Using the Same Actor "Inference" in Employment Discrimination Cases

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I. INTRODUCTION

The same actor "inference" is a defense used by employers in employment discrimination cases. It arises when an employee complaining of a discriminatory discharge is both hired and fired by the same employer representative (most often a supervisor or personnel manager) and the period between hiring and firing is short.[1] Under these circumstances, courts applying the inference will infer that no discrimination occurred. The rationale is that if the employer representative harbored discriminatory animus against the aggrieved employee, the employer never would have hired the employee in the first place.

The first court to adopt the same actor inference was the Fourth Circuit, which did so in 1991.[2] Since then, the federal circuits have split on whether the inference is appropriate, and two circuits—the Fifth and the Eighth—have used the inference in some circumstances but not others.[3] Moreover, the circuits that *have* adopted the inference have applied it inconsistently.[4] Some, for example, have stated that the inference creates a "strong presumption" that no discrimination occurred;[5] others have held that the inference is light and easily rebuttable.[6] Some courts have used the inference to grant employer motions for summary judgment[7] or directed verdict,[8] and others merely have used it in jury instructions.[9]

This Article provides a comprehensive analysis of the case law and policies surrounding the same actor inference. Part II describes how the inference fits into the procedural framework of an employment discrimination claim. Part III reviews the circuit court decisions that have discussed the same actor inference. Part III.A explains how the inference has its genesis in a law review article that courts subsequently took out of context. Part III.B describes in detail the age discrimination case in which the inference was first

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[1] *See* Proud v. Stone, 945 F.2d 796, 797–98 (4th Cir. 1991).

[2] *See id.*

[3] *See infra* Part III.B.

[4] *See* Marlinee C. Clark, Note, *Discrimination Claims and "Same-Actor" Facts: Inference or Evidence?*, 28 U. MEM. L. REV. 183, 194–96 (1997); Julie S. Northup, Note, *The "Same Actor Inference" in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193, 204–07 (1998).

[5] *See, e.g.*,Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 215 (4th Cir. 1994).

[6] *See, e.g.*, Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (noting that inference could have been overcome if plaintiff's evidence had been stronger).

[7] *See id.* at 652 (granting summary judgment).

[8] *See, e.g.*, Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 173–74 (8th Cir. 1992) (granting directed verdict).

[9] *See, e.g.*, Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 463–64 (6th Cir. 1995) (affirming jury instruction).

adopted. Parts III.C, III.D, and III.E discuss, respectively, the extension of the inference to other circuits, to other protected classes, and beyond hiring and firing situations. Part III.F considers whether, and under what circumstances, the length of time between hiring and firing should affect the use or strength of the inference. Part III.G examines the three circuit court decisions which have, either categorically or contextually, rejected the inference.

Part IV evaluates the policy arguments that courts have made both for and against the inference. It concludes that the policy justifications for the inference are relatively weak, and that if the inference is given a strong presumptive effect, it could result in the dismissal of meritorious discrimination claims. Part V considers precisely what weight the inference should be given. It explains that the same actor inference, as currently used by courts, is actually neither an inference nor a presumption. Instead, it merely reflects a value judgment by courts that, under the circumstances giving rise to the "inference," plaintiffs should be held to a higher standard of proof than they otherwise would be. This, we conclude, is an appropriate use of the same actor "inference."

II. BACKGROUND

A. Traditional Burdens of Employment Discrimination

Title VII of the Civil Rights Act of 1964[10] forbids employment discrimination on the basis of race, color, religion, sex, or national origin,[11] and other federal statutes prohibit discrimination on the basis of age[12] and disability.[13] There are two theories under which a plaintiff may bring a

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[10]Pub. L. No. 88-352, 78 Stat. 241, 253 (1964) (codified at 42 U.S.C. §§ 2000e to e-16 (1994 & Supp. II 1996)), *amended by* Pub. L. No. 105-220, 112 Stat 936 (1998).

[11]*See* 42 U.S.C. § 2000e-2 (1994).

[12]*See* 29 U.S.C. §§ 621–634 (1994 & Supp. II 1996), *amended by* Pub. L. No. 105-220, 112 Stat. 936 (1998).

[13]*See* 42 U.S.C. §§ 12101–12213 (1994 & Supp. II 1996). For general discussions of the Americans With Disabilities Act, see R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 1993 DET. C.L. REV. 1163 *passim* (1993); R. Bales, *Once Is Enough: Evaluating When a Person Is Substantially Limited in Her Ability to Work*, 11 HOFSTRA LAB. L.J. 203, 209–16 (1993) (explaining origin and providing overview of ADA); Richard A. Bales, *Title I of the Americans with Disabilities Act: Conflicts Between Reasonable Accommodation and Collective Bargaining*, 2 CORNELL J.L. & PUB. POL'Y 161, 169–78 (1992) (exploring provisions and scope of ADA); Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 *passim* (1991) (discussing ADA and its civil rights implications).

discrimination lawsuit: disparate treatment and disparate impact.[14] The disparate treatment theory permits a plaintiff to challenge an employment practice that is discriminatory on its face.[15] The disparate impact theory permits a plaintiff to challenge an employment practice that on its face appears nondiscriminatory, but that is discriminatory in effect.[16] Issues concerning the same actor inference arise under the disparate treatment theory.[17]

A plaintiff can prove a disparate treatment case in either of two ways. The first, often called the "direct evidence" or "mixed motive" approach, requires the plaintiff to show direct evidence[18] or, in some circuits, particularly strong circumstantial evidence,[19] of discrimination.[20] If the plaintiff can

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[14]*See* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 22–23 (1991).

[15]*See* International Bd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977) (describing disparate treatment discrimination as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.").

[16]*See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (finding discriminatory high school diploma requirement that effectively excluded black applicants but was unrelated to job).

[17]*See* Clark, *supra* note 4, at 189.

[18]*See, e.g.*, Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995) (plaintiff may obtain mixed-motive instruction only when plaintiff offers direct evidence that decision maker placed "substantial negative reliance on an illegitimate criterion." (citation omitted)); Griffiths v. CIGNA Corp., 988 F.2d 457, 470 (3d Cir. 1993) ("At a bare minimum, a plaintiff seeking to advance a mixed motive case will have to adduce circumstantial evidence 'of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude.'" (citations omitted)).

The direct evidence test was endorsed in Justice Sandra Day O'Connor's concurrence in Price Waterhouse v. Hopkins, 490 U.S. 228, 243–44 (1989). For general discussions of this branch of disparate treatment cases, see Steven M. Tindall, Note, *Do As She Does, Not As She Says: The Shortcomings of Justice O'Connor's Direct Evidence Requirement in* Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332, 367 (1996) (calling for revision of Supreme Court's mixed-motive approach and advocating test "which turns on the probative value of the plaintiff's evidence rather than its type"); Joseph J. Ward, Note, *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, 629 (1997) (discussing mixed-motive direct evidence requirements in employment discrimination claims); Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After* Price Waterhouse v. Hopkins, 46 STAN. L. REV. 959, 986 (1994) (suggesting that "[u]ntil plaintiffs' evidentiary restrictions in mixed-motive cases are revised to take into account the prudential, precedential, and policy issues addressed in this note, employment discrimination victims will continue to be denied access to the mixed-motive anti-discrimination principle promoted by *Price-Waterhouse*").

[19]*See, e.g.*, Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 201 n.1 (8th Cir. 1993) ("[T]here is no restriction on the *type* of evidence a plaintiff may produce to demonstrate that an illegitimate criterion was a motivating factor in the challenged employment

make this showing, the burden shifts to the employer to prove that it would have taken the same adverse employment action—such as discharge or refusal to hire—against the plaintiff absent the discrimination[21] and, even if this showing is made, the plaintiff may be entitled to an award of declaratory relief, injunctive relief, and attorney's fees.[22]

Employers and their decision makers, however, rarely are so stupid or careless as to leave behind strong evidence of discrimination, and hence, direct evidence and mixed motive cases are relatively rare.[23] The Supreme Court has responded to this difficulty of proof by creating a "unique"[24] procedural framework for cases in which a plaintiff has only weaker circumstantial evidence upon which to rely. This framework, established in the two cases of *McDonnell Douglas Corp. v. Green*[25] and *Texas Department of Community Affairs v. Burdine*,[26] and modified in *St. Mary's Honor Center v. Hicks*,[27] allocates the burden of production and creates an order for the presentment of proof in such circumstantial evidence cases.[28]

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decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the challenged decision."); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1187 (2d Cir. 1992) (stating that "what is required [for mixed-motive analysis] is simply that the plaintiff submit enough evidence that, if believed, could reasonably allow a jury to conclude that the adverse employment consequences were 'because of' an impermissible factor").

[20]*See* Jerome A. Hoffman, *Thinking About Presumptions: The "Presumption" of Agency from Ownership as Study Specimen*, 48 ALA. L. REV. 885, 891 (1997) (discussing distinction between "direct" and "circumstantial" evidence). For an example of a direct evidence case, see Caban-Wheeler v. Elsea, 71 F.3d 837, 842–43 (11th Cir. 1996) (involving black decision maker who told white employee that decision maker wanted black person to have white employee's job).

[21]*See* Eskra v. Provident Life & Accident Ins. Co., 125 F.3d 1406, 1411 (11th Cir. 1997).

[22]*See* 42 U.S.C. § 2000e-5(g)(2)(B)(i) (1994). *But see* Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1335–39 (4th Cir. 1996) (reversing award of attorney fees to plaintiff because district court failed to consider degree of plaintiff's success in setting amount of award); *Tyler*, 958 F.2d at 1182 (suggesting in dictum that "there may be case-and-controversy difficulties with the remedial portion of [the 1991 Act] which allows a plaintiff without a personal stake in the litigation to act as a private attorney general for purposes of obtaining declaratory or injunctive relief").

[23]*See* Castelman v. Acme Boot Co., 959 F.2d 1417, 1420 (7th Cir. 1992).

[24]Melissa A. Essary, *The Dismantling of* McDonnell Douglas v. Green*: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385, 397 (1994).

[25]411 U.S. 792 (1973).

[26]450 U.S. 248 (1981).

[27]509 U.S. 502 (1993).

[28]*See id.* at 506–07. For recent articles discussing this procedural framework, see Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks*, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 187–92 (1997); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting*

This burden-shifting framework, often called the *McDonnell Douglas* or *Burdine* test, involves three steps. First, the plaintiff must make out a prima facie case of discrimination by demonstrating, by a preponderance of evidence, the following four elements: (1) that plaintiff is a member of a protected class; (2) that plaintiff is qualified for the position for which plaintiff has applied or from which plaintiff has been discharged; (3) that plaintiff has suffered some adverse employment action, such as a discharge; and (4) that the position still exists.[29] By establishing a prima facie case, the plaintiff creates a weak presumption that the employer unlawfully discriminated against her.[30] If, after a plaintiff has established a prima facie case, an employer remains silent, judgment must be entered against the employer.[31]

Once the plaintiff has established a prima facie case of discrimination, the case shifts to step two, in which the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action.[32] The employer's explanation must be in the form of admissible evidence and must clearly set forth reasons that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the challenged employment action.[33] Although the burden of production is shifted to the employer, "[t]he ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the plaintiff remains at all times with the plaintiff."[34]

When the employer has satisfied its production burden, the case shifts to the third step, in which the burden reverts to the plaintiff to prove to the trier of fact that the employer intentionally discriminated against her.[35] There is some confusion over precisely what this entails. In *Burdine*, the Court stated that the plaintiff may do so "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

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Approach in Employment Discrimination Cases, 61 BROOK. L. REV. 703, 703–11 (1995); Kevin W. Williams, Note, *The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98, 103–04 (1997).

[29]*See Burdine*, 450 U.S. at 252–53.

[30]*See id.* at 254.

[31]*See St. Mary's*, 509 U.S. at 506 (quoting 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 67 (1977)).

[32]*See Burdine*, 450 U.S. at 254.

[33]*See id.* at 254–55.

[34]*Id.* at 253 (citing Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978)).

[35]*See id.* at 256.

credence."[36] Most courts interpreted this to mean that if a plaintiff proved that the defendant's proffered reason was pretextual, the plaintiff automatically was entitled to judgment.[37] This became known as the "pretext-only" approach[38] to the third step of *Burdine*. Other courts interpreted the Court's language in *Burdine* to mean that proof of pretext permits, but does not compel, the trier of fact to find for plaintiff.[39] This became known as the "permissive pretext-only" approach.[40] Still other courts would grant a plaintiff judgment only if plaintiff both proved pretext and provided additional evidence of discrimination.[41] This became known as the "pretext-plus" approach.[42] The *Hicks* Court firmly rejected the pretext-only approach,[43] but did not conclusively adopt either of the two remaining approaches.[44]

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[36]*Burdine*, 450 U.S. at 256 (citing *McDonnell Douglas*, 411 U.S. at 804–05). Until 1991, employment discrimination cases were decided by bench trials. The 1991 Civil Rights Act gave plaintiffs the right to jury trials. *See* 42 U.S.C. § 1981a(c) (1994).

[37]*See, e.g.*, Caban-Wheeler v. Elsea, 904 F.2d 1549, 1554 (11th Cir. 1990) (stating that once employee proves employer's proffered reasons were pretextual, employee "satisfies the required ultimate burden of demonstrating that he or she has been the victim of intentional racial discrimination").

[38]*See* Davis, *supra* note 28, at 716–18.

[39]*See, e.g.*, Samuels v. Raytheon Corp., 934 F.2d 388, 392 (1st Cir. 1991) (determining that agency finding that employee was disabled when fired was insufficient to conclude firing was pretextual).

[40]*See* Davis, *supra* note 28, at 715.

[41]*See, e.g.*, Grady v. Affiliated Cent., Inc., 130 F.3d 553, 561 (2d Cir. 1997) ("[T]he creation of a genuine issue of fact with respect to pretext alone is not sufficient. There must also be evidence that would permit a rational fact finder to infer that the discharge was actually motivated, in whole or in part, by discrimination."); EEOC v. Flasher Co., 986 F.2d 1312, 1321 (10th Cir. 1992) (stating that "[p]roffered reasons may be a pretext for a host of motives, both proper and improper, that do not give rise to a liability under Title VII").

[42]*See* Davis, *supra* note 28, at 714.

[43]*See Hicks*, 509 U.S. at 511.

[44]*See id.* On the one hand, the Court stated that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Id.* Some courts have interpreted this as adopting the pretext-permissive approach. *See, e.g.*, Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir. 1993). On the other hand, the *Hicks* Court also pronounced that the plaintiff must prove "'that the proffered reason was not the true reason for the employment decision,' . . . and that race was." *Hicks*, 509 U.S. at 508 (quoting *Burdine*, 450 U.S. at 256). This pronouncement has been interpreted as adopting the pretext-plus approach. *See, e.g.*, Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993). Muddying the waters still further, the Fifth Circuit recently held that the question of whether a trier of fact will be allowed to find discrimination must be answered on a case-by-case basis, with the disproof of the employer's proffered reason as only one factor in the analysis. *See* Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996) (en banc).

B. Fitting the Inference into the Procedural Framework

The same actor inference does not alter the burden-shifting framework set out by the Supreme Court in *McDonnell Douglas* and *Burdine*.[45] Instead, it merely adds a gloss to the third stage of the analysis.[46] The shade of this gloss depends on what stage in the litigation process the court is willing to apply the inference. Courts making the strongest use of the inference have used it to justify the entry of summary judgment. For example, in *Brown v. CSC Logic, Inc.*,[47] the Fifth Circuit used the inference to discount plaintiff's evidence of pretext, and then concluded that the evidence of pretext was insufficient to go to a jury.[48] It therefore affirmed the district court's entry of summary judgment.[49] The Eighth Circuit used the same reasoning in *Lowe v. J.B. Hunt Transport, Inc.*,[50] when it granted the employer a directed verdict.[51] In the Sixth Circuit case of *Buhrmaster v. Overnite Transportation Co.*,[52] however, the court let the pretext issue go to the jury, and merely used the inference as the basis of a jury instruction.[53]

Despite the variation among these cases in procedural posture, each of the courts emphasized that the inference was not, by itself, dispositive on the issue of pretext. The *Brown* and *Lowe* courts indicated that had their respective plaintiffs' evidence of pretext been stronger, the inference would not have been sufficient to justify the entry of summary judgment or directed verdict;[54] the *Buhrmaster* court instructed the jury that it could, but was not required to, conclude, based on the inference, that no discrimination had occurred.[55] These decisions demonstrate that the employer's use of the same actor inference does not automatically win the case for the employer, because the plaintiff's evidence of pretext may overcome the inference. The same actor inference therefore is not an absolute defense.

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[45]*See* Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991).
[46]*See id.*
[47]82 F.3d 651 (5th Cir. 1996) (discussed *infra* at notes 74–81 and accompanying text).
[48]*See id.* at 658.
[49]*See id.*
[50]963 F.2d 173 (8th Cir. 1992) (discussed *infra* at notes 67–70 and accompanying text).
[51]*See id.* at 174–75.
[52]61 F.3d 461 (6th Cir. 1995).
[53]*See id.* at 463–64.
[54]*See Brown*, 82 F.3d at 658; *Lowe*, 963 F.2d at 174–75.
[55]*See Buhrmaster*, 61 F.3d at 463.

III. THE DEVELOPMENT OF THE INFERENCE

As the preceding discussion illustrates, there is wide variation among the circuits regarding when the inference should be used. The circuits also differ on whether the inference should be used at all, and if it should, how much weight it should be given under various circumstances. The following discussion of the case law will help clarify these issues.

A. The Genesis of the Inference

The same actor inference had its genesis in a law review article written in 1991 by Professor John J. Donohue III and Peter Siegelman.[56] In this article, the authors sought an explanation for a dramatic shift in the composition of employment discrimination litigation: whereas prior to about 1968 discriminatory hiring charges outnumbered discriminatory firing charges, at the time the article was written (and still today[57]) a dramatically large percentage of the charges filed were for discriminatory firing.[58] *En route* to concluding that Title VII may be functioning as some sort of "rent" or "transition" supporting statute,[59] Donohue and Siegelman considered—and rejected—the possibility that the trend could be explained by a decrease in discriminatory hiring and an increase in discriminatory firing. This, they said, was irrational, for "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."[60]

Although Donohue and Siegelman's focus was on the number of hirings and firings in the *aggregate*, the language they used seemed directed at individual instances of alleged discrimination.[61] Only months after their article came out, it was appropriated by the Fourth Circuit and applied to a

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[56]John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991).

[57]*See* George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 135 (1995).

[58]*See* Donohue & Siegelman, *supra* note 56, at 1015–16.

[59]*See id.* at 1029–31. George Rutherglen has explained:

> This pattern persists because incumbent employees have more to lose and better access to evidence, and therefore more reason to sue, than applicants for employment. Incumbent employees are more likely to hold high-paying jobs that support a large award of damages than are applicants for employment, who, by definition, are looking for work and may well find searching for another job more attractive than pursuing litigation.

Rutherglen, *supra* note 57, at 135 (1995).

[60]Donohue & Siegelman, *supra* note 56, at 1017.

[61]*See* Northup, *supra* note 4, at 213 n.145.

case where the same employer representative had both hired and fired the plaintiff—a context very different from Donohue and Siegelman's original purpose.

B. Adoption into Case Law

With the 1991 decision in *Proud v. Stone*,[62] the Fourth Circuit became the first court to recognize the same actor inference.[63] In adopting the inference, the *Proud* court concluded that a strong supposition exists that discrimination could not have been a determining factor for adverse employment action taken by the employer in cases where the hirer and firer are the same individual and the termination of employment occurs within a relatively short time following the hiring.[64]

Warren Proud was sixty-eight years old when the Department of the Army hired him for the position of Chief Accountant of its Central Accounting Division.[65] Proud's duties included handling five funds for which the Division provided accounting services. Robert Klauss was the Central Accounting Officer in charge of the Division and the person responsible for hiring Proud. He testified that although Proud's background, education, and experience convinced Klauss that Proud was the ideal candidate for the job, after Proud began work, Klauss quickly became dissatisfied with Proud's handling of several funds. Thereafter, Klauss gave Proud two oral counseling sessions and warned Proud that he would be fired if his performance did not improve within thirty days.

According to Klauss, Proud's performance failed to improve and, six months after Proud was hired, Klauss fired him. Proud, on the other hand, claimed that he had received inadequate training, difficulty acquiring needed data, and no written procedures to follow. He also claimed that similarly situated, younger employees who had performed comparably to him had not been discharged. In any event, seventeen months after Proud's discharge, the Army filled his position with a thirty-two-year-old woman. The following month, Proud filed suit, claiming he had been discharged because of his age. The Army's proffered reason for discharge was poor job performance.

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[62]945 F.2d 796 (4th Cir. 1991). For other Fourth Circuit cases involving the same actor inference, see Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 959 (4th Cir. 1996); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995); Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 214–15 (4th Cir. 1994).

[63]*See Proud*, 945 F.2d at 797.

[64]*See id.* at 797.

[65]Unless otherwise noted, facts and procedural history are taken from the court's opinion in *Proud*, 945 F.2d at 796–97.

At the close of Proud's evidence at trial, the district court granted the Army's motion for dismissal. On appeal, the Fourth Circuit affirmed, and, quoting Donohue and Siegelman, stated that

> 'claims that employer animus exists in termination but not in hiring seem irrational.' From the standpoint of the putative discriminator, '[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.'[66]

Proud has become the touchstone for courts applying the same actor inference to employment discrimination cases.

C. Extension of the Inference to Other Circuits

The next circuit court to recognize the same actor inference was the Eighth Circuit, which did so in *Lowe v. J.B. Hunt Transport, Inc.*[67] Like *Proud*, *Lowe* was an age discrimination case.[68] Lowe was fifty-two years old when he was hired as a manager of the company's trucking terminal in Kansas City. He worked for almost two years before he was fired, allegedly for falsifying a petty cash report. Lowe claimed that he was really fired because of his age, and that the employer's allegation of falsification was pretextual. At trial, Lowe presented evidence that the shortage in the petty cash fund was insignificant; that he was not accused of having taken the money for himself; that his performance ratings had been good; and that another, younger employee, who similarly had been accused of falsifying a petty cash report, was disciplined rather than fired. The district court granted the employer's motion for directed verdict.

On appeal, the Eighth Circuit acknowledged that under normal circumstances, Lowe's evidence of pretext would have been sufficient to defeat a motion for directed verdict. Nonetheless, the court affirmed, holding that no age discrimination could have occurred where Lowe was fired by the same persons who had hired him two years earlier. "It is simply incredible," the court reasoned, "that the company officials who had hired [Lowe] at age fifty-one had suddenly developed an aversion to older people less than two

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[66]*Id.* at 797 (quoting Donohue & Siegelman, *supra* note 56, at 1017).

[67]963 F.2d 173 (8th Cir. 1992). For other Eighth Circuit cases involving the same actor inference, see Herr v. Airborne Freight Corp., 130 F.3d 359, 362–63 (8th Cir. 1997); Rothmeier v. Investment Advisors, Inc., 85 F.3d 1328, 1337 (8th Cir. 1996).

[68]Unless otherwise noted, the facts and procedural history are taken from the court's opinion in *Lowe*, 963 F.2d at 173–75.

years later."[69] As in *Proud*, three pieces of evidence were crucial to the employer's successful invocation of the same actor inference: first, Lowe was a member of the protected age group both at the time of his hiring and at the time of his firing; second, he was both hired and fired by the same individuals; and third, the time between hiring and firing was relatively short.

The *Proud* and *Lowe* decisions have been relied upon and cited to by the other U.S. circuit courts of appeals that to date have adopted the same actor inference.[70] Subsequent cases have both extended and qualified the inference.

The First Circuit adopted the same actor inference in *LeBlanc v. Great American Insurance Co.*[71] Theodore LeBlanc was fifty-seven years old, and had worked as an insurance salesperson for Great American for nine years, when he was transferred from Maryland to Massachusetts.[72] His transfer was approved by Al Conte, the acting president of the company's Northeast Zone, who also agreed to pay for LeBlanc's moving expenses, and to give him a sixteen percent pay raise. Two years later, Conte fired LeBlanc, telling him that his layoff was part of a general reduction-in-force necessitated by a downturn in the region's economy. LeBlanc sued Great American for age discrimination. The district court, finding insufficient evidence of pretext, granted Great American's motion for summary judgment. The First Circuit, citing to *Proud* and *Lowe*, affirmed, noting that "LeBlanc points to nothing in the record to suggest why Conte, who . . . approved LeBlanc's transfer, at Great American's expense, to eastern Massachusetts and his corresponding sixteen percent pay raise, would develop an aversion to older people less than two years later."[73]

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[69]*Id.* at 175.

[70]*See, e.g.*, Bergan v. Standard Duplicating Mach. Corp., No. 95-35364, 1996 WL 422876, at *2 (9th Cir. July 29, 1996) (finding that plaintiff's "claim of age discrimination is undermined by the fact that the same people who had hired him at age fifty-one, fired him at age fifty-five"); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (recognizing that same actor inference has been adopted by several circuits and expressly adopting doctrine for Fifth Circuit); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 463–64 (6th Cir. 1995) (allowing same actor inference to be applied in sex discrimination cases); Rand v. CF Indus., Inc., 42 F.3d 1139, 1147 (7th Cir. 1994) ("It seems rather suspect to claim that the company that had hired him at age 47 'had suddenly developed an aversion to older people' two years later."); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993) (applying same actor inference where employer had approved employee's transfer and increased his pay).

[71]6 F.3d 836 (1st Cir. 1993).

[72]Unless otherwise noted, all facts and procedural history are taken from *LeBlanc*, 6 F.3d at 847.

[73]*Id.* at 847. The court also found it significant that a person only one year younger than LeBlanc assumed most of LeBlanc's responsibilities upon his termination. *See id.*

In *Brown v. CSC Logic, Inc.*,[74] the Fifth Circuit used the same actor inference defense to find that the dismissal of a fifty-eight-year-old man, who was hired four years earlier by the same individual who fired him, was not a pretext for age discrimination.[75] CSC Logic hired Robert Davis as its director of Logic Management Services and then promoted him six months later. Shortly before his termination, Davis told management that the company was over-staffed and that expenses needed to be reduced. The company, apparently taking his advice, fired Davis and another employee whose combined salaries totaled $319,000.

The district court granted CSC Logic's motion for summary judgment, and Davis appealed. The Fifth Circuit affirmed. After noting that Davis had been both hired and fired by the same individual who himself was four years older than Davis, the court stated that "[t]his 'same actor' inference has been accepted by several other circuit courts, and we now express our approval."[76] The court cautioned, however, that by approving of the inference, it was not "rul[ing] out the possibility that an individual could prove a case of discrimination in a similar situation. We hold only that the facts in this particular case are not sufficiently egregious to overcome the inference that CSC Logic's stated reason for discharging Davis was not pretext for age discrimination."[77]

Barely a month before the *Brown* decision was issued, a different panel of the Fifth Circuit had refused to apply the inference. *Haun v. Ideal Industries, Inc.*,[78] was an age discrimination case brought by Haun, a fifty-one-year-old employee who recently had been transferred to the company's southwestern division, then fired.[79] At trial, Haun introduced evidence that the employer had lied about why he had been fired, that the employer had lied when it told Haun that a job transfer (to Virginia) to which Haun sought a transfer was no longer available, and that the president of the company had told human resource officials not to hire older workers. The jury returned a verdict for Haun.

On appeal, the employer argued that there was insufficient evidence to support the verdict. It also argued that a strong inference of nondiscrimination existed because the supervisor who fired Haun was the same person who a

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[74]82 F.3d 651 (5th Cir. 1996).

[75]*See Brown*, 82 F.3d at 652–58. Subsequent Fifth Circuit cases have applied the same actor inference, citing *Brown*, but not *Haun*. *See, e.g.*, Faruki v. Parsons S.I.P., Inc., 123 F.3d 315, 320 n.3 (5th Cir. 1997); Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997).

[76]*Id.* at 658.

[77]*Id.*

[78]81 F.3d 541 (5th Cir. 1996).

[79]Unless otherwise noted, all facts and procedural history are taken from the court's opinion in *Haun*, 81 F.3d at 544–47.

year and one-half earlier had approved his transfer to the southwestern division. The Fifth Circuit disagreed, concluding that "[w]hile evidence of such circumstances is relevant in determining whether discrimination occurred, we decline to establish a rule that no inference of discrimination could arise under such circumstances."[80]

At a superficial level, the *Brown* and *Haun* decisions appear inconsistent. The *Brown* panel found the same actor inference determinative while the *Haun* panel did not. However, both opinions stressed that the inference was not to be used as an inflexible rule, but as a sort of default option in close cases.[81] Viewed this way, the cases are consistent: the *Brown* panel applied the inference because the plaintiff's evidence of discrimination was otherwise weak; the *Haun* panel did not apply the inference because the plaintiff's evidence was strong.

Another circuit that has approved the same actor inference is the Seventh Circuit, which did so in *Rand v. CF Industries, Inc.*[82] Robert Liuzzi, the president of CF Industries ("CFI"), hired Joseph Rand to serve as that corporation's Assistant General Counsel and Assistant Secretary.[83] Rand's first year on the job apparently went smoothly, and he received a favorable performance review, a large bonus, and the maximum salary increase. Shortly thereafter, however, Rand's relationship with CFI deteriorated rapidly. A co-worker alleged that Rand had harassed her by repeatedly demanding documents, second-guessing her judgment as to the appropriate search methodology, and embarrassing her during a telephone conference. Liuzzi also began hearing reports from CFI executives that Rand was arrogant and insulting, and that the executives no longer would go to him for advice. Less than two years after Liuzzi hired Rand, he fired him.

Rand sued CFI for age discrimination. CFI moved for summary judgment on the ground that Rand had insufficient evidence of pretext to go to a jury. Rand responded by arguing that his performance review, raise, and bonus proved that his work was satisfactory, and that Liuzzi's proffered

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[80]*Id.* at 546.

[81]*Compare Brown*, 82 F.3d at 658 (refusing to rule out possibility of applying inference), *with Haun*, 81 F.3d at 546 (stating that court "prefer[s] to look at the evidence as a whole, keeping in mind the ultimate issue: Whether age was a determinative factor in the employment decision").

[82]42 F.3d 1139 (7th Cir. 1994). For other Seventh Circuit cases involving the same actor inference, see Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 399 (7th Cir. 1997); EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996).

[83]Unless otherwise noted, all facts and procedural history are taken from *Rand*, 42 F.3d at 1141–47.

reasons for discharge therefore must be pretextual.[84] The district court granted CFI's motion, and the Seventh Circuit affirmed. The performance review, raise, and bonus, the court stated, were irrelevant to the determination of pretext, because they covered only Rand's first year of employment, whereas the negative reports Liuzzi had received about Rand involved events occurring in the second year of Rand's employment. The remaining evidence of pretext was too slim, the court held, to overcome the inference of nondiscrimination created by the fact that Rand was both hired and fired by Liuzzi within two years.

The Ninth Circuit, in an unpublished decision in *Bergan v. Standard Duplicating Machines Corp.*,[85] approved the same actor inference despite a four-year time lag between the plaintiff's hiring and firing.[86] The court, quoting *Lowe* and citing to *Rand* and *Proud*, noted the "logical inconsistency" in plaintiff's claim that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than four years later.[87] It therefore affirmed the district court's grant of summary judgment.[88] The Ninth Circuit subsequently applied the same actor inference again in the published decision of *Bradley v. Harcourt, Brace & Co.*[89]

The most recent circuit to adopt the same actor inference is the Second, which did so in *Grady v. Affiliated Central, Inc.*[90] Plaintiff Maxine Grady claimed that she was discriminated against on the basis of age when she was fired.[91] The employer moved for summary judgment and presented affidavits indicating that Grady had been fired for poor performance. The Second Circuit affirmed, relying in part on the fact that the person who made the firing decision was the same person who had hired her only eight days earlier.[92]

The decisions in *Lowe*, *LeBlanc*, *Rand*, *Brown*, *Bergan*, and *Grady* indicate that a large proportion of the federal circuit courts have adopted the same actor inference. Each of these cases involved an age discrimination claim that was defeated by the court's adoption of the same actor inference. Recently, however, courts have begun extending the inference to other

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[84]The court also found it significant that Rand's replacement was only nine years younger than Rand.

[85]No. 95-35364, 1996 WL 422876 (9th Cir. July 29, 1996).

[86]*See id.* at *2.

[87]*Id.* at **2–3.

[88]*See id.* at *3.

[89]104 F.3d 267, 270–71 (9th Cir. 1996).

[90]130 F.3d 553, 560–62 (2d Cir. 1997).

[91]Unless otherwise noted, all facts and procedural history are taken from the court's opinion in *Grady*, 130 F.3d at 554–57.

[92]*See id.* at 560–62.

protected classes, and to employment actions other than hiring and firing decisions.

D. Extension of the Inference to Other Protected Classes

Although the same actor inference developed in age discrimination cases, courts have applied the inference to other protected classes in the employment discrimination context.[93] In *Buhrmaster v. Overnite Transportation Co.*, the Sixth Circuit[94] became the first circuit to use the inference in the context of sex discrimination.[95] Mary Buhrmaster worked for Overnite for seven and one-half years.[96] She was never written up for any workplace violations and was repeatedly complimented by her supervisor for her competency and willingness to work hard. However, both an alleged affair with a subordinate and employee discontent with her management style caused several employees to complain, first to a supervisor and then to the home office in Virginia. These complaints ultimately led to Buhrmaster's discharge.

The district court instructed the jury on the same actor inference defense. Following a jury verdict for the employer, Buhrmaster appealed, arguing, among other things, that the same actor inference should be limited to age discrimination claims.[97] The Sixth Circuit disagreed, concluding that "[a]n individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class. This general principle applies regardless of whether the class is age, race, sex, or some other protected classification."[98]

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[93]*See, e.g.*, EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996) (race discrimination); Amirmoki v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995) (national origin discrimination); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 463–64 (6th Cir. 1995) (sex discrimination).

[94]For another Sixth Circuit case involving the same actor inference, see Hartsel v. Keys, 87 F.3d 795, 804 n.9 (6th Cir. 1996).

[95]*See Buhrmaster*, 61 F.3d at 463–64. For other sex discrimination cases involving the same actor inference, see Herr v. Airborne Freight Corp., 130 F.3d 359, 362–63 (8th Cir. 1997) (affirming district court's use of same actor inference as factor in granting employer's summary judgment motion in sex discrimination case); Richmond v. Johnson, No. 96-6329, 1997 WL 809962, at *2 (6th Cir. Dec. 18, 1997) (same).

[96]Unless otherwise noted, all facts and procedural history are taken form the court's opinion in *Buhrmaster*, 651 F.3d at 463–64.

[97]*See id.* at 464.

[98]*Id.*; *see also* Faruki v. Parsons S.I.P., Inc., 123 F.3d 315, 318, 320 n.3 (5th Cir. 1997) (applying same actor inference to claims of age and national origin discrimination); Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996) (applying same actor inference to claim of sex discrimination).

The same actor inference has been applied by at least one circuit court to disability claims as well.[99] In *Tyndall v. National Education Centers, Inc.*,[100] the Fourth Circuit considered a discharged plaintiff, hired by her employer with "full knowledge of her disability only two years earlier,"[101] and concluded that

> [w]hile *Proud* addressed a claim of age-based discrimination, the strong inference of nondiscrimination when the hirer and firer are the same person applies to disability discrimination claims as well. An employer who intends to discriminate against disabled individuals or holds unfounded assumptions that such persons are not good employees would not be apt to employ disabled persons in the first place.[102]

However, in *Susie v. Apple Tree Preschool & Child Care Center, Inc.*,[103] the U.S. District Court for the Northern District of Iowa cautioned that the same actor inference may not be appropriate for many, or even most, disability cases.[104] According to the court, the rationale behind the inference is predicated on the assumption that the person responsible for the hiring and firing knew, at the time of hiring, of the plaintiff's protected status.[105] If the decision maker was unaware, at the time of hiring, of the plaintiff's protected status, but learned of it during the plaintiff's employment, then no inference of a lack of discriminatory intent can be drawn from the fact that the hiring and firing were done by the same person. The hiring might be due more to the decision maker's ignorance of the plaintiff's protected status than to the decision maker's lack of discriminatory animus.

While a person's race[106] and sex are generally both apparent and immutable and a person's age is at least roughly apparent and its progression predictable, the same is not true of many disabilities. As the court pointed out in *Susie*, employers generally are prohibited from asking job applicants about the existence or severity of any disabilities.[107] Moreover, a disability may

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[99]*See* Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 215 (4th Cir. 1994).

[100]31 F.3d 209 (4th Cir. 1994).

[101]*Id.* at 211.

[102]*Id.* at 215.

[103]866 F. Supp. 390 (N.D. Iowa 1994).

[104]*See id.* at 397.

[105]*See id.*

[106]*See* Nieto v. L&H Packing Co., 108 F.3d 621, 624 (5th Cir. 1997) (applying same actor inference in national origin case); EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996) (applying same actor inference in race discrimination case).

[107]*See Susie*, 866 F. Supp. at 397 (citing 42 U.S.C. § 12112(d)(2) (1991)). However the *Susie* court noted that under 42 U.S.C. § 12112 (d)(2)(B), "[a] covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions." *Id.*

worsen over time, thus increasing the burden imposed on the employer to offer reasonable accommodation.[108] Thus, the *Susie* court concluded that unlike cases arising under Title VII and the Age Discrimination in Employment Act ("ADEA"),[109]

> the employer's knowledge of [an] employee's disability, the nature and scope of the disability, and the degree of a required reasonable accommodation may substantially vary after the individual's hiring. These factors . . . have the potential of minimizing, if not eliminating, the force of the inference of non-discrimination articulated in *Proud* and adopted in *Lowe*.[110]

Similarly, the U.S. District Court for the Northern District of Iowa has held that the same actor inference is inapplicable to a case involving religious discrimination where the plaintiff's religion was not known to the decision maker at the time of hire.[111]

Thus, while the same actor inference is broadly applicable to most types of discrimination claims, it is not appropriate where the decision maker was unaware of the plaintiff's membership in a protected class at the time of hiring. In cases where the plaintiff's status is at issue, the burden should be on the employer (who is invoking the inference) to prove that the decision maker had such knowledge at the time of hiring. Such an allocation makes sense because the employer is in the best position to prove what its decision maker did or did not know. The same actor inference also is inappropriate in disability claims where the plaintiff's disability has worsened since the hiring. In cases where the decision maker knew at the time of hiring that the plaintiff was disabled but the plaintiff claims that the disability had worsened by the time of discharge, the burden should be placed on the plaintiff to prove that the condition had worsened (or that the employer had regarded the condition as having worsened),[112] but the burden should be on the employer

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at 397 n.16.

[108]*See id.* at 397. For a general discussion of the reasonable accommodation burden imposed on employers by the Americans with Disabilities Act, see R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical Frameworks for Enforcing Title I of the Americans with Disabilities Act*, 3 DET. C.L. REV. 1163, 1175–84 (1993).

[109]Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621–634 (1994)).

[110]*Susie*, 866 F. Supp. at 397.

[111]*See* Vetter v. Farmland Indus., Inc., 884 F. Supp. 1287, 1302–03 (N.D. Iowa 1995), *rev'd on other grounds*, 120 F.3d 749 (8th Cir. 1997).

[112]*See* 42 U.S.C. § 12102(2)(C) (1994) (defining "disability" to include persons who are "regarded as" disabled). For further discussion of the meaning of this phrase, see R. Bales, *Once Is Enough: Evaluating When Person Is Substantially Limited in Her Ability to Work*, 11

to show that the decision maker did not know of the plaintiff's changed condition. Again, this allocation of the burdens reflects the parties' respective access to proof.

E. Extension of the Inference Beyond Hiring and Firing Decisions

The same actor inference originally required that the same employer representative both hired *and* fired the plaintiff. Many courts, with relatively little discussion, have softened either or both of these requirements.[113] An example of a case in which the court softened both requirements is *Richmond v. Johnson*.[114] In *Richmond*, the plaintiff, a police officer for the University of Tennessee (the "University"), sued the University claiming that it discriminated against her on the basis of sex when a male officer was chosen instead of her for a promotion to the position of lieutenant.[115] The Sixth Circuit affirmed the district court's grant of the University's summary judgment motion, noting that the same employer representative (the chief of the University's police force) responsible for the failure to promote the plaintiff to lieutenant had promoted the plaintiff to sergeant the year before.[116] Thus, the same actor inference was applied despite the facts that the plaintiff was not fired (she was denied a promotion) and that the employer representative had not hired her (he had given her a lower-ranking promotion the year before).[117]

The softening of these requirements, particularly the extension of the inference to failure-to-promote cases, fails to account for the possibility that a hirer with discriminatory animus might be willing to hire a woman or minority for a menial or entry-level job but at the same time might be unwilling to promote that person to a job with higher status or responsibility.

HOFSTRA LAB. L.J. 203, 221–25 (1993).

[113]*See, e.g.*, Richmond v. Johnson, No. 96-6329, 1997 WL 809962, at *2 (6th Cir. Dec. 18, 1997) (discussed *infra* at notes 114–17 and accompanying text); Hartsel v. Keys, 87 F.3d 795, 804 n.9 (6th Cir. 1996) (applying inference where same employer representative gave plaintiff temporary promotion into vacant position but later filled job with someone else); Fucci v. Graduate Hosp., 969 F. Supp. 310, 319 (E.D. Pa. 1997) (applying inference to plaintiff who had been promoted approximately one year before his discharge); Caussade v. Brown, 924 F. Supp. 693, 703 (D. Md. 1996), *aff'd*, 107 F.3d 865 (4th Cir. 1997) (same); Holmes v. Marriott Corp., 831 F. Supp. 691, 701–03 (S.D. Iowa 1993) (same); Town v. Michigan Bell Tel. Co., 568 N.W.2d 64, 70 (Mich. 1997) (applying inference to plaintiff who had been transferred as result of corporate merger).

[114]1997 WL 809962, at *2.

[115]*See id.* at *1.

[116]*See id.* at **2–3.

[117]*See id.* at **1–3.

In *Griggs v. Duke Power Co.*,[118] for example, the employer was willing to hire African-Americans to shovel coal, but unwilling to promote or transfer them to more desirable positions.[119] This indicates that the apparent lack of discriminatory animus in the original hiring has little or no probative value to show lack of discriminatory animus in a subsequent decision not to promote.

F. The Impact of Time

The time period between the hiring and firing in *Proud* was six months;[120] in *Lowe* it was two years.[121] Plaintiffs in several subsequent cases have argued that courts should disregard the inference if there is a long period of time between the plaintiff's hiring and firing.[122] The courts that have considered this issue, however, have declined to disregard the inference entirely, and instead have adopted a "sliding scale" of sorts which recognizes that the length of time between hiring and firing only affects the strength of the inference that discrimination was not a factor in the employee's discharge.[123] For instance, the *Buhrmaster* court held that a jury could draw the inference of nondiscrimination when the length of time between the hiring and firing was seven and one-half years.[124]

The length of time between hiring and firing is more important in some cases than others. While it is relatively unlikely that a supervisor will acquire discriminatory animus over a short period of time, and only marginally more likely that this will occur over a longer period of time, plaintiffs should not be foreclosed from defeating the inference by showing that the supervisor recently has joined the Ku Klux Klan, or has made disparaging remarks about women following his recent divorce. Similarly, a weakening of the temporal element is not sensitive to the possibility that corporate culture may change over time. If, for example a small company is taken over by a new owner who has an aversion to a protected class, this animus may taint the employment

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[118]401 U.S. 424 (1971).

[119]*See id.* at 427.

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

[121]*See* Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174 (8th Cir. 1992)

[122]*See, e.g.*, Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995); Freund v. Westlake Imports, Inc., No 94-C2024, 1997 WL 156543, at *3 (N.D. Ill. April 1, 1997) (stating that "the eight-year time span between [plaintiff's] hiring and firing weakens the inference").

[123]*See Buhrmaster*, 61 F.3d at 464. *But see* Kastel v. Winnetka Bd. of Educ., 946 F. Supp. 1329, 1335 (N.D. Ill. 1996) (rejecting inference where time span between hiring and firing was 31 years).

[124]*See Buhrmaster*, 61 F.3d at 462, 464.

decisions made by middle managers, rendering the inference inaccurate. Thus, the inference is not particularly useful when there is some indication that the supervisor's attitude may have changed since the date of the original hiring.

Moreover, the period of time between hiring and firing may be particularly relevant when the protected classification on which plaintiff bases her claim is one that can change with time. For instance, the *Buhrmaster* court noted that a shorter period of time may be required to infer a lack of discrimination in age discrimination cases, since "an employee hired at thirty is not the same employee fired at sixty" (although, presumably, neither is the decision maker).[125] Likewise, a shorter period of time should be required in disability cases where the disability is degenerative, because the nature of the disability, as well as the hardship to the employer of providing the legally required reasonable accommodation, can change over time.[126]

This "sliding scale" approach to the relevance of the time between hiring and firing affords courts maximum flexibility in determining when and how the same actor inference should be used. In cases in which the protected classification on which plaintiff bases her claim is an immutable one such as race or sex, the length of time is unlikely to be critical, absent a showing that the supervisor's attitude has changed toward members of the protected class. However, the inference should be given less weight or disregarded entirely when the length of time is long and the nature of the plaintiff's classification has changed significantly in the interim.

G. Circuits Rejecting the Inference

To date, three circuits either have rejected the application of the same actor inference in particular cases or have rejected the inference outright. The Fifth Circuit, as discussed in Part III.B above, first rejected the application of the inference under the circumstances in *Haun v. Ideal Industries, Inc.*,[127] but then adopted the inference in *Brown v. CSC Logic, Inc.*[128] These opinions can be reconciled by recognizing that the Fifth Circuit uses the inference as a sort of default option in close cases: it applies the inference when the plaintiff's evidence of discrimination otherwise is weak, but does not apply the inference when the plaintiff's evidence is strong.

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[125]*Id.* at 464 n.2; *see Kastel*, 946 F. Supp. at 1335.

[126]*See supra* notes 106–10 and accompanying text.

[127]81 F.3d 541, 546 (5th Cir. 1996) (discussed *supra* at notes 78–80 and accompanying text).

[128]82 F.3d 651, 658 (5th Cir. 1996) (discussed *supra* at notes 74–77 and accompanying text).

The Eighth Circuit seems to have adopted a similar approach. As discussed in Part III.C, the Eighth Circuit's case of *Lowe v. J.B. Hunt Transport, Inc.*,[129] was one of the initial circuit court decisions to adopt the inference.[130] However, in *Johnson v. Group Health Plan, Inc.*,[131] the Eighth Circuit declined to apply the inference.[132] Plaintiff Lucille Johnson was a thirty-eight-year employee of Physicians Clinic when the company was bought by Group Health Plan ("GHI").[133] GHI initially hired Johnson to manage the clinic, but fired her less than a year and one-half later. GHI moved for summary judgment, and, citing the Eight Circuit's *Lowe* decision, argued that the same actor inference undermined Johnson's argument that she had been fired because of her age. The Eighth Circuit disagreed, however, finding that application of the inference was inappropriate because evidence existed that GHI may have hired Johnson with the sole purpose of helping them transition through the buyout period, but then fired her because of her age.[134]

The Third Circuit case of *Waldron v. SL Industries, Inc.*,[135] constitutes a much more decisive rejection of the same actor inference than either the Fifth Circuit's *Haun* decision or the Eighth Circuit's *Johnson* decision.[136]

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[129]963 F.2d 173, 174–75 (8th Cir. 1992) (discussed *supra* at notes 67–69 and accompanying text).

[130]*See id.*

[131]994 F.2d 543 (8th Cir. 1993).

[132]*See id.* at 547–48.

[133]Unless otherwise noted, all facts and procedural history are taken from the court's opinion in *Johnson*, 994 F.2d at 544–48.

[134]*See also* Brown v. Stites Concrete, Inc., 994 F.2d 553, 566 (8th Cir. 1993) (en banc) (vacating entire panel decision, granting rehearing only as to issue unrelated to whether same actor inference should have been given as jury instruction, and reinstating panel decision except for that portion ruling on issue considered in rehearing). In this case, the plaintiff was hired at age 75, and then fired approximately two years later. The district court failed to give a jury instruction on the same actor inference, and the jury returned a verdict in favor of the plaintiff. *See id.* at 567–68 (Loken, J., dissenting). On appeal, a divided panel of the Eighth Circuit stated:

> Some may argue that because [defendant] hired [plaintiff] when he was at an advanced age, this proves that [defendant] could not have intentionally discriminated against [plaintiff] because of his age. The weakness of this reasoning becomes apparent when it is extended to other protected groups. No one would argue that an employer who hires a minority or a woman is incapable of intentionally discriminating against that employee in the workplace.

Id. at 567 n.8. The dissenting judge argued that the instruction was required by the Eighth Circuit's earlier *Lowe* decision, and would have reversed on this ground. *See id.* at 568 (Loken, J., dissenting). The effect of the Eighth Circuit's action was to leave open the issue involving the same actor inference. *See id.* at 556–57.

[135]56 F.3d 491 (3d Cir. 1995).

[136]*See id.* at 496 n.6.

Reed Waldron was employed by SL Waber, Inc. for fourteen years, but was laid off in a reorganization.[137] Two years later, Waber rehired Waldron, then sixty-one years old, as a consultant.[138] Two years after that, he was fired and replaced with a thirty-two-year-old.[139] Waldron sued Waber claiming age discrimination.[140]

The district court granted Waber's motion for summary judgment, and stated that although its decision did not rely on the same actor inference, the court did "accept the logic that underlies" the inference.[141] On appeal, the Equal Employment Opportunity Commission ("EEOC")[142] submitted an amicus brief in which it opposed adoption of the same actor inference, stating that

> where, as in *Proud*, the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. But this is simply evidence like any other and should not be accorded any presumptive value.[143]

The EEOC further argued that the inference was inappropriate because evidence existed that Waber may have hired Waldron with the intention of using his skills for a few years while grooming someone younger for the position, and then fired Waldron because of his age.[144] The Third Circuit agreed. After explicitly adopting the EEOC's argument that "same actor" evidence should not be accorded presumptive value, the court concluded that

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[137]*See id.* at 493.

[138]*See id.*

[139]*See id.*

[140]*See id.*

[141]Waldron v. SL Indus., Inc., 849 F. Supp. 996, 1006 n.14 (D.N.J. 1994), *rev'd*, 56 F.3d 491 (3d Cir. 1995). The primary reason for the Third Circuit's reversal of the district court's decision was the district court's holding that a plaintiff in an employment discrimination case must prove, in step three of the *Burdine* burden-shifting framework, both that the employer's proffered reasons for the adverse employment action were false, and that the adverse employment action was really motivated by discrimination. *See Waldron*, 56 F.3d at 495; *Waldron*, 849 F. Supp. at 1004 n.11. The Third Circuit held that a plaintiff need only demonstrate that the employer's proffered reasons were false. *Waldron*, 56 F.3d at 495. The disagreement among the circuits as to what is required by the third step of the *Burdine* burden-shifting framework is discussed *supra* at notes 38–44 and accompanying text.

[142]The EEOC is the administrative agency that administers the federal antidiscrimination statutes. *See generally* RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 77–88 (1997).

[143]*Waldron*, 56 F.3d at 496 n.6 (citing EEOC Brief at 22). For a discussion of *Proud v. Stone*, 945 F.2d 796 (4th Cir. 1991), see *supra* notes 62–66 and accompanying text.

[144]*See id.*

"even if we were inclined to apply *Proud* in some circumstances, this case would be an inappropriate candidate for the presumption."[145]

In addition to these circuit court cases, two other courts have imposed a significant limitation on the reach of the same actor inference. Both the U.S. District Court for the Southern District of Iowa and the Maryland Court of Appeals (the state's highest court) have held that the inference is not applicable to cases where the plaintiff has presented direct evidence of discrimination.[146] To date, no court has applied the inference in a case involving the "direct evidence" or "mixed motive" proof scheme for disparate treatment cases.

Such a limitation on the reach of the same actor inference makes sense. Under the "direct evidence" or "mixed motive" proof scheme, once the plaintiff has made a strong showing of discrimination, the burden of proof (both the burdens of production and persuasion) shifts to the employer to prove that the employer would have made the same employment decision even if it had not relied on the illegitimate criteria.[147] An "inference" of nondiscrimination makes little sense in this context, unless the "inference" is given the much stronger force of a presumption[148] and thereby is deemed sufficient to meet the employer's burden of proof. Giving the same actor inference such presumptive force, however, would constitute a significant departure from precedent.[149] In any event, as discussed below, the same actor inference should not be given the strength of a presumption.

IV. COMPETING POLICY CONSIDERATIONS

If the circuits are tallied as if on a scorecard, the result is six circuits (the First, Second, Fourth, Sixth, Seventh, and Ninth) that have unconditionally adopted the same actor inference and given it some varying degree of weight, two circuits (the Fifth and the Eighth) that have adopted the inference but have declined to apply it in certain circumstances, and one circuit (the Third) that has explicitly rejected the inference. This Part of this Article considers the policy arguments that courts have made both for and against the inference.

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[145] *Id.*

[146] *See* Holmes v. Marriott Corp., 831 F. Supp. 691, 703 (S.D. Iowa 1993); Molesworth v. Brandon, 672 A.2d 608, 618–19 (Md. 1996).

[147] *See supra* notes 45–54 and accompanying text.

[148] *See* Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 215 (4th Cir. 1994) (stating that *Proud* creates "strong presumption of nondiscrimination"); *Moles worth*, 672 A.2d at 619 (characterizing same actor inference as presumption).

[149] *See supra* notes 45–52 and accompanying text.

Courts have advanced two arguments in support of the same actor inference. The first is that the inference assists in the dismissal of frivolous claims by providing a means for quick disposal of easy cases. Where the inference is given little weight, as the EEOC urged in *Waldron*,[150] or where the jury is merely instructed that they *could* infer a lack of discrimination from the fact that the plaintiff was hired and fired by the same individual, the inference seems relatively uncontroversial. Indeed, one suspects that many of the cases adopting the same actor inference would have come out identically even if the court had not used the inference. However, if the inference is outcome-determinative—for example, if a court grants an employer's summary judgment or directed verdict motion but would not have done so absent use of the inference—a stronger justification is needed.

The second argument in favor of the same actor inference is that it helps ameliorate the perverse hiring incentives that antidiscrimination laws have on employers. As Donohue and Siegelman pointed out in their article that precipitated the same actor inference, far more discrimination suits are brought by fired employees than by nonhired applicants.[151] Thus, the antidiscrimination laws may actually create a net *disincentive* for employers to hire applicants who are members of protected classes, since the probability of an employee bringing a discriminatory firing suit is substantially higher than the probability that an unsuccessful applicant will bring a discriminatory failure-to-hire suit,[152] and the probability of a suit being brought by a member of a protected class is substantially higher than the probability of a suit being brought by someone who is not in such a class. Thus, the litigation-averse employer will prefer to hire white males, because rejected minority applicants are unlikely to sue and because a white male hire is less likely to sue for discriminatory discharge than a hire in a protected class.[153]

The same actor inference operates in theory to reduce the cost disparity between hiring white males and hiring persons in protected classes. The inference does this by making it harder for hired-but-then-fired employees to

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[150]*See* Waldron v. SL Indus., Inc., 56 F.3d 491, 496 (3d Cir. 1995) (discussed *supra* at notes 135–45 and accompanying text).

[151]*See* Donohue and Siegelman, *supra* note 56, at 1015–16.

[152]*See id.* at 1024; Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 519 (1987).

[153]The phrase "protected class" is a misnomer, because all individuals are protected by Title VII. *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–80 (1976); *see also* E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 483–84 (1998). For the sake of simplicity, however, we use the phrase in the same way that the courts consistently use it—to refer to racial minorities, women, and other persons who Title VII was specifically designed to protect.

sue, at least insofar as the same individual was responsible for the hiring and firing. By reducing the number of suits brought by such employees (or at least by reducing the costs of defending them or the likelihood of paying out a judgment), the inference in theory helps restore the intended purpose of antidiscrimination legislation, which was to encourage the hiring of members of protected classes.[154]

The problem, however, is that the inference is so underinclusive that its practical effect on hiring decisions is most likely negligible. The inference arises in a relatively small proportion of discrimination cases, most likely because the job mobility of both the plaintiff and the person doing the hiring makes it unlikely that any given individual will be both hired and fired by the same person. Moreover, even when the hirer and firer are the same, the effect of the inference is at best merely to reduce, but not to eliminate, the disincentive to hire protected classes. Assuming that a lawsuit is baseless and that the inference helps the employer ultimately to prevail, the employer nonetheless must defend the suit at least through summary judgment, and (if the inference is used only as the basis for a jury instruction) perhaps through trial. Even with the same actor inference, then, it is still rational for an employer to prefer to hire white males. Thus, both for this reason and because the inference applies to a relatively small proportion of employment discrimination cases, it is unlikely that the same actor inference will further, in any significant way, the goal of removing the legal disincentives to hire members of protected classes.

The argument against the same actor inference is simply that the act of hiring a member of a protected class does not by itself prove a nondiscriminatory motive in a subsequent employment decision.[155] For example, as the cases discussed in Parts III.D and III.E illustrate, the plaintiff's classification could change between the date of hiring and the date of firing (the plaintiff could get older; the plaintiff's disability could worsen), and this could cause a negative reaction by the decision maker giving rise to a discriminatory firing. Similarly, the decision maker's attitude toward persons in plaintiff's protected class could change, as with regard to the opposite sex following a bitter divorce. A final example is that the decision maker might hire members

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[154]*See* Proud v. Stone, 945 F.2d 796, 798 (4th Cir. 1991) ("Courts must promptly dismiss such insubstantial claims in order to prevent the statute from becoming a cure that worsens the malady of age discrimination.").

[155]*Cf.* Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1001–02 (1998) (noting that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex"); Castaneda v. Partida, 430 U.S. 482, 499 (1997) (rejecting presumption that members of one "definable group will not discriminate against other members of their group").

of protected classes under legal or social pressure to diversify the workplace; this would not necessarily change the decision maker's attitude toward persons in the protected classes, and they might later be held to a higher standard or otherwise be treated differently once on the job.

For these reasons, any inference that can be drawn from the fact that the hiring and firing decisions were made by the same person is necessarily weak, and that the same actor inference therefore should not be given a strong presumptive effect. To discuss precisely what effect the inference should be given, however, it first is necessary to discuss the nature of inferences and presumptions.

V. INFERENCES AND PRESUMPTIONS

Although the words "inference" and "presumption" often are used interchangeably,[156] their effect when applied to a given case can be dramatically different.[157] An inference is a logical conclusion that a fact finder is permitted, but not required, to make based on circumstantial evidence.[158] The fact finder may draw the inference or not, as its experience and the other evidence may move it.[159] An example is the pretext-permissive approach to the third step of the *McDonnell Douglas-Burdine* framework for deciding disparate treatment cases:[160] the demonstration of pretext permits but does not require the fact finder to conclude that the employer's conduct was motivated by discrimination. The demonstration of pretext therefore creates an *inference* of discrimination.

A presumption, on the other hand, is a conclusion that the fact finder is *required* to make if the party against whom it operates fails to rebut it.[161] The burden of rebuttal may be a relatively light burden of production or a heavier

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[156]*See* Joel S. Hjelmaas, *Stepping Back from the Thicket: A Proposal for the Treatment of Rebuttable Presumptions and Inferences*, 42 DRAKE L. REV. 427, 430–31 (1993); Note, *Presumptions in the Law of Iowa*, 20 IOWA L. REV. 147, 147 (1934); *see, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.").

[157]*See* Hjelmaas, *supra* note 156, at 430.

[158]*See id.* at 431.

[159]*See id.*; Hoffman, *supra* note 20, at 892.

[160]*See supra* notes 35–44 and accompanying text.

[161]*See* Hoffman, *supra* note 20, at 894–95; Hjelmaas, *supra* note 156, at 431; Addison M. Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431, 438 (1980–81) (stating that presumption is "coercive: once the basic facts are established, the trier of fact is compelled to find the ultimate fact unless evidence of the nonexistence of the ultimate fact has been introduced").

burden of persuasion, and may be the deciding factor in a case.[162] An example is, again returning to the *McDonnell Douglas-Burdine* framework, the employer's duty to articulate a legitimate, nondiscriminatory reason for the adverse employment action once the plaintiff has established a prima facie case. If the employer remains silent, the plaintiff automatically is entitled to judgment. The plaintiff's prima facie showing therefore creates a presumption of discrimination (albeit a light one, because the employer's burden is only one of production). An example of a heavier presumption is the burden that shifts to the employer once a plaintiff has shown direct evidence or (in some circuits) particularly strong circumstantial evidence of discrimination. In this instance, the employer bears both the burdens of production and persuasion to prove that it would have made the same employment decision even absent its consideration of the illegitimate criteria.[163]

Courts create presumptions for a variety of reasons. Perhaps the most common is probability: "[P]roof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it."[164] A second reason is to correct an imbalance in the parties' access to proof.[165] An example is the presumption of a bailee's negligence upon proof that the property was damaged while in the bailee's possession.[166] Because the bailee controlled the property at the time it was damaged, the bailee also controls the access to proof as to how it was damaged. A third reason is to avoid an impasse caused by lack of evidence, as with presumptions concerning the survivorship of persons who die simultaneously.[167] A fourth is to further a result deemed

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[162]*See* Hjelmaas, *supra* note 156, at 431.

[163]*See supra* notes 32–34 and accompanying text.

[164]MCCORMICK ON EVIDENCE § 343 (John William Strong ed., 4th ed. 1992). Professor Morgan explains that this

> may indicate one or both of two things. [First], it may indicate that the fact presumed is so usually a concomitant of the basic facts that it would be a waste of time in the ususal case to take testimony .... [Second, t]he party against whom the presumption operates is relying upon the existence of the unusual, and this might well require him to make it appear more probable than not; that is, to produce a preponderance of the evidence. In the absence of other factors pertinent to the allocation of the burden of persuasion, why should not the trier whose mind is in equilibrium be required to find for the usual rather than the unusual?

Edmund M. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 929–30 (1931).

[165]*See* Hjelmaas, *supra* note 156, at 434–35; Morgan, *supra* note 164, at 926–28.

[166]*See* U.C.C. § 7-403(1)(b) (1995).

[167]*See* MCCORMICK, *supra* note 164, at § 343; Morgan, *supra* note 164, at 924–26.

socially desirable,[168] as with the presumption that a child born in wedlock is legitimate.[169]

Courts create inferences for much the same reasons. Many courts adopting the same actor inference, for instance, have done so explicitly because they believe that the facts underlying the inference make it probable that no discrimination occurred,[170] and because they wish to further the socially desirable result of minimizing the legal disincentives to hire the persons whom the antidiscrimination statutes were designed to protect.[171] Inferences, however, lack the efficiency advantages of presumptions: because the finder of fact still *may* make a finding adverse to the inference, the party in whose favor the inference operates is not relieved of the burden of proof even if the party against whom the inference operates proffers no evidence to rebut the inference. In summary judgment parlance, there is still a fact issue. To some degree, then, an inference seems like little more than a shorthand way for courts to say that they find a given fact or set of facts particularly significant.

This, we believe, is the practical effect of the application of the same actor inference to employment discrimination cases. Recall that courts apply the inference in the third step of the *Burdine* framework—at which point the plaintiff has the burdens of both production and persuasion.[172] In this context, it would make little sense to treat the same actor inference as a presumption that shifts the burden of proof to the plaintiff, because the plaintiff already bears the burden of proof.[173] It similarly would make little sense to treat it as an inference that would permit but not require the fact finder to determine that no discrimination occurred, because, again, the plaintiff already bears the much heavier burden of proving that discrimination occurred. The "inference," therefore, is neither an inference nor a presumption. Rather, it reflects a value judgment by the court that the plaintiff should be held to a higher standard of proof than otherwise would be necessary. The plaintiff must

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[168]*See* Hjelmaas, *supra* note 156, at 435; Morgan, *supra* note 164, at 930.

[169]*See* Hjelmaas, *supra* note 156, at 435.

[170]*See* Tyndall v. National Educ. Ctrs., Inc., 31 F.3d 209, 214–15 (4th Cir. 1994); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 175 (8th Cir. 1992).

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

[172]*See supra* notes 35–44 and accompanying text.

[173]An exception would be in "pretext-permissive" circuits. In these circuits, the finder of fact may, but is not required to, infer discrimination from the fact that the plaintiff has disproved the employer's legitimate nondiscriminatory reason for the adverse employment action. *See* Davis, *supra* note 28, at 715. The same actor inference, if applied as a presumption, would then have the effect of requiring the plaintiff to provide additional evidence of discrimination beyond the disproof of the employer's articulated reason. We have not, however, found a single case in which a court has used the same actor inference in this fashion.

produce more or better evidence of discrimination to get to a jury or to sustain a verdict than the plaintiff would have to show if the hirer and firer were not the same person.

This is an appropriate use of the inference. The fact that in a given case the hiring and firing decisions were made by the same person makes it somewhat less likely that discrimination occurred, but does not *prove* that no discrimination occurred. Courts therefore should be free to apply the inference in summary judgment or directed verdict proceedings as part of the third step in the *Burdine* framework, but the inference should only be given significant weight when the plaintiff's evidence of discrimination otherwise is weak. Similarly, with regard to jury instructions, there is little harm in instructing jurors that they may but are not obligated to find a lack of discrimination from the fact that the hiring and firing decisions were made by the same person. Used in these ways, however, it is apparent that the impact of the inference is weakened considerably. If plaintiff's evidence of discrimination is weak, then it is likely that the court would rule for the defendant regardless of whether it applies the inference. Similarly, the inclusion of the inference by the court in jury instructions accomplishes little more than might otherwise be accomplished by skillful counsel in closing argument.[174]

VI. CONCLUSION

The same actor inference provides a simple rationale for disposing of easy cases, and reduces in some small degree the legal burden that Title VII places on employers who hire minority employees. It does not, however, provide absolute proof that discrimination has not occurred. For this reason, in *Burdine*-type cases where the plaintiff's circumstantial evidence of discrimination is weak, courts should be free to apply the inference in summary judgment or directed verdict proceedings as part of the third step in the *Burdine* framework. The effect of the inference should be to hold the plaintiff to a slightly higher standard of proof than would be necessary absent the facts creating the inference. However, the inference should be given no presumptive effect in direct evidence cases or where the plaintiff's circumstantial evidence of discrimination is particularly strong.

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[174]*See* Molesworth v. Brandon, 672 A.2d 608, 620 (Md. 1996) ("Our refusal to adopt the 'same actor inference' as a presumption in this case does not preclude [defendant] from making this argument to the jury.").