The Same Actor Inference: A Mechanism for Employment Discrimination

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I. INTRODUCTION

In 1991, the Fourth Circuit Court of Appeals turned an argument which appeared in the law review article, *The Changing Nature of Employment Discrimination Litigation*, into law in its landmark decision of *Proud v. Stone*. The authors of the article asserted that, from the standpoint of a potential discriminator, hiring members from a class he or she dislikes is irrational. As a result, the authors concluded that employers are unlikely to hire individuals from protected classes and fire them once they begin the job merely because they are members of a protected

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2 945 F.2d 796 (4th Cir. 1991).
3 *See The Changing Nature, supra note 1, at 1017.*
Using this reasoning, the Fourth Circuit held that when the same actor both hires and fires an employee in Age Discrimination in Employment Act cases within six months, a powerful inference that discrimination was not a motivating factor exists.

The effect of this decision has been the creation of an additional requirement for a plaintiff alleging discrimination. Prior to 1991, plaintiffs were only required to meet the inferential proof scheme established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*. *McDonnell Douglas* established that, in discrimination cases, the plaintiff has the burden to prove his or her prima facie case by showing that: 1) he or she was a member of a protected class; 2) he or she was subjected to an adverse employment action; 3) he or she was qualified for the position; and 4) the position either remained open or was filled by a person of similar qualifications. After the plaintiff establishes her prima facie case, an inference of discrimination exists and the defendant is required to establish that it was motivated by legitimate reasons. Finally, after the defendant asserts its nondiscriminatory reasons for firing or failing to promote the plaintiff, the plaintiff then has the burden to show that the defendant's reasons are not legal but are mere pretexts for discrimination.

*Proud* expands this scheme to include an additional requirement for the plaintiff. After *Proud*, the plaintiff is not only required to show that the employer's offered reasons are pretextual, but also that the pretextual reasons are sufficient to overcome an inference of nondiscrimination when the same individual both hired and fired the plaintiff. Thus, the *Proud* decision increases the plaintiff's burden in proving discriminatory motives under the *McDonnell Douglas* standard.

The "same actor inference" deserves an examination because of its unestablished parameters. Currently, courts are divided on its application and significance. Some courts have chosen to keep the inference within the boundaries expressed in the *Proud* holding, while other courts have expanded the inference to include almost any discriminatory situation, and still other courts have rejected it. Because the application of the "same actor inference" is unsettled, the reasonableness and limitations of the inference merit a critical analysis.

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4 See id.
6 See *Proud*, 945 F.2d at 797.
8 See id. at 802.
9 See id.
10 See id. at 804.
12 See, e.g., Waldron v. SL Indus. Inc., 56 F.3d 491, 496 n.6 (3rd Cir. 1995).
This comment focuses on the “same actor inference’s” effect on Title VII individual discrimination lawsuits. In addition, this comment also addresses summary judgment decisions in favor of employers asserting the “same actor inference” in Title VII lawsuits. First, Section II serves as an overall introduction into disparate treatment lawsuits and inferential standards established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* and the Fourth Circuit’s decision to supplement the Supreme Court’s standard to include the “same actor inference” expressed in *Proud v. Stone*. Second, Section III of this comment investigates post *Proud v. Stone* rulings where courts have expanded the “same actor inference” to include gender, racial discrimination, and national origin lawsuits under Title VII, promotion situations, “business as actor” situations, and situations where the adverse employment act did not occur within a short time after the plaintiff’s hiring. Third, Section IV discusses the shortcomings of the “same actor inference,” criticizing the misuse of the inference and its application in summary judgment proceedings. Finally, Section V concludes by asserting that the “same actor inference” should not be expanded to include any protected groups other than those specifically articulated by the *Proud* court and should never be applied to grant summary judgment where the plaintiff has met the requirements of the *McDonnell Douglas* standard.

II. BACKGROUND

A. McDonnell Douglas Corp. v. Green

In *McDonnell Douglas v. Green*, the United States Supreme Court established a three-tier burden-shifting standard for plaintiffs claiming individual disparate treatment discrimination. In that case, the plaintiff worked for the defendant as a mechanic and laboratory technician until he was laid-off. The plaintiff, feeling that the layoff was racially motivated because he was African-American and a vocal activist and supporter of the civil rights movement, initiated a protest in front of the defendant’s plant wherein the plaintiff and other participants blocked access to the defendant’s plant during the morning shift change. Thereafter, the plaintiff applied for a different job and was subsequently denied the position. The district court dismissed the plaintiff’s Title VII Section 703 claim against the defendant. Upon examination of the case, the Supreme Court ruled that the standard for asserting a Title VII claim involves a burden-shifting analysis wherein the plaintiff always bears the burden of persuasion, but the burden of production shifts between

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14 See id. at 794.
15 See id.
16 See id. at 796.
18 See *McDonnell Douglas*, 411 U.S. at 797.
the plaintiff and the defendant at appropriate times. Specifically, the court asserted that 1) the plaintiff must belong to a protected class; 2) the plaintiff must have applied for and be qualified for a job for which the employer was seeking applicants; 3) the plaintiff must be rejected; and 4) after plaintiff’s rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff’s qualifications. The court then ruled that after the plaintiff established his or her prima facie case, the defendant was required to provide a legitimate and nondiscriminatory reason for firing or failing to hire the plaintiff. Finally, after the defendant asserted its nondiscriminatory reason, the plaintiff was required to show that the defendant’s offered reasons were pretexts for discrimination. Following McDonnell Douglas, courts applied this standard to Title VII gender and religious discrimination claims, ADEA claims, and Americans With Disability Act (“ADA”) claims. Additionally, courts have applied the McDonnell Douglas standard to cases involving promotion and termination.

B. Proud v. Stone

In Proud v. Stone, the Fourth Circuit upheld a directed verdict against a plaintiff in an age discrimination case where the plaintiff met the requirements of McDonnell Douglas. It did so by relying on the “same actor inference” to negate the inference of discrimination that arises when a plaintiff presents evidence that meets each of the elements of McDonnell Douglas. In Proud, the plaintiff was a sixty-eight-year-old man who applied for a job with the Department of the Army. The individual who hired the plaintiff interviewed him over the telephone but presumptively knew his age because his date of birth was listed on his application. Upon hiring, the plaintiff was asked to assume duties in addition to the duties of the

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19 See id. at 802.
20 See id.
21 See id.
22 See id. at 804.
27 See Proud, 945 F.2d at 797-798.
28 See id. at 798.
29 See id. at 796.
30 See id.
job for which he was hired. The plaintiff, having no experience with these duties but in an effort to comply with the request, accepted. Afterwards, the plaintiff did not perform these additional duties efficiently and was, consequently, fired by the same individual who had hired him six months earlier.

The issue before the Proud court was whether an employee who is hired and fired within six months by the same person can prove discrimination under the ADEA. The court, relying on the law review article, The Changing Nature, determined that, in ADEA cases, when the hirer and firer are the "same individual, a powerful inference relating to the 'ultimate question' that discrimination did not motivate the employer" exists. Therefore, because the plaintiff was hired by the same individual who fired him, despite the fact that he was hired over the telephone and was given duties in addition to those specified for his job, the court determined that discrimination was unlikely. To support its conclusion, the court relied on The Changing Nature in stating, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."

To justify its modification of the McDonnell Douglas proof scheme, the court explained that the "same actor inference" does not violate McDonnell Douglas by stating, "[c]ourts must . . . resist the temptation to become so entwined in the intricacies of the proof scheme that they forget that the scheme exists solely to facilitate determination of 'the ultimate question . . . .'" In other words, the court chose to employ a "bottom-line" analysis, but an apparent problem with this justification is the Supreme Court created the McDonnell Douglas proof scheme to establish a universal method for determining disparate treatment lawsuits. The Court did not provide a meaningful justification to transform the "same actor inference" into law.

This new "same actor inference," as applied by the Fourth Circuit in Proud, created a higher standard for the plaintiff in a discrimination claim where he was hired and fired by the same individual. By its analysis, the Fourth Circuit arguably permits the "same actor inference" to override the plaintiff's right to have the jury decide the case after meeting the McDonnell Douglas proof scheme. The

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31 See id.
32 See Proud, 945 F.3d at 796.
33 See id. at 797.
35 Proud, 945 F.2d at 798.
36 See id. at 797-798.
37 Id. at 797 (quoting The Changing Nature, supra note 1, at 1017).
38 Id. at 798.
39 See id.
"same actor inference" has been adopted by the First, 40 Second, 41 Fourth, 42 Fifth, 43 Sixth, 44 Seventh, 45 Eighth and Ninth Circuits. 46 The Third and Eleventh Circuits have not adopted the analysis established by the Fourth Circuit giving the same actor facts a presumptive or mandatory value but have, rather, determined that same actor facts are merely evidentiary or permissively inferential. 48 The Tenth Circuit has not addressed the same actor issue, though district courts within the circuit have adopted it. 49

Courts characterize the "same actor inference" in a variety of ways. The inference is termed a "strong presumption," a "presumption," a "powerful inference," a "strong inference," a "compelling" inference, and an "inference." The "same actor inference" is currently being expanded to include Title VII lawsuits, including gender, race, and national origin, and ADA claims. Given this expansion of the inference, it warrants a critical analysis addressing the effects on the newly targeted Title VII groups.

III. RECENT DEVELOPMENTS

Originally, the "same actor inference" was applied narrowly in its birth case, Proud v. Stone. Proud specifically held that when the plaintiff was hired and fired by the same person in ADEA cases and when the plaintiff was hired within six months of firing, a powerful inference that the employer did not engage in pre-

41 See Grady v. Affiliated Central, Inc., 130 F.3d 553, 560, (2d Cir. 1997).
42 See Proud, 945 F.2d at 797.
43 See Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996)
44 See Buhrmaster, 61 F.3d at 463.
45 See EEOC v. Our Lady of the Resurrection Medical Center., 77 F.3d 145, 152 (7th Cir. 1996).
46 See Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174-175 (8th Cir. 1992)
48 See Waldron, 56 F.3d at 496 n. 6; see also Williams v. Vitro Services Corp., 144 F.3d. 1438, 1442 (11th Cir. 1998).
51 Brown, 82 F.3d at 658 n.25.
52 Evans v. Technologies Applications & Service Co., 80 F.3d 954, 959 (4th Cir. 1996); Proud, 945 F.2d at 798.
53 Bradley, 104 F.3d at 267, 270-271.
54 The Proud court described the inference as having a "compelling nature." Proud, 945 F.2d at 797.
55 Buhrmaster, 61 F.3d at 463; Our Lady of the Resurrection Medical Center, 77 F.3d at 152.
textual discrimination existed. Although the court likely intended a broad construction of the "same actor inference" due to language such as "employers who knowingly hire workers within a protected group seldom will be credible targets of pretextual firing," this language is dicta and can be narrowly construed. Moreover, the essential problem with the Proud court's reasoning, and, perhaps, the cause of subsequent expansive application of the "same actor inference," is the Proud court applies the "same actor inference" while assuming that the plaintiff has provided evidence that the reason given for his or her discharge was pretextual. To further complicate its analysis, the court fails to discuss when a plaintiff's proof of pretext will overcome the inference. As a result, no standard exists to protect plaintiffs who provide legitimate and believable pretextual reasons for discrimination.

Since the decision, courts have aggressively expanded the holding in Proud. Recent developments in same actor cases have proven that the inference can be applied in almost any lawsuit where the adverse actor hired and allegedly discriminated against the plaintiff.

A. The Expansion of the "Same Actor Inference" to Include All Protected Classes and the Elimination of the Time Requirement Expressed in Proud

1. Gender Discrimination and Time Requirement

Buhrmaster v. Overnite Transportation Company expanded the Proud decision to cover gender discrimination and situations where the plaintiff was not terminated within a short time of hiring. In Buhrmaster, a female office manager sued her former employer under Title VII alleging discrimination based upon sex. Buhrmaster was initially hired as a Customer Service Representative in 1984, a relatively low-level position, and was eventually promoted to Office Manager in 1989 by the same manager who hired her in 1984. The Office Manager position placed Buhrmaster as second in command at the Overnite Dayton Terminal and

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56 See Proud, 945 F.2d at 797.
57 Id. at 798.
58 The court states, [w]hile we can imagine egregious facts from which a discharge in this context [same actor context] could still be proven to have been discriminatory, it is unlikely that the compelling nature of the inference arising from facts such as these will make cases involving this situation amenable to resolution at an early stage.
59 Id. at 797 (alteration in original). Even so, the court does not explain this exception in its analysis.
61 See Buhrmaster, 61 F.3d at 462.
62 See id.
gave her significant power supervising lower-level employees.\textsuperscript{63} Buhrmaster was the only woman at the terminal with significant authority.\textsuperscript{64} Moreover, throughout her career at Overnite, Buhrmaster was repeatedly complimented on her diligence as an employee.\textsuperscript{65} Despite her obvious diligence, Buhrmaster may have used a management style that her subordinates did not appreciate.\textsuperscript{66} According to the company, as a result of complaints regarding her “style,” Buhrmaster was fired from her position by the same person who had hired her several years earlier without any notice of the complaints.\textsuperscript{67}

On an appeal questioning the validity of “same actor inference” jury instructions, the Sixth Circuit adopted the \textit{Proud} analysis and expanded it to include sex discrimination. The court did not discuss the possibility that the plaintiff’s management style may have been bothersome to her subordinates because she was a woman with significant authority. Moreover, the court did not address that the individual who fired Buhrmaster did so because of these complaints. Rather, the court simply affirmed the lower court’s expansion of the \textit{Proud} holding by stating that “[a]n individual who is willing to hire and promote a person of a certain class is unlikely to fire them simply because they are a member of that class” and “[t]his general principle applies regardless of whether the class is age, race, sex, or some other protected classification.”\textsuperscript{68} Furthermore, the court stated that “a short period of time is not an essential element of the ‘same actor inference.’”\textsuperscript{69} Thus, the court expanded the “same actor inference” in two directions. Specifically, the court expanded the “same actor inference” to include sex discrimination while it eliminated the short time period requirement.\textsuperscript{70}

2. Race and National Origin Discrimination

\textit{Jiminez v. Mary Washington College} expanded the \textit{Proud} holding to race and national origin discrimination cases.\textsuperscript{71} In \textit{Jiminez}, the plaintiff was a black professor from the West Indies.\textsuperscript{72} The plaintiff was hired by Mary Washington College

\begin{footnotesize}
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\item See id.  
\item See id.  
\item See id.  
\item See \textit{Buhrmaster}, 61 F.3d at 462.  
\item See id.  
\item \textit{Id.} at 464.  
\item Id.  
\item Since the \textit{Buhrmaster} decision, the “same actor inference” has been used in several Title VII cases, including \textit{Amirmokri}, 60 F.3d at 1130 (national origin), and \textit{Jiminez v. Mary Washington College}, 57 F.3d 369, 378 (4th Cir. 1995) (race and national origin).
\item See \textit{Jiminez}, 57 F.3d at 378; see also \textit{Our Lady of the Resurrection Medical Center}, 77 F.3d at 152.  
\item See \textit{Jiminez}, 57 F.3d at 369.
\end{itemize}
\end{footnotesize}
Part of the determination of tenure relied upon student evaluations of each professor's competence and teaching ability. Initially, Jiminez received low evaluations from his students during his first five semesters of teaching. Thereafter, his evaluations increased to an acceptable level. Several students wrote letters to the college and testified before the court that the majority of Jiminez's negative evaluations arose from racial intolerance by Jiminez's students. These students asserted that a conspiracy to keep Jiminez from tenure existed because, during the evaluation periods, several students would gather together and discuss how they could give him negative evaluations while making fun of his nationality and accent. In addition, these students testified that Jiminez was not afforded the same respect usually given to white professors.

The district court determined that Jiminez had sufficiently proven that the defendant's asserted reasons for terminating him were pretextual. The defendant asserted that it did not grant the plaintiff tenure because he consistently received poor student evaluations, he produced no scholarly work, and he failed to obtain his Ph.D. Jiminez then asserted that these reasons were pretextual because the defendant knowingly relied upon the tainted student evaluations and gave tenure to other professors who had not received their Ph.D. "The district court concluded that the more favorable student evaluations Jiminez received during his sixth, seventh, and eighth semesters at MWC constituted proof that his student evaluations for the first five semesters were tainted by the collusive effort of some white students." Consequently, the court ruled in Jiminez's favor.

On appeal, the Fourth Circuit reviewed the facts of the case and determined that the district court should have granted the defendant judgment as a matter of law based on the "same actor inference" and the Proud "bottom-line" discrimination analysis. The court noted that the district court misapplied the

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73 See id. at 372.
74 See id. at 373.
75 See id. at 373-375.
76 See id. at 375.
77 See Jiminez, 57 F.3d at 373-375.
78 See id.
79 See id. at 374.
80 See id. at 379-380.
81 See id. at 376.
82 See Jiminez, 57 F.3d at 376.
83 Id. at 379-380.
84 See id. at 372.
85 See id. at 378.
86 See Proud, 945 F.2d at 798.
McDonnell Douglas standard because the Fourth Circuit had previously ruled in its 1991 Proud decision that same actor facts "create[] a strong inference that the employer's stated reason for acting against the employee is not pretextual. . . . In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."87 As a result, Jiminez lost his case on appeal.88

B. The Expansion of the "Same Actor Inference" to Include "Business As Actor" Situations

Amirmokri v. Baltimore Gas and Electric Company radically and most notably expanded the "same actor inference" established in Proud by expanding it to include "business as actor" situations.89 In Amirmokri, the plaintiff was an Iranian immigrant who was allegedly promised a Senior Engineering position at the defendant's business within six months of hiring.90 Upon hiring, the plaintiff was systematically harassed at his job.91 Specifically, he was harassed by the leader of his engineering work group.92 This supervisor aggressively harassed the plaintiff by using ethnic slurs such as "local terrorist," "camel jockey," "the ayatollah" and "the Emir of Waldorf."93 Not surprisingly, the plaintiff did not receive the Senior Engineering position when it became available five months later.94 Instead, the defendant chose to promote another applicant with better performance ratings95 than the plaintiff but fewer qualifications, including the lack of an engineering degree.96

The district court granted summary judgment for the defendant. On appeal, the Fourth Circuit radically expanded the "same actor inference." The court stated that "BG&E [the defendant] was aware of Amirmokri's Iranian descent just five months earlier when it hired him and allegedly promised him a promotion, making it especially unlikely that he was denied a promotion because of bias against his national origin."97 In its opinion, the court overlooked the fact that the plaintiff's

87 Id. (alteration in original). Again, the court relies on The Changing Nature in its opinion. In this article, the authors assert that, from the standpoint of the discriminator, hiring employees from groups that one dislikes is irrational. See The Changing Nature, supra note 1, at 1017.
88 See Jiminez, 57 F.3d at 384.
89 See Amirmokri, 60 F.3d at 1130.
90 See id. at 1128-1129.
91 See id. at 1129.
92 See id.
93 Id.
94 See Amirmokri, 60 F.3d at 1129.
95 It is important to note that the same supervisor who harassed the plaintiff by using ethnic slurs was also the supervisor who evaluated Amirmokri's performance. See id.
96 See id. at 1130.
97 Id.
performance ratings could have been affected by his group leader's prejudice against Iranians. Instead, the court chose to expand the "same actor inference" by applying it to a business entity without regard to the fact that the individual who actually hired the plaintiff was not involved in firing him. Thus, according to Amirmokri, the "same actor inference" can apply not only when an employee is fired by the same person who hired him or her, but also when the employee is fired by the same business entity that hired him or her. Obviously, an employee is usually hired by the same business entity that fired him or her. Furthermore, it is hard to even imagine or to hypothesize a situation, less a company merger or acquisition, when an employee will not be both hired and fired by the same business entity. In short, this case may provide employers an argument that they did not fire or fail to promote an employee for discriminatory reasons merely because they hired that employee. In the face of this argument, a plaintiff is likely to have a challenging battle prevailing in a discrimination lawsuit in the Fourth Circuit.

C. Outcomes of the Recent Cases

These recent cases suggest as many questions as they answer. The rapid expansion of the "same actor inference" to apply to all protected groups, to promotion situations, to situations where the time period between hiring and the adverse employment act is not brief, and to business entities as "actors" creates questions because no boundaries appear to exist. For instance, under these new developments a defendant can legitimately argue that because it hired a minority or woman into an entry-level position several years earlier, an inference and presumption of non-discrimination exists when it fails to promote her to a higher-level position. Clearly, this analysis demonstrates a misunderstanding about the role that stereotypes and prejudice play in the workplace.

IV. ANALYSIS

A. The "Same Actor Inference" Is Unreasonable When Minorities and Women Are Asserting Disparate Treatment Claims

Many explanations exist to rebut the logic and reasoning utilized by the authors of The Changing Nature and the Proud decision. The article and the cases purport to be based on a "common sense" notion that management will not hire someone against whom it is prejudiced. Thus, the authors and the courts suggest that the mere hiring of an individual demonstrates that management is not prejudiced when it later fires the individual. This analysis displays a lack of understanding about the manner in which prejudice and stereotypes actually affect decision-

98 The Fourth Circuit's reasoning is likely to be accepted by other circuits judging by the swift acceptance of the Proud reasoning.

99 See Amirmokri, 60 F.3d at 1130.
making in the workplace. Further, several explanations such as grooming,\textsuperscript{100} outside influences,\textsuperscript{101} circumstantial changes and attitudes,\textsuperscript{102} and, most important, discriminatory stereotyping\textsuperscript{103} rebut this suggestion. Simply stated, the “same actor inference” is a misguided assumption. This is especially true given the fact that the authors of The Changing Nature conceded that it was originally based on little or no empirical findings.\textsuperscript{104} Unfortunately, that concession was ignored by the Fourth Circuit and the majority of circuits that support the “same actor inference.”

First, a few courts have discussed the possibility of grooming in situations where an employee is hired and terminated within a brief time.\textsuperscript{105} These courts have agreed that a jury can reasonably conclude that employees from protected classes who are qualified for the position at issue may be hired merely to act as a “groomer” or trainer for another individual that the employer prefers from an unprotected class.\textsuperscript{106} That is, the protected individual was merely hired or promoted to train an unprotected employee. Second, as shown in Jimenez\textsuperscript{107} and Amirmokri,\textsuperscript{108} outside influences can greatly influence the decision-maker’s judgment. Thus, the individual actors who actually hired the plaintiffs may not be acting with discriminatory intent but are, instead, influenced by subordinates, coworkers, and superiors who evaluated the plaintiffs such as the students\textsuperscript{109} and supervisors\textsuperscript{110} illustrated in

\begin{footnotes}
\item\textsuperscript{100} See Waldron, 56 F.3d at 496 n.6.
\item\textsuperscript{101} See Amirmokri, 60 F.3d at 1129 (involving lack of promotion based on performance evaluations prepared by racist supervisor).
\item\textsuperscript{103} See Price Waterhouse v. Hopkins, 490 U.S. 228, 234, 235 (1989).
\item\textsuperscript{105} See Johnson v. Group Health Plan, Inc., 994 F.2d. 543, 548 (8th Cir. 1993) (acknowledging likelihood that age protected plaintiff was hired to groom a younger employee); Waldron, 56 F.3d at 496 n.6; see also Northup, supra note 104, at 210.
\item\textsuperscript{106} For example, the Waldron court accepted the EEOC position that an employer may hire an older employee to simply “use his skills for a few years while a younger person [is] being ‘groomed’ for his position” and, essentially, fire the individual because of his age. Waldron, 56 F.3d at 496 n.6 (alteration in original).
\item\textsuperscript{107} To illustrate, the district judge in Jimenez reasoned that the college discriminated against Jimenez by relying on student evaluations that were “tainted by collusion and racial and national origin animus” in its tenure decisions. Jimenez, 57 F.3d at 376. Therefore, it is clear that individuals who are not directly involved in employment decisions may influence a decision-maker.
\item\textsuperscript{108} In Amirmokri, the plaintiff was racially harassed by a supervisor who evaluated his performance; thus, although the actual decision-makers may not have intended to discriminate, they utilized the evaluations made by a supervisor who racially harassed the plaintiff while making the promotion decision. See generally Amirmokri, 60 F.3d at 1129.
\item\textsuperscript{109} See Jimenez, 57 F.3d at 372-376.
\item\textsuperscript{110} See Amirmokri, 60 F.3d at 1129-1130.
\end{footnotes}
the example cases. Third, many situations exist where emerging discriminatory attitudes begin after the plaintiff is employed. For instance, an employer's opinion of the plaintiff may change when new factors emerge such as marriage, pregnancy, and child-rearing. Finally, a possibility always exists that an employee may be adversely affected due to employer advocated stereotypes and prejudices. In this situation, employers may not have an aversion toward women and minorities as long as they continue to work in stereotypical or traditional jobs. These employers may be perfectly willing to hire a woman or minority but unwilling to promote women and minorities into nontraditional and more responsible positions within the company. Indeed, they may intend to keep women and minorities in entry-level positions. They may also hold women and minorities to a higher standard based upon stereotypes or be quick to criticize minorities and women on the job due to their prejudices and stereotypes.

The courts' decision to expand the "same actor inference" to include Title VII classes is particularly troublesome when considering all of the menacing stereotypes that plague women and minorities. It is difficult to understand how the courts could overlook the inference's obvious negative implications in discrimination lawsuits based upon stereotypes. Certainly, the court cannot deny that discrimination based upon stereotypes exists; therefore, presuming a nondiscriminatory motive based merely on the fact that a business entity or an individual hired a woman or minority employee is clearly erroneous.

To illustrate the shortcomings of the "same actor inference," consider the


112 For example, the Seventh Circuit Court of Appeals recently stated:

[j]he psychological assumption underlying the same-actor inference may not hold true on the facts of the particular case. For example, a manager might hire a person of a certain race expecting them not to rise to a position in the company where daily contact with the manager would be necessary. Or an employer might hire an employee of a certain gender expecting that person to act, or dress, or talk in a way the employer deems acceptable for that gender and then fire that employee if she fails to comply with the employer's gender stereotypes. Similarly, if an employee were the first African-American hired, an employer might be unaware of his own stereotypical views of African-Americans at the time of hiring. If the employer subsequently discovers he does not wish to work with African-Americans and fires the newly hired employee for this reason, the employee would still have a claim of racial discrimination despite the same-actor inference.


114 See, e.g., Price Waterhouse, 490 U.S. 228 (1989)(ruling that employer stereotypes were motivating factors behind plaintiff's lack of promotion).

115 See Julie S. Northup, supra note 104; see, e.g., Price Waterhouse, 490 U.S. 228.
Price Waterhouse v. Hopkins decision in 1989.\(^\text{116}\) In Price Waterhouse, the Supreme Court ruled that stereotypes based upon gender are discriminatory under Title VII when the stereotypes serve as "motivating factors" in the employer's promotion decisions.\(^\text{117}\) In Price Waterhouse, the plaintiff sued for discrimination evidenced by lack of promotion.\(^\text{118}\) Instead of promoting the plaintiff based on her excellent performance in securing multimillion dollar contracts and excellent client rapport, Price Waterhouse managers placed Hopkins' application on hold and advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."\(^\text{119}\) In addition, Price managers accused Hopkins of being "overly aggressive" and "unduly harsh" even though these traits were not issues for male employees and associates.\(^\text{120}\) Unquestionably, Price Waterhouse created different rules of professionalism based on gender, specifically based on gender stereotypes. Indeed, the stereotypes advocated by Price Waterhouse harm "women by restricting workplace opportunities, inhibiting opportunity for career advancement, and limiting earning power."\(^\text{121}\)

Price Waterhouse was obviously decided before the Proud decision in 1991. Therefore, applying the facts of Price Waterhouse to a "same actor inference" analysis illustrates the unreasonableness of expanding it to include Title VII classes. Because Price Waterhouse was a disparate treatment case that involved discriminatory promotional decisions based upon sex, the McDonnell Douglas proof scheme\(^\text{122}\) and the "same actor inference" from Proud v. Stone can apply.\(^\text{123}\)

Using the McDonnell Douglas standard, Hopkins could establish her prima facie case by showing that she was a member of a protected class, applied for and was qualified for a promotion, was denied the promotion, and the employer promoted another person of similar qualifications.\(^\text{124}\) Next, Price Waterhouse would assert that it did not promote Hopkins because of nondiscriminatory factors such as the fact that she was "overly aggressive, unduly harsh, difficult to work with and impatient with staff."\(^\text{125}\) Thereafter, Hopkins would assert that she was not promoted because of discrimination based upon stereotypical notions of womanhood.

\(^{116}\) 490 U.S. 228 (1989).
\(^{117}\) See id. at 250.
\(^{118}\) See id. at 232.
\(^{119}\) Id. at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).
\(^{120}\) Id. (quoting Hopkins, 618 F. Supp. at 1113).
\(^{122}\) In Price Waterhouse, the Supreme Court lowered the McDonnell Douglas burden shifting framework by shifting the burden of persuasion to the employer after the plaintiff established direct acts of discrimination. See Price Waterhouse, 490 U.S. at 230, Syl. Pt. b.
\(^{123}\) See McDonnell Douglas, 411 U.S. 792; Proud, 945 F.2d. 796.
\(^{124}\) See McDonnell Douglas, 411 U.S. at 802.
\(^{125}\) Hopkins, 618 F. Supp. at 1113.
She would particularly note that key decision-makers found her to be “macho” and in need of a “course at charm school.” Yet under the same actor analysis, Hopkins would probably be denied the opportunity to argue her case before a jury. In fact, using the analysis of the Amirmokri court, some federal courts might conclude that, because Price Waterhouse hired Hopkins in the past, it is unlikely that it discriminated against her when it failed to offer her a partnership. In fact, the court may be as extreme as the Fifth Circuit in Brown v. CSC Logic Inc. In Brown, the court ruled that age-related comments such as “old goat” were “not sufficiently egregious to overcome the inference that [the defendant’s] stated reason for discharging [the plaintiff] was not pretext for age discrimination.” Using this analysis, the Price Waterhouse managers and supervisors can make discriminatory remarks to Hopkins without worrying about their reasons being labeled pretextual unless those remarks constitute sufficiently egregious remarks. Because statements such as “old goat” are as equally offensive as statements such as “wear makeup,” Price Waterhouse’s gender related statements are, arguably, not sufficiently egregious to overcome the “same actor inference.” The final outcome is Price Waterhouse could effectively defend its discriminatory actions against Hopkins by asserting the “same actor inference” despite all the discriminatory statements its agents made to her regarding her employment and possibility for advancement.

To fully appreciate the deficiencies of the same actor analysis, the role of stereotypes in the workplace as they affect women and minorities must be considered. Women and minorities typically reach the glass ceiling significantly earlier than white men of similar qualifications. For example, although white men consist of about forty-seven percent of the total work force and only forty-eight percent of the college degree work force, they still control the majority of the top employment positions. Additionally, even though “women are over half of the adult population and nearly half of the workforce, most continue to work in traditionally ‘female’ jobs such as teachers, nurses, clerical workers, and librarians.” Furthermore, women still compose the extreme minority in nontraditional jobs such as the position of partner at Price Waterhouse. In summary, statistical proof shows

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126 Price Waterhouse, 490 U.S. at 235.
127 This is because the “same actor inference” is applied extensively in summary judgment proceedings.
128 See Amirmokri, 60 F.3d at 1130.
129 Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir. 1996).
130 Id. at 656.
131 Id. at 658 (alteration in original).
133 See O’Melveny, supra note 113, at 893.
134 O’Melveny, supra note 113, at 893.
135 See O’Melveny, supra note 113, at 893.
that disparities exist in the percentages of women and minorities in nontraditional positions. This is so despite the fact that white men are the minority of college graduates. These disparities have been proven to be statistically significant in their relationships to stereotypes held by whites and men.\textsuperscript{136} Therefore, no court should even assume that an employer who hires women and minorities will not discriminate against those individuals in later employment decisions. This assumption defies reality given the volume of Title VII case law\textsuperscript{137} and statistical research showing otherwise.

The Proud court supports application of the "same actor inference" by a policy argument that ignores the reality of prejudice in the workplace. The court states that allowing employees to bring discrimination claims against an employer when the same actor both hired and fired the employee is unduly burdensome to the employer and will create the "risk that employers who otherwise would have no bias against older workers [would] now refuse to hire them in order to avoid meritless but costly ADEA actions."\textsuperscript{138} Thus, the court rationalizes its decision by asserting that, because plaintiffs are less likely to claim discrimination in hiring and employers are aware of this, permitting plaintiffs to claim discrimination in firing under same actor facts will cause employers to discriminate in hiring. This reasoning ignores the fact that discrimination against protected classes is illegal in both situations. In the end, the court really offers no compelling policy reason in transforming the "same actor inference" from a premise in a law review article into law in Proud.

B. The "Same Actor Inference" Should Be Afforded the Evidentiary Standard Allowed by the Third Circuit or, Alternatively, Should Be Narrowly Constrained

Originally, the "same actor inference" was applied narrowly. In fact, the Proud court appeared to require four elements to apply the "same actor inference." The Proud holding states that an inference of nondiscrimination exists in 1) ADEA cases when 2) the plaintiff is hired and fired 3) by the same individual 4) within six months of hiring.\textsuperscript{139} Although the "same actor inference" in any discrimination situation has serious weaknesses, the Proud holding keeps the inference within


\textsuperscript{137} Several cases show that, despite same actor facts, discrimination does occur. See e.g., Haun v. Ideal Industries, Inc. 81 F.3d 541, 544 (5th Cir. 1996); Thurman v. Yellow Freight Systems, Inc., 90 F.3d 1160, 1168 (6th Cir. 1994).

\textsuperscript{138} Proud, 945 F.2d at 797 (alteration in original).

\textsuperscript{139} Id.
reasonable limits by outlining four elements in its holding. Moreover, it does not apply to promotion decisions or adopt the “business as actor” language. Most important, a narrow reading of Proud limits the “same actor inference” to ADEA cases while protecting Title VII classes. In essence, the courts’ broad readings of Proud are the essential problem because they have lead to misapplication.

The Third Circuit was the first circuit to reject the Proud analysis. In Waldron v. SL Industries, Inc., the Third Circuit rejected giving same actor facts an inferential value and, instead, granted them an evidentiary value. In Waldron, the defendant hired the plaintiff when he was sixty-one years old. Two years later, the defendant reorganized its company and divided the plaintiff’s position into two different positions. It, then, hired a younger man to fill one of these positions while the plaintiff was informed that he would not be considered for the remaining position. The other position remained open. Thereafter, the two positions were combined into the one position that the plaintiff previously occupied, and the younger employee received the other half of the plaintiff’s job. In the end, the younger person received the plaintiff’s job in its entirety. The defendant argued that the Third Circuit should apply the “same actor inference” from Proud. Instead, the Third Circuit affirmed the Equal Employment Opportunity Commission’s position that same actor facts are merely evidentiary at trial and should not be given a presumptive value. Because it used the term “presumptive,” the Third Circuit likely recognized that the “same actor inference” was not really “inference” at all but, instead, a presumption.

A similar analysis was established by the Eleventh Circuit in Williams v. Vitro Services Corp. The plaintiff in Williams was rehired by the defendant when he was forty-nine years old. When the defendant was unable to receive a particu-

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140 See id. at 491.
141 See id. at 496 n.6.
142 See id. at 493.
143 See id.
144 See id. at 493.
145 See Waldron, 56 F.3d at 493.
146 See id.
147 See id. at 496 n.6.
148 See id.
149 Many courts appear to treat the “same actor inference” as a presumption. For example, the Brown court analyzed that evidence of discrimination must be “egregious” to overcome the “same actor inference.” Brown, 82 F.3d at 658. Some courts even refer to the “same actor inference” as a “presumption.” See e.g., Chiaramonte v. Fashion Bed Group, Inc., A Division of Leggett & Platt, Inc., 129 F.3d 391, 399 (7th Cir. 1997). At any rate, the “inference” is dispositive because it generally means that the case will have a pro-employer outcome. See Northup, supra note 104, at 206.
150 144 F.3d 1438.
151 See id. at 1440.
lar contract, it offered the plaintiff a severance package which he did not accept. 152 Thereafter, the same individual who had previously hired him earlier terminated his employment. 153 The district court granted summary judgment to the defendant. 154 On appeal, the defendant asked the court to conclude a "lack of discriminatory motive . . . based on the fact that the same actor was involved in the decision to hire, promote, and terminate Williams." 155 The Eleventh Circuit rejected the defendant's argument and, instead, ruled that, because of the burden-shifting nature of discrimination lawsuits, the "same actor inference" is "a permissible—not a mandatory—inference that a jury may make in deciding whether intentional discrimination motivated the employer's conduct." 156 Therefore, the Eleventh Circuit reasoned that same actor facts may be relevant, but they lead to a permissible inference at the jury's discretion. 157 This language is clearly less restrictive than the Proud "powerful inference" and "compelling inference" language.

In contrast to the decisions of the Third Circuit and the Eleventh Circuit, most circuits quickly accepted and expanded the Proud holding. 158 Post-Proud case law reveals that a current standard for the use of the "same actor inference" no longer resembles the Proud holding. Today, an expansive reading of the law is that a powerful presumption, presumption, powerful inference, compelling inference, or inference 159 of nondiscrimination exists in 1) all discrimination cases where 2) the plaintiff was hired and fired or hired and not promoted 3) by the business entity or the same individual who hired the plaintiff 4) at any time in the past. 160 Unquestionably, this extended standard usurps the entire purpose of Title VII to combat discrimination in the workplace based on race, gender, national origin, and religion. Obviously, a plaintiff will be suing the same business entity that hired her. Furthermore, unless the courts incorrectly interpret Title VII to only protect individuals in discriminatory hiring cases, the new standard seems irrational. Hence, the courts have expanded the "same actor inference" to unreasonable levels.

To protect Title VII groups from the extreme application of the doctrine, courts should follow the limited analysis of the Third Circuit or the Eleventh Circuit. These courts assert that same actor facts are relevant as evidence or as a per-

152 See id.
153 See id.
154 See id.
155 Williams, 144 F.3d at 1442.
156 Id. at 1443.
157 See id.
158 See Grady, 130 F.3d at 560; Brown, 82 F.3d at 658; Buhrmaster, 61 F.3d at 463; Our Lady of the Resurrection Medical Center, 77 F.3d at 152; Lowe, 963 F.2d at 174-175; Bradley, 104 F.3d at 270-271; Tyndall, 31 F.3d at 215; Evans, 80 F.3d at 959.
159 See Tyndall, 31 F.3d at 215.
160 See Buhrmaster, 61 F.3d at 464.
The "Same Actor Inference" at trial but should be left for the jury to weigh in its verdict. The cases allow the defendant to argue the "same actor inference" to the trier of fact while allowing the plaintiff to argue why, in the particular case, the inference is not persuasive. This approach allows the plaintiff and the defendant the opportunity to make reasonable arguments before the trier of fact. Furthermore, these analyses protect plaintiffs from summary judgment based on same actor facts.

C. The "Same Actor Inference" Should Not Be Employed in Summary Judgment Proceedings

Most circuit courts have shown through their rulings that the "same actor inference" is not only an inference or presumption of nondiscrimination, but also a dispositive factor that allows employers to avoid liability in discrimination cases by obtaining summary judgment. In response, courts should not use the "same actor inference" in summary judgment proceedings because doing so ignores the spirit of the rule of summary judgment. If a party can show that there is no "genuine issue as to any material fact" in a lawsuit, then the party is "entitled to judgement as a matter of law." Additionally, the court is required to view all of the facts in favor of the nonmoving party. Only in this situation is summary judgment appropriate.

To explain the *McDonnell Douglas* standard's affect on summary judgment, the Third Circuit stated in *Fuentes v. Perskie* that after a plaintiff establishes her prima facie discrimination case, she may defeat a motion for summary judgment by 1) discrediting the defendant's reasons for the adverse employment decision, either circumstantially or directly or 2) introducing direct or circumstantial evidence that discrimination was more likely than not a motivating or determinant cause of the adverse employment decision. This approach to summary judgment advances the spirit of the *McDonnell Douglas* decision because it gives significant merit to a plaintiff's ability to prove pretext. Originally, once the plaintiff offered evidence from which a jury could reasonably infer that the employer's reason for termination was pretextual, the plaintiff was protected from summary judgment. That is, once the plaintiff made reasonable assertions that the defendant's legitimate reasons were actually pretextual, then determining factual inferences would be made by a jury instead of a judge in a summary judgment proceeding.

Since its birth in *Proud*, the "same actor inference" has consistently been
used in summary judgment proceedings. In fact, a policy argument in Proud encourages courts to utilize the inference in summary judgment proceedings. Specifically, Proud states "[i]f former employees in these [same actor] situations bring ADEA claims that are allowed to proceed to trial, employers may fear that a costly suit is possible even when there are completely legitimate reasons for a discharge." After the Proud decision, courts have earnestly made sure that employers no longer have this fear.

A brief overview of the cases involving the "same actor inference" leaves an impression that employees do not have a bright future when their adverse employment decision was made by the same person who hired them. Indeed, more than three-fourths of the cases using the "same actor inference" had pro-employer decisions and nearly two thirds of the decisions resulted in summary judgment decisions in favor of the employer. Hence, employers should have no fear when they are sued for discrimination under same actor facts while plaintiffs should be prepared to lose their case.

In addition, the "same actor inference" should not be used in motions for summary judgment because it ignores the proper role of the judge and jury. In Anderson v. Liberty Lobby, Inc., the United States Supreme Court specifically cautioned the trial court to refrain from making evidentiary determinations and inferential determinations based upon the facts. The court noted that those functions are within the province of the jury. In addition, the Diebold court established that all factual determinations should be made in favor of the nonmoving party. Without question, when the court uses the "same actor inference" to crush a plaintiff's proof of pretext, it is not making factual determination in favor of the nonmoving party. Most important, the Anderson court went further to state that the court should draw reasonable inferences against the moving party while granting the jury the power to make factual determinations.

V. CONCLUSION

Because employment discrimination cases rarely involve "smoking-guns," the "same actor inference" should not expand the McDonnell Douglas standard. Moreover, it should not be expanded to include Title VII protected classes, promotion situations, situations where the adverse employment act did not occur within a brief period of plaintiff's hiring, and situations where the actor is not the individual

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168 See Julie S. Northup, supra note 104, at 207.
169 Proud, 945 F.2d at 798 (alteration in original).
170 See Julie S. Northup, supra note 104, at 207-08.
172 See id. at 255.
173 See Diebold, 369 U.S. at 655.
174 See Anderson, 477 U.S. at 255.
who directly hired the plaintiff. Furthermore, the inference should never be used in summary judgment proceedings because it should be evidence available to the jury instead of a dispositive factor. The "same actor inference" ignores the common employment experiences of minorities and women. Because of serious inconsistencies in the reasoning of the inference, courts should either abandon it completely or recognize that it is only an inference and narrowly apply it.

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