of age-based motive, "was sufficient evidence for the jury to find that defendants discriminated against Russell on the basis of age."[226]

The *Russell* holding is significant for two reasons. First, the court found that Steve Ciulla, the individual who made the age-based remarks, was "principally responsible" for the plaintiff's termination, even though he was employed in a position that was the same level as the plaintiff's position, and even though Ciulla did not officially terminate the plaintiff.[227] The Fifth Circuit based this determination on the fact that Ciulla, whose father was the CEO of the parent corporation, "wielded sufficiently great 'informal' power . . . such that he effectively became the decisionmaker with

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to be only a stray remark and may be of little probative value"); Hunt v. City of Markham, 219 F.3d 649, 652 (7th Cir. 2000); Williams v. Raytheon Co., 220 F.3d 16, 20 (1st Cir. 2000) ("[G]iven the probative value" of the defendant's stated legitimate, nondiscriminatory reason, "these stray remarks (or nonremarks) do not support a reasonable inference that [defendant] acted out of a discriminatory purpose."); Epstein v. Loyola Univ. Med. Ctr., No. 99-3690, 2000 U.S. App. LEXIS 22732 (7th Cir. Sept. 7, 2000); Campbell v. Coastal Mart, No. 00-1060, 2000 U.S. App. LEXIS 14672, at *7 (10th Cir. June 27, 2000) (employer's comment, "poor old black woman wants to learn," which trial court concluded was "at best a stray remark" was "insufficient to support an inference of discriminatory motivation").

222. 2000 U.S. App. LEXIS 22732, at *12.

223. *See* Russell v. McKinney Hosp. Venture, 235 F.3d 219, 221 (5th Cir. 2000).

224. Evidence presented by the plaintiff indicated that the decisionmaker repeatedly referred to the plaintiff as "old bitch." *Id.* at 226. The court determined that the jury could reasonably find that the repeated use of "old bitch" indicates that the decisionmaker had discriminatory motives. *See id.*

225. *Id.* at 229.

226. *Id.*

227. *Id.* at 226-29. Although another employee, Ms. Jacobsen, actually fired the plaintiff, the evidence showed that Ciulla threatened to quit if Jacobsen did not terminate Russell. *Id.*

respect to Russell's termination."[228] Thus, the court adopted a more lenient view of the decisionmaker requirement and found that Ciulla's remarks were not "stray" and could be properly presented to the jury.[229]

Second, the *Russell* opinion is significant because it specifies that, in general, it is no longer acceptable to view evidence of workplace remarks through the "harsh lens" previously utilized by the Fifth Circuit and several other circuits.[230] Implementing this new post-*Reeves* approach, the court concluded that age-based remarks could be found by a jury to demonstrate age-based animus, even if the remarks were "not in the direct context of the decision and even if uttered by one other than the formal decisionmaker, provided that the individual is in a position to influence the decision."[231]

C. Should Any Aspects of the Doctrine Survive Reeves*?*

Justice O'Connor articulated the Stray Remarks Doctrine in *Price Waterhouse* to identify a particular type of evidence—stray remarks—that do not constitute direct evidence.[232] This Note argues that the Doctrine was thus meant to apply only to discrimination cases in which a plaintiff attempts to prove his or her case by presenting *direct* evidence of an employer's discriminatory motive. Justice O'Connor never indicated that workplace remarks not made by a decisionmaker in the context of a decision cannot be presented to a jury as circumstantial evidence. Thus, this Note insists that, at least as it has been applied to *circumstantial* evidence discrimination cases, the Stray Remarks Doctrine should be significantly modified in light of *Reeves*.[233]

First, the doctrine should no longer refer to "stray" remarks. In fact, the name "Stray Remarks Doctrine" should perhaps be eliminated altogether from the legal lexicon. Unquestionably, the title was a misnomer from its inception.[234] By characterizing remarks as "stray," the name concludes what it purports to assess—

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228. *Id.* at 228. Ciulla was found to have possessed greater power than the ordinary workers at his level due to his father's position. *See id.* He was also found to have taken advantage of that power. *See id.*

229. *See id.* at 226.

230. *Id.*

231. *Id.* at 229.

232. 490 U.S. 228, 277-79 (1989) (O'Connor, J., concurring).

233. 530 U.S. 133, 151-54 (2000).

234. This idea was first suggested to the author by The Honorable Lee H. Rosenthal, United States District Court for the Southern District of Texas, in November 2000.

that is, the probative value (or lack thereof, i.e., the "stray-ness") of discriminatory workplace remarks. This Note suggests that workplace remarks in disparate treatment cases should be treated the same as other types of circumstantial evidence are treated in any other civil case. There is nothing so uniquely characteristic about workplace remarks that warrants taking the determination of their evidentiary weight away from juries. The relevance, probative value, and potential prejudice of the evidence of remarks should be initially assessed by the court in accordance with the *Federal Rules of Evidence*.[235] Upon a finding that the evidence of workplace remarks does have some relevance, and that its probative value is not substantially outweighed by a risk of prejudice to the defendant, the evidence should be submitted to and weighed by the factfinder. Accordingly, a jury should consider evidence that can shed light on an employer's motives, unless the court determines that the potential prejudice of the evidence substantially outweighs its value. It should be up to the jury, as the factfinder, to weigh all of the evidence and decide whether workplace remarks were "too vague, too distant, or counterbalanced by other evidence to support a claim of discrimination."[236]

This conclusion is supported by the Court's decision in *Reeves*[237] and is further substantiated by the fact that Justice O'Connor, the creator of the Stray Remarks Doctrine, also authored the majority opinion in *Reeves*.[238] The *Reeves* decision insisted that simply because an offensive racist, sexist, or age-based remark is not made directly in the context of an employment decision, this fact should not eviscerate the remark's probative value.[239] Such remarks, particularly when viewed in the aggregate, should not be categorically excluded from jury consideration. Instead, a jury should be entitled to consider such remarks when determining whether an employer has given a false reason for an employment decision and whether the proffered reason was intended to mask the true discriminatory motive. Presented with evidence that a supervisor expressed discriminatory views in the past, a jury could

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235. *See* FED. R. EVID. 401-403.

236. Reply Brief of Petitioner at *18, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (No. 99-536).

237. 530 U.S. at 151-54.

238. *See id.* at 137.

239. *See id.* at 152-53. Courts have substantiated this conclusion. For example, the Fifth Circuit declared in *Evans v. City of Bishop*: "*Reeves* emphatically states that requiring evidence of discriminatory animus to be 'in the direct contoxt' of the employment decision is incorrect." 238 F.3d 586, 591 (5th Cir. 2000).

reasonably infer that the supervisor still adhered to those views, even if the employer did not express them at the time he or she made the employment decision.[240] Given the high evidentiary burden placed on the plaintiff in disparate treatment cases based upon indirect evidence,[241] allowing the jury to consider evidence of such formerly "stray" remarks in deciding whether an employer had a discriminatory motive for making the employment decision would not unfairly prejudice the defendant.

Second, if it is reasonable for the trier of fact to assess the weight that should be given to evidence of discriminatory remarks not made in the direct context of the decisionmaking process, it should also be reasonable for the trier of fact to evaluate the probative value of remarks not made by decisionmakers themselves. Armed with clear and thorough jury instructions, juries are capable of assessing the level of influence the speaker may have had over the decisionmaking process. Likewise, juries have the capability to decide, based upon the totality of the evidence, whether discriminatory remarks made by nondecisionmaking supervisors and employees are illustrative of a hostile and biased work environment that necessarily tainted the adverse decision, or whether those remarks did not influence the decision in any way. After all, "the very essence of the [jury's] function is to select from among conflicting inferences" in order to decide "that which it considers most reasonable."[242]

Persistent age-based, sexist, or racist remarks may contribute to a workplace climate where discrimination appears to be the norm.[243] A decisionmaker in that climate will be influenced to make employment decisions in accordance with that norm. Such discriminatory statements, when made by other employees or supervisors, or by the decisionmaker himself, are not "stray" at all. At a minimum, the remarks tend to show an employer's acceptance of or acquiescence to such discriminatory attitudes in the workplace, and

240. This idea was similarly espoused by Reeves in his Reply Brief to the Supreme Court. Reply Brief of Petitioner at *17, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (No. 99-536).

241. Justice Souter, in his dissent in *Hicks*, characterized the evidentiary burden formulated by the majority as a rule adopted "for the benefit of employers who have been found to have given false evidence in a court of law," whom the court favors "[by] exempting them from responsibility for lies." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 537 (1993) (Souter, J., dissenting).

242. *See* Anderson v. Bessermer City, 470 U.S. 564, 574-75 (1985); Tennant v. Peoria Pac. Union Ry., 321 U.S. 29, 35 (1944).

243. *See* Lawton, *supra* note 55, at 641.

more likely, they demonstrate that an employer was more likely than not to have acted from an unlawful motive.[244]

Certainly, a trier of fact presented with evidence of such discriminatory workplace attitudes and behavior may conclude that discrimination did *not* motivate the adverse decision against the plaintiff. But, the key point is that it is up to the trier of fact to decide that factual issue based upon the evidence. It is improper for the court, rather than the trier of fact, to conclude that evidence of workplace attitudes in the form of remarks is stray in nature and irrelevant to the plaintiff's case. As Professor Deborah Malamud has asserted, " 'Stray remarks' of a discriminatory nature may mean very little when the plaintiff's case is otherwise extremely weak. But if the plaintiff's case appears to have some merit in other respects, or if the remarks corroborate other evidence of . . . tension in the workplace, it would be inappropriate categorically to ignore the remarks."[245]

This Note acknowledges the justifications for the Stray Remarks Doctrine and the insistence on the part of employers that they not be held liable for the discriminatory attitudes of their employees who played no role in the decisionmaking process.[246] Undeniably, it is crucial that a finding of disparate treatment liability under Title VII or the ADEA be firmly based upon a plaintiff's clear showing that an illegal motivation on the part of the employer prompted the challenged employment decision.[247] Yet, this Note also argues that the determination of whether the plaintiff has made that clear showing is a factual question that should be answered by the trier of fact. Modifying the Stray Remarks Doctrine as proposed herein does not automatically lead to unwarranted liability for employers. Rather, the modification simply assigns the task of weighing the circumstantial evidence, including evidence in the form of workplace remarks, to the appropriate party—the trier of fact.

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244. *See* Smith v. Leggett Wire Co., 220 F.3d 752, 765 (6th Cir. 2000) (Martin, C.J., dissenting) ("Evidence of racist remarks or isolated incidences of racial conduct directed toward . . . employees . . . may he critical for the jury's assessment of whether a given employer was more likely than not to have acted from [a discriminatory] motive . . . [; t]he jury was entitled to factor such remarks into their decision.").

245. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2324 (1995) (arguing that evidence of discrimination should get its meaning and strength from the context in which it arises).

246. *See supra* Part V.B.

247. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134 (2000).

VII. CONCLUSION

From *McDonnell Douglas* to *Reeves*, the Supreme Court has evaluated disparate treatment cases in an attempt to limit confusion among circuit courts and clarify the evidentiary burdens that should be placed on plaintiffs and defendants when plaintiffs attempt to prove their cases using circumstantial evidence. Additionally, the Court in *Reeves* clarified another facet of discrimination law that prompted much confusion and dissention among circuits—the lower courts' interpretation and application of the Stray Remarks Doctrine to circumstantial evidence disparate treatment cases.[248] Holding that evidence of remarks made in the workplace, but not necessarily made in the direct context of an employment decision, may be assessed by the factfinder, the Court directed circuit courts to rethink their pre-*Reeves* jurisprudence regarding the Stray Remarks Doctrine.[249]

Tracing the progression of the Court's analytical framework in circumstantial evidence disparate treatment cases, one can see that the Court in *Reeves* has ultimately moved toward treating disparate treatment cases less like exceptional legal situations that demand uniquely higher evidentiary burdens to be put on parties, and more like any other type of civil case.[250] It follows, then, that evidence presented in those disparate treatment cases should be governed by the same evidentiary rules and standards that regulate other civil cases. Thus, a court presiding over a disparate treatment case, in which the plaintiff is attempting to prove her case by presenting a combination of pieces of circumstantial evidence, should follow the *Federal Rules of Evidence* and assess all evidence for relevance, probative value, prejudice, etc. Accordingly, the trier of fact should determine the weight and credibility of the evidence of workplace remarks formerly branded as "stray," notwithstanding the fact that the remarks may have been uttered by a nonofficial decisionmaker, or not made in the direct context of the decisionmaking process.

This conclusion necessarily precludes application of the Stray Remarks Doctrine to disparate treatment cases in which plaintiffs utilize circumstantial, not direct, evidence of discrimina-

248. *Id.*
249. *See supra* Parts V.B-C.
250. 530 U.S. at 148-49.

tory motive. Such a preclusion has the benefit of both unifying and simplifying the approach taken by circuit courts regarding the assistance that evidence of workplace remarks can lend plaintiffs in proving their cases of intentional discrimination.

Laina Rose Reinsmith[*]

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