Notre Dame Law Review

Volume 95 | Issue 3 Article 3

3-2020

Into the Weeds: Modern Discrimination Law

Sandra F. Sperino
University of Cincinnati College of Law

INTO THE WEEDS: MODERN DISCRIMINATION LAW

*Sandra F. Sperino**

Introduction

Modern discrimination law is the law of minutiae. Judicial energy is not primarily focused on large questions about why workplace inequality exists or how to prevent it. It is not even focused on whether the plaintiff in a particular case was treated differently because of a protected trait. Instead, judicial energy centers on interpreting and applying an ever-growing phalanx of complicated court-created ancillary doctrines.

Since the 1970s, the federal courts have created a number of frameworks to analyze discrimination claims.[1] Each framework provides a roadmap for proving a certain theory of discrimination. Over time, the courts have added bells and whistles to these basic roadmaps. These court-created ancillary doctrines or subdoctrines require an ever-increasing amount of judicial attention.[2]

While legal scholars have challenged the ancillary doctrines individually,[3] this Article examines them collectively. When viewed collectively, it is easier to see how the system of creating and using ancillary doctrines is signif-

* Judge Joseph P. Kinneary Professor of Law, University of Cincinnati College of Law. I am indebted to faculty who provided insightful comments and questions through the Notre Dame School of Law Faculty Colloquium, the Saint Louis University School of Law Faculty Colloquium, and the University of Missouri School of Law Faculty Colloquium.

1 *See generally* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 Mich. L. Rev. 69 (2011) (providing an overview of the frameworks used to evaluate disparate treatment, harassment, retaliation, and disparate impact).

2 This scenario is not unique to discrimination law. *See, e.g.*, Jane B. Baron, *Romancing the Real*, 57 U. Miami L. Rev. 573, 577 (2003) (describing similar situation in zoning law); Randall R. Rader, Foreword, *Always at the Margin: Inequitable Conduct in Flux*, 59 Am. U. L. Rev. 777, 785–86 (2010) (describing a similar problem in patent law).

3 *See, e.g.*, Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L.J. 728, 731–35 (2011) (explaining deficiencies in the "similarly situated" test); Natasha T. Martin, *Pretext in Peril*, 75 Mo. L. Rev. 313, 347–51 (2010) (critiquing the "stray remarks" doctrine); *see also* Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 Mo. L. Rev. 149, 179–80 (2012) (similarly critiquing the stray

icantly flawed.[4] Any benefits that derive from it are outweighed by its problems.

First, the subdoctrine jurisprudence is ineffective. As this Article will demonstrate, the court-created subdoctrines create confusion in even the simplest cases. A judge can use the current doctrine to reach conflicting results: either granting summary judgment for the employer or letting a case go to trial.[5] According to the established ancillary doctrines, either outcome can be justified.

Second, by looking at the ancillary doctrines together, rather than as separate concepts, a pattern emerges. In each instance, courts created an employment-discrimination-specific paradigm that is one or two steps removed from the statutory language, using new language and concepts that are not found in the original statutes. Any objective review of the new language reveals scores of unanswered questions hidden within it. After the courts create the particular framework or defense, years or decades of confusion follow, as judges try to interpret the original judicially created idea.

At times, the judges find words within the original concept and turn these words into terms of art. The terms of art derive from the judicially created concept, and not from the statutes themselves. Judges then spend time defining these terms of art, which are yet another step removed from the original statutes.

The terms of art also contain terms of art. Judges must then define these secondary terms of art, which are at least three steps removed from the original statutes. At times, the original terms of art or secondary terms of art appear to conflict with or are in tension with other court-created terms of art. The courts must then resolve how these terms of art relate to one another. These issues are even further removed from the statute.

In some instances, judges interpret the framework, doctrine, or defense in a particular way, and then encounter a factual scenario that does not fit

---

comments doctrine, and particularly the way in which courts employ the "stray" designation in determining the evidentiary worth of comment evidence).

4 At the outset, it is worth noting critiques about legal reasoning generally. *See, e.g.*, Baron, *supra* note 2, at 573 ("Whether we talk doctrine, policy, or values, we, along with our opponents, play a fundamentally empty and meaningless game with fundamentally empty and meaningless forms. You cannot advance your cause with mere shadows."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1349–50 (1988); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 5 (1984).

5 For a similar critique of statutory interpretation canons, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950), *as reprinted in* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS app. C at 521–28 (1960); and LLEWELLYN, *supra*, app. C at 528–35. *But see* Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1225 (defending the apparent inconsistencies in the canons as "stem[ming] from the fact that the implicatures arising from the maxims are always cancelable and often have to be weighed against one another to determine which implicature is the strongest in a given case").

well within the original iteration. Judges then formalize an exception. At times, they have then created exceptions to the exceptions. The exceptions and the exceptions to the exceptions are not always neatly defined, causing confusion. In addition, circuits formalize different exceptions, creating circuit splits. While each of the ancillary doctrines discussed in this Article can be critiqued individually, it also is important to illuminate the pattern of doctrines, subdoctrines, and sub-subdoctrines that is a structural feature of this court-created jurisprudence.

Third, this Article argues that any new court-created doctrines are subject to these same structural problems. It shows how "cat's paw" doctrine is heading down the same path as older subdoctrines. And, as the courts continue to add more and more doctrines, the field is beginning to collapse on itself. The court-created doctrines collide with one another, creating questions that not only cannot be resolved in any principled way but also do not help us understand why discrimination exists or how to stop it. This is, in part, because the subdoctrines are so disconnected from the statutes' texts and purposes.

Finally, I show how the ancillary doctrines underestimate the complexity of the modern workplace and enshrine factual inferences that are not universally true. These problems are baked into all of the ancillary doctrines. Courts should abolish most, if not all, of the court-created ancillary doctrines and create a statement rule strongly discouraging courts from creating new ancillary doctrines in the future. I propose a way forward that relies on statutory text, Supreme Court caselaw relating to context, and values enshrined in the Federal Rules of Evidence and Federal Rules of Civil Procedure. These sources all caution judges to be careful about how much they know and can infer from a particular set of facts, and to judge evidence in its totality.

This Article proceeds as follows. Part I explores how the court-created doctrines do not provide a principled basis for judges to resolve even simple cases. Part II focuses on several ancillary doctrines and shows how each of these doctrines is removed from the text and purposes of the statute. Each doctrine has spawned its own set of terms of art, exceptions, and subdoctrines, which draw the courts into endless questions about how to interpret and apply the court-created doctrine. Part III discusses how a new ancillary doctrine, cat's paw theory, is prone to these same problems. Part IV explores how employment discrimination law is collapsing in on itself as courts are called upon to resolve conflicts between the ancillary doctrines. Part V shows how the ancillary doctrines contain mistaken factual inferences and underestimate the complexity of the American workplace. It proposes that courts abolish or diminish the ancillary doctrines and create a statement rule strongly discouraging courts from creating new ones.

I. The Doctrines Are Ineffective

One way to test the effectiveness of the ancillary doctrines is to determine whether they help courts resolve cases. In the employment discrimination context, judges are often asked to determine whether it is proper to

grant an employer summary judgment or whether there are enough factual disputes to allow the case to go to trial. This Part will demonstrate how even in the simplest kinds of employment discrimination cases, the ancillary doctrines are not effective.

All of the ideas discussed in this Article ostensibly stem from the courts' interpretations of the federal discrimination statutes. Title VII is the cornerstone federal employment discrimination statute. Title VII prohibits an employer from discriminating against a worker because of race, sex, national origin, color, or religion.[6] Title VII's main operative provision consists of two subparts. Under the first subpart, it is an unlawful employment practice for an employer "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."[7]

Under Title VII's second subpart, it is unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[8] These two subparts form the foundation of Title VII's text.[9] The Age Discrimination in Employment Act (ADEA) contains similar main language,[10] and the Americans with Disabilities Act (ADA) contains similar concepts, although not always stated in the same language.[11]

One common scenario in discrimination law unfolds as follows. A supervisor refers to a worker using racist or sexist slurs or epithets. In some cases, the worker then uses the slurs or epithets as the basis of a harassment claim. In other cases, the worker uses the slurs or epithets to show that the supervisor took a negative action because of race or sex. Even though these are the most basic employment discrimination cases, it is difficult to predict whether such cases will go to jury trial or whether the court will grant summary judgment in the employer's favor.

Take for example the following case. In *Boyer-Liberto v. Fontainebleau Corp.*, a worker filed a racial harassment claim submitting evidence her supervisor called her "porch monkey" twice.[12] Although the judge did "not question that the term is highly offensive to African Americans," the judge found

6 *See* 42 U.S.C. § 2000e-2(a) (2012).

7 *Id.* § 2000e-2(a)(1).

8 *Id.* § 2000e-2(a)(2).

9 Congress amended Title VII in 1991. *See* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071. However, this does not change the fact that the foundational text of Title VII is contained in § 2000e-2(a).

10 29 U.S.C. § 623(a) (2012).

11 42 U.S.C. § 12112.

12 Boyer-Liberto v. Fontainebleau Corp., No. 12-212, 2013 WL 1413031, at *2–3 (D. Md. Apr. 4, 2013), *vacated en banc*, 786 F.3d 264 (4th Cir. 2015). The supervisor denied making the comments. *Id.* Throughout this Article, I refer to the evidence submitted by the parties. Often, the employer contests the plaintiff's evidence. I am not making any

the isolated comments did not meet the required level of seriousness to count as harassment under federal law.[13] The judge used the "severe or pervasive" doctrine to grant summary judgment for the employer.[14]

The "severe or pervasive" concept comes from the Supreme Court's opinion in *Meritor Savings Bank, FSB v. Vinson*, in which the Court recognized that sexual harassment is cognizable under Title VII.[15] In *Meritor*, the Supreme Court discussed whether the words "'terms, conditions, or privileges' of employment" encompass sexual harassment.[16] The Court stated that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[17] The Court continued: "[W]e agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[18] Rather than using the statutory language to define the level of harm required to prevail under the harassment theory, the Court created a new term of art—"severe or pervasive." The Court stated that harassment affects the terms, conditions, or privileges of employment when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.'"[19]

The Supreme Court did not define why severe or pervasive was the touchstone for altering the conditions of a victim's employment. For example, if a supervisor threatened to fire a worker twice because of his race, a reasonable worker would believe the terms or conditions of his work were affected, even though the behavior was not severe or pervasive. Since the Supreme Court's decision in *Meritor*, the courts have tried to determine what is sufficient to be "severe or pervasive" and what is not, developing a complex set of rules and standards for what counts and what does not.[20] One line of cases covers when slurs and epithets are sufficient to establish harassment.

The worker in *Boyer-Liberto* appealed the case to the U.S. Court of Appeals for the Fourth Circuit. While the three-judge panel noted that the

---

claims about whether discrimination did or did not occur in a particular case, just whether the evidence might be sufficient for a factfinder to find discrimination.

13 *Id.* at *3.

14 *Id.* at *3–4.

15 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67 (1986).

16 *Id.* at 64.

17 *Id.* (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

18 *Id.* at 66.

19 *Id.* at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

20 *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 241–43 (2018) (discussing the "severe or pervasive" doctrine); *see also* Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 85 (2003) (similarly discussing the "severe or pervasive" doctrine); *cf.* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1692–1710 (1998) (discussing the early development of sexual harassment law).

use of the term "porch monkey" was "racially derogatory and highly offensive," it upheld the grant of summary judgment.[21] The statements could not constitute harassment because the plaintiff only asserted her supervisor called her "porch monkey" twice.[22]

The full Fourth Circuit en banc reversed.[23] It held that a reasonable jury could find that the worker was subjected to racial harassment.[24] The court noted that "[p]erhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet."[25]

Multiple judges looked at this same set of facts. To many of the judges, the facts could never constitute harassment because they were not severe or pervasive enough to state a claim under the statute. To other judges, even a single use of the racial epithet would be severe enough. There are other cases from different circuits involving use of the "porch monkey" epithet. At times judges allow the cases to proceed.[26] Other times they do not.[27]

Indeed, there is almost no way to predict the outcome of harassment cases involving racist or sexist slurs or epithets. Contrast the Fourth Circuit's finding that the use of a racial epithet is sufficient to establish harassment with the following cases:

- Harassment was not severe or pervasive when a worker testified that he saw the rebel flag on tool boxes and hard hats, the letters "KKK" scrawled into places, and a noose in another employee's locker and that a supervisor called him "n*****" three times and repeatedly called him "boy."[28]
- Conduct was not severe or pervasive enough to support a claim for racial harassment when a worker presented evidence that her supervisor referred to her as "ghetto" and a manager referred to other African American employees as monkeys.[29]

---

21 Boyer-Liberto v. Fontainebleau Corp., 752 F.3d 350, 356, 360 (4th Cir. 2014), *vacated on reh'g en banc*, 786 F.3d 264 (4th Cir. 2015).

22 *Id.* at 357.

23 *Boyer-Liberto*, 786 F.3d at 268.

24 *Id.* at 280.

25 *Id.* (alteration in original) (quoting Spriggs v. Diamond Auto Glass, 242 F.3d 179, 185 (4th Cir. 2001)).

26 *See, e.g.*, Curry v. SBC Commc'ns, Inc., 669 F. Supp. 2d 805, 835 (E.D. Mich. 2009) (noting that while use of a racist epithet alone might not create a hostile environment, it could be added to other factors to allow claim to proceed).

27 *See, e.g.*, Cargo v. Kan. City S. Ry. Co., No. 05-2010, 2012 WL 4596757, at *6–7 (W.D. La. Oct. 1, 2012) (holding that the isolated use of a racist epithet did not create a hostile environment).

28 Barrow v. Ga. Pac. Corp., 144 F. App'x 54, 57–58 (11th Cir. 2005) (per curiam).

29 Harrington v. Disney Reg'l Entm't, Inc., 276 F. App'x 863, 876 (11th Cir. 2007) (per curiam).

- Evidence of comments by a supervisor that she did not want to work with people like the plaintiff and that "whites rule" was not sufficient to state a claim for racial harassment.[30]
- Evidence that independent contractors and a manager referred to the plaintiff as "boy" and "porch monkey" and used term "n*****-rigged" was not sufficient to be severe or pervasive.[31]

Even within the severe or pervasive doctrine, there is contradictory caselaw about whether the single use of an epithet is ever sufficient to establish harassment.[32]

Contradictory outcomes also appear in cases where the plaintiff tries to use evidence of a racist or sexist slur to support her claim that her race or sex caused a negative employment outcome. Some judges use the stray remarks to declare that a supervisor's use of slurs or epithets does not count as evidence of discrimination. Other judges look at the exact same evidence and find that there is sufficient evidence to go to a jury.

The most famous example of this is *Ash v. Tyson Foods, Inc.*[33] In that case, two African American men alleged that the company denied them promotions because of their race.[34] The plaintiffs presented evidence, which included evidence that the plant manager, who made the promotion decisions, referred to each of them as "boy."[35] After a jury found in their favor, the trial court judge reversed the verdict, noting that even if the supervisor referred to the workers as "boy," the employees had not shown that the manager's use of that term was racial in nature.[36] The appellate court also found that the mere use of the word "boy" was not evidence of discrimination when its use was not modified by a racial classification.[37]

In *Ash v. Tyson*, the Supreme Court reversed the appellate court's decision regarding the use of the word "boy."[38] The Court noted:

> Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context,

30 Baker v. FedEx Ground Package Sys. Inc., 278 F. App'x 322, 329 (5th Cir. 2008) (per curiam).

31 Holt v. Roadway Package Sys., Inc., 506 F. Supp. 2d 194, 204 (W.D.N.Y. 2007); *see also* McCurdy v. Ala. Disability Determination Serv., No. 2:13cv934, 2015 WL 5737103, at *14 (M.D. Ala. Sept. 30, 2015).

32 *Compare* Wyre v. Bollinger Shipyards, Inc., No. 14-1759, 2015 WL 222327, at *5 (E.D. La. Jan. 14, 2015) (compiling cases holding that a single use of an epithet is not sufficient), *with* Jasmin v. N.J. Econ. Dev. Auth., No. 16-1002, 2018 WL 3617955, at *10 (D.N.J. July 30, 2018) (collecting cases holding that a single use of an epithet is sufficient).

33 546 U.S. 454, 455–56 (2006) (per curiam).

34 Ash v. Tyson Foods, Inc., No. 96-3257-M, 2004 WL 5138005, at *1, *4 (N.D. Ala. Mar. 26, 2004), *aff'd in part, rev'd in part*, 129 F. App'x 529 (11th Cir. 2005) (per curiam), *vacated and remanded*, 546 U.S. 454.

35 *Id.* at *6.

36 *Id.* at *1, *6, *9.

37 129 F. App'x at 533.

38 546 U.S. at 456–58.

> inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous.[39]

Most cases do not end up in the Supreme Court, and outcomes similar to the ones reached by the lower courts in *Ash v. Tyson* are common.[40] Courts often invoke the stray remarks doctrine to decline to consider evidence offered by the plaintiff in employment discrimination cases.[41] Through this doctrine, judges can refuse to consider evidence of discriminatory comments or actions in the workplace if the court deems the comments too remote in time from the contested decision, not made in the context of the decision, or too ambiguous to show discriminatory bias.[42]

The stray remarks doctrine is a court-created doctrine that allows courts to declare that certain remarks are not relevant to an underlying claim of discrimination. The stray remarks doctrine is not contained within the text of any of the federal discrimination statutes.[43] Instead, the stray remarks doctrine is a special evidentiary rule that courts created and apply in discrimination cases. The stray remarks doctrine first appeared in a concurring opinion by Justice Sandra Day O'Connor in the 1989 case of *Price Waterhouse v. Hopkins*.[44] In that case, Justice O'Connor noted:

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements

---

39 *Id.* at 456. The dispute about whether the term "boy" was racial in nature continued after the Supreme Court opinion. *See* Ash v. Tyson Foods, Inc., 190 F. App'x 924, 926 (11th Cir. 2006) (per curiam).

40 *See* Chappell v. Bilco Co., No. 3:09CV00016, 2011 WL 9037, at *9 (E.D. Ark. Jan. 3, 2011) (granting summary judgment to employer), *aff'd*, 675 F.3d 1110 (8th Cir. 2012).

41 Former federal judge Nancy Gertner referred to the doctrine as "[h]igh on the list of heuristics that fundamentally distort the outcome of discrimination cases." Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 118 (2012); *see also* Martin, *supra* note 3, at 347–48; Stone, *supra* note 3, at 180.

42 *See* Mosberger v. CPG Nutrients, No. 01100, 2002 WL 31477292, at *8 (W.D. Pa. Sept. 6, 2002) ("Discriminatory stray remarks are generally considered in one of three categories—those made (1) by a non-decisionmaker; (2) by a decisionmaker but unrelated to the decision process; or (3) by a decisionmaker but 'temporally remote' from the adverse employment decision." (quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992)); *see also* Hasemann v. United Parcel Serv. of Am., Inc., No. 3:11-cv-554, 2013 WL 696424, at *6 (D. Conn. Feb. 26, 2013) (noting that the following issues are relevant to the stray remarks inquiry: "(1) who made the remark, *i.e.*, a decisionmaker, a supervisor, or a low-level coworker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, *i.e.*, whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was made, *i.e.*, whether it was related to the decision making process" (quoting Silver v. N. Shore Univ. Hosp., 490 F. Supp. 2d 354, 363 (S.D.N.Y. 2007))).

43 Courts do not uniformly apply the stray remarks doctrine, and some judges have criticized it. *See, e.g.*, Holmes v. Marriott Corp., 831 F. Supp. 691, 704–05 (S.D. Iowa 1993).

44 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in the judgment).

> by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard.[45]

Justice O'Connor was not claiming that the stray remarks were not relevant in intentional discrimination cases. Rather, she was making a narrow claim related to the specific issue raised in *Price Waterhouse* about whether a plaintiff could proceed under a mixed-motive framework without what she called "direct evidence" of discrimination.[46] While her remarks were part of a concurring opinion and are not controlling law, courts have expanded on her idea. As Professor Kerri Lynn Stone has noted, after *Price Waterhouse*, "the so-called stray comments doctrine . . . had a groundswell of usage, building in popularity year after year."[47] Professor Jessica Clarke has observed that the doctrine has "spread like a cancer through lower court opinions in a number of procedural contexts."[48]

Just as with the severe or pervasive doctrine, it is difficult to determine when a court will use the stray remarks doctrine to declare an epithet or slur irrelevant and when a court will allow that same epithet or slur to be used as key evidence supporting the plaintiff's claim that she faced discrimination.[49] It is nearly impossible to predict how a court will choose to resolve a case when the defendant invokes the stray remarks doctrine.

Looking at the caselaw in the aggregate shows that the subdoctrines of "severe or pervasive" and the stray remarks doctrine do not help resolve even the most basic employment discrimination factual scenarios: those involving supervisors using patently offensive epithets and slurs. This, standing alone, is a compelling reason to question the benefits that courts derive from creating and applying such doctrines.

---

45 *Id.*

46 *Id.* at 269, 270–71. The stray remarks doctrine is also confusing because some judges appear to be using it to determine whether a plaintiff relies on direct or circumstantial evidence for purposes of determining whether the court should use the *McDonnell Douglas* burden-shifting framework. *See, e.g.*, Natal Pérez v. Oriental Bank & Tr., 291 F. Supp. 3d 215, 225–26 (D.P.R. 2018). If a court uses the stray remarks doctrine in this context, it may still allow the "stray remark" to serve as circumstantial evidence of discrimination. Courts often conflate the issue of whether evidence counts as direct evidence with the question of whether it counts as evidence at all.

47 Stone, *supra* note 3, at 170.

48 Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 542 (2018).

49 *Compare* Boyd v. State Farm Ins., 158 F.3d 326, 329–30 (5th Cir. 1998) (holding that a racial epithet was a stray remark in a "failure to promote" case), *and* Vega v. Chi. Park Dist., 165 F. Supp. 3d 693, 703 (N.D. Ill. 2016) (holding that certain remarks, including those referring to the plaintiff as a "bitch" and opining that "she looks like a dude," were stray remarks and not sufficient to defeat defendant's motion for summary judgment), *and* Martin v. Kroger Co., 65 F. Supp. 2d 516, 549 (S.D. Tex. 1999) (describing some slurs that are stray remarks and thus do not count as evidence of discrimination), *aff'd mem.*, 224 F.3d 765 (5th Cir. 2000), *with* Williams v. Mercy Health Sys., 866 F. Supp. 2d 490, 499 (E.D. Pa. 2012) (finding epithets could be probative of discrimination), *and* Reid v. Evergreen Aviation Ground Logistics Enter. Inc., No. 07-1641, 2009 WL 136019, at *9 (D. Or. Jan. 20, 2009) (parsing which epithets and slurs are stray remarks and which are not).

II. A Pattern Emerges

Not only are the subdoctrines ineffective, they are also far removed from the original statutes they purport to support. This Part demonstrates a familiar pattern that occurs with these ancillary doctrines. The Supreme Court often creates a framework for evaluating a certain theory of discrimination, such as the multipart framework for evaluating harassment cases or the *McDonnell Douglas* three-part burden-shifting test for some disparate treatment cases. The frameworks introduce new terms of art and concepts into the jurisprudence. The frameworks also generate many questions about how to apply these terms of art and concepts in particular cases. The Supreme Court or the lower courts then create a series of subdoctrines to better define the original framework. At times, they create myriad exceptions to the ancillary rules. They also create sub-subdoctrines that also come with their own terms of art and inherent ambiguity.

This Part illuminates this pattern by exploring some of the ancillary doctrines that arise under the *McDonnell Douglas* test and those that arise from the multipart test for evaluating harassment.

A. McDonnell Douglas*: One Step Away*

In 1973, the Supreme Court decided the case of *McDonnell Douglas Corp. v. Green*.[50] In that case, the Court first enunciated the three-part burden-shifting framework that is now called the *McDonnell Douglas* test.

Since 1973, both courts and litigants have struggled to understand and apply the three-step burden-shifting framework. Scholars have argued that the test is now a device used by some judges to defeat plaintiffs' claims.[51] Additionally, some members of the Supreme Court have stated that the numerous and complicated frameworks courts use in the employment context make employment law "difficult for the bench and bar"[52] and that "[l]ower courts long have had difficulty applying *McDonnell Douglas*."[53] One commentator described the test as having "befuddled most of those who have attempted to master it"[54] and called the burden-shifting framework "complex" and "somewhat Byzantine."[55]

The *McDonnell Douglas* test is one way for a plaintiff to prove a discrimination claim. In the 1973 case, the Supreme Court held that a plaintiff proceeding on a disparate treatment claim based on circumstantial evidence could prove his case through a three-part burden-shifting framework.[56] In

50 411 U.S. 792 (1973).

51 *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 229 (1993).

52 Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989) (Kennedy, J., dissenting).

53 *Id.* at 291.

54 Kenneth R. Davis, Price*-Fixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 859 (2004).

55 *Id.* at 862.

56 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973).

the *McDonnell Douglas* case, the Supreme Court held that the plaintiff could establish the prima facie case by showing

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[57]

The Supreme Court cautioned, however, that the facts required to establish a prima facie case will necessarily vary, depending on the factual scenario of the underlying case.[58] The Supreme Court has stated on numerous occasions that the prima facie case is not supposed to be onerous.[59]

After the plaintiff establishes this prima facie case, a rebuttable presumption of discrimination arises.[60] The analysis then proceeds to the second step of *McDonnell Douglas*. After a plaintiff makes a prima facie showing, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the allegedly discriminatory decision or action, thereby rebutting the presumption.[61] If the employer does this, the inquiry proceeds to the third step.

In the third step, the plaintiff may show that the employer's stated reason is pretext.[62] From this showing, a factfinder may infer that the employer discriminated because of a protected trait. In the third step, the plaintiff may also rely on any other evidence that helps to establish that the employee's protected trait caused the outcome.[63]

The Supreme Court did not purport to ground the *McDonnell Douglas* test within the text of Title VII. The Court has cryptically stated that *McDonnell Douglas* does not represent the elements of a claim under Title VII, but rather is an evidentiary standard that can be used to evaluate employment discrimination cases.[64] The burden shifting and many of the factors within it are not drawn from Title VII's text.

On its face, *McDonnell Douglas* leaves many unanswered questions, including, but not limited to the following: How are courts allowed to modify the prima facie case? What is the plaintiff's burden in the prima facie case? After the plaintiff makes the prima facie case, what benefit accrues? What does a legitimate, nondiscriminatory reason mean? What happens if the employer provides an unbelievable reason? What is the defendant's burden at the second step? What does pretext mean? Is pretext alone sufficient? Can the plaintiff use evidence from the prima facie case to support the pre-

57 *Id.* at 802.

58 *Id.* at 802 n.13.

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

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

61 *McDonnell Douglas*, 411 U.S. at 802.

62 *Id.* at 804.

63 *Id.* at 804–05.

64 *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

text showing? What evidence, other than evidence of pretext, is sufficient to meet the third step? Is the plaintiff required to establish intent, or is the proper concept causation?

The case also introduced several terms of art into employment discrimination law, such as "qualified" for a job; "legitimate, nondiscriminatory reason"; and "pretext."[65] Each of these terms of art has developed its own line of cases interpreting them.[66] Even more than forty years after the Supreme Court decided *McDonnell Douglas*, courts still have not consistently defined "qualified" or "pretext." For purposes of clarity, this Article cannot fully explore all of the ancillary doctrines within employment discrimination law because there are simply too many. However, these examples show how just one case can create a ripple effect of ancillary doctrines. Importantly, none of these new terms is contained within Title VII, the ADEA, or the ADA.

After *McDonnell Douglas*, significant confusion existed about how to apply the three-part burden-shifting framework, especially regarding what the shifting burdens meant for litigants.[67] In *Texas Department of Community Affairs v. Burdine*, the Court indicated that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous."[68] According to the Court, the prima facie case serves the function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[69]

The Court further explained that if the plaintiff makes a prima facie case, the defendant is required to articulate a legitimate, nondiscriminatory reason for its actions to rebut the presumption of discrimination.[70] The defendant's burden is one of production only.[71] After the defendant has articulated a legitimate, nondiscriminatory reason, the plaintiff has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. The Court indicated that the plaintiff "may succeed in this 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."[72] The Court held that the "ultimate burden of persuading the trier of fact that the defen-

65 *McDonnell Douglas*, 411 U.S. at 802, 804.

66 *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–43 (2000) (discussing legitimate, nondiscriminatory reason); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254–55 (1981) (discussing legitimate, nondiscriminatory reason); McKinney v. Office of the Sheriff, 866 F.3d 803, 813 (7th Cir. 2017) (discussing qualified); Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580, 590 (6th Cir. 2014) (discussing qualified); *infra* subsection II.B.3 (discussing pretext).

67 *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 504 (1993); *Burdine*, 450 U.S. at 249–50.

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

69 *Id.* at 253–54.

70 *Id.* at 254–56.

71 *Id.* at 255–56.

72 *Id.* at 256.

dant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[73]

In *St. Mary's Honor Center v. Hicks*, the Court considered whether the factfinder's rejection of the employer's asserted reason for its action mandated a finding for the plaintiff.[74] The Supreme Court held that while the factfinder's rejection of the employer's proffered reason permits the factfinder to infer discrimination, it does not compel such a finding.[75]

B. McDonnell Douglas*: Multiple Steps Away*

In *McDonnell Douglas*, the Supreme Court specifically noted that courts would need to modify parts of the framework to fit different factual scenarios.[76] In the second step away from the statute, federal district and appellate courts began determining which iterations of the prima facie case they would allow. Even more than forty years after *McDonnell Douglas*, courts are still discussing how to modify the factors of the burden-shifting test.[77]

There are a number of subdoctrines that courts have used in the context of *McDonnell Douglas*. Some further explain the prima facie case or the burden-shifting framework. Some explore what a plaintiff must show to establish the third step of the test. Others, like the same actor inference, the same protected class inference, and the stray remarks doctrine, are not officially part of the test, but are often used in conjunction with it.[78]

---

73 *Id.* at 253.

74 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 504, 511 (1993).

75 *Id.* at 511.

76 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

77 *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1354–55 (2015); *see also* SANDRA SPERINO, *MCDONNELL DOUGLAS*: THE MOST IMPORTANT CASE IN EMPLOYMENT DISCRIMINATION LAW ch. 4, BNA (database updated May 2019).

78 The same protected class doctrine presumes that a person who is in the same protected class as the worker would not discriminate against the worker based on the protected trait that they share. Warenecki v. City of Philadelphia, No. 10-1450, 2010 WL 4344558, at *9 (E.D. Pa. Nov. 3, 2010). The same actor inference allows a court to assume that if a supervisor made a positive decision in favor of a worker that the same supervisor's later negative action against that same worker cannot be discriminatory. Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996). Some courts will use the same actor inference where there is a short period of time between the positive decision and the later negative decision. Proud v. Stone, 945 F.2d 796, 796–97 (4th Cir. 1991). However, courts have applied the doctrine when the time between the positive decision and the negative decision was seven years. Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1135 (2008). *But see* Carlton v. Mystic Transp., Inc., 202 F.3d 129, 132 (2d Cir. 2000) (criticizing use of the doctrine when there is a long intervening period between the positive decision and the negative one). For example, if a supervisor hired an older worker and then a few years later fires the worker, the court will assume that the supervisor did not take age into account when firing the worker. Supreme Court precedent contradicts both the same actor and same protected class inferences. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 139, 152, 154 (2000) (finding sufficient evidence of discrimination to submit to jury without acknowledging an inference that the employment decisionmakers older

For purposes of time and clarity, we will focus on three doctrines related to the *McDonnell Douglas* test: the adverse action factor, the concept of similarly situated workers, and pretext. We explored the stray remarks doctrine as it relates to slurs and epithets in Part I. There is an entire body of cases related to what kinds of remarks count as stray and what kinds do not.[79]

1. Adverse Action

In the *McDonnell Douglas* case itself, the Supreme Court stated that for the third factor of the prima facie case, the plaintiff was required to establish that "despite his qualifications, he was rejected."[80] When lower courts first applied the *McDonnell Douglas* test, they often inserted the challenged employment action into the analysis.[81] So, for example, in the third prong a plaintiff might be required to prove that she was denied a promotion or that she was not hired. There are numerous types of employment actions that might fall within this third prong, and courts began to develop a shorthand for describing the third prong, rather than making it case specific.

Although the actual words varied, the courts began to describe this third prong as requiring that the plaintiff establish that she was subjected to an adverse action.[82] These are not words found in Title VII. Instead, Title VII refers to the "terms, conditions, or privileges of employment" or to the "limit[ing], segregat[ing], or classify[ing] . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of" the individual's protected trait.[83] Even though Title VII itself provides language about the

than fifty could not discriminate because of age); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that men can discriminate against men).

79 SPERINO, *supra* note 77, ch. 8.

80 *McDonnell Douglas*, 411 U.S. at 802.

81 *See, e.g.*, Farber v. Arrow Co., No. 82 Civ. 7563, 1986 WL 10731, at *1, *3 (S.D.N.Y. Sept. 24, 1986); Citron v. Jackson State Univ., 456 F. Supp. 3, 11 (S.D. Miss. 1977) (noting that the plaintiff complained of several different employment actions, and analyzing them).

82 Tukay v. United Airlines, Inc., 708 F. App'x 922, 923 (9th Cir. 2018); Hogue v. Sec'y, U.S. Dep't of the Army, 718 F. App'x 877, 879 (11th Cir. 2017) (per curiam); Chew v. City & County of San Francisco, 714 F. App'x 687, 691 (9th Cir. 2017); Reedy v. Rich Transp., LLC, 712 F. App'x 516, 521 (6th Cir. 2017); Moody v. Atl. City Bd. of Educ., 870 F.3d 206, 213–14 n.11 (3d Cir. 2017); Edwards v. Hiland Roberts Dairy, Co., 860 F.3d 1121, 1125 (8th Cir. 2017); Hiatt v. Colo. Seminary, 858 F.3d 1307, 1316 (10th Cir. 2017); Williams v. Franciscan Missionaries of Our Lady Health Sys., Inc., 689 F. App'x 374, 375 (5th Cir. 2017) (per curiam); Mussallihattillah v. McGinnis, 684 F. App'x 43, 47 (2d Cir. 2017); Tshibaka v. Sernulka, 673 F. App'x 272, 278 (4th Cir. 2016) (per curiam); Kuttner v. Zaruba, 819 F.3d 970, 976 (7th Cir. 2016); Del Valle-Santana v. Servicios Legales de P.R., Inc., 804 F.3d 127, 130 (1st Cir. 2015); Walker v. Johnson, 798 F.3d 1085, 1091 (D.C. Cir. 2015). The courts also used similar words to describe the required harm for retaliation. Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67–68 (2006).

83 42 U.S.C. § 2000e-2(a)(1)–(2) (2012).

required level of harm, the lower courts chose to insert the words "adverse action" into the jurisprudence and to define this new term of art.

There is wide variation across circuits and even among panels within circuits regarding the words used to define this new term of art. For example, the U.S. Court of Appeals for the Tenth Circuit recently described an adverse action as follows:

> For discrimination claims, "[a]n adverse employment action is a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." "[A] mere inconvenience or an alteration of job responsibilities" does not qualify as an adverse action.[84]

Another court described the requirement as follows: "A plaintiff sustains an adverse employment action if he or she endures a 'materially adverse change' in the terms and conditions of employment."[85] The Eleventh Circuit described adverse action as requiring the plaintiff to "show a 'serious and material change in the terms, conditions, or privileges of employment.' We use an objective standard when assessing whether the employment action was 'serious and material.'"[86]

After creating the "adverse action" term of art, the courts were required to apply that new concept to all of the various kinds of negative actions that might occur in the workplace. This introduced a third level of doctrine about what actions counted and what actions did not count as adverse actions. If an action is not an adverse action, then an employer can take the action based on a protected trait without facing liability under federal discrimination law.

There is wide divergence among circuits and even within circuits about whether some actions count as an adverse action. As one court noted, "[d]ivergent authority, nationwide, obscures the parameters of adverse employment action."[87] The Eleventh Circuit has noted that courts use different words to describe what counts as an adverse action, including "'significant,' 'materially adverse,' and 'serious and tangible.'"[88]

In all circuits, actions specifically mentioned within the primary operative language of the discrimination statutes are cognizable. Thus, courts allow claims for terminations, failures to hire,[89] discriminatory demotions,[90]

84 *Hiatt*, 858 F.3d at 1316 (alterations in original) (citation omitted) (first quoting Daniels v. United Parcel Serv., Inc., 701 F.3d 620, 635 (10th Cir. 2012); and then quoting Piercy v. Maketa, 480 F.3d 1192, 1203 (10th Cir. 2007)).

85 Pfizenmayer v. Hicksville Pub. Sch., 700 F. App'x 64, 65 (2d Cir. 2017) (quoting Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 238 (2d Cir. 2007)).

86 Rainey v. Holder, 412 F. App'x 235, 238 (11th Cir. 2011) (per curiam) (citation omitted) (quoting Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001)).

87 Nelson v. Univ. of Me. Sys., 923 F. Supp. 275, 281 (D. Me. 1996).

88 Martin v. Eli Lilly & Co., 702 F. App'x 952, 956 (11th Cir. 2017) (citing *Davis*, 245 F.3d at 1239).

89 *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

90 *See, e.g.*, Acevedo Martinez v. Coatings Inc., 251 F. Supp. 2d 1058, 1068 (D.P.R. 2003).

and pay differentials. However, outside of these actions or similar actions, there is wide disagreement about what constitutes an adverse action and what does not. Some courts will find that the following conduct is not an adverse action[91]:

- giving an employee a negative evaluation or write-up;[92]
- denying a lateral transfer;[93]
- transferring an employee to a less desirable job;[94]
- reprimanding or threatening a worker with disciplinary action;[95]
- excessively scrutinizing a worker's job performance;[96]
- failing to train an employee;[97]
- threatening to fire a worker;[98] and
- assigning additional or more difficult work.[99]

---

91 A plaintiff can establish that a constructive discharge is an adverse action. There is a separate body of caselaw about what constitutes a constructive discharge. *See, e.g.*, Alba v. Merrill Lynch & Co., 198 F. App'x 288, 294 (4th Cir. 2006). If a plaintiff cannot establish a constructive discharge, a question might still remain about whether the actions taken by the employer constitute an adverse action or harassment.

92 *See, e.g.*, Taylor v. Small, 350 F.3d 1286, 1293 (D.C. Cir. 2003); Mitchom v. Bi-State Dev. Agency, 43 F. App'x 958, 959 (7th Cir. 2002); Taylor v. N.Y.C. Dep't of Educ., No. 11-CV-3582, 2012 WL 5989874, at *1–2, *7 (E.D.N.Y. Nov. 30, 2012) (holding that being rated as having unsatisfactory performance alone is not sufficient to constitute an adverse action); Sotomayor v. City of New York, 862 F. Supp. 2d 226, 254 (E.D.N.Y. 2012), *aff'd*, 713 F.3d 163 (2d Cir. 2013); Siddiqi v. N.Y.C. Health & Hosps. Corp., 572 F. Supp. 2d 353, 367 (S.D.N.Y. 2008).

93 *See, e.g.*, Alvarado v. Tex. Rangers, 492 F.3d 605, 612 (5th Cir. 2007); Santana v. U.S. Tsubaki, Inc., 632 F. Supp. 2d 720, 721 (N.D. Ohio 2009).

94 *See, e.g.*, Lara v. Unified Sch. Dist. #501, 350 F. App'x 280, 284 (10th Cir. 2009) (holding that a threatened transfer is not enough to constitute an unlawful employment practice); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 (10th Cir. 1998) (holding that a job transfer that increased teacher's commute from a few minutes to between thirty and forty minutes is not sufficient to constitute an adverse employment action); Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996); Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994) (holding that being given more stressful job duties alone is not sufficient to constitute an adverse employment action); Craven v. Tex. Dep't of Criminal Justice-Institutional Div., 151 F. Supp. 2d 757, 766 (N.D. Tex. 2001). *But see* Czekalski v. Peters, 475 F.3d 360, 364 (D.C. Cir. 2007) (noting that some lateral transfers do constitute adverse actions); Collins v. Illinois, 830 F.2d 692, 703 (7th Cir. 1987) (noting that an adverse action occurred when employer moved employee's office to undesirable location).

95 Chukwuka v. City of New York, 795 F. Supp. 2d 256, 262 (S.D.N.Y. 2011), *aff'd*, 513 F. App'x 34 (2d Cir. 2013).

96 *Id.*

97 *See, e.g.*, Paradisis v. Englewood Hosp. Med. Ctr., 680 F. App'x 131, 136–37 (3d Cir. 2017) (per curiam); Hill v. Rayboy-Brauestein, 467 F. Supp. 2d 336, 352 (S.D.N.Y. 2006).

98 *See, e.g.*, Myers v. Md. Auto. Ins. Fund, No. 09-3391, 2010 WL 3120070, at *5 (D. Md. Aug. 9, 2010).

99 *See, e.g.*, White v. Hall, 389 F. App'x 956, 960 (11th Cir. 2010) (per curiam) (assigning more difficult work was not adverse employment action); Han v. Whole Foods Mkt. Grp., Inc., 44 F. Supp. 3d 769, 789 (N.D. Ill. 2014) (increasing workload did not constitute adverse employment action).

Courts have even found that conduct is not an adverse action after the question has been submitted to a jury and the jury finds that it is one.[100]

However, the cases are not uniform. Like the subdoctrines discussed in Part I, the adverse action concept is also plagued by uncertainty. For each of the categories listed above, some courts will recognize the same or similar conduct as an adverse action:

- giving an employee a negative evaluation or write-up;[101]
- denying a lateral transfer;[102]
- transferring an employee to a less desirable job;[103]
- reprimanding or threatening a worker with disciplinary action;[104]
- excessively scrutinizing a worker's job performance;[105]
- denying training;[106]
- threatening to fire a worker;[107] and
- assigning additional or more difficult work.[108]

Some courts have noted that "[l]esser actions may also constitute adverse employment actions," that there are no bright-line rules as to which employment actions meet the threshold, and that courts must determine adverse action on a case-by-case basis.[109]

The adverse action doctrine invokes its own set of questions, including, but not limited to, the following. There are countless negative actions. Which count as adverse actions and which do not? Courts also have to

100 *See, e.g.*, Martin v. Eli Lilly & Co., 702 F. App'x 952, 956 (11th Cir. 2017).

101 *See, e.g.*, *Hill*, 467 F. Supp. 2d at 351 (noting that a negative evaluation can be an adverse action if it leads to a material adverse change in work conditions).

102 Gaddis v. Russell Corp., 242 F. Supp. 2d 1123, 1145 (M.D. Ala.) (describing how denial of lateral transfer would be adverse action if it affected pay, prestige, or job responsibilities), *aff'd mem.*, 88 F. App'x 385 (11th Cir. 2003).

103 *See, e.g.*, Czekalski v. Peters, 475 F.3d 360, 364 (D.C. Cir. 2007) (noting that some lateral transfers do constitute adverse actions); Collins v. Illinois, 830 F.2d 692, 703–04 (7th Cir. 1987) (finding an adverse action occurred when employer moved employee's office to undesirable location).

104 *See, e.g.*, Chattman v. Toho Tenax Am., Inc., 686 F.3d 339, 348 (6th Cir. 2012) (finding that disciplinary notice can be an adverse action when it makes the plaintiff ineligible for promotions).

105 In the discrimination context, most courts hold that excessive scrutiny alone is not an adverse action. *See, e.g.*, Chukwuka v. City of New York, 795 F. Supp. 2d 256, 260, 262 (S.D.N.Y. 2011), *aff'd*, 513 F. App'x 34 (2d Cir. 2013). In the retaliation context, some courts have held excessive scrutiny can be an adverse action. Corrado v. N.Y. State Unified Court Sys., No. CV 2012-1748, 2014 WL 4626234, at *12 (E.D.N.Y. Sept. 15, 2014) (discussing cases).

106 *Hill*, 467 F. Supp. 2d at 352.

107 Murray v. Town of North Hempstead, 853 F. Supp. 2d 247, 269 (E.D.N.Y. 2012) (discussing how threats can be relevant to constructive discharge); *see* Myers v. Md. Auto. Ins. Fund, No. 09-3391, 2010 WL 3120070, at *4 (D. Md. Aug. 9, 2010).

108 *See* Han v. Whole Foods Mkt. Grp., Inc., 44 F. Supp. 3d 769, 789 (N.D. Ill. 2014) (noting that increasing workload could constitute adverse employment action when used to punish the employee or set her up to fail).

109 *Hill*, 467 F. Supp. 2d at 351.

decide what to do when workers allege that two or more of these actions happen. For example, is it an adverse action when a supervisor threatens to fire a worker and then instead of firing her transfers her to a different department? If an action is not an adverse action, can it be used to support a harassment theory? If an employer takes both an adverse action and a nonadverse action can the plaintiff recover damages for the additional nonadverse action? How do the required administrative filing deadlines intersect with the nonadverse action? Is the doctrine of adverse action the same in discrimination and retaliation cases? Is adversity an objective standard, and if so, how many of the circumstances of the individual plaintiff and her particular workplace should be taken into account?

To handle these questions courts then develop a variety of exceptions and sub-subdoctrines under the adverse action idea, several of which I will highlight here for purposes of illustration. Some courts were unhappy with the idea that all negative evaluations and lateral transfers fell outside the reach of Title VII, so these courts began to develop legal standards for when a negative evaluation would count and when it would not. For example, some courts will allow a negative evaluation to count if it affects a person's "position, grade level, salary, or promotion opportunities."[110] For lateral transfers, one court recognized a lateral transfer as an adverse action because the "reassignment would require [the plaintiff] to undergo training and recertification and would render largely unusable her eight years of experience."[111]

Courts had also used the term "adverse action" or something similar in the context of retaliation claims. The Supreme Court clarified what this concept meant in the context of retaliation claims and created another subdoctrine. The Supreme Court held that retaliation must be "materially adverse" to be cognizable.[112] An employee presents an actionable claim if the negative consequence would dissuade a reasonable person from complaining about the alleged discrimination.[113] Actionable conduct must rise above

110 Taylor v. Solis, 571 F.3d 1313, 1321 (D.C. Cir. 2009) (quoting Baloch v. Kempthorne, 550 F.3d 1191, 1199 (D.C. Cir. 2008)). *But see* Davis v. Town of Lake Park, 245 F.3d 1232, 1243 (11th Cir. 2001) ("A negative evaluation that otherwise would not be actionable will rarely, if ever, become actionable merely because the employee comes forward with evidence that his future prospects have been or will be hindered as a result.").

111 Alvarado v. Metro. Transp. Auth., No. 07 Civ. 3561, 2012 WL 1132143, at *7 (S.D.N.Y. Mar. 30, 2012); *see also* Rodriguez v. Bd. of Educ., 620 F.2d 362, 366 (2d Cir. 1980) (finding transfer of seasoned middle-school art teacher to an elementary school with "profoundly different" art programs constituted an adverse action). *But see* Asanjarani v. City of New York, No. 09 Civ. 7493, 2011 WL 4343687, at *11 (S.D.N.Y. Aug. 18, 2011) (finding that "any lateral transfers or reassignments that were unaccompanied by a change in title or salary cannot be fairly considered 'demotions' that would constitute" an adverse action).

112 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

113 *Id.*

"normally petty slights, minor annoyances, and simple lack of good manners."[114]

The Supreme Court stated that the reasonable person standard was an objective one.[115] However, the Supreme Court later provided examples that suggest that the objective standard also includes considering some of the circumstances of the plaintiff. The Court indicated as follows:

> We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination.[116]

The Court held that reassignment of a worker to a job with significantly more onerous duties was materially adverse treatment even though the reassignment resulted in no loss of wages or other tangible benefits.[117] Likewise, the plaintiff could maintain a retaliation claim for her suspension without pay, even though the employer eventually awarded her backpay.[118]

The lower courts have had difficulty reconciling the adverse action standards in discrimination and retaliation cases. In some instances, an action that will not be cognizable in the discrimination context, will be sufficient in the retaliation context.[119]

As this subsection shows, just within one prong of the *McDonnell Douglas* test there are a variety of subdoctrines and sub-subdoctrines and exceptions. This is only one small part of the three-part burden-shifting framework. It is worth noting that *McDonnell Douglas* is or was mired in countless doctrinal questions related to the test enunciated by the Supreme Court. Indeed, the Supreme Court has resolved more than fifteen cases that relate to *McDonnell Douglas*.[120]

---

114 *Id.* at 68.

115 *Id.*

116 *Id.* at 69 (citations omitted) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998)).

117 *Id.* at 57.

118 *See id.* at 73.

119 *See, e.g.*, Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 92 (2d Cir. 2015) (finding a poor performance review can count as an adverse action for purposes of retaliation).

120 The major Supreme Court cases interpreting *McDonnell Douglas*, in chronological order, are *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 281 (1976); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 569 (1978); *Board of Trustees of Keene State College v.*

2. Similarly Situated

In *McDonnell Douglas* itself, the Supreme Court articulated the fourth prong of the prima facie case: "[A]fter his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[121] Courts had to determine how to articulate a fourth prong to apply to varying factual scenarios outside of the hiring context and outside of the particular circumstances of Percy Green's case. Courts began to allow plaintiffs to make the fourth prong of the prima facie by showing that they were treated differently than a similarly situated person outside their protected class.[122] Now, a new concept or term of art is embedded in discrimination jurisprudence: the similarly situated employee.

Just like with the adverse action concept, the issue of whether two people can be compared for purposes of making an inference of disparate treatment because of a protected class arises in many different contexts. Additionally, the strength of the inference may depend on the other evidence presented by the plaintiff.

The concept of similarly situated invites many questions. For example, how similar do the individuals need to be? On what dimensions will courts measure similarity? If a human resources professional is applying a company-wide rule to an individual, does this change the level of similarity required? In cases involving multiple protected classes (such as older women), who are the correct comparators? How does comparator evidence intersect with other evidence that plaintiffs present to show discrimination?

There is a split among circuits (and even within some circuits) about how similar the plaintiff must be with the comparator.[123] The Seventh Circuit has noted that the plaintiff and the comparator "need not be identical in every conceivable way"; rather, they must be "'directly comparable' to the

Sweeney, 439 U.S. 24, 24–25 (1978) (per curiam); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *U.S. Postal Service Board of Governors v. Aikens (Aikens I)*, 453 U.S. 902 (1981) (mem.); *U.S. Postal Service Board of Governors v. Aikens (Aikens II)*, 460 U.S. 711, 715–17 (1983); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989) (plurality opinion); *Patterson v. McLean Credit Union*, 491 U.S. 164, 186 (1989); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510–11, 514–15 (1993); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 309 (1996); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 140 (2000); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003); *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 455 (2006) (per curiam). Although it encompasses additional questions, *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1353–55 (2015), also addresses the test.

121 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

122 Goldberg, *supra* note 3, at 751–59 (explaining deficiencies in similarly situated test).

123 The Supreme Court held that the plaintiff is not required to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways. *See Young*, 135 S. Ct. at 1354. However, the courts have not fully explored what this portion of the *Young* case means for discrimination law generally.

plaintiff 'in all material respects.'"[124] The Sixth Circuit has stated that comparators must be "nearly identical."[125] It noted:

> In order to be similarly situated in the disciplinary context, an employee "'must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.'"[126]

However, the Sixth Circuit has also reasoned: "The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment."[127] The Fifth Circuit has stated that the employees must be "under nearly identical circumstances."[128] That circuit noted:

> "The employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories." On the other hand, "[e]mployees with different supervisors, who work for different divisions of a company or . . . who have different work responsibilities . . . are not similarly situated." Significantly, if a difference between the plaintiff and the proposed comparator "*accounts for* the difference in treatment received from the employer, the employees are not similarly situated for the purposes of an employment discrimination analysis."[129]

The similarly situated idea is a subdoctrine of *McDonnell Douglas*, which is already a subdoctrine of the discrimination statutes. Even within the sub-subdoctrine of similarly situated, there are distinctions and exceptions.

For example, the Supreme Court has held that a person alleging age discrimination under the ADEA can use comparator evidence, even where the comparator is forty or older and thus not outside the protected class.[130] While the comparator does not need to fall outside the ADEA's protected class, the age difference between the plaintiff and a comparator must be sufficient to establish an inference of discrimination.[131] The Supreme Court noted: "Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is

124 Skiba v. Ill. Cent. R.R. Co., 884 F.3d 708, 723 (7th Cir. 2018) (quoting Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012)).

125 Brown v. Metro. Gov't, 722 F. App'x 520, 527 (6th Cir. 2018) (quoting Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1998)).

126 *Id.* at 527–28 (quoting *Ercegovich*, 154 F.3d at 352).

127 *Ercegovich*, 154 F.3d at 352.

128 Heggemeier v. Caldwell County, 826 F.3d 861, 868 (5th Cir. 2016) (per curiam) (quoting Lee v. Kan. City S. Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009)).

129 *Id.* (citations omitted) (quoting *Lee*, 574 F.3d at 259–60).

130 O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312–13 (1996).

131 *Id.*

the fact that the plaintiff was replaced by someone outside the protected class."[132]

Going further down the rabbit hole of this doctrine, lower courts have now created standards and rules for what "substantially younger" means. At least one circuit has held that a three-year difference between the plaintiff and the comparator is sufficient.[133] The Second Circuit has allowed a one-year period to suffice when combined with evidence of age-related comments.[134] However, other courts have rejected shorter time spans.[135] Some circuits have created bright-line rules to govern lower courts in deciding what age difference (when standing alone) is sufficient. For example, the Sixth Circuit has held that, without more evidence, a plaintiff cannot prevail by showing that the employer replaced her with a person six years younger.[136] The Sixth Circuit has also held that a ten-year gap is presumptively sufficient.[137] However, other circuits have declined to adopt bright-line rules.[138] Even without bright-line rules, some courts will generally characterize the age difference that is or is not sufficient to establish an inference.[139] Since most cases do not just rely on comparator evidence, courts must also consider how these rulings should be applied when a plaintiff presents comparator evidence that is bolstered by additional evidence.

3. Pretext

In the third step of *McDonnell Douglas*, the plaintiff is provided the opportunity to show that the employer's stated reason for the employment action was, in fact, pretext, and that the plaintiff's protected trait was the real

132 *Id.* at 313.

133 *See* Carter v. DecisionOne Corp., 122 F.3d 997, 1003–04 (11th Cir. 1997) (per curiam) (three years is enough); *see also* Liebman v. Metro. Life Ins., 808 F.3d 1294, 1299 (11th Cir. 2015) (per curiam) (seven years is sufficient); Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1360 (11th Cir. 1999) (five years).

134 Nembhard v. Mem'l Sloan Kettering Cancer Ctr., 104 F.3d 353, 1996 WL 680756, at *4 (2d Cir. 1996) (unpublished table decision).

135 *See, e.g.*, Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160, 1166 (10th Cir. 2000) (rejecting two-year time period); *see also* Grosjean v. First Energy Corp., 349 F.3d 332, 338 (6th Cir. 2003) (collecting cases).

136 *See Grosjean*, 349 F.3d at 340.

137 *See id.* at 336.

138 *See* Colandrea v. Hunter-Tannersville Cent. Sch. Dist., No. 1:15-CV-0456, 2017 WL 1082439, at *6 (N.D.N.Y. Mar. 22, 2017) ("There is no bright line rule as to the size of an age discrepancy that is required to support an inference of discrimination . . . ."); Johnson v. UAH Prop. Mgmt., LP, No. 3:09-CV-0609, 2010 WL 11530908, at *3 (N.D. Tex. Sept. 10, 2010) (recognizing that neither the Supreme Court nor Fifth Circuit have established a bright-line rule as to what age difference is too small), *aff'd*, 428 F. App'x 311 (5th Cir. 2011) (per curiam); Burrows v. Township of Logan, No. 05-458, 2008 WL 4274369, at *6 (W.D. Pa. Sept. 17, 2008) (recognizing that the Third Circuit has not yet established a bright-line rule).

139 *See, e.g.*, Irvin v. Ascension Par. Sch. Bd., No. 15-518, 2017 WL 354854, at *11 (M.D. La. Jan. 24, 2017) (explaining that even though there is no bright-line rule in the Fourth Circuit, many district courts look for an age gap of seven years or more).

reason for the decision.[140] The Supreme Court indicated that the plaintiff "may succeed in this 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."[141] The Court held that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[142]

Embedded within *McDonnell Douglas* is another term of art, "pretext."[143] The word itself has given lower courts problems. In some cases, courts tend to use the term "pretext" as a term of art, broadly encompassing any evidence that suggests a protected trait played a role in an outcome.[144] However, in other cases, courts seem to require the plaintiff to show that the employer is lying about the reason for its decision.[145]

Although the courts have encountered numerous problems with decoding the concept of pretext, this subsection focuses on one subdoctrine of the subdoctrine of pretext: the honest belief doctrine. The word "pretext" is not contained within Title VII; nor is the honest belief doctrine. These are both court-created concepts.

Under the honest belief doctrine, a court will find that if an employer took a negative action against an employee based on wrong information, there is no discrimination if the employer honestly believed the wrong information at the time it made the decision. For example, if an employer fires a worker for three unexcused absences, the employer will not be held liable for discrimination if it later turns out that the worker did not have three unexcused absences. Even though the employer was wrong, courts reason, the reason for the termination was not the worker's protected trait.[146]

Like the other ancillary doctrines, the honest belief doctrine invites a whole host of questions, including, but not limited to the following: Who has to prove it? Is it an affirmative defense? Whose belief must be honest? If the employee brings evidence of possible discrimination to the employer's attention before or directly after the contested decision, can the employer still assert honest belief? What happens if the employer investigates the employee's allegations of discrimination but finds they are without merit and then takes the contested action? What happens if there is evidence that a supervisor reports rule infractions more when the rule breaker is a woman or a person of color?

140 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973).

141 Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

142 *Id.* at 253.

143 *McDonnell Douglas*, 411 U.S. at 804.

144 *See, e.g.*, *Irvin*, 2017 WL 354854, at *18 (requiring evidence "that age discrimination was the but-for cause of the employment decision").

145 *See* Farrell v. Butler Univ., 421 F.3d 609, 613 (7th Cir. 2005) (explaining that pretext means the employer lied); Ahuja v. Danzig, 14 F. App'x 653, 657 (7th Cir. 2001) (same).

146 *See, e.g.*, Castro v. DeVry Univ., Inc., 786 F.3d 559, 576 (7th Cir. 2015) (considering whether the employer honestly believed that the employee was dishonest with her employer when they decided to fire her).

This subsection focuses on just a tiny fraction of the many issues that arise under *McDonnell Douglas*. It shows a pattern of the courts creating frameworks that are one step removed from the statutory language. The courts then develop subdoctrines and sub-subdoctrines to interpret the frameworks, leading to even more disarray.

C. Harassment and Faragher/Ellerth

The courts have also developed a robust set of ancillary doctrines in the context of harassment. The Supreme Court first recognized that plaintiffs can prevail under Title VII if they face harassment (or a hostile work environment) in *Meritor Savings Bank, FSB v. Vinson*.[147] In *Meritor*, the Supreme Court discussed whether the words "terms, conditions, or privileges of employment" encompass sexual harassment.[148] The Court stated: "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[149] The Court then stated that harassment affects the terms, conditions, or privileges of employment when it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment.' "[150] As discussed in Part I above, the Supreme Court created the "severe or pervasive" doctrine in *Meritor*.

In *Meritor*, the Supreme Court also started the seeds for another subdoctrine. At the end of *Meritor*, the Supreme Court mused about employer liability for harassment. It noted that employers would not be automatically liable for all harassment that occurred in the workplace but also noted they would not be shielded from liability just for having a sexual harassment policy.[151]

Meritor added new terms of art and concepts to Title VII jurisprudence, like "severe or pervasive" and the idea that employers might not be automatically liable for all harassment that occurs in the workplace. These are the first steps away from the statute.

The second step away occurred in *Faragher v. City of Boca Raton*[152] and *Burlington Industries, Inc. v. Ellerth*.[153] In these cases, the Court created a complicated framework for evaluating employer liability. Even though the cases were decided on the same day, they provide differing rationales for the enunciated test.

In *Faragher*, the Court noted that *Meritor* provided rough contours for determining employer liability. First, *Meritor* indicated that employers would not be absolved of liability based on the existence of a company complaint

147 477 U.S. 57, 66 (1986).

148 *Id.* at 63–64 (quoting 42 U.S.C. § 2000e-2(a)(1) (1982)).

149 *Id.* (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13, 708 (1978)).

150 *Id.* at 67 (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

151 *Id.* at 72.

152 524 U.S. 775 (1998).

153 524 U.S. 742 (1998).

procedure or in cases where the employer did not possess actual knowledge of the harassment.[154] Second, *Meritor* indicated that employers would not be automatically liable for a supervisor's sexual harassment. Although these statements in *Meritor* were arguably dicta, the *Faragher* Court built upon these principles.[155]

The Court looked to agency law and then created an employment-discrimination-specific, agency-like test for determining employer liability for harassment. The Court noted that the majority of lower courts had held coworker harassment to be outside the scope of an employee's duties and based employer liability on its own negligence.[156] The Court held that an employer would be automatically liable for a supervisor's harassment when it culminated in a tangible employment action but that an employer would have an affirmative defense to liability when the harassment did not result in a tangible employment action.[157] The words "tangible employment action" appear nowhere in Title VII and are a court-created term of art. Nor do the statutes draw any distinction between employer liability for actions by coworkers versus those committed by supervisors.

Facially, *Faragher* and *Ellerth* leave a number of questions unresolved, including, but not limited to, the following: How should courts evaluate the two prongs of the affirmative defense? Who is a supervisor? What about if customers commit the harassment? What if the harassment is caused by both supervisors and coworkers? Is a constructive discharge a tangible employment action? How close to the harassment does the tangible employment action need to be? What if one supervisor harasses and the other takes the employment action? Can employees prove liability through other ways, such as apparent authority? What if a supervisor has apparent authority but not actual authority to take a tangible employment action? What is a tangible employment action?

D. Ancillary Doctrines of Faragher/Ellerth

After *Faragher* and *Ellerth*, courts were faced with questions about when employers could get the benefit of the affirmative defense. The district and appellate courts needed to define the term "tangible employment action" and also needed to define who counts as a supervisor for purposes of applying the affirmative defense.

In *Vance v. Ball State University*, the Supreme Court resolved a circuit split and defined the term "supervisor" for purposes of the *Faragher/Ellerth* test.[158]

154 *Meritor*, 477 U.S. at 72.

155 *Faragher*, 524 U.S. at 791–92. The Court also purported to interpret the word "agent" as used in Title VII, but the resulting analysis is not connected to the statutory term. *See Meritor*, 477 U.S. at 70–72.

156 *Faragher*, 524 U.S. at 793–94. *See generally* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851 (2014) (discussing the role of lower-court precedent in Supreme Court analysis).

157 *Faragher*, 524 U.S. at 807.

158 Vance v. Ball State Univ., 570 U.S. 421, 430–31 (2013).

Over a robust dissent by Justice Ginsburg, the Court held that the only employees who qualify as "supervisors" for purposes of the *Faragher/Ellerth* defense are those who have the power to take tangible employment action against the complaining employee.[159]

A tangible employment action means to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[160] To reach this outcome, the Supreme Court was not able to rely on the definition of the term "supervisor," because, as the Court noted, the word often has different meanings both in colloquial and legal usages.[161] Instead, the Court reasoned that *Faragher* and *Ellerth* contemplated a sharp division between who was a supervisor and who was not, given that the test enunciated in those opinions relied heavily on the distinction.[162] The Court rejected the Equal Employment Opportunity Commission's proposed standard, which the Court stated would lead to uncertainty in practice.[163]

In dicta, the Court noted that employers might try to insulate themselves against automatic liability by vesting the authority to make tangible employment actions to only a narrow band of employees.[164] The Supreme Court anticipated that employers might still face automatic liability for harassment in those instances. It noted that in such situations the small group of individuals able to make tangible employment actions would need to rely on the recommendations of other workers to make decisions: "Under those circumstances, the employer may be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."[165]

Vance is defining terms that are several steps removed from the original statutory language. However, it too is leading to additional questions. In her *Vance* dissent, Justice Ginsburg noted that it is unclear whether certain actions, such as reassignments and discipline, count as tangible employment actions.[166] After *Vance*, it is unclear what should happen if a person possesses apparent authority to take an action or influence a supervisor but does not possess actual authority.[167] It is also unclear how much influence a person must have in an employment decision to count as a supervisor under the "delegated power" concept.[168]

159 *Id.* at 431.

160 *Id.* (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

161 *Id.* at 432–34.

162 *Id.* at 432.

163 *Id.* at 431–32.

164 *Id.* at 446–47.

165 *Id.* at 447.

166 *Id.* at 464 (Ginsburg, J., dissenting).

167 *See* Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 739 (10th Cir. 2014).

168 *See* McCafferty v. Preiss Enters., Inc., 534 F. App'x 726, 731 (10th Cir. 2013); Delozier v. Bradley Cty. Bd. of Educ., 44 F. Supp. 3d 748, 761 (E.D. Tenn. 2014).

Courts have spent the last several decades defining *Faragher/Ellerth* and all of its subparts, and ambiguities still remain within the court-created doctrine. As discussed in Part IV, the court-created concepts within *Faragher/Ellerth* do not remain in their silo. Instead, they intersect with concepts from *McDonnell Douglas* and cat's paw theory.

III. Cat's Paw

A fairly recent addition to the canon is the concept of the "cat's paw," formally recognized by the Supreme Court in *Staub v. Proctor Hospital*.[169] With its name coined by Judge Richard Posner and drawn from a fable,[170] the concept of cat's paw has taken ground quickly, discussed in hundreds of cases. It has many of the same features of the *McDonnell Douglas* test and the *Faragher/Ellerth* affirmative defense: ill-defined or undefined terms of art and multiple exceptions. Its analytical reach is getting further and further from the employment discrimination statutes.

A. One Step Away

The Supreme Court recognized the cat's paw theory in *Staub v. Proctor Hospital*.[171] Vincent Staub sued his employer for terminating his employment, alleging the employer violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).[172] USERRA prohibits employers from discriminating or retaliating against service members based on their military service.[173]

The Court stated that the concept of "intent" requires a person to intend the consequences of his actions or believe that consequences are substantially certain to occur.[174] It noted that even if two of Staub's supervisors acted with discriminatory animus, they did not terminate Staub. Instead, they put negative performance reports in his file and another individual made the final decision to fire him.[175]

The Court continued by deciding whether the hospital can be held liable for the animus and actions of the two subordinate supervisors. It stated: "Perhaps, therefore, the discriminatory motive of one of the employer's agents (Mulally or Korenchuk) can be aggregated with the act of another agent (Buck) to impose liability on Proctor."[176] The Court discussed various views on agency law and then somehow resolved the agency issue through causation. The Court stated:

169 562 U.S. 411 (2011).
170 *Id.* at 415 n.1.
171 *Id.*
172 Staub v. Proctor Hosp., 560 F.3d 647, 650–51 (7th Cir. 2009), *rev'd*, 562 U.S. 411 (2011).
173 38 U.S.C. § 4311 (2012).
174 *Staub*, 562 U.S. at 417.
175 *Id.* at 417–18.
176 *Id.* at 418.

> Ultimately, we think it unnecessary in this case to decide what the background rule of agency law may be, since the former line of authority is suggested by the governing text, which requires that discrimination be "a motivating factor" *in the adverse action.* When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a "factor" or a "causal factor" in the decision; but it seems to us a considerable stretch to call it "a motivating factor."[177]

The Court ultimately held "that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[178] Turning to the facts, the Court held that the facts presented could meet the new standard.[179] However, because the jury was not instructed with this standard, the Court remanded the case to the Seventh Circuit to determine whether the jury's verdict should be reinstated or whether a new trial should be granted.[180]

The Court explicitly noted that it was not deciding a number of questions related to cat's paw. It did not decide what should happen if the subordinate supervisor intended one outcome, but a different outcome resulted.[181] It also did not decide whether liability would occur if a coworker (rather than a supervisor) possessed the required bias.[182]

B. Cat's Paw: Multiple Steps Away from the Statute

Since *Staub*, there has been surprisingly little scholarly attention paid to cat's paw doctrine.[183] The cat's paw concept creates a litany of unanswered questions, each of which is likely to cause the courts to create new ancillary doctrines and terms of art. Can biased coworkers serve as the conduit? What

177 *Id.* at 418–19.

178 *Id.* at 422 (footnote omitted).

179 *Id.* at 422–23.

180 *Id.*

181 *Id.* at 419 n.2.

182 *Id.* at 422 n.4.

183 *See* L. Camille Hébert, *The Supreme Court's 2010–2011 Labor and Employment Law Decisions: A Large and "Mixed Bag" for Employers and Employees*, 15 EMP. RTS. & EMP. POL'Y J. 279, 293–98 (2011); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432–34 (2012). Some articles briefly discuss cat's paw theory. *See, e.g.*, Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, 34 BERKELEY J. EMP. & LAB. L. 159, 183–184 (2013); Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2202 (2018) (considering whether cat's paw could be used to hold employer's liable for using discriminatory customer feedback); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1413–14 (2014) (briefly noting the causal questions cat's paw theory invites). For scholarly attention predating *Staub*, see, for example, Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 389–97 (2008) (discussing the competing standards established by the circuit courts of appeals).

about biased customers? What is the effect of an employer investigation on employer liability? Does cat's paw analysis apply to all instances where one person is biased and another person is not? What if the decisionmaker knows the person giving a recommendation or reporting misconduct has said or done discriminatory things in the past? What does proximate cause mean in the context of employment discrimination? What if the biased individual intends one result but sets in motion another outcome? Is cat's paw about agency, intent, causation, or all three? How does it fit with existing concepts? Who has to prove cat's paw and what is the effect of the doctrine? Is it a complete defense to liability or is it a partial defense to damages?

The Supreme Court anticipated some of these problems, ducked some of them, and did not recognize others. Just following one of these questions shows how much uncertainty remains within cat's paw for the lower courts to resolve.

For example, one question that arises under cat's paw is the effect of an independent judgment or investigation by a nonbiased decisionmaker. The Court distinguished independent judgment from a subsequent investigation.[184] It specifically held that the independent judgment of a decisionmaker does not break the causal chain.[185] The Court purported to address this problem through proximate-cause jurisprudence. The Court noted:

> And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that [are] too remote, purely contingent, or indirect." We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent."[186]

The Court continued by noting that the decisionmaker's judgment is a proximate cause of the decision, but noted that the common law allows for multiple proximate causes.[187] It also indicated that the judgment is not a superseding cause because superseding cause only exists if it is a "cause of independent origin that was not foreseeable."[188]

The Court also rejected the idea that the independent judgment breaks the causal chain for practical and fairness reasons. The Court reasoned:

> Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action,

184 *Staub*, 562 U.S. at 420–21.

185 *Id.*

186 *Id.* at 419 (alterations in original) (footnote and citation omitted) (quoting Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010)).

187 *Id.* at 420.

188 *Id.* (quoting Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 837 (1996)).

> then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.[189]

The Court held that the mere fact that an investigation occurred did not relieve the employer of liability. "The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."[190] The Court also noted: "Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action,' precisely as the text requires."[191]

However, the Court left room for an investigation to break the causal chain, in very limited circumstances. It held that the employer's investigation must be "unrelated" to the supervisor's original biased action.[192] The Court also noted that under USERRA, the defendant would be required to prove the causal break.[193] However, the biased report remains a factor "if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified."[194]

Predictably, there is a developing ancillary body of jurisprudence about when investigations are sufficient to cut off liability in cat's paw cases.[195] For example, the Eleventh Circuit has indicated that there is no cat's paw liability when the employer "makes an effort" to independently investigate.[196] Some courts are grappling with the issue of whether the employer can claim an independent investigation if it relied at all on the biased supervisor's input or recommendation. In other words, to break the causal chain, must the investigation show that the adverse action is justified without relying on the biased supervisor?[197]

Although cat's paw doctrine is still in its infancy, it is easy to see how it is likely to follow the pattern of the other court-created subdoctrines with a complicated array of new terms of art and even more ancillary doctrines.

---

189 *Id.*

190 *Id.* at 421.

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

195 *See* Marshall v. Rawlings Co., 854 F.3d 368, 380 (6th Cir. 2017); Roberts v. Columbia Coll. Chi., 821 F.3d 855, 866 (7th Cir. 2016).

196 Duncan v. Alabama, 734 F. App'x 637, 639 (11th Cir. 2018) (per curiam).

197 *E.g.*, Perkins v. Child Care Assocs., 751 F. App'x 469, 476 (5th Cir. 2018) (per curiam).

IV. The Field Collapses on Itself

Over the last several decades, courts have spent a tremendous amount of judicial resources on the court-created doctrines and all of their subdoctrines. Part I demonstrated how the court-created ancillary doctrines do not help resolve even the simplest kinds of discrimination cases. Therefore, there is a big question about exactly what work the subdoctrines perform.

This Part shows how the field is collapsing in on itself. Courts are now spending time determining how various subdoctrines intersect with other subdoctrines and sub-subdoctrines. Here is a partial list of just some of the questions that exist among the ancillary doctrines with examples of the kinds of factual scenarios in which they might arise:

- In a case that raises both disparate treatment and retaliation, would some negative outcomes create liability for purposes of retaliation because they are materially adverse, but not create liability for discrimination because they do not meet the different definition of adverse action? For example, if a supervisor gave a plaintiff a negative evaluation because of his race and then later gave him a second negative evaluation because he complained about discrimination, would the second evaluation be sufficient to raise a retaliation claim, even if the first one is not an adverse action?
- Can actions that do not rise to the level of an adverse action for a discrimination claim nonetheless constitute severe or pervasive harassment? For example, if a supervisor threatens to fire a woman twice, gives her a negative evaluation, and makes one sexist remark, can she prove harassment even if the incidents would not support a sex discrimination claim?
- How does the cat's paw doctrine intersect with the honest belief doctrine?[198] For example, if a human resources professional honestly believes a worker was late for work three times, does the employer face liability if in the later discrimination case it is revealed that the reporting supervisor was biased and did not report tardiness of other similarly situated employees?
- How does cat's paw intersect with *McDonnell Douglas*? Do courts perform the two tests separately? Is cat's paw analyzed in the third step of the *McDonnell Douglas* test?
- When a coworker's harassment combines with a tangible employment action, together causing a constructive discharge, can the employer use the *Faragher/Ellerth* affirmative defense?[199]
- Is the definition of supervisor for cat's paw doctrine the same definition the Supreme Court enunciated in *Vance* for purposes of the *Faragher/Ellerth* affirmative defense?[200]

198 *See, e.g.*, *Marshall*, 854 F.3d at 380.

199 *E.g.*, Isaac v. Precision Drilling Co., No. 4:16-CV-01253, 2017 WL 4423213, at *6 (S.D. Tex. Oct. 5, 2017).

200 *See, e.g.*, Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 738 (10th Cir. 2014).

- Can you use cat's paw analysis in cases that require the plaintiff to establish "but for" cause, such as the ADEA and Title VII retaliation cases?[201]

Given that no one wants to read a 200-page law review article, I will focus on two of these collisions to demonstrate two concerns. First, these cases illustrate the worst kind of judicial navel gazing, where the courts are being drawn into the minutiae of deciding what other judges meant. Judges are being diverted away from the factors actually listed in the text of the statutes. Second, resolving these questions does not help courts answer the question of why workplace inequality exists or how to stop it from happening. Indeed, answering these questions does not help a court resolve whether a particular plaintiff faced differential treatment because of a protected trait.

A. Staub *Supervisor vs.* Vance *Supervisor*

Under cat's paw doctrine, a worker can establish discrimination under the following factual scenario: a biased supervisor takes an action intended to cause an adverse action, and a second unbiased person authorizes the adverse action based on the biased supervisor's conduct.[202] The Supreme Court specifically declined to determine if cat's paw analysis applied to biased coworker conduct.[203] Presently, the distinction between supervisors and coworkers is important because biased supervisors fall within the doctrine, and it is still an open question whether biased coworker conduct does.[204]

In the *Staub* case, the Supreme Court characterized the case as involving two biased supervisors, one of whom was Janice Mulally.[205] The Court described Mulally as Staub's immediate supervisor without fully describing what actions she could formally take on behalf of the hospital.[206] Rather, the lower court described her as preparing work schedules for the imaging department where Staub worked.[207] The Court also noted that she could issue disciplinary notices.[208] According to the Supreme Court's recitation of the facts in the light most favorable to the jury verdict, it appears that Mulally wanted Staub fired, yet she did not have the power to do it. When the Court enunciated its cat's paw doctrine, it called Mulally a supervisor.[209]

---

201 *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346–47 (2013); Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); Sims v. MVM, Inc., 704 F.3d 1327, 1336 (11th Cir. 2013).

202 Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011).

203 *Id.* at 422 n.4.

204 Smyth-Riding v. Scis. & Eng'g Servs., LLC, 699 F. App'x 146, 156 (4th Cir. 2017); McCullough v. Whitaker, No. 14-296, 2019 WL 171404, at *6 & n.1 (D.D.C. Jan. 8, 2019) (noting issue).

205 *Staub*, 562 U.S. at 414.

206 *See id.*

207 Staub v. Proctor Hosp., 560 F.3d 647, 651 (7th Cir. 2009), *rev'd*, 562 U.S. 411 (2011).

208 *Staub*, 562 U.S. at 414.

209 *Id.* at 414, 422.

Recall that in *Vance v. Ball State University*, the Supreme Court resolved a circuit split and defined the term "supervisor" for purposes of the *Faragher/Ellerth* test.[210] The Court held that the only employees who qualify as "supervisors" for purposes of the *Faragher/Ellerth* defense are those who have the power to take tangible employment action against the complaining employee.[211] A tangible employment actions means to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[212]

Under *Vance*, it is unlikely that Mulally would be a supervisor. Thus, it appears that there are two kinds of supervisors in employment discrimination law: people that count as supervisors under *Staub* and those that count as supervisors under *Vance*. Indeed, it does not make sense to incorporate *Vance*'s definition of supervisor into the cat's paw context. If the first supervisor had the authority to take a tangible employment action, the first supervisor could just take the action, rather than encouraging others to take the negative action. It does not make sense to define the term "supervisor" to be consistent in both contexts.

As discussed in Part V below, courts are failing to see that whether there is a line between supervisor and coworker varies according to the workplace. Basing a legal standard on a crisp delineation between the two is always going to fail because the crisp dichotomy exists in some workplaces and not in others. More importantly, reconciling the two kinds of "supervisors" does not help the courts to understand whether a worker faced discrimination. In other words, if a court reframes Mulally as a coworker because she does not have the power to take tangible employment actions, the distinction between coworker and supervisor does not in any way change whether the plaintiff faced discrimination.

Nor do these questions relate to the core concepts of the employment discrimination statutes: whether a protected trait affected a person's terms, conditions, or privileges of employment. The employment discrimination statutes do not exempt employers from liability just because a coworker, rather than a supervisor, sets in motion a chain of events.

Coworker status may be important in some cases, because it may point to a problem with causation. The coworker's actions may be so far removed from the decision that no reasonable jury would find that the coworker's bias caused the outcome. In many (but not all) instances a coworker's input would be further removed from an outcome than a supervisor's input would be. However, because the Supreme Court enshrined the concept of supervisor into cat's paw (and left open the question of what happens with coworker bias), lower courts are diverted into believing that coworker/supervisor status might be the relevant issue, rather than causation. Coworker/supervisor status is part of cat's paw analysis in some circuits but is not contained in the

210 Vance v. Ball State Univ., 570 U.S. 421, 430–31 (2013).

211 *Id.* at 430–32.

212 *Id.* at 431 (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

federal discrimination statutes. Causation is included in the discrimination statutes.

B. Honest Belief, Pretext, and Cat's Paw

It is also difficult to reconcile the honest belief doctrine, cat's paw, and pretext.

In *McDonnell Douglas Corp. v. Green*, the Supreme Court held that a worker may prove discrimination by showing that the reason provided by the employer for its decision is not true, but rather is a pretext for discrimination.[213] The Court explained this in detail in *Reeves v. Sanderson Plumbing Products, Inc.* when it noted:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[214]

In discrimination cases, a jury may find in favor of the plaintiff if it finds that the employer's reason is not credible. The noncredible reason is a proper basis from which the jury may infer discrimination.

Under the honest belief doctrine, the employer will not be liable for discrimination if it mistakenly relied on facts when making a decision that later turned out to be untrue. One court noted, "When an employer reasonably and honestly relies on particularized facts in making an employment decision, it is entitled to summary judgment on pretext even if its conclusion is later shown to be 'mistaken, foolish, trivial, or baseless.'"[215] Some courts have noted that the honest belief rule explicitly contradicts pretext doctrine.

> [T]he "honest belief rule" appears to eviscerate the third prong of the *McDonnell Douglas* analysis as the employee's opportunity to show that the employer's proffered explanation is merely a pretext for discrimination is effectively foreclosed. Keeping in mind that summary judgment should seldom be granted in employment cases, [t]he Court is extremely hesitant to

213 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805, 807 (1973).

214 Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000) (citations omitted) (quoting Wright v. West, 505 U.S. 277, 296 (1992) (plurality opinion)).

215 Chen v. Dow Chem. Co., 580 F.3d 394, 401 (6th Cir. 2009) (quoting Clay v. United Parcel Serv., Inc., 501 F.3d 695, 713–15 (6th Cir. 2007)).

> apply any rule that decidedly reduces an employee's opportunity to show that her employer's actions were motivated by unlawful discrimination.[216]

This contradiction is especially visible when one compares the standard for establishing the third step of *McDonnell Douglas* against what courts state about the honest belief doctrine. For example, in describing the third step of *McDonnell Douglas*, another court stated that the plaintiff could meet it

> "by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons." Pretext may also be shown by providing direct evidence that the proffered rationale is false, or that the plaintiff was treated differently from similarly-situated employees.[217]

Yet, the honest belief doctrine allows a court to find no discrimination, in some circumstances where its reason for acting is inconsistent with what actually occurred. It is difficult to reconcile these two doctrines.

Additionally, it is easy to think of fact scenarios in which an employer's honest belief is still compatible with a finding of discrimination. Imagine that an employer fires a worker because it honestly, but mistakenly, believed that the worker stole company property. The worker is black and has evidence that the company has fired a number of black employees for stealing company property when the fired employees did not steal any property. The evidence shows that the company has never fired a white employee for stealing. Even if we believe the employer's reason for the termination, we can also believe that the company excessively scrutinizes black employees and wrongfully believes that they are stealing based on their race.

Likewise, many cat's paw cases are incompatible with the honest belief doctrine. The term "cat's paw" describes a case in which an individual who does not harbor animus makes the challenged decision. However, that decision is impacted by the efforts of another individual who exhibited bias, and the decisionmaker does not know about the animus at the time the decision is made. For example, if a supervisor wanted to discriminate against a black employee, that supervisor might falsely accuse the employee of work-related misconduct and then provide that information to the company's human resources department. A human resources representative might then decide to fire the individual based on the false information. An employer in such a scenario might claim that the employee who made the decision had an honest belief about the plaintiff's misconduct when he or she made the adverse

216 Jennings v. Mid-Am. Energy Co., 282 F. Supp. 2d 954, 963 (S.D. Iowa 2003). *But see* Dewitt v. Sw. Bell Tel. Co., 845 F.3d 1299, 1311 (10th Cir. 2017) (finding the doctrine does not eviscerate pretext).

217 Crowe v. ADT Sec. Servs., 649 F.3d 1189, 1196 (10th Cir. 2011) (citation omitted) (quoting Swackhammer v. Sprint/United Mgmt. Co., 493 F.3d 1160, 1167 (10th Cir. 2007)).

decision. However, the Supreme Court's decision in *Staub* makes it clear that using the honest belief doctrine in some cat's paw cases is not allowed.[218]

It is incredibly difficult to reconcile the honest belief doctrine with pretext and cat's paw. More importantly, it is not clear that reconciling these doctrines is the best way to advance employment discrimination jurisprudence.

Each of these doctrines, in its own way, asks questions that divert attention away from the central tenets of employment discrimination. For example, the name of the honest belief doctrine suggests that if a belief is honest, it cannot be discriminatory. This is simply untrue. And, in some cases, focusing on the honesty of the employer's reason may not be relevant to whether a protected trait caused a particular outcome. As discussed earlier, cat's paw doctrine is currently unclear about whether coworker status affects its analysis. Additionally, to the extent that cat's paw seems to require that a subordinate intend an adverse action, it is inserting an extra element into the discrimination inquiry. Again, the central question is whether a protected trait caused an outcome. It is not whether an individual person intended an outcome and convinced someone else to finalize that outcome. Each of these diversions muddles the field further.

V. WHY AND SOME SOLUTIONS

The court-created doctrines discussed in this Article have some common features. All of them fail to recognize the complexity of the workplace and people. They also enshrine factual inferences that are true in some instances but not in others. Ultimately, the courts would be better served to stop creating new ancillary doctrines and to abolish or greatly diminish those that already exist. Courts can use the values contained in the statutory language, Supreme Court caselaw, and existing rules of procedure and evidence. When taken together, these sources indicate that the totality of facts matter, that context is important, that the workplace is complex, and that it is difficult for judges to make factual inferences when they are not the factfinder.[219] Based on these values, the courts could form statement rules to serve as a cautionary tale about creating new ancillary doctrines.[220]

---

218 Staub v. Proctor Hosp., 562 U.S. 411, 420 (2011).

219 This is not a question about the different benefits and costs of rules versus standards. Most of the ancillary doctrines have both standard-like and rule-like elements. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561 (1992); *cf.* Gideon Parchomovsky & Alex Stein, Essay, *Catalogs*, 115 COLUM. L. REV. 165, 166–68 (2015).

220 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 688 (1990) (discussing statement rules); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 595 & n.4 (1992).

A. The Complexity of the Workplace and People

Almost all of the ancillary doctrines memorialize a set of facts into a legal doctrine. One of the reasons that the ancillary doctrines often fail is that they do not take into account the complexity of how discrimination manifests itself, how decisions are made, which people have power in a workplace, and how employers choose to organize themselves.

Take, for example, the cat's paw doctrine. It is based on a case where evidence showed two biased supervisors reported alleged misconduct to a higher-level manager who made a decision.[221] This is a fairly specific factual scenario. The Supreme Court specifically chose not to answer whether cat's paw analysis would apply if a coworker alleged the misconduct.[222] Even a cursory interrogation opens up additional possible factual scenarios, none of which are explicitly encapsulated within the Supreme Court's cat's paw jurisprudence.

What if a higher-level manager gives biased feedback to a lower-level manager, and it is the lower-level manager who makes the decision? What if a customer gives the biased feedback? What if the feedback comes from a friend of the supervisor who is not employed at the company? What happens if the biased feedback is not immediately passed along to a person, but sits in an evaluation or a personnel file and is later used to make a decision? What happens if another person tells the decisionmaker that the alleged misconduct did not happen? What happens if another person tells the decisionmaker that the person reporting the misconduct was biased or applying different standards to different employees? What happens when the biased supervisor has apparent authority to take action?

Or take as another example the honest belief doctrine. It posits that an employer is not liable for discrimination if it had an honest belief in the reason it made a decision, even if later evidence shows the reason was not correct. In some factual scenarios this intuition is likely correct, but it is very difficult (especially at summary judgment) to distinguish cases. For example, does an employer get the benefit of the honest belief doctrine if there is evidence of a pattern of reporting work-rule violations committed by women or people of certain races? Can the honest belief doctrine apply if the reason given might be a race- or sex-based stereotype (e.g., firing a woman because she is bossy or too emotional)? What if the worker or others alert the employer to the possibility of discrimination prior to the decision? What if the employer takes a negative action against an employee, even when its own internal investigation into the underlying conduct was inconclusive?

The ancillary doctrines often fail because they underestimate the complexity of the American workplace. Many different people impact decisions, including people who do not work for the employer.[223] Many workplaces do

221 *See Staub*, 562 U.S. at 414–15.

222 *Id.* at 422 n.4.

223 *See* Flake, *supra* note 183, at 2202 (considering whether cat's paw could be used to hold employer's liable for using discriminatory customer feedback).

not have strict, hierarchical structures. In some workplaces, people work on teams where they rotate in and out of leadership roles. Some employers use 360-degree reviews, where an employee is reviewed by subordinates, supervisors, and others. Some employers reach decisions through multitiered or multimembered panels or boards, making it difficult to pin down a decisionmaker. Employers use technology and algorithms to make decisions.[224] There are often differences between the employer's official policies and what happens in practice.

Discrimination can manifest itself in a number of ways. At times, discrimination happens because a biased person makes a biased decision. Scholars have provided rich theoretical groundwork for thinking about discrimination in other ways: negligent discrimination, structural discrimination, and unconscious discrimination. Structural discrimination theorists have proposed that the locus of discrimination is not always a bad individual or a company policy but rather unthinking assumptions about how work is organized.[225] Structural discrimination often occurs from a mix of intentional, negligent, and unconscious motives and actions. Unconscious discrimination posits that discrimination is not always caused by conscious animus against a protected group.[226]

Professor David Benjamin Oppenheimer has proposed a theory of negligent discrimination.[227] Under this proposal an employer would be liable for negligent discrimination under two circumstances. First, the employer would be liable "when the employer fails to take all reasonable steps to prevent discrimination that it knows or should know is occurring, or that it expects or should expect to occur."[228] An employer would also face liability if "it fails to conform its conduct to the statutorily established standard of care by making employment decisions that have a discriminatory effect, without first carefully examining its processes, searching for less discriminatory alternatives, and examining its own motives for evidence of stereotyping."[229]

Any court-created doctrine that fails to take into account this variety will ultimately fail because it will not be nimble enough for courts to apply it in a

224 Matthew T. Bodie et al., *The Law and Policy of People Analytics*, 88 U. COLO. L. REV. 961, 962 (2017); Pauline T. Kim, *Data-Driven Discrimination at Work*, 58 WM. & MARY L. REV. 857, 860 (2017).

225 *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 138 (2003).

226 *See* Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1057 (2017); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 745 (2005); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–25 (1987); Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 419 (2000).

227 David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 900 (1993).

228 *Id.*

229 *Id.*

wide variety of factual circumstances. Or it will become riddled with so many subdoctrines and exceptions as to render it unusable.

On multiple occasions, the Supreme Court has recognized the need to value context and flexibility in discrimination cases. For example, in *Oncale v. Sundowner Offshore Services, Inc.*, the Court noted how the severity of actions could differ depending on context:

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." . . . A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or rough-housing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[230]

The Court also recognized the importance of the individual facts of cases in *Burlington Northern & Santa Fe Railway Co. v. White*, in which it noted:

> Context matters. . . . A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children. A supervisor's refusal to invite an employee to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination. Hence, a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an "act that would be immaterial in some situations is material in others."[231]

In *Ash v. Tyson*, the Court noted that determining whether the term "boy" was racial involved "context, inflection, tone of voice, local custom, and historical usage."[232]

Justice Ginsburg, in dissent in *Vance v. Ball State University*, recognized variability within workplace structures:

> Supervisors, like the workplaces they manage, come in all shapes and sizes. Whether a pitching coach supervises his pitchers (can he demote them?), or an artistic director supervises her opera star (can she impose significantly

230 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

231 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) (citations omitted) (quoting Washington v. Ill. Dep't of Revenue, 420 F.3d 658, 661 (7th Cir. 2005)).

232 Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) (per curiam). The dispute about whether the term "boy" was racial in nature continued after the Supreme Court opinion. Ash v. Tyson Foods, Inc., 190 F. App'x 924, 926 (11th Cir. 2006) (per curiam).

> different responsibilities?), or a law firm associate supervises the firm's paralegals (can she fire them?) are matters not susceptible to mechanical rules and on-off switches. One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim.[233]

Workplace decisions are impacted by a variety of facts that are not easily captured in a doctrine. Any doctrine that relies on piecing together specific facts will ultimately fail because it cannot capture the infinite variety of the workplace.

B. Factual Inferences

Many of the doctrines also fail because buried within them are factual inferences that are not universally true, especially when looking at evidence in its totality. Working through a few examples is helpful.

Take the similarly situated employee doctrine. In some circuits, to use comparator evidence the plaintiff must show that another worker outside her protected class engaged in nearly identical conduct, worked for the same supervisor, and held the same position as she did.[234] However, it is easy to imagine hypotheticals in which comparator evidence is relevant, but does not meet this standard. For example, imagine a company has a zero-tolerance violence policy. A black employee punches a coworker, and the human resources department recommends that he be fired. A month before this, a white employee who works in a different department punched a coworker, and the human resources department recommended retaining the employee. Even though the two workers do not meet the similarly situated requirement in some circuits, this evidence would still be relevant to whether the black employee faced race discrimination.

Or, imagine that a woman is the only administrative assistant in a department. Even though the workers have fixed work hours according to company policy, the supervisor has never reported any workers for being late, even though everyone in the department has been late to work on multiple occasions. The woman tells her supervisor that she is pregnant. The supervisor begins to report every time the woman is even one minute late for work. Even though the other workers in the department do not have the same position as the pregnant employee, this comparator evidence is still relevant.

Factual inferences are also contained within the adverse action doctrine. The lower courts have tried to draw bright-line rules about what actions count as discrimination and which do not. However, factual claims like "a negative evaluation is never serious" quickly unravel when applied to real-world problems. For example, if a company regularly uses evaluations for determining which employees to put in promotion pools, which employees to terminate in a reduction in force, whether to put employees on perform-

233 Vance v. Ball State Univ., 570 U.S. 421, 465 (2013) (Ginsburg, J., dissenting).

234 *See, e.g.*, Brown v. Metro. Gov't, 722 F. App'x 520, 527–28 (6th Cir. 2018).

ance improvement plans, or which employees are eligible for bonuses, a reasonable employee would consider a negative evaluation to be serious and also to be a change in the "terms, conditions, or privileges" of employment.

Faragher/Ellerth makes multiple factual inferences. It assumes there is a stark dividing line between supervisors and nonsupervisors. It assumes that the ability to take tangible employment actions is significant, while ignoring that supervisors and others can take official actions short of tangible employment actions, like changing a worker's shift or assigning her less desirable tasks within her job description.

Likewise, the *McDonnell Douglas* test, especially in the prima facie case and the pretext analysis, makes a number of factual inferences that are true in some cases but not in others. It is not true that a worker who establishes the prima facie case should always be entitled to a rebuttable presumption of discrimination. Nor is it true that a worker always has enough evidence of discrimination to get to a jury by establishing pretext. Imagine a case where a white man applies for a job, is qualified for a job, and the employer chooses not to hire the worker but keeps looking to fill the position. The employer eventually hires a woman. The reason the supervisor gives for refusing to hire the man is that he did not interview well. However, the real reason the supervisor does not hire him is because the applicant dated his sister and broke up with her. All of the elements of *McDonnell Douglas* are present here, yet there are no facts suggesting that the man was not hired because of his sex.

Perhaps in response to overclaiming within *McDonnell Douglas*, courts have introduced concepts such as the honest belief doctrine to try to rein in *McDonnell Douglas*. However, in doing so, they also created a doctrine that contains problematic factual inferences. Just because a supervisor actually believes a nondiscriminatory reason for a decision does not mean that the decision was not influenced by the person's protected class. If a coworker regularly reports a minority coworker for tardiness and the minority coworker is fired by a supervisor, the worker's race might have impacted the decision, if other workers were tardy and not reported. The cat's paw scenario presented in *Staub* gives another example of where discrimination might have happened despite the honest belief of a supervisor.[235]

Many of the ancillary doctrines fail because the factual inferences they draw are not universally accurate.

C. Proposed Paths Forward

The ancillary doctrines are ineffective. There is no end in sight to the courts' creation of doctrines, subdoctrines, sub-subdoctrines, and terms of art. Now the courts are pulled into countless questions about how to reconcile all of the various court-created doctrines. The ancillary doctrines rely on inaccurate factual inferences and underestimate the variety of the American workplace.

235 Staub v. Proctor Hosp., 562 U.S. 411, 415 (2011).

Yet, at the same time, the federal courts must continue to adjudicate cases and federal judges must give reasons for their rulings. Fortunately, there is a path forward that relies on statutory language, existing caselaw, the Federal Rules of Procedure, and the Federal Rules of Evidence. Rather than point to a particular outcome in a particular fact scenario, this approach provides general guidance to judges about how to view facts. It countenances against using rigid, fact-specific doctrines.

As I have advocated in the past, the language of the federal discrimination statutes (while inexact) provides a workable framework through which to resolve most disparate treatment cases.[236] The language also refuses to confine discrimination to specific facts.

Take for example the language of Title VII. Under the first subpart, it is an unlawful employment practice for an employer "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."[237] This language asks whether a worker's protected class caused certain kinds of negative outcomes. It does not require that the connection be proven in any particular way. Nor does it require that any particular people cause or intend the outcome. Additionally, a worker can prevail under Title VII's second subpart, which makes it is unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[238]

The courts should defer to this broad approach. The federal discrimination statutes do not rely on fact-specific rules about what counts as discrimination and what does not. Instead, they inherently recognize that fact-specific rules are not workable and that a broader approach is required. Indeed, the Supreme Court has recognized: "The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."[239] And, the Court has also noted that lower courts must consider the totality of the evidence, viewed under the lens of applicable rules of civil procedure.[240]

There are multiple Supreme Court cases that warn against applying inflexible analytical structures. For example, in *McDonnell Douglas Corp. v. Green*, the Supreme Court indicated that the prima facie proof would need to change according to the facts of the underlying case.[241] In *O'Connor v. Con-*

236 Sperino, *supra* note 1, at 115.

237 42 U.S.C. § 2000e-2(a)(1) (2012).

238 *Id.* § 2000e-2(a)(2).

239 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

240 *See* Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147–49 (2000).

241 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

solidated Coin Caterers Corp., the Court chided the lower courts for requiring age-discrimination plaintiffs to prove that they were treated differently than someone under the age of forty (outside the protected class), because this required the plaintiff to prove too much.[242] Evidence that an employer preferred fifty-year-olds over sixty-five-year-olds might also suggest age discrimination.[243]

Title VII's language and the Supreme Court's statements about context, flexibility, and the importance of looking at all of the evidence, call into question the continued use of fact-specific ancillary doctrines. The federal courts could adopt statement rules to express a preference against creating new ancillary doctrines that enshrine factual inferences and make judgments about a fixed notion of the American workplace and how discrimination manifests itself. For example, one statement rule might be:

> Context matters in employment discrimination cases. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[244] It is often impossible to find a rigid framework that applies in every case. Flexibility is required.

This kind of statement rule is bolstered by the Federal Rules of Civil Procedure and the Federal Rules of Evidence, which instruct judges on how to respond to evidence. Judges are often using the ancillary doctrines when ruling on an employer's summary judgment motion. Rule 56 of the Federal Rules of Civil Procedure requires judges to get out of the weeds, look at the totality of the evidence, and make all inferences supported by the evidence in favor of the nonmoving party.[245] Thus, while the summary judgment standard does not mandate a particular outcome for a particular set of facts, it does tell judges to not make inferences in favor of the moving party. This is the role for the factfinder, not the judge ruling on a summary judgment motion. Encapsulated within Rule 56 is a skepticism about a judge's ability to make factual inferences, especially considering that summary judgment motions are considered on a paper record.

Likewise, the Federal Rules of Evidence adopt a broad, non-fact-specific framework for determining relevance. Evidence is relevant if "(a) it has any

242 O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312–13 (1996).

243 *See id.*

244 Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81–82 (1998)).

245 *See* FED. R. CIV. P. 56(a); Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1280–81 (2017) (Sotomayor, J., dissenting from the denial of certiorari) (interpreting Rule 56(a)); *see also* FED. R. CIV. P. 50(a); *Reeves*, 530 U.S. at 150 (interpreting Rule 50(a) to require a court to review all evidence on the record and draw inferences in favor of the nonmoving party).

tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[246]

Taken together, these general principles can get courts out of the weeds of the ancillary doctrines. For example, rather than enshrine or apply a cat's paw doctrine, judges could ask whether there is evidence from which a reasonable jury could believe that a plaintiff's protected class caused a negative outcome. Judges might discuss how it is possible for a negative outcome to be caused by biased input from a nondecisionmaker. This analysis relies on concepts contained within the statutory language. Without a cat's paw doctrine, the jury in *Staub* was able to reason that Staub was likely fired because of his military service.[247]

However, the judge should not be forced to determine whether a biased supervisor intended an adverse action, as enshrined in cat's paw jurisprudence. These concepts (that a supervisor intended to cause an adverse action) are not contained within the employment discrimination statutes, and thus, this articulation of cat's paw diverts a courts attention from the statutes' core concepts.

The judge would determine whether a case should proceed by giving deference to the idea that context and the totality of the circumstances matter in employment discrimination cases, that it is unlikely that any subdoctrine will be flexible enough to be useful, and that the governing rules of civil procedure limit the instances in which a judge can draw inferences in favor of a nonmoving party.

I am not arguing that this method resolves all difficult questions in employment discrimination law. For example, courts will still need to resolve whether some conduct is so de minimis that it does not meet the statutory threshold or what the required causal connection is. However, this is a smaller subset of cases than those currently implicated by the ancillary doctrines.

Additionally, as discussed throughout this Article, the ancillary doctrines tend to introduce new concepts into the jurisprudence, rather than focusing on the concepts contained in the discrimination statutes or the applicable rules of procedure and evidence. Even if courts abolish the ancillary doctrines, judges will still need to decide whether certain evidence is relevant. Using relevance as the required standard is preferable to using the constructs of the similarly situated comparator or the stray remarks doctrine. Both of these doctrines require a judge to do more than determine the relevance of the underlying evidence.

This path forward is workable as demonstrated by a fairly recent Seventh Circuit case.[248] The Seventh Circuit had previously held that a plaintiff may prevail on a discrimination claim through either a direct method or an indi-

246 FED. R. EVID. 401.

247 *See* Staub v. Proctor Hosp., 560 F.3d 647, 651 (7th Cir. 2009), *rev'd*, 562 U.S. 411 (2011).

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

rect method.[249] The court had further held that a plaintiff could prevail under the direct method by showing a convincing mosaic of circumstantial evidence.[250] However, the circuit recently retracted the convincing mosaic framework, in part, because judges were improperly using it to restrict how they viewed evidence.[251] As the Seventh Circuit noted: "The district court treated each method as having its own elements and rules, even though we have held that they are just means to consider whether one fact (here, ethnicity) caused another (here, discharge) and therefore are not 'elements' of any claim."[252]

The Seventh Circuit also noted that even though it had tried to warn courts not to treat the convincing mosaic test as the "elements" of a "claim," its admonitions did not work.[253] The Seventh Circuit noted:

> Today we reiterate that "convincing mosaic" is not a legal test. . . . From now on, any decision of a district court that treats this phrase as a legal requirement in an employment-discrimination case is subject to summary reversal, so that the district court can evaluate the evidence under the correct standard.
>
> That legal standard . . . is simply whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race, ethnicity, sex, religion, or other proscribed factor caused the discharge or other adverse employment action. Evidence must be considered as a whole, rather than asking whether any particular piece of evidence proves the case by itself—or whether just the "direct" evidence does so, or the "indirect" evidence. Evidence is evidence. Relevant evidence must be considered and irrelevant evidence disregarded, but no evidence should be treated differently from other evidence because it can be labeled "direct" or "indirect."[254]

The federal courts could use a similar approach to eradicate or greatly diminish the use of the ancillary doctrines. Getting rid of cat's paw doctrine may be the easiest because it is the most recent ancillary doctrine. However, courts could take a similar approach to all of the ancillary doctrines.

If courts choose to retain some or all of the ancillary doctrines, they could still limit their use by relying more heavily on general principles of relevance under the Federal Rules of Evidence, by heeding the Supreme Court's admonitions that context and flexibility matter, and by following the Federal Rules of Civil Procedure's enshrined preferences that factfinders, not judges, decide contested facts.

Conclusion

Federal employment discrimination jurisprudence is mired in ancillary doctrines. These ancillary doctrines tend to enshrine specific factual scena-

249 *Id.* at 764.
250 *Id.*
251 *Id.*
252 *Id.* at 763.
253 *Id.*
254 *Id.* at 765.

rios into legal doctrine, making inferences about when a specific factual scenario counts as discrimination. The American workplace is complex, and discrimination manifests itself in many ways. It is difficult to reduce discrimination jurisprudence into a fact-based set of universal rules. Doing so only causes a multitude of unworkable rules.

The federal courts should abolish or diminish the ancillary doctrines. They should adopt a statement rule that cautions them against creating ancillary doctrines that rely on the inferences to be drawn from certain factual scenarios. This kind of statement rule represents the language of the federal discrimination statutes, Supreme Court pronouncements about context and flexibility, and preferences about inferences and evidence enshrined in the Federal Rules of Evidence and the Federal Rules of Civil Procedure.