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## EVIDENTIARY INEQUALITY

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### ABSTRACT

*Federal employment discrimination law is rife with evidentiary inequality. Courts allow employers to draw from a broad palette of evidence to defend against discrimination claims, while highly restricting the facts from which plaintiffs can prove their claims.*

*This Article draws from hundreds of cases to show how judges favor the employer's evidence and disfavor the plaintiff's evidence across multiple dimensions, such as time, witnesses, documents, relevance, and reliability.*

*Judges have created a host of named doctrines that severely restrict the evidence plaintiffs are allowed to use to prove their discrimination claims. At the same time, a host of unnamed, and thus invisible, doctrines and preferences further bias the evidentiary record in favor of the employer. The cumulative weight of the named and invisible doctrines make it difficult for plaintiffs to prove discrimination.*

*This evidentiary inequality is court created and is not required by or contained within the federal discrimination statutes. This Article argues that judges must create clear rules that guard against this evidentiary inequality.*

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## INTRODUCTION

Federal employment discrimination law is rife with evidentiary inequality. Federal courts often apply radically different standards in evaluating evidence and the inferences that may be drawn from the evidence depending on which party is relying on it. Courts exclude evidence that workers offer and downplay the significance of even admissible evidence, while allowing employers great latitude in what evidence to admit and great deference as to what that evidence establishes.

Consider a case in which an employee has evidence that her supervisor used racial epithets to describe her. A year later, the supervisor fired her. Many courts will invoke the stray remarks doctrine and refuse to allow the plaintiff to use evidence of the racial epithets to support a race discrimination claim.<sup>1</sup> Through the stray remarks doctrine, judges can refuse to consider evidence of discriminatory comments or actions in the workplace if the court deems the comments are too remote in time from the contested decision, not made in the context of the decision, or too ambiguous to show discriminatory bias.<sup>2</sup>

However, courts will regularly allow defendants to use evidence that is remote in time and context from the contested employment decision. Employers regularly defend discrimination cases by trying to show that the employee engaged in misconduct or otherwise was a bad employee.<sup>3</sup> Courts will regularly allow a defendant to rely on evidence that is years old to establish the narrative that the employee was a bad apple.<sup>4</sup> Courts rely on this evidence even when the employer continued to employ the individual and often took no or minimal action in response to the alleged misconduct.<sup>5</sup> The employer can pull together evidence across a wide swath of time, while the courts limit the plaintiff's evidence to a narrow time frame. This is just one of the many ways that courts favor the defendant and disfavor the plaintiff.

This Article examines evidentiary inequality across several different dimensions: time, witnesses, documents, relevance, and reliability. It

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<sup>1</sup> Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 149 (2012) (noting that doctrine devalues or partially devalues probative evidence); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 347 (2010) ("Notwithstanding the often inflammatory nature of the remarks, their force tends to fall on the deaf ears of the courts.").

<sup>2</sup> *E.g.*, *Hasemann v. United Parcel Serv. of Am., Inc.*, No. 3:11-cv-00554, 2013 WL 696424, at \*6 (D. Conn. Feb. 26, 2013) (describing stray remarks inquiry); *Mosberger v. CPG Nutrients*, No. 2:01-cv-01100, 2002 WL 31477292, at \*8 (W.D. Pa. Sept. 6, 2002) (same).

<sup>3</sup> *See infra* Sections II.A, III.A.

<sup>4</sup> *See infra* Section II.A.

<sup>5</sup> *See, e.g.*, *Jeffrey v. Thomas Jefferson Univ. Hosps., Inc.*, No. 2:17-cv-00531, 2019 WL 2122989, at \*1 (E.D. Pa. May 14, 2019) (describing employer's submission of thirteen years of complaints made and disciplinary action taken against plaintiff); *Basil v. CC Servs., Inc.*, 116 F. Supp. 3d 880, 889 (N.D. Ill. 2015) (noting plaintiff's deficient performance ratings over six years).

demonstrates that across each dimension, courts often treat employer evidence differently than they do similar evidence offered by plaintiffs.<sup>6</sup>

The final result of this evidentiary inequality is that courts allow employers to draw from a broad palette of facts to defend against discrimination cases, while highly restricting the facts from which plaintiffs can prove their claims. When employers try to prove they did not discriminate, courts allow them to use evidence that draws from numerous people across wide swaths of time. Courts often allow employers to rely on evidence that is vague or appears to rely on hearsay. Additionally, courts do not require employers to tie the evidence together and prove how it relates to the contested decision.

On the other hand, courts often exclude or diminish evidence from workers, requiring them to prove their cases through a narrow band of witnesses and within a constricted time span. Courts require workers to prove how their evidence relates to the contested decision and often heavily restrict what evidence counts. Courts often require the plaintiffs' evidence to be more specific than the defendants' evidence, and judges often reject evidence under the hearsay doctrine.

Evidentiary inequality manifests itself through the cumulative weight of court-created, named doctrines and through a series of unnamed, and somewhat invisible, doctrines and preferences.

This evidentiary inequality is predicted by a wide range of social science and legal scholarship.<sup>7</sup> This is the first article to show how the tendency to favor one

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<sup>6</sup> I am not arguing that evidentiary inequality exists in all cases. Counterexamples abound. The prevalence of these evidentiary rulings that disfavor plaintiffs occurs frequently enough to be problematic, especially given that courts often disfavor a plaintiff's evidence when ruling on a defendant's motion for summary judgment.

<sup>7</sup> See, e.g., Deborah Epstein, *Discounting Credibility: Doubting the Stories of Women Survivors of Sexual Harassment*, 51 SETON HALL L. REV. 289, 293 (2020) (discussing credibility discounting); Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 3 (2017) (noting that women accusers of sexual assault usually do not "fare well in these contests"); Anita Kim & Natasha Tidwell, *Examining the Impact of Sexism on Evaluations of Social Scientific Evidence in Discrimination Litigation*, 38 LAW & HUM. BEHAV. 520, 521 (2014) (discussing how perceptions of protected classes affect admissibility of expert evidence); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1061-62 (2006) ("But well-established insights from psychological science, accumulated over fifty years of peer-reviewed, replicated research, has called [suppositions about how bias operates] into serious doubt, if not discredited them entirely."); Rebecca E. Zietlow, *Beyond the Pronoun: Toward an Anti-Subordinating Method of Process*, 10 TEX. J. WOMEN & L. 1, 4 (2000) ("To make the system more responsive to the needs of those outsiders, the insights and methods of those outsiders should be incorporated into the present procedural framework."); see also Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1154 (2012) (addressing possibility of implicit bias in employment discrimination cases but explicitly declining to consider how this might impact evidence admitted).

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party pervades federal discrimination law. While a rich literature exists critiquing individual discrimination doctrines, this Article demonstrates that the tendency to buoy the defendant's evidence and undermine the plaintiff's evidence is not confined to these doctrines. It occurs through a number of diffuse mechanisms.

This evidentiary inequality is especially problematic because it often occurs when judges are deciding an employer's motion for summary judgment. At the summary judgment stage, the Federal Rules of Civil Procedure instruct judges to make all reasonable inferences from a given fact in favor of the nonmoving party.<sup>8</sup> Notwithstanding that directive, judges routinely make inferences against the plaintiff at the summary judgment stage when the employer moves for summary judgment in its favor. Not only are judges routinely making inferences against the worker (the nonmoving party) at summary judgment, they are also failing to apply the same inferences to the employer's evidence that they apply to the worker's evidence.

Courts must recognize this evidentiary inequality and then dismantle it. Courts should abolish most, if not all, of the named inferences. They should follow the Federal Rules of Civil Procedure and the Federal Rules of Evidence when adjudicating summary judgment and other similar motions. However, if judges are not willing to abolish the inferences, they should at least apply the same inferences to the defendant's evidence as they do the plaintiff's evidence.

This Article argues that the Supreme Court should use its supervisory authority to create explicit rules that would govern federal district court judges when ruling on employers' motions for summary judgment and appellate courts considering appeals related to summary judgment. These rules would emphasize a judge's appropriate role at summary judgment, caution judges against making inferences in favor of the moving party, and require judges to fully explain all of the evidence presented by the plaintiff. Short of this, the Supreme Court should reiterate that it has repeatedly rejected the evidentiary inequality imposed by the lower courts.

Part I provides an overview of federal discrimination law and a preview of the mechanisms courts use to restrict evidence. Part II explores how courts view time differently when considering evidence submitted by the plaintiff as compared to similar evidence submitted by the employer. Part III explores how courts allow employers to draw evidence from a wide variety of witnesses and documents, while limiting the witnesses and documents that support the plaintiff's case. Part IV examines how courts require plaintiffs to provide more

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<sup>8</sup> FED. R. CIV. P. 56(a). The critiques in this Article are not limited to the summary judgment stage; however, this Article focuses on summary judgment because it is the procedural step that affects the most cases in a dispositive manner. *See, e.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 131 (2009) (discussing how appellate court reversals favor employers).

precise evidence than they require from defendants. Part V proposes a path forward.

#### I. AN OVERVIEW OF EVIDENTIARY INEQUALITY

Evidentiary inequality occurs in three primary ways. First, judges have infused discrimination jurisprudence with doctrines and concepts that favor employers and disfavor workers, contrary to the text and purposes of federal discrimination law. While the individual doctrines are problematic, this Article focuses on the cumulative weight of the doctrines and on doctrines that have not received sufficient attention.

The second issue is the most difficult to see because of the absence of doctrine. Courts will regularly apply an inference that favors the employer without applying a similar inference that would favor the worker. The fact that the plaintiff is not getting the benefit of similar inferences is not mentioned in the written opinions. The absence of the inference is only visible after reading the facts of cases and how courts resolve those cases.

Finally, evidentiary inequality also occurs in the way judges choose to describe evidence. Judges often fail to fully describe the plaintiff's evidence and sometimes encapsulate it in a single word or phrase (for example, "conclusory"), while describing and relying on evidence from the defendant that is contested or irrelevant. Judges often characterize the plaintiff's evidence as unreliable, even while allowing defendants to rely on similar evidence.

The totality of the evidentiary inequality is relatively well hidden for several reasons. It is spread across many cases. In any particular case, both the plaintiff and the defendant may not submit evidence that relies on similar inferences. Thus, in a particular case, a judge may not realize the logical inconsistency that underlies the evidentiary inequality. Even in cases where judges are confronted with evidence relying on similar inferences, they often do not recognize the inferential similarity and the way they treat similar evidence differently depending on the party submitting the evidence.

Only some of the evidentiary doctrines that create the inequality have names. It is easy to identify and understand when courts use the named doctrines because they use the name of the doctrine and explain how it works before applying it. Scholars have extensively discussed and critiqued some, but not all, of these named doctrines.<sup>9</sup> The named doctrines only describe a portion of the evidentiary inequality.

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<sup>9</sup> See, e.g., Katie Eyer, *The Return of the Technical McDonnell Douglas Paradigm*, 94 WASH. L. REV. 967, 982-83 (2019) (critiquing circuit court interpretations of *McDonnell Douglas* that are hypertechnical and contradict Supreme Court precedent); Victor D. Quintanilla & Cheryl R. Kaiser, *The Same-Actor Inference of Nondiscrimination: Moral Credentialing and the Psychological and Legal Licensing of Bias*, 104 CALIF. L. REV. 1, 6-7 (2016) (discussing same-actor inference and stating that it "continues to deprive claimants of access to justice"); Stone, *supra* note 1, at 180 (explaining that judges often sidestep "proper

The rest of the inequality occurs through other mechanisms. To get the entire picture, one also must identify unnamed inferences the courts apply. It is only by reading hundreds of cases that the evidentiary inequality emerges. This Article is the first to provide a picture of how the combined use of the named and unnamed doctrines creates evidentiary inequality.

A. *Federal Discrimination Law Generally*

Federal employment discrimination law is primarily grounded in four statutes: Title VII, the Age Discrimination in Employment Act (“ADEA”), the Americans with Disabilities Act (“ADA”),<sup>10</sup> and 42 U.S.C. § 1981 (“Section 1981”). 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.<sup>11</sup>

Title VII’s main operative provision consists of two subparts. Under the first subpart, it is an unlawful employment practice for an employer to take certain employment actions or “otherwise to discriminate” against a person with respect to compensation or in the “terms, conditions, or privileges of employment” because of race, color, religion, sex, or national origin.<sup>12</sup> 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 a protected trait.<sup>13</sup> These two subparts form the foundation of Title VII’s text.<sup>14</sup>

The ADEA contains similar language,<sup>15</sup> and the ADA contains similar concepts, although not always stated in the same language.<sup>16</sup> Section 1981 does not use similar language; however, the courts have often used the same

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summary judgment standard[s]” and “substitute their personal judgments for those of reasonable factfinders”); Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 118 (2012) (explaining that stray remarks doctrine “discounts *explicitly* discriminatory statements”); Martin, *supra* note 1, at 347 (describing courts’ treatment of “expressions of bias” as “unfavorable”); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 577-78 (2001) (arguing that frameworks allow courts to ignore collective weight of evidence).

<sup>10</sup> The primary operative provisions of Title VII, the ADEA, and the ADA are, respectively, 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623(a); and 42 U.S.C. § 12112(a)-(b).

<sup>11</sup> 42 U.S.C. § 2000e-2(a).

<sup>12</sup> *Id.* § 2000e-2(a)(1).

<sup>13</sup> *Id.* § 2000e-2(a)(2).

<sup>14</sup> Congress amended Title VII in 1991. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). However, this does not change the fact that the foundational text of Title VII is contained in 42 U.S.C. § 2000e-2(a).

<sup>15</sup> 29 U.S.C. § 623(a) (prohibiting employers from refusing to hire or discharging; limiting, segregating, or classifying; or reducing the wages of employees because of age).

<sup>16</sup> 42 U.S.C. § 12112(a)-(b) (prohibiting employers from discriminating based on disability).

frameworks to analyze disparate treatment claims under Section 1981 and Title VII.<sup>17</sup> Each of these statutes also prohibits retaliation.<sup>18</sup> Under each of these statutory regimes, a plaintiff has the right to a jury trial under certain circumstances.<sup>19</sup>

On numerous occasions, the Supreme Court has reiterated that federal discrimination statutes are designed to “strike at the entire spectrum” of discriminatory conduct.<sup>20</sup> The Court has repeatedly stated that “Title VII tolerates no . . . discrimination, subtle or otherwise.”<sup>21</sup>

### B. *Named Doctrines*

Despite the broad statutory language of the discrimination statutes and their purposes of stopping discrimination in the workplace, courts have seeded the discrimination jurisprudence with a number of doctrines that favor the employer and disfavor the worker. This Section will focus on certain perversions of the framework established in *McDonnell Douglas Corp. v. Green*,<sup>22</sup> the honest

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<sup>17</sup> See, e.g., *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1056 (8th Cir. 1997) (“The analysis applicable to Title VII disparate treatment and 42 U.S.C. § 1981 claims in employment cases is the familiar three-part framework initially set out in *McDonnell Douglas Corp. v. Green* . . .”). But see *Comcast v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1013 (2020) (holding plaintiff is required to establish “but for” cause in Section 1981 cases).

<sup>18</sup> 42 U.S.C. §§ 2000e-3(a), 12203(a); 29 U.S.C. § 623(d). While 42 U.S.C. § 1981 and the ADEA as applied to federal employees have no expressed non-retaliation provisions, both statutes implicitly prohibit retaliation using standards similar to the expressed statutory protection. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (holding that Section 1981 prohibits “retaliation against a person who has complained about a violation of another person’s contract-related ‘right’”); *Gomez-Perez v. Potter*, 553 U.S. 474, 477 (2008) (holding that ADEA federal sector provision authorizes claim from “victim of retaliation due to the filing of a complaint of age discrimination”).

<sup>19</sup> 42 U.S.C. § 1981a(c); 29 U.S.C. § 626(c). Plaintiffs are not entitled to a jury trial in all instances. For example, a jury trial is not available for disparate impact claims under Title VII. 42 U.S.C. § 1981a(a), (c). The ADEA’s federal sector provision does not provide a jury trial. *Lehman v. Nakshian*, 453 U.S. 156, 168 (1981) (finding that Congress could have provided for jury trials if it had desired to do so).

<sup>20</sup> See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (“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.” (quoting *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978))).

<sup>21</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 (1989) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973)); see also *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) (“[A] prima facie Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group.”); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 & n.8 (1976) (finding that Title VII protected “white men and white women and all Americans” (quoting 110 CONG. REC. 2578 (1964) (statement of Rep. Emanuel Celler))); *McDonnell Douglas*, 411 U.S. at 801 (“Title VII tolerates no racial discrimination, subtle or otherwise.”).

<sup>22</sup> 411 U.S. at 802-03.



belief doctrine, and the stray remarks doctrine. Importantly, none of the following concepts are contained within the text of the federal discrimination statutes.

Courts often use court-created frameworks to analyze discrimination cases. A court first places a set of facts within a category and then applies the appropriate framework to those facts.<sup>23</sup> In an individual disparate treatment case, the plaintiff or a small group of plaintiffs argues that the employer discriminated against them because of a protected trait.<sup>24</sup>

In 1973, the Supreme Court decided *McDonnell Douglas*, announcing the three-part burden-shifting framework that is now called the *McDonnell Douglas* test.<sup>25</sup> Courts regularly use *McDonnell Douglas* to evaluate discrimination and retaliation claims under Title VII, the ADEA, the ADA, and Section 1981.<sup>26</sup>

*McDonnell Douglas* is one way to establish discrimination.<sup>27</sup> To use the framework, the plaintiff first establishes a prima facie case, after which a rebuttable presumption of discrimination arises.<sup>28</sup> In *McDonnell Douglas*, the Supreme Court held that the plaintiff could establish a 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

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<sup>23</sup> See generally Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011) (providing an overview and critique of frameworks).

<sup>24</sup> See Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1368-69 (2009) (discussing disparate treatment and disparate impact).

<sup>25</sup> *McDonnell Douglas*, 411 U.S. at 802. The Court has 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. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 (2002) (holding that employment discrimination complaint “must contain only ‘a short and plain statement of the claim showing that the pleader is entitled to relief’” (quoting FED. R. CIV. P. 8(a)(2))).

<sup>26</sup> See, e.g., *Steele v. Pelmor Lab’ys, Inc.*, 725 F. App’x 176, 178-79 (3d Cir. 2018); *Tri-Cities Holdings LLC v. Tenn. Admin. Procs. Div.*, 726 F. App’x 298, 308 (6th Cir. 2018); *Robinson v. Jackson State Univ.*, 714 F. App’x 354, 359 (5th Cir. 2017); *Gavurnik v. Home Props., L.P.*, 712 F. App’x 170, 173 (3d Cir. 2017); *Lawson v. Homenuk*, 710 F. App’x 460, 462 (2d Cir. 2017); *Melendez v. Bd. of Educ.*, 711 F. App’x 685, 688 (4th Cir. 2017); *Dagnesses v. Target Media Partners*, 711 F. App’x 927, 933 (11th Cir. 2017); *Malcolm v. Vicksburg Warren Sch. Dist. Bd. of Trs.*, 709 F. App’x 243, 247 (5th Cir. 2017); *Harrell v. Robinson*, 703 F. App’x 440, 443-44 (8th Cir. 2017); *Parker Excavating, Inc. v. Lafarge W., Inc.*, 863 F.3d 1213, 1220 (10th Cir. 2017).

<sup>27</sup> Although many plaintiffs frame their case through *McDonnell Douglas*, they are not required to use the *McDonnell Douglas* test to prove discrimination. Instead, a court can consider whether the evidence, taken together in its entirety, “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.” *Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765 (7th Cir. 2016).

<sup>28</sup> *O’Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996).

position remained open and the employer continued to seek applicants from other persons possessing complainant's qualifications.<sup>29</sup>

The Supreme Court cautioned, however, that the factors required to establish a prima facie case will necessarily vary depending on the factual scenario of the underlying case.<sup>30</sup> The Supreme Court has stated on numerous occasions that the prima facie case is not supposed to be onerous.<sup>31</sup>

Subsequent cases have rearticulated the prima facie case so that it can be applied to a broader set of factual circumstances. For example, some courts articulate the second prong of the test as requiring that "the plaintiff [show she] was qualified for the position in question."<sup>32</sup> The plaintiff can satisfy the second factor "by showing that she performed at a level that generally met her employer's objective minimum qualifications."<sup>33</sup>

However, many courts have perverted this second prong and unnecessarily focus the evidence on the beliefs of the decisionmaker at the time of the contested action.<sup>34</sup> The court then limits the plaintiff's ability to present evidence of the plaintiff's good performance over time or from people the court does not deem to be decisionmakers.<sup>35</sup>

If a plaintiff successfully establishes the prima facie case, a rebuttable presumption of discrimination arises.<sup>36</sup> The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the

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<sup>29</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>30</sup> *Id.* at 802 n.13.

<sup>31</sup> *See, e.g.*, *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228 (2015) (stating same).

<sup>32</sup> *Bulifant v. Del. River & Bay Auth.*, 698 F. App'x 660, 663 (3d Cir. 2017).

<sup>33</sup> *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 590 (6th Cir. 2014).

<sup>34</sup> *Berini v. Fed. Rsrv. Bank of St. Louis*, 420 F. Supp. 2d 1030, 1037 (E.D. Mo. 2006) ("[T]he plaintiff's managers felt that she was making an unacceptable number of errors, that she had not managed to learn the skills required by the new accounting methodologies, and that she was made aware of these shortcomings."). *But see Angelone v. Seyfarth Shaw LLP*, No. 2:05-cv-02106, 2007 WL 1033458, at \*7 (E.D. Cal. Apr. 3, 2007) (indicating that because some people for whom plaintiff worked thought her work was satisfactory, she could meet second prong).

<sup>35</sup> *McDowell v. Nucor Bldg. Sys.*, No. 3:10-cv-00172, 2011 WL 7447349, at \*4 (D.S.C. Dec. 15, 2011) ("However, it is well settled that in determining satisfactory job performance, it is the perception of the decision maker which is relevant."), *report and recommendation adopted*, No. 3:10-cv-00172, 2012 WL 714632 (D.S.C. Feb. 29, 2012), *aff'd*, 475 F. App'x 462 (4th Cir. 2012); *Berini*, 420 F. Supp. 2d at 1037. The courts are inconsistent on this prong of *McDonnell Douglas*. *See, e.g.*, *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 352 n.21 (5th Cir. 2005) (allowing plaintiff to rely on evidence of past performance reviews to establish this prong).

<sup>36</sup> *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996) (discussing the logical connection between the elements of a prima facie employment discrimination case and the resulting rebuttable presumption of illegal discrimination).

allegedly discriminatory decision or action, thereby rebutting the presumption.<sup>37</sup> At this stage, the employer often presents evidence that the plaintiff engaged in misconduct or that the plaintiff lacked the required skills or qualifications for a particular job.<sup>38</sup> If the employer meets its relatively light burden, the inquiry proceeds to the third stage.

In the third stage, the plaintiff may show that the employer's stated reason is pretext.<sup>39</sup> From this showing, a factfinder may infer that the employer discriminated because of a protected trait.<sup>40</sup> The plaintiff may also rely on any other evidence that helps establish that the employee's protected trait caused the outcome.<sup>41</sup>

As shown throughout this Article, courts often limit what evidence counts as pretext.<sup>42</sup> They also use the "honest belief" doctrine to exclude or diminish plaintiffs' evidence by declaring that such evidence contesting the employer's decision is not relevant because only the decisionmaker's belief at the time of the contested action is relevant.<sup>43</sup>

Courts also use another doctrine, the "stray remarks" doctrine, to decline to consider plaintiffs' evidence. 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.<sup>44</sup> For example, in an age discrimination case, if a plaintiff tried to admit

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<sup>37</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>38</sup> *Id.* at 803 (finding employer "assigned respondent's participation in unlawful conduct against it as the cause for his rejection").

<sup>39</sup> *Id.* at 804 (instructing lower court on remand to allow respondent the opportunity to show employer's reason for respondent's rejection was pretextual).

<sup>40</sup> *See id.* at 807.

<sup>41</sup> *See Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 256 (1981) (suggesting plaintiff may succeed with her ultimate burden of persuasion with either direct evidence of discrimination or indirect evidence of discrimination by showing the employer's proffered reason was pretext).

<sup>42</sup> *See generally* D. Wendy Greene, *Pretext Without Context*, 75 *MO. L. REV.* 403 (2010) (criticizing how courts approach pretext).

<sup>43</sup> *See* Gertner, *supra* note 9, at 121-22 (explaining how the "honest belief" doctrine makes it more difficult for plaintiffs to demonstrate pretext by granting employers leeway with their proffered reason for the adverse employment action).

<sup>44</sup> *See* *Hasemann v. United Parcel Serv. of Am., Inc.*, No. 3:11-cv-00554, 2013 WL 696424, at \*6 (D. Conn. Feb. 26, 2013) (noting 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))); *Mosberger v. CPG Nutrients*, No. 2:01-cv-01100, 2002 WL 31477292, at \*6 (W.D. Pa. Sept. 6, 2002) (same); *see also* *Stone*, *supra* note 1, at 180

evidence that ten years ago a coworker made a racist statement, the evidence would be excluded because it is not relevant to the underlying claim. While the stray remarks doctrine has some legitimate uses, many judges use it expansively to exclude otherwise relevant evidence supporting plaintiffs' claims.

The stray remarks doctrine is not contained within the text of any of the main federal discrimination statutes.<sup>45</sup> Instead, the doctrine is a special evidentiary rule that courts created and apply in discrimination cases.<sup>46</sup> 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*.<sup>47</sup> Professor Kerri Lynn Stone has noted that the doctrine "had a groundswell of usage, building in popularity year after year."<sup>48</sup> Professor Jessica Clarke has observed that the doctrine has "spread like a cancer through lower court opinions in a number of procedural contexts."<sup>49</sup> 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."<sup>50</sup>

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(explaining effect of courts failing to treat stray remarks as direct evidence of discrimination and also declaring piece of evidence to be worthless or effectively worthless); Martin, *supra* note 1, at 347-51 (explaining why courts do not treat stray remarks as evidence of pretext).

<sup>45</sup> Cf. Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 389-92 (2020) (discussing how courts expanded stray remarks doctrine). See generally Stone, *supra* note 1 (discussing the proliferation of stray comment jurisprudence). 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, 704-06 (S.D. Iowa 1993) (reviewing different jurisdictions' legal standards for stray remark evidence).

<sup>46</sup> See Stone, *supra* note 1, at 159 ("The 'stray remarks' [doctrine] . . . is a series of loosely-bound doctrines and casual labels that different courts assign to proffered evidence of discrimination that they plan to discount or ignore.").

<sup>47</sup> 490 U.S. 228, 277 (1989) (O'Connor, J., concurring). Rather than claiming that stray remarks were not relevant in intentional discrimination cases, Justice O'Connor was making a narrow claim related to the specific issue of whether a plaintiff could proceed under a mixed-motive framework without what she called "direct evidence" of discrimination. *Id.* at 276-77.

<sup>48</sup> Stone, *supra* note 1, at 170.

<sup>49</sup> Jessica A. Clarke, *Explicit Bias*, 113 NW. U. L. REV. 505, 542 (2018).

<sup>50</sup> Gertner, *supra* note 9, at 118. Courts have even created two additional special inferences that favor the employer. The "same protected class" inference presumes that a decisionmaker who is in the same protected class as the employee would not discriminate against the employee based on the protected trait they share. See, e.g., *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1471 (11th Cir. 1991) (noting the "primary players" behind plaintiff's discharge were also in the class protected by the ADEA); *Cartee v. Wilbur Smith Assocs., Inc.*, No. 3:08-cv-04132, 2010 WL 5059643, at \*5 (D.S.C. Oct. 6, 2010) ("[T]he fact that the ultimate decision makers in this case were older than Cartee mitigates any inference of age discrimination."), *report and recommendation adopted*, No. 3:08-cv-04132, 2010 WL 5059639 (D.S.C. Dec. 6, 2010). But see *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 361 (7th Cir. 2001) (rejecting inference). Similarly, the "same actor" inference allows a court to assume that if the same person who hires or promotes an employee also fires or demotes the employee, the action taken against the employee cannot be discriminatory. *Brown v. CSC*

These doctrines favor the employer and disfavor the worker. The cumulative weight of these doctrines makes it extraordinarily difficult for plaintiffs to get judges to consider the entire evidentiary record in their cases. While these doctrines are applied in thousands of cases, it is worth noting that none of them are included in or required by the text of the employment discrimination statutes.<sup>51</sup> And, many of them are actually contrary to Supreme Court precedent.<sup>52</sup>

C. *Invisible Ideas: The Rest of the Picture*

The cumulative weight of the named doctrines makes it difficult for plaintiffs to get their evidence admitted, considered, and given full weight by courts. However, these named doctrines are not the only causes of evidentiary inequality. There are also several unnamed ways that inequality manifests. Because the preferences are not named, the role they play is largely invisible.

Here is one of the less visible ways inequality occurs: Courts do not apply the named doctrines in the same way to the plaintiff's and the defendant's evidence. Courts treat very similar evidence differently depending on the party presenting it. As discussed in the prior subsection, there are several named doctrines that prioritize evidence by the decisionmaker at the time of the contested action. Courts regularly use these named doctrines to exclude or diminish the plaintiff's evidence. For example, a court might exclude evidence about the plaintiff's good performance simply because it is from a coworker or because it reflects the plaintiff's performance at a time earlier than the contested decision.<sup>53</sup>

However, courts allow defendants to present evidence to support their actions by people who were not decisionmakers at the time of the contested action.<sup>54</sup> This same kind of evidence is rejected when offered by plaintiffs.<sup>55</sup>

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Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (inferring age discrimination was not the motive behind plaintiff's discharge since plaintiff was hired and fired by the same decisionmaker); see Proud v. Stone, 945 F.2d 796, 796-97 (4th Cir. 1991) ("In assessing whether Proud established that age was a motivating factor for his discharge, we focus on the undisputed fact that the individual who fired Proud is the same individual who hired him less than six months earlier with full knowledge of his age."). 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); Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1135 (2008) (suggesting same).

<sup>51</sup> See *supra* notes 11-16 and accompanying text.

<sup>52</sup> See Eyer, *supra* note 9, at 967.

<sup>53</sup> See, e.g., Diamond v. Bea Maurer, Inc., 128 F. App'x 968, 973 (4th Cir. 2005) (rejecting evidence of plaintiff's good performance because it was months before termination); see also cases discussed in Section II.B.

<sup>54</sup> See generally cases discussed in Section II.A.

<sup>55</sup> Cf. Kang et al., *supra* note 7, at 1156 (discussing how motivated reasoning can cause decisionmakers to change the criteria for making a decision based on the person they want to favor).

Evidentiary inequality occurs in another unnamed way: Courts often refuse to apply the same inferences to different kinds of evidence. As discussed earlier, under the stray remarks doctrine a court might exclude or diminish a discriminatory remark because it was made one year prior to a contested decision.<sup>56</sup> The underlying inference is that the comment is too far removed in time to be relevant.

However, there is no stray mistake doctrine that limits negative information about the plaintiff. Courts regularly allow defendants to produce information about plaintiffs' mistakes or poor performance years prior to the contested decision without requiring the employer to tie that evidence to the contested decision.<sup>57</sup> If the evidence of discrimination loses probative value over time, the employee's mistakes should also lose probative force, unless the employer explicitly ties the evidence together (such as in cases involving use of a documented, progressive discipline policy).

A third unnamed problem occurs in choices judges make when describing evidence. Judges often fail to fully describe the plaintiff's evidence, while describing and relying on evidence from the defendant that is contested or irrelevant.<sup>58</sup> Judges often characterize the plaintiff's evidence as unreliable, even when they allow defendants to rely on similar evidence.<sup>59</sup>

The cumulative weight of both the named doctrines and the unnamed, invisible manifestations of inequality makes it difficult for plaintiffs to prove their cases. This imbalance often occurs when judges are considering and often granting employers' motions for summary judgment.

Summary judgment is a key stage in federal discrimination suits. Litigants have a right to a jury trial under the federal discrimination statutes, at least under certain circumstances.<sup>60</sup> Under the federal rule governing summary judgment, a claim may only be dismissed if no reasonable jury could find in favor of the nonmoving party.<sup>61</sup> In most employment discrimination cases, the employer is the party requesting summary judgment. As such, the judge is supposed to assume that the evidence presented by the plaintiff is true and draw all

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<sup>56</sup> See, e.g., *Hasemann v. United Parcel Serv. of Am., Inc.*, No. 3:11-cv-00554, 2013 WL 696424, at \*6 (D. Conn. Feb. 26, 2013) (noting "when the remark was made in relation to the employment decision at issue" as relevant to the stray remarks inquiry).

<sup>57</sup> See *infra* notes 77-86 and accompanying text.

<sup>58</sup> See, e.g., *Baffa v. STAT Health Immediate Med. Care, P.C.*, No. 2:11-cv-04709, 2013 WL 5234231, at \*2 (E.D.N.Y. Sept. 17, 2013) (providing numerous details of defendant's affidavits with limited reference to plaintiff's affidavits).

<sup>59</sup> See *infra* Section IV.B.

<sup>60</sup> 42 U.S.C. § 1981a(c) (providing the right to a jury trial for complainants seeking compensatory or punitive damages under Section 1981a); 29 U.S.C. § 626(c) (including the right to a jury trial); see also *supra* note 19 and accompanying text (discussing instances where a jury trial is not available for employment discrimination claims).

<sup>61</sup> See FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

reasonable inferences in favor of the employee, the nonmoving party.<sup>62</sup> Any disputed facts are read in the plaintiff's favor for purposes of summary judgment. Most of the time when judges rule on summary judgment motions, they rule on a paper record and never actually see or hear the parties' witnesses. Judges are supposed to apply the same evidentiary rules at the summary judgment stage as they would at trial, with a few exceptions.<sup>63</sup>

When used properly, summary judgment serves an important role in preserving court resources and limiting claims that lack merit. In many cases, however, the parties heavily contest the facts. Congress has decided that the proper entity to resolve factual disputes in intentional discrimination cases is the jury.<sup>64</sup>

Some judges have emphasized the importance of allowing cases to go to trial when the parties contest the facts. They note that judges usually live "in a narrow segment of the enormously broad American socio-economic spectrum," and they generally lack "current real-life experience."<sup>65</sup> They emphasize how employment discrimination cases "are factually complex, deal with state-of-mind issues, are typically proved circumstantially, and are rarely uncontested."<sup>66</sup> Unfortunately, many judges are granting summary judgment by favoring the employer's evidence and disfavoring the worker's evidence. This practice directly contravenes Federal Rule of Civil Procedure 56.<sup>67</sup>

## II. TIME

Time plays an important role in evidentiary inequality. Judges often allow employers to present evidence spanning a longer time frame while limiting the time frame for the plaintiffs' evidence. Courts regularly admit defendants' evidence of an employee's alleged poor performance or misconduct over periods of years. Courts will often allow defendants to pull together evidence to create a "history" of employee misconduct.<sup>68</sup>

Time works differently when it comes to plaintiffs' evidence. When plaintiffs try to rely on a history of good performance, judges often exclude or diminish this evidence. While employee misconduct or poor performance appears to remain relevant in perpetuity, a worker's good performance seems to have a

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<sup>62</sup> *Cf. Blue v. Lopez*, 901 F.3d 1352, 1357 (11th Cir. 2018) (explaining the standard for summary judgment as required by the Federal Rules of Civil Procedure).

<sup>63</sup> For example, a party is not required to reduce all information to an admissible form at summary judgment. *Straka v. Comcast Cable*, 897 F. Supp. 2d 346, 360 (W.D. Pa. 2012). That being said, information may only be considered if it is likely that the information can be reduced to admissible evidence at trial. *Id.*

<sup>64</sup> In 1991, Congress explicitly added a provision to Title VII to provide a right to jury trial in some instances. 42 U.S.C. § 1981a(c).

<sup>65</sup> *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998).

<sup>66</sup> *Gertner*, *supra* note 9, at 113.

<sup>67</sup> FED. R. CIV. P. 56(a).

<sup>68</sup> *See infra* notes 77-86 and accompanying text.

short shelf life.<sup>69</sup> Judges will sometimes go as far as deeming such past performance to be completely irrelevant.<sup>70</sup>

Courts also regularly exclude plaintiffs' evidence of discriminatory or retaliatory conduct if it is years, and sometimes even months, removed from the contested actions.<sup>71</sup> The relevant time period for employer bad acts is extraordinarily limited, and courts often refuse to see this evidence as tied to a history of discriminatory or retaliatory conduct.

I am not arguing that a judge must deem all plaintiffs' evidence relevant, no matter how old. Instead, as discussed later in the Article, judges should be evaluating evidence consistent with the demands of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. For example, in most cases, if a plaintiff tries to rely on a good evaluation that predates the contested action by five years, this evaluation likely has minimal relevance under Federal Rule of Evidence 401.<sup>72</sup> According to the Federal Rules of Civil Procedure, if the employer files a motion for summary judgment, the judge would consider whether a reasonable jury could draw a favorable inference from such evidence to favor the worker.<sup>73</sup>

Unfortunately, as described throughout this Article, courts are using named doctrines and unnamed concepts to restrict plaintiffs' evidence in ways that are not consistent with Federal Rule of Evidence 401 or the summary judgment standard. At the same time, courts often credit an employer's evidence without imposing the same limits. Just as a five-year-old positive evaluation likely has minimal relevance to support a plaintiff's case, a five-year-old negative evaluation likely has minimal relevance to the employer's case, unless the employer can tie it to the contested action. The way the courts apply these evidentiary doctrines is asymmetrical.

#### A. *Employer's Evidence*

Employers often defend discrimination cases by producing evidence that the plaintiff performed poorly, engaged in misconduct, or did not possess the skills or temperament for a job. This evidence is used in the second and third stages of the *McDonnell Douglas* framework.<sup>74</sup> During discovery in discrimination cases,

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<sup>69</sup> See *infra* Section II.B.3.

<sup>70</sup> See, e.g., *Davis v. Nissan N. Am., Inc.*, 693 F. App'x 182, 184 (4th Cir. 2017).

<sup>71</sup> See *infra* Section II.B.2.

<sup>72</sup> FED. R. EVID. 401.

<sup>73</sup> FED. R. CIV. P. 56(a).

<sup>74</sup> Some courts mistakenly view this evidence as part of the prima facie case when evaluating whether the plaintiff met the qualifications for the position. See, e.g., *Ferrill v. Oak Creek-Franklin Joint Sch. Dist.*, 860 F.3d 494, 500 (7th Cir. 2017) (taking employer's evidence of plaintiff's job performance into account when determining whether plaintiff met her employer's expectations). This prong of the prima facie case only requires the plaintiff to meet the minimum objective qualifications of the job. See *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 590 (6th Cir. 2014) (criticizing lower courts for making plaintiff-



employers have an additional incentive to find out about past employee misconduct and other issues because of the “after-acquired evidence” doctrine. Under this doctrine, an employer can avoid certain types of relief (such as reinstatement), if it can establish that it would have fired the employee for past conduct, even if it first found out about the conduct during discovery.<sup>75</sup>

Judges often allow employers to present evidence that spans months, years, and even different decades.<sup>76</sup> Examples include the following:

- Recounting evidence of the plaintiff’s performance from 1992 for a contested termination in 2000, thus allowing the employer to recount performance evidence over an *eight-year* period;<sup>77</sup>
- Reciting performance deficiencies in otherwise satisfactory performance reviews from 1996 and 1998 when the challenged employment action occurred in 2003;<sup>78</sup>
- Allowing the employer to present evidence of plaintiff’s poor performance from three different supervisors over *three different years*;<sup>79</sup>
- Allowing an employer that terminated an employee in 2011 to defend the case by using performance reviews going back to 2005, about *six years* prior to the challenged action;<sup>80</sup>
- Reciting performance issues over a *thirteen-year* period;<sup>81</sup>

employees satisfy a higher burden than is required, which is simply performing at a level that meets the employer’s “objective minimum qualifications”). Subjective evidence of employee performance should be considered later in the framework. *See* *Nicholson v. Hyannis Air Serv., Inc.*, 580 F.3d 1116, 1123 (9th Cir. 2009) (explaining particular skills are subjective and “cannot be considered in evaluating a plaintiff’s qualifications” as part of prima facie case).

<sup>75</sup> *See* *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 355, 361-63 (1995) (prohibiting reinstatement and limiting plaintiff’s recovery of backpay).

<sup>76</sup> *See, e.g.,* *D’Alessandro v. City of Newark*, 454 F. App’x 53, 55 (3d Cir. 2011) (allowing evidence spanning over four years and from multiple supervisors); *Robinson v. Mondelez Int’l, Inc.*, 228 F. Supp. 3d 448, 454 (E.D. Pa. 2017) (allowing evidence for defense dating back several years); *Cunningham v. Fla. Credit Union*, No. 5:16-cv-00024, 2017 WL 6610886, at \*6 (M.D. Fla. Nov. 1, 2017) (accounting for performance issues spanning more than one year); *Shade v. Alfa Laval Inc.*, No. 1:14-cv-00813, 2017 WL 839456, at \*11 (M.D. Pa. Mar. 3, 2017) (using evidence of a verbal warning and a second written warning even though they were eight months apart); *King v. Lowe’s Home Ctrs., Inc.*, No. 8:08-cv-03393, 2009 WL 3681686, at \*1 (D. Md. Nov. 2, 2009) (recounting evidence of performance issues over two years); *Berini v. Fed. Rsv. Bank of St. Louis*, 420 F. Supp. 2d 1030, 1034-37 (E.D. Mo. 2006) (reviewing years of performance evaluations offered by the employer).

<sup>77</sup> *Silver v. Am. Inst. of Certified Pub. Accts.*, 212 F. App’x 82, 84-85 (3d Cir. 2006).

<sup>78</sup> *Bolton v. Sprint/United Mgmt. Co.*, 220 F. App’x 761, 763 (10th Cir. 2007).

<sup>79</sup> *Truesdale v. CSX Transp., Inc.*, No. 3:15-cv-01373, 2017 WL 4182327, at \*4 (M.D. Fla. Sept. 21, 2017).

<sup>80</sup> *Basil v. CC Servs., Inc.*, 116 F. Supp. 3d 880, 889 (N.D. Ill. 2015).

<sup>81</sup> *Jeffrey v. Thomas Jefferson Univ. Hosps., Inc.*, No. 2:17-cv-00531, 2019 WL 2122989, at \*1 (E.D. Pa. May 14, 2019).

- Accepting the employer's use of performance evaluations going back to 2003, a period of *eight years* before termination of employee during 2011 reduction in force;<sup>82</sup>
- Relying on employer evidence from performance reviews and coworker complaints from *four years* prior to the contested decision;<sup>83</sup>
- Allowing the employer to rely on evidence of plaintiff's performance over an *eight-year* period;<sup>84</sup>
- Recounting negative comments in performance reviews from the late 1990s for a case in which the employee-plaintiff was terminated in 2006;<sup>85</sup> and
- Recounting performance problems in 2000 for an adverse action that occurred in 2012, a period of *twelve years*.<sup>86</sup>

Courts also recount alleged misconduct or poor performance without providing the date on which it happened.<sup>87</sup>

Sometimes, courts weave plaintiffs' alleged misconduct together and describe it as a "history" of misconduct or poor performance. In one case, a court recounted that while a worker was generally a dependable worker, he "had a history" of damaging the defendant's equipment.<sup>88</sup> When the court actually described the "history," it consisted of two incidents over two years and another incident where a piece of equipment broke while the plaintiff was driving it.<sup>89</sup> In another case, the court described the plaintiff's work history as "marked by various co-worker complaints, discipline, and written warnings."<sup>90</sup> In some

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<sup>82</sup> *Castro v. Sch. Bd. of Manatee Cnty.*, 903 F. Supp. 2d 1290, 1295-96 (M.D. Fla. 2012).

<sup>83</sup> *Philpot v. Blue Cross Blue Shield of Ga.*, No. 1:07-cv-00657, 2008 WL 11407269, at \*2-8 (N.D. Ga. July 14, 2008), *report and recommendation adopted*, No. 1:07-cv-00657, 2008 WL 11407343 (N.D. Ga. Aug. 27, 2008).

<sup>84</sup> *Eib v. Marion Gen. Hosp., Inc.*, No. 1:17-cv-00277, 2019 WL 3774234, at \*7 (N.D. Ind. Aug. 12, 2019).

<sup>85</sup> *Fuller v. Seagate Tech., LLC*, 651 F. Supp. 2d 1233, 1235 (D. Colo. 2009).

<sup>86</sup> *Chew v. City & Cnty. of S.F.*, 714 F. App'x 687, 691-92 (9th Cir. 2017).

<sup>87</sup> *See, e.g., Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1206 (9th Cir. 2008) (noting plaintiff had once received a verbal warning but not providing date of warning); *Ploscowe v. Kadant*, 121 F. App'x 67, 75 (6th Cir. 2005) (noting that performance reviews and testimony from coworkers indicated problems with interpersonal skills but not stating when problems occurred); *Fuller*, 651 F. Supp. 2d at 1235 (not listing the date for several performance reviews).

<sup>88</sup> *Diaz*, 521 F.3d at 1206.

<sup>89</sup> *Id.*

<sup>90</sup> *Philpot v. Blue Cross Blue Shield of Ga.*, No. 1:07-cv-00657, 2008 WL 11407269, at \*2 (N.D. Ga. July 14, 2008), *report and recommendation adopted*, No. 1:07-cv-00657, 2008 WL 11407343 (N.D. Ga. Aug. 27, 2008).

cases, the court labels the plaintiff as having a “history” of problems but never describes the history.<sup>91</sup>

As described throughout this Article, judges often use named doctrines to limit plaintiffs’ evidence.<sup>92</sup> There is no named doctrine that limits an employer’s ability to present negative evidence about the plaintiff, even when that evidence relates to events that occurred years before the contested employment action and even when the employer fails to tie it to the contested action. In other words, there is no stray mistake doctrine that limits the employer’s ability to submit evidence related to an employee’s poor performance.

Judges rarely place any time limits on evidence related to a plaintiff’s alleged misconduct or poor performance.<sup>93</sup> Courts will even recount issues with a plaintiff’s performance, even though the employer promoted the plaintiff after those issues.<sup>94</sup>

#### B. *Worker’s Evidence*

In relation to time, courts often treat plaintiffs’ evidence differently than defendants’ evidence in three different ways. First, courts often severely limit the evidence that a plaintiff can present about discriminatory words or conduct.<sup>95</sup> In many instances, courts have excluded or diminished a worker’s evidence of discrimination because it occurred months before the challenged employment decision.<sup>96</sup> Second, courts severely restrict how plaintiffs can use inferences that might be drawn from the temporal proximity of a discriminatory or retaliatory action and the challenged employment decision.<sup>97</sup> Finally, many courts are unwilling to draw inferences in favor of the plaintiff when the plaintiff has a history of good performance.<sup>98</sup> While any performance infractions (even minor

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<sup>91</sup> See *Ploscowe v. Kadant*, 121 F. App’x 67, 70 (6th Cir. 2005) (using phrase “history of poor performance” without describing poor performance).

<sup>92</sup> See *supra* Part I.B.

<sup>93</sup> For an example of a court placing such a limit, see *Altman v. New Rochelle Pub. Sch. Dist.*, No. 7:13-cv-03253, 2017 WL 66326, at \*7 (S.D.N.Y. Jan. 6, 2017) (noting that employer had not shown how prior evaluations were connected to contested decision).

<sup>94</sup> See, e.g., *Rodríguez-Cardi v. MMM Holdings, Inc.*, 936 F.3d 40, 44 (1st Cir. 2019) (noting promotion “[d]espite the concerns expressed in the evaluation”); *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 323 (7th Cir. 2002) (describing promotion “in spite of the recent drop in her performance rating”).

<sup>95</sup> See, e.g., *Rodríguez v. Eli Lilly & Co.*, 820 F.3d 759, 764 (5th Cir. 2016) (categorizing as stray remark comment made four months before challenged decision).

<sup>96</sup> See, e.g., *Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 898 (7th Cir. 2015) (noting six-month lapse between plaintiff’s EEO complaints and adverse employment action).

<sup>97</sup> See, e.g., *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (finding that eighteen-month lapse between protected activity and adverse employment action did not give rise to an inference of causation).

<sup>98</sup> See, e.g., *Farias v. Great Lakes Credit Union*, No. 1:15-cv-11515, 2018 WL 827952, at \*4 (N.D. Ill. Feb. 9, 2018) (noting that positive reviews two months prior to termination did not outweigh the negative reviews leading up to plaintiff’s termination).

ones that took place in the distant past) count toward the narrative that the plaintiff is a poor performer, the plaintiff's history of good performance often counts for very little, even when combined with other evidence.

### 1. Limited Palette of Discriminatory Evidence

In many discrimination cases, a worker tries to present evidence of discriminatory words or conduct. Courts routinely diminish or exclude evidence of discriminatory actions or words if the words or actions occurred outside of a fairly limited time frame.<sup>99</sup>

For example, courts have refused to consider the following as evidence of discrimination based on temporal proximity concerns:<sup>100</sup>

- In an age discrimination case, statements made by supervisors in the *months* leading up to the plaintiff's termination that "the young guns are kicking your butt" and asking on more than one occasion, "Are you getting to [sic] old to perform this job?"<sup>101</sup>
- In a race and national origin discrimination case, a question by a human resources professional that "[i]f you don't like it here, why don't you go back to Ethiopia" was not probative of discrimination because of an *eight-month* time gap.<sup>102</sup>
- In an age discrimination case, the following comments made *four months* before termination were considered to be stray remarks: "you know, the job is changing"; "a person from your era wouldn't have the type of analytical skills that we require"; "things are different today"; and "the skills needed today are typically of a younger sales manager."<sup>103</sup>
- In an age discrimination case, comments that the plaintiff was "old and antiquated and need[s] to go" made *ten months* before decision were stray remarks.<sup>104</sup>

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<sup>99</sup> See, e.g., *Rodriguez*, 820 F.3d at 764; *Martin v. City Univ. of N.Y.*, No. 1:17-cv-06791, 2018 WL 6510805, at \*10 (S.D.N.Y. Dec. 11, 2018) (disregarding comments made ten months prior to termination); *Moore v. Verizon*, No. 1:13-cv-06467, 2016 WL 825001, at \*9 (S.D.N.Y. Feb. 5, 2016) (denoting remarks made almost one year prior to termination as "non-actionable stray remarks").

<sup>100</sup> Throughout the Article, I reference the evidence that workers and employers present. In many instances, the evidence is contested. In this Article, I am not making any claims about the veracity of any individual piece of evidence.

<sup>101</sup> *Hasemann v. United Parcel Serv. of Am., Inc.*, No. 3:11-cv-00554, 2013 WL 696424, at \*4 (D. Conn. Feb. 26, 2013).

<sup>102</sup> *Legendre v. Chase Manhattan Bank*, No. 1:94-cv-02911, 1996 WL 514874, at \*1 (S.D.N.Y. Sept. 10, 1996) (alteration in original).

<sup>103</sup> *Testa v. CareFusion*, 305 F. Supp. 3d 423, 434 (E.D.N.Y. 2018).

<sup>104</sup> *Ortiz v. Cedar Crest Coll.*, No. 5:16-cv-06703, 2017 WL 6422164, at \*5 (E.D. Pa. Dec. 18, 2017) (alteration in original).

- In an age discrimination case, a statement that the supervisor wanted to get rid of the older employees and hire “young blood” was not probative because it was made *two years* prior to termination.<sup>105</sup>
- In a race discrimination case, a supervisor’s comment that the employer had “a problem . . . with past black coaches” and that the supervisor “would do his best to get rid of” the plaintiff “if there was another problem” was a stray remark when it was made nearly *a year* before the decision not to renew the plaintiff’s contract.<sup>106</sup>
- In a reverse discrimination case, statements by supervisors that “Asians work better” and “[t]hey don’t complain” were stray remarks when made *a year* before termination.<sup>107</sup>

The timing concerns can also arise in cases in which plaintiffs try to present evidence that non-supervisors made comments that might show bias.<sup>108</sup> Additionally, at times it is difficult to understand how much time has elapsed because the court does not describe the amount of time and then dismisses the allegedly discriminatory comments as irrelevant.<sup>109</sup>

One key insight of this Article is that the courts have often created formal, named doctrines to limit the plaintiffs’ evidence.<sup>110</sup> The stray remarks doctrine is one of those doctrines. When considering temporal proximity, the stray remarks doctrine often places an expiration date on the plaintiff’s evidence of discriminatory words or conduct. According to the courts, this evidence does not carry any probative weight after a period of time.

This is in sharp contrast to how courts treat employers’ evidence of workers’ misconduct or poor performance. Courts routinely allow employers to rely on evidence of an employee’s poor performance over lengthy periods of time. No formal, named doctrine limits an employer’s ability to present evidence. Judges regularly dismiss or diminish the plaintiff’s evidence based on concerns that the passage of time decreases the probative value of the evidence to show discrimination or retaliation. Judges rarely make similar judgments about the passage of time related to the evidence that favors the employer.

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<sup>105</sup> Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997).

<sup>106</sup> Auguster v. Vermilion Par. Sch. Bd., 249 F.3d 400, 404-05 (5th Cir. 2001) (alteration in original).

<sup>107</sup> Stites v. Alan Ritchey, Inc., No. 2:09-cv-00392, 2011 WL 81076, at \*7 (E.D. Pa. Jan. 10, 2011) (alteration in original).

<sup>108</sup> See, e.g., Paul v. Postgraduate Ctr. for Mental Health, 97 F. Supp. 3d 141, 169 (E.D.N.Y. 2015) (finding that comments made by coworkers that the plaintiff could not be the boss because he was old and Haitian were stray remarks in part because of ten-month time gap).

<sup>109</sup> See, e.g., Straka v. Comcast Cable, 897 F. Supp. 2d 346, 362 (W.D. Pa. 2012) (finding that age-related statements made by plaintiff’s prior supervisor were not probative and not describing time between comments and plaintiff’s termination).

<sup>110</sup> See *supra* Section I.B.

## 2. Temporal Proximity

In some cases, plaintiffs try to rely on evidence of temporal proximity to establish discrimination or retaliation. A plaintiff may rely on evidence of temporal proximity between the plaintiff's protected conduct and a negative outcome to establish retaliation.<sup>111</sup> For example, in some retaliation cases, a plaintiff tries to establish her case by showing that she engaged in a protected activity and that shortly thereafter, the employer took an adverse action against her. In the discrimination context, a plaintiff might try to establish a short time period between the employer's knowledge of a protected trait and an adverse action.<sup>112</sup> For example, a plaintiff might argue that her employer terminated her shortly after learning about a pregnancy or learning about a disability.

Often, courts will reject a plaintiff's temporal proximity evidence, finding that the time between the two events is too long to create an inference of discrimination or retaliation.<sup>113</sup> If a plaintiff relies on temporal proximity alone, courts typically require the plaintiff to show that the negative outcome happened a short time after the protected activity or the employer's knowledge of the protected trait.<sup>114</sup> Even when the plaintiff is relying on temporal proximity and

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<sup>111</sup> See, e.g., *Buchanan v. Delta Air Lines, Inc.*, 727 F. App'x 639, 642 (11th Cir. 2018) (holding that "temporal proximity alone cannot establish causation"); *Garcia v. City of Everett*, 728 F. App'x 624, 628 (9th Cir. 2018) ("Courts have held 'very close' temporal proximity to mean that 1.5 months is sufficient whereas three and four months is too long."); *Garcia-Garcia v. Costco Wholesale Corp.*, 878 F.3d 411, 426 (1st Cir. 2017) (holding that plaintiff failed to meet his burden of presenting evidence of employer's retaliatory animus, even though in other cases temporal proximity could have otherwise been sufficient); *Spector v. District of Columbia*, No. 1:17-cv-01884, 2020 WL 977983, at \*12 (D.D.C. Feb. 28, 2020) (noting seven-month period that followed plaintiff's report to Equal Employment Opportunity Commission and plaintiff's reclassification).

<sup>112</sup> See, e.g., *Rosencrans v. Quixote Enters., Inc.*, 755 F. App'x 139, 143 (3d Cir. 2018) (calling it "of significance" that there was only one day in between employer telling boss that she got married and termination of her employment); *Baker v. Roman Catholic Archdiocese of San Diego*, 725 F. App'x 531, 533 (9th Cir. 2018) (holding that there was a triable issue where employee's employment contract was not renewed five months after she had concussion); *Hester v. Ind. State Dep't of Health*, 726 F.3d 942, 947 (7th Cir. 2013) (calling "suspicious timing" an "example[] of pertinent circumstantial evidence").

<sup>113</sup> See, e.g., *Sklyarsky v. Means-Knaus Partners, L.P.*, 777 F.3d 892, 898 (7th Cir. 2015) (six-month lapse between plaintiff's EEOC complaints and adverse employment action); *Musolf v. J.C. Penney Co.*, 773 F.3d 916, 919 (8th Cir. 2014) (seven months); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) ("A nearly 18-month lapse between protected activity and an adverse employment action is simply too long, by itself, to give rise to an inference of causation."); *Coleman v. Home Health Res. Inc.*, 269 F. Supp. 3d 935, 945 (D. Ariz. 2017) (eight months is too long).

<sup>114</sup> See, e.g., *Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 391 (2d Cir. 2020) (five-month gap may establish pretext in some cases); *Bentley v. AutoZoners, LLC*, 935 F.3d 76, 90 (2d Cir. 2019) (one-month gap is not sufficient); *Parron v. Herbert*, 768 F. App'x 75, 77 (2d Cir. 2019) (timing alone is not sufficient); *Garcia*, 728 F. App'x at 628 (noting that one-and-a-half months is sufficient, but three months is not); *Molden v. E. Baton Rouge Par. Sch. Bd.*,

additional evidence, courts often do not allow plaintiffs to rely on temporal proximity if the time exceeds several months. Some courts have stated that temporal proximity inferences dissipate after three months or even shorter time frames.<sup>115</sup>

Some courts have drawn strange divisions related to temporal proximity. For example, the Fifth Circuit has explained that if a plaintiff is solely relying on evidence of temporal proximity, a four-month gap could be sufficient to establish a causal connection, but a five-month gap is not probative.<sup>116</sup> Additionally, the circuits are inconsistent in how they apply temporal proximity limits. The Eleventh Circuit has held that when standing alone, evidence of a four-month gap between protected activity and an adverse action is not sufficient to establish causation.<sup>117</sup> This appears to contradict the four-month line drawn by the Fifth Circuit.

The Eleventh Circuit has rejected a temporal proximity argument based on a three-month gap<sup>118</sup> and in one case a gap of fifty-eight days.<sup>119</sup> The Eleventh Circuit has even suggested that a gap of two weeks might not be probative.<sup>120</sup>

Judges severely limit the time frame in which they are willing to infer a connection between a plaintiff's protected activity and an adverse action. And they similarly limit the inferences they are willing to draw based on an employer's knowledge of a plaintiff's protected class and an adverse action. At the same time, judges routinely infer that employees are "bad employees" based on evidence far removed in time from the contested action.

Strangely, courts have not described why they have drawn lines about temporal proximity and limited its inferential value to a certain number of months. The limits do not appear to be based on any empirical study of jury

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715 F. App'x 310, 318 (5th Cir. 2017) (fourteen months is too long); *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 221 (3d Cir. 2017) (holding inferences that can be drawn from temporal proximity dissipate after three months); *see also D'Andrea v. Nielsen*, 765 F. App'x 602, 605-06 (2d Cir. 2019) (collecting cases regarding temporal proximity). It is not clear how courts are determining the time period from which a reasonable jury might infer retaliation.

<sup>115</sup> *See, e.g., Bentley*, 935 F.3d at 90 (one-month gap is not sufficient); *Moody*, 870 F.3d at 221 (holding inferences that can be drawn from temporal proximity dissipate after three months); *Kilby-Robb v. Devos*, 247 F. Supp. 3d 115, 129 (D.D.C. 2017) (temporal proximity must be less than three months); *Greer v. Bd. of Trs. of the Univ. of D.C.*, 113 F. Supp. 3d 297, 311 (D.D.C. 2015) (noting that three months is perceived as the outer limit).

<sup>116</sup> *Aguillard v. La. Coll.*, 824 F. App'x 248, 251 (5th Cir. 2020).

<sup>117</sup> *McConico v. City of Tampa*, 823 F. App'x 763, 768 (11th Cir. 2020).

<sup>118</sup> *Gilliam v. U.S. Dep't of Veterans Affs.*, 822 F. App'x 985, 990 (11th Cir. 2020) (calling three-month period "too long to permit an inference of causation based on temporal proximity alone").

<sup>119</sup> *Johnson v. Miami-Dade County*, 948 F.3d 1318, 1327-28 (11th Cir. 2020) (noting that much shorter timelines were held insufficient in the past).

<sup>120</sup> *Id.* at 1328 (describing two-week period as "probably insufficient" (quoting *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1298 (11th Cir. 2006))).

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verdicts or any other evidence about the likely impact of engaging in protected activity or making a protected status known.<sup>121</sup>

There is nothing in the text of the employment discrimination statutes or within the Federal Rules of Civil Procedure that limit a plaintiff's ability to rely on temporal proximity. Indeed, at summary judgment, the question for the court is whether a reasonable jury could find discrimination or retaliation based on the proffered evidence.<sup>122</sup> Courts also have not explained why they can infer that poor performance or misconduct is probative even years after it occurred, while evidence favoring the plaintiff is only relevant for extraordinarily short periods of time.

### 3. History of Good Performance

Courts also limit plaintiffs' ability to demonstrate their good performance over time. If employers can rely on a "history" of bad performance to defend cases, it seems that workers should be able to rely on a "history" of good performance to support their cases, especially in certain circumstances.

A history of good performance could be relevant in many different ways. A plaintiff might want to rely on a history of good performance to establish that she was qualified for her job, which is the second factor of the *McDonnell Douglas* prima facie case.<sup>123</sup> If an employer asserts that it fired an employee for a history of poor performance, the plaintiff should be able to counter the employer's evidence by showing she performed well over time. If the employer fired the plaintiff abruptly or for a minor offense, the plaintiff might want to show that the employer's stated reason is not the likely reason for its action.<sup>124</sup> The plaintiff's good performance may establish that the employer's stated reason is pretextual, which is one of the inquiries in the third step of the *McDonnell Douglas* framework.

The plaintiff might want to compare her history of performance against the performance of other similarly situated workers. Or, the plaintiff might want to show that when a new supervisor started, that supervisor began downgrading the plaintiff's performance and that the new supervisor might view her performance differently because of a protected trait.<sup>125</sup> These are some ways in which a plaintiff's history of good performance might be relevant to a discrimination claim. Despite the recognition by some judges that these inferences can play a

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<sup>121</sup> Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 78 (2005).

<sup>122</sup> FED. R. CIV. P. 56(a).

<sup>123</sup> See, e.g., *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 590 (6th Cir. 2014) (twenty-five-year employment with company sufficient to establish employee qualifications).

<sup>124</sup> See, e.g., *Halliwell v. N. White Sch. Corp.*, No. 4:13-cv-00084, 2016 WL 795893, at \*2 (N.D. Ind. Mar. 1, 2016) (agreeing with plaintiff that his proffered evidence of school recharacterizing his performance was relevant).

<sup>125</sup> See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 504-05 (1993) (alleging similar fact pattern).



valid role in discrimination cases, in many cases judges limit plaintiffs' ability to present such evidence.

Examples of courts limiting the time frame for the plaintiff's evidence of good performance include the following:

- Refusing to draw inferences in favor of the plaintiff when the plaintiff received good evaluations less than one year prior to a demotion;<sup>126</sup>
- Indicating that a performance review given in January was not relevant to whether the plaintiff was performing well in August of that year;<sup>127</sup>
- Stating that a June performance review finding that the employee met the employer's expectations was not relevant to a termination in August of the same year;<sup>128</sup>
- Refusing to consider positive performance reviews from 2014 and 2015 for a termination in June 2016;<sup>129</sup>
- Noting that positive reviews received two months before a contested action did not establish that the plaintiff was performing her job satisfactorily;<sup>130</sup>
- Holding that reviews received seven months before a contested decision were not probative in proving the plaintiff met her employer's legitimate expectations;<sup>131</sup> and

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<sup>126</sup> *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 18-20 (1st Cir. 1999) (declining to make inference most favorable to nonmoving plaintiff during summary judgment when finding that juror could not infer the plaintiff met expectations at one job based on positive evaluations from prior supervisor); *see also* *Avant v. S. Md. Hosp., Inc.*, No. 8:13-cv-02989, 2015 WL 435011, at \*5 (D. Md. Feb. 2, 2015) (holding that positive review from person who supervised plaintiff nine months before termination was too removed from the time of termination to be relevant). *But see* *Lewis v. Home Depot U.S.A., Inc.*, No. 1:06-cv-00058, 2007 WL 1100422, at \*6 (W.D. Tex. Apr. 10, 2007) (finding evaluations relevant when they preceded adverse action by eight weeks).

<sup>127</sup> *O'Connor v. Consol. Coin Caterers Corp.*, 56 F.3d 542, 547 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 308 (1996).

<sup>128</sup> *McDowell v. Nucor Bldg. Sys.*, No. 3:10-cv-00172, 2011 WL 7447349, at \*4 (D.S.C. Dec. 15, 2011) (considering the negative, but not positive, aspects of a review prior to termination), *report and recommendation adopted*, No. 3:10-cv-00172, 2012 WL 714632 (D.S.C. Feb. 29, 2012), *aff'd*, 475 F. App'x 462 (4th Cir. 2012).

<sup>129</sup> *Dinda v. CSC Gov't Sols., LLC*, No. 2:17-cv-03171, 2019 WL 4280370, at \*8 (D.S.C. Mar. 21, 2019) (noting only relevant performance is performance at time of termination), *report and recommendation adopted*, No. 2:17-cv-03171, 2019 WL 3244186 (D.S.C. July 19, 2019). *But see* *Mitter v. County of DuPage*, No. 1:13-cv-00841, 2017 WL 345538, at \*6 (N.D. Ill. Jan. 24, 2017) (holding prior good performance could help plaintiff establish pretext).

<sup>130</sup> *Farias v. Great Lakes Credit Union*, No. 1:15-cv-11515, 2018 WL 827952, at \*4 (N.D. Ill. Feb. 9, 2018) (noting that positive reviews two months prior to termination did not outweigh the negative reviews leading up to plaintiff's termination).

<sup>131</sup> *Hess v. Atl. Marine Corps Cmty. Prop. Mgmt., LLC*, No. 7:13-cv-00018, 2014 WL 1321001, at \*3 (E.D.N.C. Apr. 1, 2014).

- Indicating that an evaluation five months before the contested decision was not relevant.<sup>132</sup>

Even when courts recount the full history of the plaintiff's good performance, they often appear to infer more from negative comments in otherwise good performance reviews than they infer from the positive comments.<sup>133</sup> In some instances, courts state that the plaintiff received a good performance review but then focus only on the negative aspects of the review without discussing the positive aspects.<sup>134</sup>

At times, courts diminish or refuse to consider evidence that a plaintiff has a long history of favorable performance under one supervisor and then faced immediate poor performance reviews by a new supervisor.<sup>135</sup> In one case, a plaintiff presented evidence that he worked for a company for eighteen years "primarily without any major performance issues."<sup>136</sup> The plaintiff, who was legally blind, claimed that a new supervisor overly criticized his performance and then fired him.<sup>137</sup> The court refused to credit this evidence as supporting a claim of disability discrimination.<sup>138</sup> The plaintiff's history of good performance under other supervisors did not count as a reason to be suspicious about the new supervisor's reports of poor performance.<sup>139</sup> Instead of inferring discrimination from this evidence, courts often conclude new supervisors have different, legitimate standards and that the new supervisor's criticism is nondiscriminatory.<sup>140</sup>

Courts justify these restrictions in different ways. Numerous ideas work either individually or in tandem to exclude or diminish plaintiffs' evidence. For lack of a defined term, I refer to them as the "decisionmaker at the time" doctrines. These doctrines limit the inferences courts are willing to draw in favor of the

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<sup>132</sup> *Stern v. St. Anthony's Health Ctr.*, No. 3:12-cv-00785, 2013 WL 5967746, at \*5 (S.D. Ill. Nov. 8, 2013).

<sup>133</sup> *See, e.g., Bolton v. Sprint/United Mgmt. Co.*, 220 F. App'x 761, 763-65 (10th Cir. 2007) (recounting plaintiff's performance history but focusing attention on negative comments).

<sup>134</sup> *McDowell v. Nucor Bldg. Sys.*, No. 3:10-cv-00172, 2011 WL 7447349, at \*4 (D.S.C. Dec. 15, 2011) (focusing on one negative performance aspect rather than otherwise satisfactory performance), *report and recommendation adopted*, No. 3:10-cv-00172, 2012 WL 714632 (D.S.C. Feb. 29, 2012), *aff'd*, 475 F. App'x 462 (4th Cir. 2012).

<sup>135</sup> *Carroll v. Off. Depot, Inc.*, No. 2:13-cv-00414, 2015 WL 1487098, at \*1 (N.D. Ala. Mar. 30, 2015) (finding the manager who suggested termination was the dispositive source of evidence, not the previous managers). *But see Kelly v. U.S. Steel Corp.*, No. 2:11-cv-00193, 2012 WL 5467759, at \*2 (W.D. Pa. Nov. 9, 2012) (allowing this kind of evidence).

<sup>136</sup> *Carroll*, 2015 WL 1487098, at \*1.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*7.

<sup>139</sup> *Id.*

<sup>140</sup> *See, e.g., Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002) ("Different supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider important.").

plaintiff if the evidence does not come from (1) a decisionmaker (2) at the time of the contested action. This Section focuses on the temporal aspects of this idea.

The second factor in the *McDonnell Douglas* prima facie case requires the plaintiff to establish that she met the employer's qualifications.<sup>141</sup> Some courts increase the burden of the plaintiff in this second step and require the plaintiff to present evidence that she was meeting her employer's expectations at the time of the contested decision.<sup>142</sup> The court will then limit the plaintiff's ability to present evidence of the plaintiff's good performance over time.<sup>143</sup>

Courts draw these limits differently depending on whether the plaintiff or defendant is offering evidence. In one case, a plaintiff was terminated in April of 2004.<sup>144</sup> The plaintiff tried to establish the second factor of the *McDonnell Douglas* prima facie case by showing that she had a history of positive reviews, including a positive review at the end of 2001 and a bonus she received in December of 2003.<sup>145</sup> The court rejected this evidence because the "relevant inquiry is whether the employee was meeting expectations at the time of termination."<sup>146</sup> However, in the very next sentence, the court discussed evidence that the employer offered to show the plaintiff was not meeting its expectations.<sup>147</sup> This proffered evidence detailed that:

[t]he performance reviews received by the plaintiff during her final three years at the bank show that the plaintiff's managers felt that she was

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<sup>141</sup> *Bulifant v. Del. River & Bay Auth.*, 698 F. App'x 660, 663 (3d Cir. 2017); *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 590 (6th Cir. 2014) ("[A] plaintiff can satisfy the qualification prong [of the *McDonnell Douglas* framework] by showing that she performed at a level that generally met her employer's objective minimum qualifications.").

<sup>142</sup> *Berini v. Fed. Rsrv. Bank of St. Louis*, 420 F. Supp. 2d 1030, 1037 (E.D. Mo. 2006) (finding that the awarding of bonuses does not prove work was satisfactory when awarded near termination). *But see* *Angelone v. Seyfarth Shaw LLP*, No. 2:05-cv-02106, 2007 WL 1033458, at \*7 (E.D. Cal. Apr. 3, 2007) (indicating that because some people plaintiff worked for thought her work was satisfactory, she could meet the second factor to establish prima facie case).

<sup>143</sup> *McDowell v. Nucor Bldg. Sys.*, No. 3:10-cv-00172, 2011 WL 7447349, at \*4 (D.S.C. Dec. 15, 2011) (finding plaintiff's evidence of positive reviews prior to termination were irrelevant to termination), *report and recommendation adopted*, No. 3:10-cv-00172, 2012 WL 714632 (D.S.C. Feb. 29, 2012), *aff'd*, 475 F. App'x 462 (4th Cir. 2012); *Berini*, 420 F. Supp. 2d at 1037 ("She also emphasizes her long tenure at the bank and the positive evaluations, promotions and raises that she received during the majority of that time. However, in evaluating whether an employee's job performance is satisfactory, the relevant inquiry is whether the employee was meeting expectations at the time of termination."). The courts are inconsistent on this prong of *McDonnell Douglas*. *Machinchick v. PB Power, Inc.*, 398 F.3d 345, 354-55 (5th Cir. 2005) (allowing plaintiff to rely on evidence of past performance reviews to establish this prong).

<sup>144</sup> *Berini*, 420 F. Supp. 2d at 1033.

<sup>145</sup> *Id.* at 1037.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* (highlighting evidence of performance reviews dating back three years from termination).

making an unacceptable number of errors, that she had not managed to learn the skills required by the new accounting methodologies, and that she was made aware of these shortcomings.<sup>148</sup>

The court did not allow the plaintiff to present evidence from 2001 to 2003 to support her case because it was not “at the time of termination,” but it allowed the employer to use evidence from the same period to support its defense.<sup>149</sup>

This happens repeatedly.<sup>150</sup> In another case, the plaintiff offered his June 2008 performance review as evidence that he met the expectations for the job.<sup>151</sup> The employer had rated the employee as mostly meeting expectations in June but fired the employee less than two months later in August.<sup>152</sup> The court stated that the June review was irrelevant as to whether the plaintiff was meeting expectations in August and that the only relevant time period was at the time of termination.<sup>153</sup> However, then the court noted that negative comments in the same performance review supported the employer’s decision to terminate the plaintiff.<sup>154</sup> The court found the evidence from the review that supported the plaintiff’s case irrelevant, while deeming relevant evidence from the same review that supported the employer.

When analyzing pretext evidence under the third step of *McDonnell Douglas*, courts have reasoned that if the employer articulates a specific reason for terminating the plaintiff, plaintiff’s evidence of good performance in other areas is not probative of pretext.<sup>155</sup> At times, courts state that the only relevant performance is the plaintiff’s performance at the time of the challenged employment action.<sup>156</sup> Courts also reason that if the plaintiff has changed jobs

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g.,* Cartee v. Wilbur Smith Assocs., Inc., No. 3:08-cv-04132, 2010 WL 5059643, at \*4-5 (D.S.C. Oct. 6, 2010) (plaintiff required to present evidence at the time of the contested action, but the defendant was allowed to support its case with reviews from a prior supervisor), *report and recommendation adopted*, No. 3:08-cv-04132, 2010 WL 5059639 (D.S.C. Dec. 6, 2010).

<sup>151</sup> McDowell v. Nucor Bldg. Sys., No. 3:10-cv-00172, 2011 WL 7447349, at \*4 (D.S.C. Dec. 15, 2011), *report and recommendation adopted*, No. 3:10-cv-00172, 2012 WL 714632 (D.S.C. Feb. 29, 2012), *aff’d*, 475 F. App’x 462 (4th Cir. 2012).

<sup>152</sup> *Id.* at \*1 (“Approximately two months prior to his termination, [plaintiff] received an overall performance review rating of ‘M,’ signifying that he was meeting expectations . . . . [Plaintiff also] received an ‘I’ with regard to his performance and achievements, denoting that he needed improvement in some important areas.”).

<sup>153</sup> *Id.* at \*4.

<sup>154</sup> *Id.*

<sup>155</sup> *Connearney v. Main Line Hosps., Inc.*, No. 2:15-cv-02730, 2016 WL 6569326, at \*7 (E.D. Pa. Nov. 4, 2016) (finding nurse could not show firing was pretextual by introducing positive letters of recommendation when employer had alleged she was terminated for falsifying a record).

<sup>156</sup> *Sargis v. Amoco Corp.*, 996 F. Supp. 790, 793-94 (N.D. Ill. 1998) (finding positive reviews did not prove pretext when employer articulated it fired plaintiff for not meeting goals and making errors).

or changed supervisors in the intervening time, then the evaluations of past supervisors are irrelevant.<sup>157</sup>

If courts place these limits on the plaintiff's evidence, it is unclear why they often refuse to similarly limit the employer's evidence. As discussed below, courts regularly allow employers to present evidence from prior supervisors and former coworkers as to the plaintiff's performance and do not limit this evidence to information the employer considered at the time the employer took the contested action.

### III. WITNESSES AND DOCUMENTS

Evidentiary inequality also exists in the way judges treat witnesses and documents in discrimination cases. Judges allow employers to provide evidence from a broad group of people and regularly admit employer evidence derived from a variety of documents, including past performance reviews.<sup>158</sup> When considering evidence of a plaintiff's misconduct, poor performance, or lack of qualifications, courts do not regularly require that this evidence come from the person who made the contested decision or even require that the person who made the decision knew about the evidence or considered it at the time the decision was made.<sup>159</sup>

In contrast, judges often severely restrict the people from whom the plaintiff can provide evidence and the documents on which plaintiffs may rely. Judges will often exclude or diminish a plaintiff's evidence about her performance if the evidence does not come from her supervisor at the time of the contested employment action.<sup>160</sup> Additionally, judges will prohibit the plaintiff from using evidence about how well the plaintiff performed her job or offering testimony

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<sup>157</sup> See, e.g., *Rodriguez-Cuervos v. Wal-Mart Stores, Inc.*, 181 F.3d 15, 20 (1st Cir. 1999) (finding that plaintiff's positive reviews from prior supervisors were not dispositive in demotion claim).

<sup>158</sup> See, e.g., *Ralser v. Hudson Grp. (HG) Retail, LLC*, No. 2:19-cv-01359, 2020 WL 94878, at \*9 (E.D. La. Jan. 8, 2020) (noting unfavorable parts of a performance review by plaintiff's former supervisor); *Nagpal v. Holder*, 750 F. Supp. 2d 20, 26-27 (D.D.C. 2010) (relying on reviews from multiple prior supervisors, many unrelated to challenged action).

<sup>159</sup> *Nagpal*, 750 F. Supp. 2d at 26-27 (citing negative reviews from individuals other than the decisionmaker at the time).

<sup>160</sup> See, e.g., *Lindeman v. Saint Luke's Hosp. of Kansas City*, 899 F.3d 603, 606 (8th Cir. 2018) (diminishing importance of reviews by prior supervisors); *Davis v. Nissan N. Am., Inc.*, 693 F. App'x 182, 184 (4th Cir. 2017) (finding evidence of good job performance by plaintiff is not relevant when provided by coworkers and former supervisors); *Dinda v. CSC Gov't Sols. LLC*, No. 2:17-cv-03171, 2019 WL 3244186, at \*5 (D.S.C. Mar. 21, 2019) ("He only provided positive performance reviews from former supervisors, as well as positive feedback from some of his clients. However, Dinda failed to provide positive performance reviews from his supervisor at the time of his termination." (citation omitted)), *report and recommendation adopted*, No. 2:17-cv-03171, 2019 WL 3244186 (D.S.C. July 19, 2019); *Weinerth v. Martinsville City Sch. Bd.*, No. 4:17-cv-00067, 2019 WL 2181931, at \*9 (W.D. Va. May 20, 2019) (finding that review from prior supervisor was not relevant).

from prior supervisors or coworkers that the plaintiff was not responsible for performance issues claimed by the defendant.<sup>161</sup>

A. *The Employer's Witnesses and Documents*

Judges routinely allow employers to present evidence of a plaintiff's poor performance or lack of credentials from a number of individuals. Judges accept this evidence from former supervisors,<sup>162</sup> coworkers,<sup>163</sup> and customers.<sup>164</sup>

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<sup>161</sup> *Martin v. Health Care & Ret. Corp.*, 67 F. App'x 109, 113-14 (3d Cir. 2003) (finding that overall good performance reviews did not outweigh specific negative accusations); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124-25 (7th Cir. 1994) ("The mere submission of materials from a coworker or supervisor indicating that an employee's performance is satisfactory, or more specifically that an employee's performance is satisfactory because he was not entirely responsible for several admitted mishaps, does not create a material issue of fact."); *Brenner v. City of N.Y. Dep't of Educ.*, 132 F. Supp. 3d 407, 419 (E.D.N.Y. 2015) (noting that coworker's affidavits were not appropriate for consideration at summary judgment stage).

<sup>162</sup> *See, e.g.,* *Seastrand v. U.S. Bank N.A.*, 807 Fed. App'x 882, 886-87 (10th Cir. 2020) (allowing evidence from former supervisor of plaintiff's poor judgment); *Sims v. MVM, Inc.*, 704 F.3d 1327, 1337 (11th Cir. 2013) (mentioning former supervisor was consulted during the employer's reduction in force process); *Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 490 (6th Cir. 2005) (mentioning a memorandum that described plaintiff's prior work deficiencies); *Ralser*, 2020 WL 94878, at \*9 (noting unfavorable performance review by the plaintiff's former supervisor); *Robertson v. Riverstone Cmtys., LLC*, No. 1:17-cv-02668, 2019 WL 4399492, at \*4 (N.D. Ga. May 28, 2019) (discussing performance review from former supervisor), *report and recommendation adopted*, No. 1:17-cv-02668, 2019 WL 3282991 (N.D. Ga. July 22, 2019); *Nagpal*, 750 F. Supp. 2d at 27 (relying on reviews from multiple prior supervisors, many unrelated to challenged action); *Philpot v. Blue Cross Blue Shield of Ga.*, No. 1:07-cv-00657, 2008 WL 11407269, at \*1-7 (N.D. Ga. July 14, 2008) (recounting complaints from prior supervisors), *report and recommendation adopted*, No. 1:07-cv-00657, 2008 WL 11407343 (N.D. Ga. Aug. 27, 2008); *Ratcliff v. ExxonMobil Corp.*, No. 2:01-cv-02618, 2002 WL 1315625, at \*5 (E.D. La. June 13, 2002) (stating that hiring decisionmakers relied on opinions of plaintiff's former supervisors).

<sup>163</sup> *Gant v. Genco I, Inc.*, 274 F. App'x 429, 434-35 (6th Cir. 2008) (noting numerous complaints from coworkers); *Vasser v. SaarGummi Tenn., LLC*, No. 1:18-cv-00083, 2019 WL 8013869, at \*3 (M.D. Tenn. Dec. 2, 2019) (noting complaints from coworkers); *Jeffrey v. Thomas Jefferson Univ. Hosps., Inc.*, No. 2:17-cv-00531, 2019 WL 2122989, at \*1 (E.D. Pa. May 14, 2019) ("Plaintiff's coworkers and supervisors recorded a number of incidents regarding Plaintiff's behavior, some of which included verbal or written warnings, or resulted in Plaintiff being removed from certain job responsibilities."); *Clark v. N.Y. State Off. of the State Comptroller*, No. 1:09-cv-00716, 2014 WL 823289, at \*2 (N.D.N.Y. Mar. 3, 2014) (noting numerous complaints from coworkers); *Bielich v. Johnson & Johnson, Inc.*, 6 F. Supp. 3d 589, 612 (W.D. Pa. 2014) (discussing coworker and customer complaints); *Georgy v. O'Neill*, No. 1:00-cv-00660, 2002 WL 449723, at \*1 (E.D.N.Y. Mar. 25, 2002) (discussing coworker complaints).

<sup>164</sup> *See, e.g.,* *Bielich*, 6 F. Supp. 3d at 612 (mentioning customer complaints); *Chytka v. Wright Tree Serv., Inc.*, 925 F. Supp. 2d 1147, 1167 (D. Colo. 2013) ("[A] supervisor for . . . Defendant's largest customer, complained to Defendant about Plaintiff's job performance . . ."); *Johnson v. MacDonald*, 897 F. Supp. 2d 51, 74 (E.D.N.Y. 2012)

Judges routinely allow employers to present evidence about a plaintiff's misconduct, poor performance, or lack of skills from people who are not the decisionmaker.

The following are some examples that provide more context about the type of people from whom the courts will accept negative evidence about the plaintiff. In one case, the director of a department made the decision to terminate the plaintiff.<sup>165</sup> When recounting evidence to support the termination decision, the court relied on evidence from the plaintiff's immediate supervisor, as well as "reports and other complaints from the testing lab, and reports from other people employed by the department."<sup>166</sup> In another case, the judge relied on plaintiff's performance history from the late 1990s until the plaintiff's termination in 2006 and recounted negative comments from at least five different supervisors, a coworker, and a non-direct supervisor.<sup>167</sup>

Additional examples of courts allowing employers to rely on evidence from a wide range of people include the following:

- Relying on evidence of the plaintiff's communication issues from multiple coworkers and complaints from two clients about project management;<sup>168</sup>
- Allowing evidence that the employer received "multiple and continued complaints from . . . fellow co-workers" about the plaintiff but rejecting plaintiff's comparator evidence;<sup>169</sup>
- Holding that summary judgment was appropriate when a company fired an employee after receiving an anonymous tip that the employee planned to steal company property, when there was contested evidence about whether the plaintiff was involved in such a plan;<sup>170</sup>
- Granting summary judgment after relying on complaints from supervisors, maintenance personnel and operators, as well as "[c]onversations with plant supervisors" about the plaintiff's conduct;<sup>171</sup>

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("Beginning in late May 2009, however, the number of allegations made by customers against plaintiff increased."); *Anderson v. AMC Cancer Rsch. Ctr.*, No. 1:06-cv-01999, 2009 WL 2219263, at \*2 (D. Colo. July 24, 2009) (noting that at least one client requested that plaintiff be removed from its project).

<sup>165</sup> *Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002).

<sup>166</sup> *Id.*

<sup>167</sup> *Fuller v. Seagate Tech., LLC*, 651 F. Supp. 2d 1233, 1235-37 (D. Colo. 2009).

<sup>168</sup> *Anderson*, 2009 WL 2219263, at \*2 (describing employer's testimony regarding complaints by six coworkers and two clients).

<sup>169</sup> *Smith v. Eaton Corp.*, 195 F. Supp. 2d 1079, 1094 (N.D. Iowa 2002).

<sup>170</sup> *Stephens v. Neal's Pallet Co.*, No. 3:11-cv-00173, 2012 WL 2994651, at \*6 (W.D.N.C. July 23, 2012).

<sup>171</sup> *Zoutomou v. Kennecott Utah Copper*, No. 2:10-cv-00719, 2013 WL 1213386, at \*2, \*6 (D. Utah Mar. 25, 2013).

- Granting summary judgment in part for the employer based on the employer's evidence that both coworkers and customers complained about the plaintiff's timeliness,<sup>172</sup> including an employee who did not work in the plaintiff's department;<sup>173</sup>
- Permitting the employer to base its legitimate, nondiscriminatory reason on a customer complaint received on a website;<sup>174</sup>
- Recounting customer complaints and negative performance reviews from multiple supervisors;<sup>175</sup> and
- Recommending grant of summary judgment in the employer's favor when a company terminated an employee based on a process that started with an anonymous complaint about the plaintiff.<sup>176</sup>

Courts allow employers to present evidence from past performance reviews and other documents.<sup>177</sup> Courts also will allow employers to rely on complaints, even when those complaints were never communicated to the worker during his employment.<sup>178</sup>

Courts even allow employers to use negative comments from otherwise positive performance reviews to support their version of events.<sup>179</sup> While employers should be able to present this evidence to the court, courts should be careful about what inferences they can draw against the worker from such evidence.

For example, in *Berini v. Federal Reserve Bank of St. Louis*,<sup>180</sup> the court granted summary judgment for the employer on the plaintiff's claim that her

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<sup>172</sup> *Bielich v. Johnson & Johnson, Inc.*, 6 F. Supp. 3d 589, 612 (W.D. Pa. 2014).

<sup>173</sup> *Id.* at 596.

<sup>174</sup> *Cox v. Lowe's Home Ctrs., LLC*, No. 3:14-cv-00679, 2015 WL 7288689, at \*1 (W.D.N.C. Nov. 17, 2015).

<sup>175</sup> *Schaffner v. Rush Presbyterian St. Luke's Hosp.*, No. 1:94-cv-02471, 1996 WL 507246, at \*1 (N.D. Ill. Sept. 4, 1996).

<sup>176</sup> *Henderson v. Rite Aid of N.Y., Inc.*, No. 1:16-cv-00785, 2020 WL 7049304, at \*1 (W.D.N.Y. Apr. 23, 2020), *report and recommendation adopted*, No. 1:16-cv-00785, 2020 WL 5987843 (W.D.N.Y. Oct. 9, 2020).

<sup>177</sup> *See, e.g., Schrock v. Publix Super Mkts., Inc.*, 653 F. App'x 662, 664 (11th Cir. 2016) (using record of counseling statements and performance reviews as evidence to grant summary judgment); *Zoutomou v. Kennecott Utah Copper*, No. 2:10-cv-00719, 2013 WL 1213386, at \*6 (D. Utah Mar. 25, 2013) (using performance reviews, PIP, STIP review, and deposition documents to support grant of summary judgment); *Berini v. Fed. Rsrv. Bank of St. Louis*, 420 F. Supp. 2d 1030, 1033 (E.D. Mo. 2006) (using performance review).

<sup>178</sup> *See, e.g., Brollosy v. Margolin, Winer & Evens, LLP*, No. 2:04-cv-00873, 2006 WL 721433, at \*9 (E.D.N.Y. Mar. 20, 2006) (citing cases that hold it is not relevant whether employer informed employee of problems); *Pronin v. Raffi Custom Photo Lab, Inc.*, 383 F. Supp. 2d 628, 632 (S.D.N.Y. 2005) (noting that employer did not tell plaintiff why he was being fired).

<sup>179</sup> *Bolton v. Sprint/United Mgmt. Co.*, 220 F. App'x 761, 763 (10th Cir. 2007).

<sup>180</sup> *Berini*, 420 F. Supp. 2d 1030.



employer terminated her employment in 2004 because of her age.<sup>181</sup> The court described the plaintiff's performance review from the year 2000 as follows:

At the end of the year, plaintiff received a summary review rating of "strong," and she was recommended for promotion to grade level 13 by her immediate supervisor[.]. [Her supervisor's] suggestions for improvements included comments on the tone of plaintiff's written communications, and a caution that she "sometimes focuses too narrowly on the details and does not fully consider the broader impact of each action she recommends."<sup>182</sup>

Even though the plaintiff received a review so favorable that her supervisor recommended her for a promotion, the court chose to point out suggestions for improvement provided in the performance review as supporting the employer's case.<sup>183</sup> The court did not recount any positive comments about the plaintiff's performance from this review. Nor did the court explain how the negative comments related to the employer's decision to terminate the plaintiff's employment approximately four years later. Even though courts often require the plaintiff to show how evidence connects to the contested decision, they do not frequently require an employer to connect the evidence from its witnesses and documents to the contested employment action or to explain why the evidence is relevant under Federal Rule of Evidence 401.<sup>184</sup>

#### B. *The Worker's Witnesses and Documents*

A strange thing often happens when the plaintiff tries to present evidence of her good performance or evidence suggesting discriminatory remarks or conduct. The courts will use a variety of doctrines to exclude or diminish plaintiffs' evidence.

##### 1. Limited Palette of Discriminatory Evidence

As discussed earlier, a court might use the stray remarks doctrine to exclude a piece of evidence that favors the plaintiff by reasoning that it is too far removed in time from the contested decision to be relevant. Courts also will use this doctrine to limit the plaintiffs' evidence because the person who made the remarks or engaged in the conduct is not the decisionmaker related to the contested action.

In one case, the court granted summary judgment for the employer on the plaintiff's age discrimination claim.<sup>185</sup> The court rejected plaintiff's evidence that his direct supervisor called him "the old man in the group," referred to him

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<sup>181</sup> *Id.* at 1035 (granting summary judgment and finding plaintiff failed to provide any evidence that defendant's reason for firing her was pretextual).

<sup>182</sup> *Id.* (footnote omitted).

<sup>183</sup> *Id.*

<sup>184</sup> FED. R. EVID. 401.

<sup>185</sup> *Connolly v. Pepsi Bottling Grp., L.L.C.*, No. 2:06-cv-01462, 2008 WL 4412090, at \*1 (W.D. Pa. Sept. 22, 2008). The court also discussed other stray remarks cases. *Id.* at \*12-14.

as an “old man,” and said he “could hire two or three people” for the money the plaintiff made.<sup>186</sup> The court held these comments were stray remarks because even though the person who made them was a supervisor and investigated the plaintiff’s conduct, that person did not make the ultimate decision to fire the plaintiff.<sup>187</sup> The court also rejected evidence that one of the decisionmakers told the plaintiff “the job has passed [you] by” and “younger key account managers can work rings around you.”<sup>188</sup> The court reasoned that the remarks by one of the decisionmakers was a stray remark because the person was one member of a five-member group who made the decision to terminate the plaintiff.<sup>189</sup>

In another case, a court deemed the following comments by managers to be stray remarks in a sex and pregnancy discrimination suit: “women should stay home with their children” and a description of a newly hired employee as a “trophy female” for the department.<sup>190</sup> The court also excluded evidence of a “lascivious” voicemail message a group of managers inadvertently sent to the entire company.<sup>191</sup> According to the court, this evidence constituted stray remarks because it did not involve the decisionmaker.<sup>192</sup>

At times, courts even refuse to rely on evidence from supervisors if the remarks are deemed unrelated to the decisional process. In a race discrimination case, a worker presented evidence that his supervisor “referred to African Americans as ‘lazy,’ ‘worthless,’ and ‘just here to get paid.’”<sup>193</sup> The judge declared, without describing why, that the comments were not causally connected to the challenged outcome.<sup>194</sup>

Courts routinely exclude or diminish plaintiffs’ evidence of discriminatory conduct or remarks based on who made the remarks.<sup>195</sup>

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<sup>186</sup> *Id.* at \*14.

<sup>187</sup> *Id.* (noting that the remarks did not directly relate to stated reasons for termination and there was no proof that those who fired plaintiff knew about conduct).

<sup>188</sup> *Id.* (alteration in original).

<sup>189</sup> *Id.* (explaining that the other decisionmakers may not have been aware of the questioned comments).

<sup>190</sup> *Suits v. Heil Co.*, 192 F. App’x 399, 407 (6th Cir. 2006).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Chappell v. Bilco Co.*, No. 3:09-cv-00016, 2011 WL 9037, at \*9 (E.D. Ark. Jan. 3, 2011) (granting summary judgment).

<sup>194</sup> *Id.*

<sup>195</sup> *See, e.g.*, *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918-19 (9th Cir. 1996) (holding that a comment by a supervisor that he intended to get rid of all the “old timers” was insufficient to create a genuine issue of material fact because “the comment was not tied directly to [the] layoff”); *Donadio v. Glob. Experience Specialists, Inc.*, No. 2:11-cv-00317, 2012 WL 5046472, at \*3 (D. Nev. Oct. 17, 2012) (“Stray remarks not acted upon or communicated to a decision maker are insufficient to establish a dispute of fact about pretext.”); *Pronin v. Raffi Custom Photo Lab, Inc.*, 383 F. Supp. 2d 628, 638 (S.D.N.Y. 2005) (determining a comment to be a stray remark when not uttered by decisionmaker or in context of decision-making process); *Argueta v. N. Shore Long Island Jewish Health Sys., Inc.*, No.

## 2. History of Good Performance

Courts also limit the witnesses and documents plaintiffs can use to show they performed their job well or possessed the skills required for a job.

Courts frequently refuse to consider positive comments that plaintiffs receive from current or former supervisors about the plaintiff's work performance.<sup>196</sup> Courts have excluded evidence of a plaintiff's good performance even when that information is documented in the employer's performance review records<sup>197</sup> and when the evidence contains facts about why and how the plaintiff performed well.<sup>198</sup>

Courts have accepted evidence of a plaintiff's poor performance from prior supervisors when that evidence supported the employer's reasons for the contested action, but have rejected evidence from other supervisors regarding the plaintiff's good performance.<sup>199</sup> In some cases, a judge may even deny an

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2:01-cv-04031, 2003 WL 22670915, at \*8 (E.D.N.Y. Nov. 6, 2003) (excluding remarks because speaker was not a decisionmaker); *see also* Stone, *supra* note 1, at 160-63 (discussing cases).

<sup>196</sup> *See, e.g.,* Coleman v. Schneider Elec. USA, Inc., 755 F. App'x 247, 249 (4th Cir. 2019) (indicating positive review by prior supervisor was not probative because new supervisor is entitled to form a different view); Smith v. Cohen, No. 00-cv-10199, 2001 WL 43521, at \*4 (5th Cir. Jan. 3, 2001) (finding magistrate judge did not err in excluding plaintiff's evidence of positive reviews from former supervisors); Brown v. First Cmty. Bank, No. 7:18-cv-00404, 2019 WL 5445300, at \*5 (W.D. Va. Oct. 23, 2019) (indicating that reviews from prior supervisor are not relevant because new supervisor is entitled to form a different opinion and citing other cases where courts rejected similar evidence); Dinda v. CSC Gov't Sols., LLC, No. 2:17-cv-03171, 2019 WL 4280370, at \*8 (D.S.C. Mar. 21, 2019) (discounting old performance reviews), *report and recommendation adopted*, No. 2:17-cv-03171, 2019 WL 3244186 (D.S.C. July 19, 2019); Hamilton v. Boys & Girls Club of Metro. Atlanta, Inc., No. 1:12-cv-03609, 2014 WL 4100750, at \*11 (N.D. Ga. Aug. 18, 2014) (asserting that former supervisor always gave plaintiff positive evaluations was not relevant and citing cases); Miller v. Univ. of Chi., No. 1:05-cv-01663, 2007 WL 317028, at \*7 (N.D. Ill. Jan. 29, 2007) (noting that such evidence is "irrelevant"); Ward v. City of North Myrtle Beach, 457 F. Supp. 2d 625, 642 (D.S.C. 2006) (downplaying evidence that one supervisor gave the plaintiff a more negative evaluation than he deserved). Some judges have recognized that such evidence is relevant. Kelly v. U.S. Steel Corp., No. 2:11-cv-00193, 2012 WL 5467759, at \*2 (W.D. Pa. Nov. 9, 2012) (indicating that plaintiff's positive performance as recounted in official company records is relevant).

<sup>197</sup> Bolton v. Sprint/United Mgmt. Co., 220 F. App'x 761, 764-65 (10th Cir. 2007); Carroll v. Off. Depot, Inc., No. 2:13-cv-00414, 2015 WL 1487098, at \*1 (N.D. Ala. Mar. 30, 2015) (refusing to consider plaintiff's positive work performance over eighteen years).

<sup>198</sup> *See Dinda*, 2019 WL 3244186, at \*5 (discounting presence of positive performance reviews); *see also* Rojas v. Florida, 285 F.3d 1339, 1343 (11th Cir. 2002) (rejecting argument that differences in performance evaluation establish pretext by emphasizing that "[d]ifferent supervisors may impose different standards of behavior, and a new supervisor may decide to enforce policies that a previous supervisor did not consider important").

<sup>199</sup> *See, e.g.,* Coleman, 755 F. App'x at 249 (noting that a former manager indicated the plaintiff had poor communication skills but rejecting evidence that another former supervisor indicated the plaintiff performed her job well).

employer's motion for summary judgment but still diminish or exclude a plaintiff's evidence.<sup>200</sup>

At times, courts do not even describe the plaintiff's evidence of good performance.<sup>201</sup> In one case, the appellate court simply noted that the opinions of the plaintiff's former supervisor and coworkers about the plaintiff's performance were "close to irrelevant."<sup>202</sup> The trial court in that case did describe the evidence from the prior supervisor, which indicated the prior supervisor had no problems with the plaintiff's performance and considered the plaintiff to be a "star performer."<sup>203</sup> The trial court held that the opinion of the prior supervisor did not help the plaintiff's case "because acceptable job performance in the past does not establish acceptable job performance at the time of the termination."<sup>204</sup>

Courts often reject this evidence, even when it is paired with evidence of differential treatment by a new supervisor. In one case, a plaintiff presented evidence of excellent performance from a former supervisor of nearly thirty years.<sup>205</sup> The plaintiff alleged that a new supervisor terminated her because of her race.<sup>206</sup> The plaintiff relied on the evidence of her performance from her former supervisor, as well as evidence that the new supervisor treated her differently than white employees.<sup>207</sup> The plaintiff also presented evidence that her new supervisor claimed to be enforcing rules that were inconsistent with prior practice and not communicated to the plaintiff.<sup>208</sup>

Although the magistrate judge recommended that the employer's summary judgment motion be denied, the district court judge granted the motion, and the Fourth Circuit affirmed the grant of summary judgment in the employer's

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<sup>200</sup> *McCallum v. Archstone Cmtys., LLC*, No. 8:12-cv-01529, 2013 WL 5496837, at \*8 (D. Md. Oct. 2, 2013) (noting that statements by apartment residents about leasing manager's good performance lacked probative value).

<sup>201</sup> *See, e.g., id.* at \*8, \*14 (noting apartment residents thought plaintiff was doing good job but not explaining more; court granted employer's motion for summary judgment); *Cartee v. Wilbur Smith Assocs., Inc.*, No. 3:08-cv-04132, 2010 WL 5059643, at \*1 (D.S.C. Oct. 6, 2010) (noting that plaintiff had positive reviews under prior supervisor but did not describe what those reviews stated), *report and recommendation adopted*, No. 3:08-cv-04132, 2010 WL 5059639 (D.S.C. Dec. 6, 2010).

<sup>202</sup> *Davis v. Nissan N. Am., Inc.*, 693 F. App'x 182, 184 (4th Cir. 2017) ("Davis primarily relies on the opinions of his former supervisors and coworkers, but such evidence is 'close to irrelevant.'" (quoting *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000))).

<sup>203</sup> *Davis v. Nissan N. Am., Inc.*, No. 8:14-cv-03166, 2016 WL 4059346, at \*1 (D. Md. July 27, 2016).

<sup>204</sup> *Id.* at \*8.

<sup>205</sup> *McZeke v. Horry County*, No. 4:10-cv-02944, 2013 WL 5438743, at \*1 (D.S.C. Aug. 8, 2013) (noting that plaintiff's former supervisor, who oversaw plaintiff's work between 1977 and 2007, called her an "excellent employee").

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at \*11.

<sup>208</sup> *Id.* at \*8 ("Judge Harris' testimony as to the expectations he communicated to his staff is vague at best.").

favor.<sup>209</sup> The district court decision did not recount the facts upon which the plaintiff relied, even though it granted summary judgment in the employer's favor.<sup>210</sup> The facts supporting the plaintiff's case only emerge from the magistrate judge's report and recommendation. The Fourth Circuit opinion also glossed over the facts supporting the plaintiff's case,<sup>211</sup> except for one dissenting judge who argued that there were sufficient facts for the case to go to trial.<sup>212</sup>

In another case, a magistrate judge recommended that an employer be granted summary judgment after recounting the facts "in the light most favorable" to the plaintiff.<sup>213</sup> The magistrate judge described how the plaintiff began working as a graphic designer at the age of forty-three.<sup>214</sup> Five years later, the plaintiff got a new supervisor, who was thirty-one.<sup>215</sup> The new supervisor hired three new team members, all of whom were under the age of thirty.<sup>216</sup> In December of that year, the plaintiff received negative performance reviews from her new supervisor, "in spite of her demonstrated artistic performance and generally positive evaluations under her previous supervisor."<sup>217</sup> The new supervisor noted that the plaintiff "produced 'inconsistent work quality' and took 'longer to complete tasks than [the] position require[d] in a deadline driven environment.'"<sup>218</sup> The plaintiff complained to company management about the first evaluation and told them that "as the oldest, I have been called the 'matriarch.'" <sup>219</sup> The court did not describe who made the statement but noted that the plaintiff did not attribute this statement to her supervisor or any member of management.<sup>220</sup> The following year, the company fired the plaintiff and replaced her with a younger woman.<sup>221</sup>

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<sup>209</sup> *McZeke v. Horry County*, 609 F. App'x 140, 141 (4th Cir. 2015).

<sup>210</sup> *McZeke*, 2013 WL 5434082, at \*3.

<sup>211</sup> *Id.* at \*8 (describing evidence supporting plaintiff's case, such as lack of clarity in instructions given to plaintiff and stating reasonable jurors could differ on whether to rule in favor of defendant); *McZeke*, 609 F. App'x at 144 (King, J., dissenting) ("[A] reasonable jury could readily conclude that McZeke was terminated because of her race.").

<sup>212</sup> *McZeke*, 609 F. App'x at 144 (describing plaintiff's argument in only one sentence).

<sup>213</sup> *Cartee v. Wilbur Smith Assocs., Inc.*, No. 3:08-cv-04132, 2010 WL 5059643, at \*1 (D.S.C. Oct. 6, 2010), *report and recommendation adopted*, No. 3:08-cv-04132, 2010 WL 5059639 (D.S.C. Dec. 6, 2010).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* (alterations in original).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

The magistrate judge recommended summary judgment for the employer be granted in this case, and the district court judge granted summary judgment.<sup>222</sup> The court did not draw any inferences from the good performance reviews submitted by the plaintiff, the change of supervisors, the age of the new supervisor, the new supervisor hiring young employees to join the work team or the fact that the employer replaced her with a younger person. This evidence when taken together created no inference of employment discrimination.

Additionally, the court found that the plaintiff could not even create a prima facie case under *McDonnell Douglas*.<sup>223</sup> The court reasoned that to establish a prima facie case, the plaintiff needed to show she was performing her job satisfactorily based on the opinion of the decisionmaker at the time of her termination.<sup>224</sup>

The court noted that in determining whether the plaintiff is meeting the expectations of the employer, only the views of the decisionmaker are relevant.<sup>225</sup> The court rejected the plaintiff's evidence of past good performance; however, the court then stated that plaintiff's prior supervisors had noted performance issues.<sup>226</sup> The court also relied on an affidavit of another person on the same work team as the plaintiff who had also noted issues.<sup>227</sup>

Often, courts will use what I am calling the "decisionmaker at the time" doctrine to exclude plaintiffs' evidence of good performance or qualifications if the evidence is not presented by the "decisionmaker" for the contested action.<sup>228</sup>

Courts also use a named doctrine, the "honest belief" doctrine, to exclude or diminish plaintiffs' evidence.<sup>229</sup> The *McDonnell Douglas* framework allows a plaintiff to prevail by establishing that the employer's articulated reason is pretextual. When a defendant asserts that the plaintiff engaged in certain

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<sup>222</sup> *Id.*; *Cartee v. Wilbur Smith Assocs.*, No. 3:08-cv-041323, 2010 WL 5059639, at \*5 (D.S.C. Dec. 6, 2010) (adopting magistrate judge's recommendation and granting summary judgment in favor of defendant). The magistrate judge used several of the doctrines discussed in this Article. The judge reasoned that people calling the plaintiff "matriarch" was a stray remark and that the plaintiff did not show it was connected to the employment decision. *Cartee*, 2010 WL 5059643, at \*3. The judge also stated that plaintiff could not establish the prima facie case from *McDonnell Douglas* because she could not show she was meeting the employer's legitimate expectations at the time of her termination. *Id.* at \*3.

<sup>223</sup> *Cartee*, 2010 WL 5059643, at \*4.

<sup>224</sup> *Id.* ("On the record presented, *Cartee* cannot establish the third element because she cannot show that she was meeting Wilbur Smith's legitimate expectations at the time of her termination.").

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at \*5 (noting that plaintiff's previous supervisor expressed that plaintiff was tardy numerous times).

<sup>227</sup> *Id.* (citing plaintiff's coworker who also claimed to notice issues with plaintiff's productivity and timeliness).

<sup>228</sup> *Rojas v. Florida*, 285 F.3d 1339, 1343 (11th Cir. 2002). I use the term "decisionmaker" in quotes because employment outcomes often occur over time and with input from many people.

<sup>229</sup> *Gertner*, *supra* note 9, at 121.

problematic behavior, the plaintiff may try to counteract this assertion with evidence that she did not engage in the behavior. However, some courts will reject the plaintiff's evidence because it does not disprove the supervisor's asserted beliefs about the employee's performance.

The following case provides an example. The defendant stated that it fired the plaintiff because of "[h]er rudeness and insubordination [which] culminated in a meeting . . . in which she behaved abominably."<sup>230</sup> To counteract the defendant's evidence, the plaintiff presented the "testimony of other meeting attendees that she acted professionally and was neither rude nor condescending."<sup>231</sup> The plaintiff also obtained a declaration from the person to whom she was allegedly rude that stated that he did not recall "anyone . . . either orally or in writing, treating [him] in a rude, condescending, or unprofessional manner."<sup>232</sup>

The court rejected the plaintiff's evidence, stating,

[w]hile the testimony of other meeting attendees may show that those individuals did not find [the plaintiff's] behavior at the . . . meeting to be rude or inappropriate, that evidence is insufficient to show a genuine issue of material fact exists as to whether . . . the decisionmaker . . . truly believed that [the plaintiff's] behavior at the meeting was rude or inappropriate.<sup>233</sup>

While the court rejected the plaintiff's evidence about what occurred at the meeting under the honest belief doctrine, it allowed the employer to supplement the supervisor's opinion about what happened with testimony from another coworker who attended the meeting.<sup>234</sup> When the coworker's testimony supported the employer, the court credited the testimony, yet similar coworker evidence supporting the plaintiff was rejected under the honest belief rule.

This even occurs when the testimony comes from supervisory employees. Courts discount evidence from the employer's own supervisory employees when that evidence supports the plaintiff. In *Bolton v. Sprint/United Management Co.*,<sup>235</sup> the court recounted a lengthy history of the plaintiff's performance from 1990 until his termination in 2003.<sup>236</sup> The plaintiff presented evidence from a project leader who expressed surprise that the company terminated the plaintiff because the project leader had not observed any problems with the plaintiff's performance that would merit termination.<sup>237</sup> The court held that this evidence

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<sup>230</sup> *Main v. Ozark Health, Inc.*, 959 F.3d 319, 324 (8th Cir. 2020) (first and second alterations in original).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* (second alteration in original).

<sup>233</sup> *Id.* at 325.

<sup>234</sup> *Id.* at 322 (allowing the employer to rely on evidence from the employer's head of information technology).

<sup>235</sup> 220 F. App'x 761 (10th Cir. 2007).

<sup>236</sup> *Id.* at 763-65.

<sup>237</sup> *Id.* at 765 n.2.

was not relevant because the project supervisor was not a decisionmaker in the decision to terminate the plaintiff.<sup>238</sup> While rejecting the plaintiff's evidence, the court recited performance problems noted by other supervisors, even citing to negative comments in otherwise positive reviews.<sup>239</sup> If only the decisionmaker's view is important, it is not clear why these negative comments from other supervisors should play a role in the court's analysis. Yet again, the evidence counted for the defendant but not for the plaintiff.

#### IV. RELEVANCE AND RELIABILITY

Evidentiary inequality also happens subtly through a judge's choices on how to characterize and describe evidence. Courts routinely allow employers to rely on evidence that is vague or poorly supported. They also allow employers to rely on evidence without demonstrating why it is relevant to the underlying claim. Additionally, courts often describe evidence that benefits the employer, even when it is not clear that the evidence comports with the required procedural standard. For example, when ruling on a motion for summary judgment, a judge often will recite evidence that favors the employer even when the evidence is contested or not relevant.

In contrast, courts often refuse to allow workers to rely on similarly vague or poorly supported evidence. Courts even characterize plaintiffs' evidence as vague or poorly supported when it is not. Additionally, some judges appear to apply a heightened relevance standard to the plaintiff's evidence, requiring plaintiffs to show a closer connection between discriminatory comments and actions and the contested decision than the relevance standard requires. And, in many cases, judges do not fully describe the plaintiff's evidence, even when the procedural posture of the case requires the court to draw all inferences from evidence in favor of the nonmoving party, which is typically the plaintiff in discrimination cases.<sup>240</sup>

##### A. *Employer's Evidence*

Courts regularly rely on vague or generalized characterizations of a plaintiff's disposition without providing facts to support the generalization. For example, courts allow evidence about the general perceived conduct or disposition of the plaintiff, such as evidence that supervisors, coworkers, or others thought the

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<sup>238</sup> *Id.* at 769.

<sup>239</sup> *Id.* at 763-65.

<sup>240</sup> *See, e.g.,* Berini v. Fed. Rsrv. Bank of St. Louis, 420 F. Supp. 2d 1030, 1035 (E.D. Mo. 2006).



plaintiff was “lazy,”<sup>241</sup> “rude,”<sup>242</sup> “difficult to work with,”<sup>243</sup> or used an “angry tone.”<sup>244</sup> In many of these cases, it is difficult to tell whether the court is only conveying the generalized information or whether the defendant’s evidence lacks specificity.

Courts often allow a supervisor or other employee to provide documents conveying the thoughts or opinions of other workers or customers.<sup>245</sup> Thus, courts allow the employer’s witnesses to testify about information they received secondhand or even thirdhand.

In one case, the employer asserted that it terminated the plaintiff’s employment because the plaintiff “did not do quality work, had a poor work ethic, and had a negative attitude.”<sup>246</sup> The plaintiff argued that the employer did not present sufficient evidence to support its reason for termination because the employer presented no evidence that a “customer or coworker complained” about the plaintiff’s performance and the decisionmaker lacked any personal knowledge about the plaintiff’s “performance, attitude, or work ethic.”<sup>247</sup>

The court held that the employer properly supported its reason for terminating the plaintiff, even though the employer submitted no “admissible evidence that

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<sup>241</sup> *Baffa v. STAT Health Immediate Med. Care, P.C.*, No. 2:11-cv-04709, 2013 WL 5234231, at \*2 (E.D.N.Y. Sept. 17, 2013) (allowing statement from coworker claiming to have heard negative comments about plaintiff).

<sup>242</sup> *Thome v. Young Men’s Christian Ass’n of the Greater Hous. Area*, 786 F. App’x 462, 463 (5th Cir. 2019) (per curiam) (providing almost no details about complaint, other than conclusions that plaintiff was rude and disrespectful); *Kho v. N.Y. & Presbyterian Hosp.*, 344 F. Supp. 3d 705, 715 (S.D.N.Y. 2018) (including statement from coworker that plaintiff was rude with no context as to how or why belief was held).

<sup>243</sup> *See, e.g., Shaunpen Zhou v. Int’l Bus. Machs. Corp.*, No. 2:15-cv-01027, 2017 WL 1217195, at \*15 (N.D. Iowa Mar. 31, 2017) (noting affidavit that described complaints from others that plaintiff was difficult to work with); *Bryson v. Renda Broad., Inc.*, No. 4:07-cv-00300, 2009 WL 931175, at \*8 (N.D. Okla. Apr. 7, 2009) (allowing affidavits from corporate officers of defendant corporation stating that plaintiff was difficult to work with); *Kirkish v. Marketron Int’l, Inc.*, No. 2:07-cv-00062, 2008 WL 11422592, at \*2 (N.D. Ala. Feb. 15, 2008) (including statement from coworker that plaintiff was difficult to work with and did not follow instructions).

<sup>244</sup> *Jeffrey v. Thomas Jefferson Univ. Hosps., Inc.*, No. 2:17-cv-00531, 2019 WL 2122989, at \*1 (E.D. Pa. May 14, 2019).

<sup>245</sup> *Moorer v. Baptist Mem’l Health Care Sys.*, 398 F.3d 469, 490 (6th Cir. 2005) (discussing memorandum from plaintiff’s former supervisor about plaintiff’s job deficiencies, including customer complaints and staff communication issues); *Bush v. Dictaphone Corp.*, 161 F.3d 363, 366 (6th Cir. 1998) (allowing corporate decisionmakers to file affidavits about what they had been told about plaintiff from unnamed employees); *Vasser v. SaarGummi Tenn., LLC*, No. 1:18-cv-00083, 2019 WL 8013869, at \*3 (M.D. Tenn. Dec. 2, 2019) (citing declaration from plaintiff’s manager about coworker complaints). Additionally, in many cases, courts describe the evidence in a way that makes it nearly impossible to determine how the employer presented the evidence.

<sup>246</sup> *Lee v. Safe-Dry Carpet & Upholstery*, No. 2:19-cv-00661, 2020 WL 6063746, at \*4 (N.D. Ala. Oct. 14, 2020).

<sup>247</sup> *Id.*

[the plaintiff] actually had a poor work ethic or that any coworker or customer complained” about his work.<sup>248</sup> Instead, the employer supported its reason for termination by submitting evidence that the person who made the termination decision *believed* the plaintiff’s work quality and work ethic were poor.<sup>249</sup> This belief was based on a second individual telling the decisionmaker about a complaint the second individual received about the plaintiff from a third person.<sup>250</sup> The court ruled that the decisionmaker’s testimony about what the second individual told him was non-hearsay and was admissible to show the effect the second individual’s statement had on the decisionmaker.<sup>251</sup> In other words, the court relied on the decisionmaker’s testimony about what a second person told him about what a third person said.

The court granted summary judgment for the employer, even though it admitted that the second individual “was either lying or mistaken when he made that statement” to the decisionmaker because “neither party ha[d] presented any evidence from which a reasonable jury could conclude” that the decisionmaker did not believe the second individual.<sup>252</sup>

Courts also rely on evidence that “unnamed” people made certain comments. One court allowed a supervisor to present an affidavit that stated: “I heard numerous staff members complain that [the plaintiff] was lazy, not performing her work and that she continuously made errors . . . .”<sup>253</sup> In another case, the Third Circuit indicated that several unidentified former supervisors had noted the plaintiff’s poor performance since 1992.<sup>254</sup> The court did not describe the evidence presented, did not provide the names of the former supervisors, did not provide the substance of the former supervisors’ criticism, or discuss how plaintiff’s past performance issues related to the case before the court.

In another case, a supervisor testified that “sometime in 2013” another person had told the supervisor that unnamed team members found meetings with the plaintiff to be a “waste of time” and “unproductive.”<sup>255</sup> The court credited the information, even though the supervisor was not able to report which team

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<sup>248</sup> *Id.* at \*4-5 (holding that although plaintiff correctly argued that employer did not present evidence that plaintiff had poor work ethic, employer had met its burden to show legitimate reason for terminating plaintiff).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at \*4.

<sup>251</sup> *Id.* at \*4 n.4 (“[Safe Dry] can rely on Mr. Hendricks’ testimony to show the effect Mr. Donaldson’s statement had on Mr. Hendricks.”).

<sup>252</sup> *Id.* at \*5 (asserting that the court focuses not on whether reason for terminating plaintiff was correct but whether reason was honest).

<sup>253</sup> *Baffa v. STAT Health Immediate Med. Care, P.C.*, No. 2:11-cv-04709, 2013 WL 5234231, at \*2 (E.D.N.Y. Sept. 17, 2013) (presenting affidavits from coworkers along with affidavits from supervisors).

<sup>254</sup> *Silver v. Am. Inst. of Certified Pub. Accts.*, 212 F. App’x 82, 85 (3d Cir. 2006) (“Silver’s performance reviews indicate problems with his performance as far back as 1992.”).

<sup>255</sup> *Isbell v. Baxter Healthcare, Corp.*, 273 F. Supp. 3d 965, 971, 977 (N.D. Ill. 2017).

members felt this way.<sup>256</sup> The supervisor also recounted other general complaints from unspecified individuals.<sup>257</sup>

When granting employers' motions for summary judgment, courts regularly allow defendants to rely on evidence of a plaintiff's mistakes or poor work performance from multiple people outside of the decision-making process without showing how these reports are relevant to the contested action. In one case, the employer sent the plaintiff a letter indicating that he was terminated for making a mistake about a patient's medicine.<sup>258</sup> However, in justifying its grant of summary judgment in favor of the employer, the court recounted the plaintiff's performance issues for the thirteen years prior to his termination without describing which of these events were relevant to the contested action.<sup>259</sup>

Likewise, employers are allowed to introduce almost any kind of past misconduct, even if it is not the same conduct that the employer is using to support its reason for taking a negative action against the plaintiff, or even if the employer did not rely on the past issues to make the contested decision.

In one case, an employer claimed that it fired an employee because of points the employee accumulated under a newly created attendance policy.<sup>260</sup> Under the employer policy, all employees were given a "fresh start" when it enacted the new attendance policy and past attendance problems were not considered under the new plan.<sup>261</sup> Nonetheless, in granting summary judgment for the employer, the court noted that the plaintiff had "received several disciplinary notices based on his attendance record before defendant enacted its new attendance policy."<sup>262</sup>

Indeed, it seems from many of these cases that any poor performance by the employee at any time supports the employer's decision.<sup>263</sup> Courts even allow

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<sup>256</sup> *Id.* at 971 (stating that supervisor "was unable to identify" who had made these statements).

<sup>257</sup> *Id.*

<sup>258</sup> *Jeffrey v. Thomas Jefferson Univ. Hosps., Inc.*, No. 2:17-cv-00531, 2019 WL 2122989, at \*3 (E.D. Pa. May 14, 2019).

<sup>259</sup> *Id.* at \*1 (listing complaints about plaintiff recorded from coworkers and supervisors between 2002 and 2015).

<sup>260</sup> *Straka v. Comcast Cable*, 897 F. Supp. 2d 346, 352 (W.D. Pa. 2012) (reiterating defendant's argument that plaintiff's twelve attendance violations warranted dismissal of plaintiff under the policy).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1206 (9th Cir. 2008) (allowing employer to support its termination decision based, in part, on the fact that plaintiff "once received a verbal warning for failure to wear safety equipment"); *Silver v. Am. Inst. of Certified Pub. Accts.*, 212 F. App'x 82, 85 (3d Cir. 2006) (relying on performance issues noted by prior supervisors); *Nagpal v. Holder*, 750 F. Supp. 2d 20, 27 (D.D.C. 2010) (relying on evidence that prior supervisor did not recommend plaintiff for promotion even though it was unclear how this related to contested action); *Philpot v. Blue Cross Blue Shield of Ga.*, No. 1:07-cv-00657, 2008 WL 11407269, at \*2 (N.D. Ga. July 14, 2008) (recounting

defendants to use negative comments contained in otherwise positive reviews of the plaintiff's performance to support a case.<sup>264</sup>

Additionally, courts routinely include negative information about a plaintiff in their recitations of the facts when it is unclear what, if any, relevance the negative information has to the current case. In one case, the court recounted how the plaintiff had been promoted in 1995 and cited evidence that the person who promoted the plaintiff did so "against her better judgment."<sup>265</sup> However, the underlying case related to the plaintiff's termination eight years later.<sup>266</sup> In another case, a court recited problems with the plaintiff's performance but then noted "[d]espite these complaints and performance concerns," the supervisor gave the plaintiff "positive end-of-year performance evaluations" for three years in a row.<sup>267</sup> If an employer gives a performance review with generally good comments or promotes an employee, one inference that can be drawn is that the employee is a good employee. This is the inference most favorable to the nonmoving party. Yet when granting summary judgment motions, courts often do not draw these positive inferences in favor of the plaintiff.<sup>268</sup>

Allowing employers to recite a liturgy of misconduct or poor performance without connecting it to the contested decision is problematic in its own right. However, it is especially problematic because of the after-acquired evidence doctrine, which encourages employers to use the discovery process to find out about past misconduct.<sup>269</sup> Under this doctrine, an employer can avoid certain types of relief, such as reinstatement, if it can establish that it would have fired the employee for past conduct, even if it first found out about the conduct during discovery.<sup>270</sup> This doctrine incentivizes employers to look for past employee misconduct, even if the misconduct would otherwise have remained

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complaints by coworkers made several years before termination in support of employer's defense without connecting those complaints to employer's asserted reason for termination, which related to different issue), *report and recommendation adopted*, No. 1:07-cv-00657, 2008 WL 11407343 (N.D. Ga. Aug. 29, 2008).

<sup>264</sup> See, e.g., *Bolton v. Sprint/United Mgmt. Co.*, 220 F. App'x 761, 763 (10th Cir. 2007), *aff'g* No. 2:04-cv-02156, 2005 WL 4708219 (D. Kan. Dec. 29, 2005) (including manager's rating of plaintiff's performance as "improvement needed" in generally positive performance reviews).

<sup>265</sup> *Bolton*, 2005 WL 4708219, at \*1.

<sup>266</sup> *Id.* at \*10.

<sup>267</sup> *Main v. Ozark Health, Inc.*, 959 F.3d 319, 322 (8th Cir. 2020).

<sup>268</sup> Again, as with all of these doctrines, the case law is not consistent. Some judges will infer the causal connection between certain comments and a later action. See *del Castillo v. Chipotle Mexican Grill, Inc.*, No. 3:16-cv-00441, 2018 WL 1411155, at \*10 (S.D. Ohio Mar. 21, 2018) (inferring connection between manager's derogatory remarks about plaintiff's ethnicity and termination of plaintiff later that month).

<sup>269</sup> *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1070 (9th Cir. 2004) (asserting that after-acquired evidence doctrine limits employee's remedies if employer later finds evidence that would have resulted in termination if known at the time).

<sup>270</sup> *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 361 (1995).

undiscovered without the litigation.<sup>271</sup> Even if an employer cannot use the newly discovered evidence to support the after-acquired affirmative defense, the employer will be tempted to use the newly found information in its recitation of facts in support of summary judgment. Courts should be careful to require employers to demonstrate that the relevant decisionmaker knew about the misconduct at the time of the contested action and that the misconduct played a role in the outcome.

B. *Worker's Evidence*

Courts regularly characterize plaintiffs' evidence as vague, conclusory, or unreliable, even when the plaintiffs' evidence provides relevant details about her work performance or the performance of other employees.<sup>272</sup> Courts often will exclude a plaintiff's testimony when the plaintiff recounts comments made by other individuals.<sup>273</sup> Some judges also appear to apply a heightened relevance standard to the plaintiff's evidence, requiring plaintiffs to show a tighter connection between discriminatory comments and actions and the contested decision than the relevance standard requires.<sup>274</sup> In addition, it often appears as if courts are not fully describing the evidence that favors the plaintiff.

When plaintiffs try to present evidence of their good performance from prior supervisors or coworkers, courts often label such evidence as merely an

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<sup>271</sup> *Rivera*, 364 F.3d at 1070 (stating that employer can avoid certain remedies by finding after-acquired evidence of misconduct).

<sup>272</sup> *See, e.g.*, *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000) (“[The plaintiff] argues that she performed well in her job and offers . . . e-mails and memoranda written by [the plaintiff] herself and statements allegedly made by her co-workers. In doing so, [the plaintiff] can prove only the unremarkable fact that [the parties] disagreed about the quality of [the plaintiff's] work.”).

<sup>273</sup> *See, e.g.*, *Bart-Williams v. Exxon Mobil Corp.*, No. 1:16-cv-01338, 2017 WL 4401463, at \*10 (E.D. Va. Sept. 28, 2017) (stating that plaintiff's recounting of positive feedback from others is irrelevant).

<sup>274</sup> *See, e.g.*, *Gamble v. Aramark Unif. Servs.*, 132 F. App'x 263, 266 (11th Cir. 2005) (asserting that evidence offered by plaintiff, including opinions from coworkers, did not meet burden of showing pretext).

opinion<sup>275</sup> or as “irrelevant.”<sup>276</sup> At times, courts characterize the evidence presented by the plaintiff’s coworkers as merely expressing their opinion about the plaintiff’s work performance, even when the evidence presented does more than express a general opinion.<sup>277</sup>

Contrasting how judges view similar evidence in the same case further highlights the evidentiary inequality. For example, in *Stevens v. Del Webb Communities, Inc.*<sup>278</sup> the plaintiff tried to offer evidence from coworkers that “she was pleasant” and was a “team player.”<sup>279</sup> The court held that these coworkers’ opinions were not relevant to the plaintiff’s claim.<sup>280</sup> However, in the very next paragraph, the court stated that plaintiff had performance problems and that these were evidenced by complaints from the plaintiff’s coworkers.<sup>281</sup> The coworker evidence that favored the plaintiff were irrelevant opinions, but the court treated the coworker evidence that favored the employer as uncontested facts.

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<sup>275</sup> *Id.* (finding that coworker’s positive statement of plaintiff’s performance did not demonstrate that employer’s reasons for not promoting plaintiff were pretextual); *Hawkins*, 203 F.3d at 280 (stating that evidence of coworkers’ statements of plaintiff’s work only prove that plaintiff and manager disagree about plaintiff’s quality of work); *Brenner v. City of N.Y. Dep’t of Educ.*, 132 F. Supp. 3d 407, 419 (E.D.N.Y. 2015) (indicating that plaintiff’s claims that he was set up to fail “amounts to nothing more than conclusion”); *McKinley v. Skyline Chili, Inc.*, No. 1:11-cv-00344, 2012 WL 3527222, at \*6 (S.D. Ohio Aug. 14, 2012) (holding that plaintiff’s reliance on opinions from coworkers about her performance does not show that employer’s reason is pretext); *Frazier v. Doosan Infracore Int’l, Inc.*, No. 1:09-cv-00187, 2011 WL 13161996, at \*14 (N.D. Ga. Jan. 20, 2011) (stating that opinions from coworkers who were not involved in decisions about plaintiff are “not relevant to the pretext inquiry”), *report and recommendation adopted*, No. 1:09-cv-00187, 2011 WL 13162052 (N.D. Ga. Feb. 24, 2011); *Stevens v. Del Webb Cmty., Inc.*, 456 F. Supp. 2d 698, 708-09 (D.S.C. 2006) (stating that coworkers’ opinions about whether plaintiff was a team player were not sufficient to create issue of material fact).

<sup>276</sup> *Bart-Williams*, 2017 WL 4401463, at \*10 (“[T]o the extent that Plaintiff claims she received positive feedback from . . . others . . . such feedback is irrelevant.”); *see also* *Davis v. Nissan N. Am., Inc.*, 693 F. App’x 182, 184 (4th Cir. 2017) (noting evidence was “close to irrelevant”).

<sup>277</sup> *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1124-25 (7th Cir. 1994) (stating that coworkers’ affidavits and depositions indicating plaintiff’s performance was satisfactory do “not create a material issue of fact”); *see also* *Frazier*, 2011 WL 13161996, at \*13 (finding plaintiff’s use of coworkers’ opinions irrelevant for pretext argument); *Cornelius v. City of Columbia*, No. 3:08-cv-02508, 2010 WL 1258009, at \*3 n.9 (D.S.C. Mar. 26, 2010) (noting that evaluations from coworkers and former supervisors were not relevant); *Alderman v. Inmar Enters., Inc.*, 201 F. Supp. 2d 532, 542 (M.D.N.C. 2002) (finding affidavits from coworkers as stating opinions and irrelevant).

<sup>278</sup> *Stevens*, 456 F. Supp. 2d 698.

<sup>279</sup> *Id.* at 729.

<sup>280</sup> *Id.* at 729-30.

<sup>281</sup> *Id.* at 730 (finding that plaintiff’s job performance was “unsatisfactory, and was unmatched by any other employee” based on statements from coworkers and customers submitted by defendant).

Courts similarly limit plaintiffs' abilities to support their cases by testifying about their own good conduct or to deny they engaged in the conduct alleged by the employer. Courts often note that a plaintiff may not contest the defendant's reason for an action by stating the plaintiff's own "opinion" about work performance.<sup>282</sup> While this may be true in some circumstances, judges characterize a plaintiff's evidence as merely the plaintiff's opinion, even when the plaintiff is testifying that she did not engage in the misconduct that the employer is using to justify the contested action.<sup>283</sup> Therefore, in some instances, judges improperly characterize facts as opinion.

It is difficult to evaluate claims that a plaintiff is offering an opinion because judges often do not describe the plaintiff's affidavit or testimony in detail.<sup>284</sup> The details matter in determining whether the judge is properly discounting the evidence. For example, if the plaintiff testifies that she was a "good" employee without more, this evidence likely is not relevant for purposes of summary judgment. However, if the plaintiff testifies that she did not engage in misconduct alleged by the employer, this is not merely an opinion because the plaintiff is contesting a fact asserted by the employer with her own factual evidence.

Courts also label the plaintiff's evidence of employer misconduct as vague or conclusory.<sup>285</sup> Often, courts characterize a plaintiff's evidence as vague even when it is not. In one case, a worker alleged that he was demoted based on his race.<sup>286</sup> The plaintiff alleged that because he was Black, he was given less support and held to a different performance standard than White employees in the same role.<sup>287</sup> In support of his claim, he offered an affidavit from a coworker stating that the person who demoted the plaintiff had called the coworker a "n\*\*\*\*\*" at work.<sup>288</sup> Despite this evidence, the court granted summary

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<sup>282</sup> See, e.g., *Climent-Garcia v. Autoridad de Transporte Maritimo y las Islas Municipio*, No. 3:16-cv-02513, 2019 WL 441996, at \*4 (D.P.R. Jan. 25, 2019) (citing cases for proposition that "[i]t is well-established that a party's subjective opinion as to her qualifications is insufficient" to establish plaintiff is qualified), *appeal dismissed*, No. 19-cv-01276, 2020 WL 7379898 (1st Cir. July 30, 2020); *McNamee v. Starbucks Coffee Co.*, 914 F. Supp. 2d 408, 418 (W.D.N.Y. 2012) (citing cases).

<sup>283</sup> See, e.g., *Beard v. Coca-Cola Bottling Co.*, No. 2:88-cv-01248, 1990 WL 299806, at \*4 (S.D. Ohio Mar. 30, 1990) (discounting plaintiff's affidavit that she did not engage in some of the claimed problematic behavior).

<sup>284</sup> See, e.g., *id.* (claiming plaintiff used broad terms in her affidavit to deny employer's claims without describing what terms plaintiff used).

<sup>285</sup> See, e.g., *Hawkins v. Dale Med. Ctr.*, No. 1:05-cv-00540, 2006 WL 1537228, at \*9 n.9 (M.D. Ala. May 31, 2006) (indicating that affidavit stating individual was angry while terminating the plaintiff was conclusory and needed additional detail).

<sup>286</sup> *Tennial v. United Parcel Serv., Inc.*, 840 F.3d 292, 301 (6th Cir. 2016).

<sup>287</sup> *Id.* at 300-01 ("Tennial further asserts that previous and subsequent Caucasian Hub Managers of the Twilight Sort also failed to meet performance goals, yet were not demoted like he was.")

<sup>288</sup> *Id.* at 302.

judgment in favor of the employer.<sup>289</sup> The court diminished the coworker affidavit by calling it “barebones” and saying it consisted of one sentence “claiming that [the supervisor] called the co-worker a ‘n\*\*\*\*\*’ while both were at work.”<sup>290</sup> However, given what the affidavit was trying to convey, it is unclear what else the affidavit needed to contain to be relevant. The court then stated that no inference of discrimination could be drawn in the plaintiff’s case from the coworker evidence.<sup>291</sup>

Courts have also refused to rely on a plaintiff’s evidence when they deem the evidence to be “self-serving.”<sup>292</sup> Courts seldom raise that critique with respect to the defendant’s evidence. Judge James Ho has criticized such limits on evidence, noting that the appropriate question is not whether evidence is self-serving but whether the evidence contains sufficient facts.<sup>293</sup>

Courts frequently prohibit plaintiffs from presenting evidence about what other people told them.<sup>294</sup> In one age discrimination and retaliation case, a plaintiff tried to present an affidavit that a coworker told her a supervisor wanted to get rid of the plaintiff because “you can’t teach an old dog new tricks.”<sup>295</sup> The court stated that because the plaintiff had not submitted any testimony from the coworker, she could not rely on this evidence.<sup>296</sup>

In another case, a plaintiff alleged that his employer terminated him based on his age.<sup>297</sup> He presented evidence that people in his department, including a prior

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<sup>289</sup> *Id.* at 305.

<sup>290</sup> *Id.* at 302.

<sup>291</sup> *Id.*

<sup>292</sup> *Salazar v. Lubbock Cnty. Hosp. Dist.*, 982 F.3d 386, 389 (5th Cir. 2020) (citing cases).

<sup>293</sup> *Id.* at 392 (Ho, J., concurring) (writing separately to clarify that summary judgment was appropriate because plaintiff’s testimony was conclusory, not because it was self-serving).

<sup>294</sup> *See, e.g., Edwards v. Nat’l Vision Inc.*, 568 F. App’x 854, 858 (11th Cir. 2014) (deciding that statements made to plaintiff by another individual that other people said they wanted to hire a White person for position were inadmissible hearsay); *Adefila v. Select Specialty Hosp.*, 28 F. Supp. 3d 517, 524 (M.D.N.C. 2014) (rejecting as hearsay plaintiff’s testimony that manager told her that third party had told manager that plaintiff filed EEOC charge of discrimination against her former employer); *Duncan v. Thorek Mem’l Hosp.*, 784 F. Supp. 2d 910, 921 (N.D. Ill. 2011) (prohibiting a plaintiff from testifying that other workers told her that company representative said she was cutting back the plaintiff’s hours because of her age); *Harrison v. Formosa Plastics Corp. Tex.*, 776 F. Supp. 2d 433, 441 (S.D. Tex. 2011) (holding that in an age discrimination case, plaintiff could not testify that another employee told her that her replacement was younger employee); *see also Ward v. Jackson State Univ.*, 602 F. App’x 1000, 1003 (5th Cir. 2015) (rejecting plaintiff’s evidence as hearsay because it was not related to plaintiff’s work duties).

<sup>295</sup> *Cartee v. Wilbur Smith Assocs., Inc.*, No. 3:08-cv-04132, 2010 WL 5059643, at \*3 n.3 (D.S.C. Oct. 6, 2010) (“Although Cartee relies heavily on hearsay statements from a co-worker, Cara Johnson, regarding Powell’s intent to force Cartee out and his alleged comment that ‘you can’t teach an old dog new tricks,’ Cartee has not presented any testimony from Johnson—or any other evidence—that complies with the requirements of Rule 56.”), *report and recommendation adopted*, No. 3:08-cv-04132, 2010 WL 5059639 (D.S.C. Dec. 6, 2010).

<sup>296</sup> *Id.*

<sup>297</sup> *Straka v. Comcast Cable*, 897 F. Supp. 2d 346, 350 (W.D. Pa. 2012).



supervisor, called him “old man” and “old cracker.”<sup>298</sup> He also testified that people would regularly ask him when he was going to retire.<sup>299</sup> His case also relied on a number of arguments related to how the employer administered its attendance policy.<sup>300</sup> One of the plaintiff’s allegations was that the employer often excused absences for younger employees while refusing to excuse absences for older employees.<sup>301</sup> In support of this, the plaintiff offered his testimony that two young employees had told the plaintiff that they were regularly given the opportunity to explain their absences before they were recorded as absences.<sup>302</sup> The plaintiff alleged that he was not given similar opportunities.<sup>303</sup> The court rejected the plaintiff’s evidence recounting statements from his coworkers as hearsay.<sup>304</sup> Strangely, it also rejected the evidence because the plaintiff “did not develop any evidence from defendant’s principals that would provide independent evidence of the events relayed in these individuals’ statements.”<sup>305</sup>

Courts often reject a plaintiff’s evidence even when the evidence is relevant to the contested decision. In an age discrimination case, the plaintiff presented evidence that his supervisor stated the following: “you know, the job is changing,” “a person from your era wouldn’t have the type of analytical skills that we require,” “things are different today,” and “the skills needed today are typically of a younger sales manager.”<sup>306</sup> The trial court granted the employer’s motion for summary judgment, reasoning that the plaintiff could not make a causal connection between these comments in August and his termination in December.<sup>307</sup>

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<sup>298</sup> *Id.* at 360.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.* at 352-53.

<sup>301</sup> *Id.* at 353.

<sup>302</sup> *Id.* (“For example, two younger employees . . . told plaintiff that their supervisors would inform them when an event was about to be placed on their records and they were able to discuss the matter with their supervisors to provide an explanation or their version of what had happened.”).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 360 (“Plaintiff’s account of [younger employees] receiving more favorable treatment is derived solely from those two individual’s statements made to plaintiff on the job. . . . [Plaintiff has not] listed these two as witnesses on his pretrial statement. . . . As such, the statements are classic hearsay which must be excluded . . . .” (citation omitted)).

<sup>305</sup> *Id.*

<sup>306</sup> *Testa v. CareFusion*, 305 F. Supp. 3d 423, 434 (E.D.N.Y. 2018) (rejecting comments as irrelevant stray remarks made too long before the adverse action to demonstrate discriminatory intent). The supervisor denied making those comments. *Id.*

<sup>307</sup> *Id.* at 435 (disregarding remarks as being too distant in time from the adverse action); see also *Harrison v. Formosa Plastics Corp. Tex.*, 776 F. Supp. 2d 433, 442 (S.D. Tex. 2011) (rejecting evidence of frequent comments by coworkers describing plaintiff as “old man,” “old fart,” “old son of a bitch,” and “fat old bastard” made right before his termination concluding they were not connected to his termination).

As previously discussed, this is a classic example of the stray remarks doctrine. Although it is not often described in this way, this doctrine serves as a special, overly restrictive relevance standard for discrimination cases. To be relevant under Federal Rule of Evidence 401, evidence must relate to a fact of consequence in the underlying action and the evidence must tend to make that fact more or less probable.<sup>308</sup> The relevance standard applies to all parties in litigation, but courts often apply the stray remarks doctrine to limit only the plaintiff's evidence.

The following case demonstrates how the stray remarks doctrine is more restrictive than a traditional relevance standard (and in some cases appears to ignore the relevance standard completely). In one sex discrimination case, a plaintiff alleged (among other things) that her employer gave her a lower bonus and later fired her because of her sex.<sup>309</sup> A judge held that it was irrelevant that a supervisor whose input was considered in both decisions repeatedly referred to the plaintiff as "bitch," "cunt," "whore," "slut," and "tart."<sup>310</sup> According to the judge, these were stray remarks because they were not made in connection with an adverse action.<sup>311</sup> It is unclear how a court could credibly exclude these statements using the typical relevance standard.

There are numerous cases in which courts refuse to consider as probative evidence potentially discriminatory statements by supervisors or others because the court believes the plaintiff has not sufficiently tied the remarks to the contested employment decisions.<sup>312</sup>

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<sup>308</sup> FED. R. EVID. 401.

<sup>309</sup> *Ferrand v. Credit Lyonnais*, No. 1:02-cv-05191, 2003 WL 22251313, at \*2 (S.D.N.Y. Sept. 30, 2003) (alleging in complaint that lower bonus and relocation decision were intended to lead to termination when plaintiff inevitably declined).

<sup>310</sup> *Id.* at \*10.

<sup>311</sup> *Id.* ("However, these 'stray remarks in the workplace' are not alleged to have been made as part of any adverse discriminatory employment action taken against [the plaintiff] by [the supervisor].").

<sup>312</sup> *See, e.g.,* *Tourtellotte v. Eli Lilly & Co.*, 636 F. App'x 831, 835-38, 843-46 (3d Cir. 2016) (affirming summary judgment in favor of employer where evidence presented that supervisor repeatedly referred to women's appearance and referred to them as Barbie dolls, along with other evidence of unequal treatment); *White v. Andy Frain Servs., Inc.*, 629 F. App'x 131, 134 (2d Cir. 2015) (ignoring remarks about plaintiff's race and religion because plaintiff did not establish causal connection between remarks and adverse action); *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1206 (10th Cir. 1999) (holding that supervisor referring to plaintiff as an "incompetent n\*\*\*\*r," stating she was on the defensive because she was Black, and that she talked like people of her culture were not comments that were sufficiently connected to termination decision); *Smith v. Mayo Clinic*, 158 F. Supp. 3d 764, 767 (D. Minn. 2016) (finding evidence that supervisors occasionally used "racially charged" language was insufficiently connected to one of those supervisors disciplining the plaintiff for missing work, including for being one minute late); *Hiramoto v. Goddard Coll. Corp.*, 184 F. Supp. 3d 84, 106 (D. Vt. 2016) (concluding that contested evidence that program director stated that plaintiff "may not be able to do this job because of [her] culture" and "[she] may be happier working somewhere else" were not evidence of discrimination because they were not

One especially problematic feature of the stray remarks doctrine is that it is a one-sided doctrine. Courts often exclude plaintiff's evidence as lacking context when the plaintiff does not directly tie the discriminatory comment to the contested action or when the comments were made by people who are not decisionmakers. However, courts regularly allow defendants to support the contested actions with evidence of performance problems across wide ranges of time and from multiple people, without tying that history to the contested decision.

Importantly, when reading cases in which courts grant summary judgment to the employer, it often seems like the court is not fully describing the evidence offered by the plaintiff. Plaintiffs' evidence is often dismissed or diminished without the court even describing what it contains. For example, a court might provide detail about negative comments in a performance review, without also describing the positive comments in an overall positive review.<sup>313</sup> Or, a court will label a coworker's views of a plaintiff's performance as "opinion" without fully describing what the coworker said.

#### V. EXPLAINING AND REMEDYING EVIDENTIARY INEQUALITY

Remedying evidentiary inequality requires courts to recognize and acknowledge the scope of the problem. Despite the pervasiveness of the inequality, the path forward is not complicated. Courts must declutter discrimination law by abolishing certain doctrines and reorienting summary judgment motion practice around core principles found within the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

##### A. *Explaining Evidentiary Inequality*

Evidentiary inequality occurs in many ways. Employment discrimination law is replete with named doctrines that favor the employer and disfavor the worker. At the same time, a number of unnamed, and therefore invisible, doctrines also bias the evidentiary record. The cumulative weight of the named and unnamed doctrines makes it difficult for plaintiffs to present evidence to courts.

As discussed throughout this Article, multiple named doctrines contribute to this evidentiary inequality. Some of these doctrines are perversions of the *McDonnell Douglas* test. These include overly rigid descriptions of the prima

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meaningfully involved in termination decision; director denied making comments (alterations in original)); *Wilkie v. Geisinger Sys. Servs.*, No. 3:12-cv-00580, 2014 WL 4672489, at \*8 (M.D. Pa. Sept. 18, 2014) (finding evidence that supervisors who recommended and approved plaintiff's termination made comments that they were not fond of Germans and made Hitler jokes was not sufficient absent other evidence to overcome stray remarks doctrine; court allowed the case to proceed because of additional evidence).

<sup>313</sup> *McDowell v. Nucor Bldg. Sys.*, No. 3:10-cv-00172, 2011 WL 7447349, at \*4 (D.S.C. Dec. 15, 2011) (dismissing claim because plaintiff's evidence, including recent positive performance review, could not establish that he was meeting employer expectations based on employer evidence of work-quality issues), *report and recommendation adopted*, No. 3:10-cv-00172, 2012 WL 714632 (D.S.C. Feb. 29, 2012).

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facie case that require the plaintiff to establish that the employer believed the plaintiff was meeting its expectations at the time of the contested decision and overly formalistic ideas of pretext that focus on the intent of the decisionmaker and the “honest belief” of the decisionmaker. The stray remarks doctrine also favors the employer.

There are also several unnamed and thus somewhat invisible mechanisms that contribute to evidentiary inequality. First, courts do not apply the named doctrines in the same way to the plaintiff’s and the defendant’s evidence. As discussed throughout this Article, courts often use unnamed doctrines that focus on the decisionmaker at the time of the contested action to limit the plaintiff’s evidence. However, courts regularly allow defendants to present evidence to support their actions by people who were not decisionmakers at the time of the contested action and evidence that does not reflect the plaintiff’s performance at the time of the contested action. Courts often do not require the employer to show what information the decisionmaker knew about and relied on when making a contested decision.

Evidentiary inequality also occurs when judges do not apply the same inferences to different kinds of evidence. Judges routinely use the stray remarks doctrine to exclude or diminish a discriminatory remark because it was made one year prior to a contested decision. The underlying inference is that the comment is not relevant because it is too distant. However, there is no stray mistake doctrine to limit negative information about the plaintiff. All of the plaintiff’s missteps are somehow relevant to the underlying claim, but few instances of the employer’s agent’s problematic conduct and statements are relevant.

Finally, courts apply ideas like relevance and reliability differently depending on which party provides the evidence. They label the plaintiffs’ evidence as vague or an opinion, while allowing defendants to rely on similar evidence. They fail to describe evidence that favors the plaintiff. They describe evidence presented by the defendant that is either contested or irrelevant and draw inferences in favor of the defendant either explicitly or implicitly.

The cumulative weight of both the named doctrines and the unnamed mechanisms makes it difficult for plaintiffs to prove their cases. This imbalance is made even more problematic because it often occurs when judges are granting employers’ motions for summary judgment.

#### B. *The Path Forward*

Evidentiary inequality can be contested on both substantive and procedural grounds. Substantively, many of the doctrines and practices described in this Article do not comport with the text or purposes of the federal discrimination statutes. Additionally, the evidentiary inequality ignores several Supreme Court cases that reject limits on the plaintiff’s evidence.<sup>314</sup> While the substantive

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<sup>314</sup> See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-58 (2006) (noting courts’ failures to

critiques are important and backed by a deep and well-established literature, federal district and appellate courts have largely ignored them, at least with respect to the named doctrines.<sup>315</sup>

Another path may prove more fruitful. Instead of attacking the doctrines purely on substantive grounds, it may be more compelling to attack them from both a procedural and a substantive perspective. One of the most surprising aspects of the doctrines and practices that underlie evidentiary inequality is that

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apply appropriate standards for plaintiffs' evidence); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 140, 150-52 (2000) (rejecting lower court's refusal to fully credit all of plaintiff's evidence related to age discrimination).

<sup>315</sup> There is a significant criticism of the frameworks courts use to undermine the reach of discrimination law. *See, e.g.*, Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y. L. SCH. L. REV. 671, 674-75, 678-79 (2013) (rejecting declining discrimination or judicial hostility towards plaintiffs as primary causes of high summary judgment rates; suggesting a more simplified approach to evaluating the evidence and cautioning judges against engaging in fact-finding); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 734 (2011) (citing scholarship diagnosing the high failure rates at summary judgment; identifying judicial focus on comparators as a significant cause); Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 92 (2005) (advising judges to lift "the lens of workplace essentialism"). *See generally* SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017) (exploring the ways in which courts have developed frameworks and doctrines that disfavor employees in discrimination suits). The literature discusses how stereotyping, intersectional discrimination, and unconscious bias might impact outcomes. *See* Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2202 (2019) (describing, among other issues, how Black women have been "deemed unable to represent women in sex discrimination claims or to represent Blacks in race discrimination claims"); Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 925 (2016) (arguing that novel and intersectional discrimination cases can expand the bounds of substantive discrimination law and create more equal workplaces); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1459 (2009) (discussing the even higher summary judgment rate dismissing actions bringing multiple discrimination claims); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 762, 771-72 (1997) (criticizing court doctrines defining the link between sexual harassment and sex discrimination and arguing for a stronger connection); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 158 (criticizing treatment of sex and race as mutually exclusive categories); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-21 (1987) (questioning the requirement for discriminatory purpose in discrimination suits). The frameworks judges use may rely too much on fitting the plaintiff within a narrowly defined protected class, rather than focusing on whether discrimination occurred. *See* Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 104 (2017) (criticizing dismissal of actions in which plaintiffs were subjected to the "wrong" kind of discrimination, including as applied to intersectional discrimination); *see also* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1365 (2012) (criticizing formalistic approaches to discrimination law).

they clearly violate requirements found within the Federal Rules of Civil Procedure and the Federal Rules of Evidence. Fortunately, that means that the Federal Rules of Civil Procedure and the Federal Rules of Evidence provide concrete ways for judges to eliminate evidentiary inequality without requiring them to grapple with complex, substantive discrimination issues.<sup>316</sup>

Federal Rule of Civil Procedure 56 explicitly cabins judges' ability to grant summary judgment. Specifically, Rule 56(a) provides that summary judgment is only appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."<sup>317</sup> The Rule also notes that "court[s] should state on the record the reasons for granting or denying the motion."<sup>318</sup> When considering a motion for summary judgment, a federal court is required to "view all facts and draw all reasonable inferences in favor of the nonmoving party."<sup>319</sup>

The Federal Rules of Evidence define relevance broadly. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and the "fact is of consequence in determining the action."<sup>320</sup> Taken together, the core principles derived from Federal Rule of Civil Procedure 56 and Federal Rule of Evidence 401 provide the backbone for the rules that govern litigation. These rules are not specific to any particular substantive area. They are supposed to be applied in the same way to all litigants, whether the litigant is a plaintiff or a defendant.

Let's examine how two key ideas—the stray remarks doctrine and the "decisionmaker at the time" doctrine—fail on both substantive and procedural grounds.

The stray remarks doctrine should be easy to eliminate. The doctrine is not required by or contained within the text of any of the main federal discrimination statutes. Substantive critiques of the doctrine are long-established and made by both scholars and judges.<sup>321</sup>

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<sup>316</sup> I am not suggesting that the Federal Rules of Civil Procedure or the Federal Rules of Evidence are perfect. *See, e.g.*, Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 870, 872 (2018) (rejecting the notion of the Federal Rules of Evidence as "all-seeing, vigilant gatekeepers"); Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2244 (2017) (discussing how judges following the Federal Rules of Evidence too often admit testimony about the lived experience of White people without evidentiary scrutiny, while excluding evidence related to the lived experiences or racialized reality of People of Color). *See generally* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (criticizing several 1989 Supreme Court decisions as severely limiting employment discrimination claims).

<sup>317</sup> FED. R. CIV. P. 56(a).

<sup>318</sup> *Id.*

<sup>319</sup> *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 274 n.1 (2009) (quoting *Broseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) (per curiam)).

<sup>320</sup> FED. R. EVID. 401.

<sup>321</sup> *See supra* notes 45-47.

And, the Supreme Court has cautioned courts against disregarding or diminishing the plaintiffs' evidence in multiple cases. For example, in *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>322</sup> the Supreme Court held that the appellate court erred in overturning a jury verdict because the plaintiff had presented both evidence of pretext and additional evidence of age-based comments.<sup>323</sup> The Court noted that the appellate court had not drawn all inferences in favor of the plaintiff and had disregarded "critical" evidence that favored the plaintiff.<sup>324</sup> In *Ash v. Tyson Foods, Inc.*,<sup>325</sup> the Court reminded the appellate court that it was not appropriate for it to draw conclusions about whether the term "boy" was used in racially discriminatory way because a speaker's meaning depends on "context, inflection, tone of voice, local custom, and historical usage."<sup>326</sup>

The procedural critique is also compelling. The stray remarks doctrine is a special evidentiary rule that courts created and apply in discrimination cases. The doctrine contradicts the normal standards of relevance found within the Federal Rules of Evidence.<sup>327</sup> The stray remarks doctrine would not be remarkable if it simply rejected irrelevant evidence. Instead, as shown throughout this Article, judges often use the doctrine to exclude or diminish evidence that a reasonable jury might use to find in favor of the plaintiff.<sup>328</sup> However, if judges were required to describe why a discriminatory remark is not relevant, using the standard set forth in the Federal Rules of Evidence, they would have a difficult time explaining why such evidence does not meet the standard.

Additionally, to the extent the stray remarks doctrine excludes or diminishes evidence that would otherwise be relevant, it also violates Federal Rule of Civil Procedure 56 when a judge uses the doctrine to exclude the plaintiff's evidence at the summary judgment stage.<sup>329</sup> The stray remarks doctrine works to favor the employer and disfavor the plaintiff. In this way, it directly contradicts the summary judgment standard that requires courts to view all inferences in favor of the nonmoving party. If a reasonable jury could use the evidence to find in favor of the plaintiff, the judge must make that favorable inference for purposes of summary judgment.

Similarly, there are strong procedural and substantive reasons for eliminating doctrines that focus on "the decisionmaker at the time." As discussed earlier, these doctrines are often centered in the *McDonnell Douglas* prima facie case and the pretext prong.<sup>330</sup>

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<sup>322</sup> 530 U.S. 133 (2000).

<sup>323</sup> *Id.* at 140, 150-54.

<sup>324</sup> *Id.* at 152.

<sup>325</sup> 546 U.S. 454 (2006).

<sup>326</sup> *Id.* at 456.

<sup>327</sup> FED. R. EVID. 401, 403.

<sup>328</sup> See discussion *supra* Sections I.B, I.C, II.B.1, III.B.1 & IV.B.

<sup>329</sup> FED. R. CIV. P. 56(a).

<sup>330</sup> See discussion *supra* Section I.B.

Substantively, it is a perversion of the *McDonnell Douglas* prima facie case to require not only that a plaintiff establish she met the employer's subjective standards but also that she does so only by using evidence that directly relates to the decisionmaker's opinion. This way of articulating the prima facie case directly contradicts Supreme Court precedent stating that the prima facie case is not onerous.<sup>331</sup> One appellate court has noted that "a plaintiff's burden to establish an initial prima facie case is, by design, 'minimal and de minimis.'"<sup>332</sup> If a plaintiff is required to establish that she met the subjective requirements of the job in the view of the decisionmaker, the prima facie case becomes onerous for the plaintiff. Substantively, it is difficult to understand how such a requirement even makes sense as part of the prima facie case.

Correctly understood, the second factor of the prima facie case only requires the plaintiff to show that "the plaintiff was qualified for the position in question."<sup>333</sup> The plaintiff can satisfy the second factor "by showing that she performed at a level that generally met her employer's objective minimum qualifications."<sup>334</sup> For example, a plaintiff would fail the second factor if she applied to be a truck driver but did not possess the required license for the job, an objective qualification. Consideration of whether the plaintiff subjectively performed her job well belongs in the second and third prongs of *McDonnell Douglas*.

Similarly, *McDonnell Douglas* does not require a plaintiff to establish pretext by showing the beliefs of the decisionmaker at the time of the contested action. A plaintiff can establish the final prong of *McDonnell Douglas* "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."<sup>335</sup> In *Young v. United Parcel Service, Inc.*,<sup>336</sup> the Supreme Court held that if the reason articulated by the employer "does not seem to make sense, a factfinder *may* infer that the employer's asserted reason for its action is a pretext for unlawful discrimination."<sup>337</sup> A plaintiff may establish pretext "by demonstrating 'such weaknesses, implausibilities, inconsistencies,

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<sup>331</sup> *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 228 (2015); *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981).

<sup>332</sup> *Kelleher v. Fred A. Cook, Inc.*, 939 F.3d 465, 468 (2d Cir. 2019) (quoting *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir. 2005)); *see also* *Howard v. Port Auth. of N.Y. & N.J.*, 771 F. App'x 130, 132 (2d Cir. 2019) (describing prima facie case burden as "de minimis"); *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 107 (2d Cir. 2019) (describing burden of establishing prima facie case as minimal); *Eyer*, *supra* note 9, at 1006-08 (arguing that Supreme Court has repeatedly rejected a technical version of the test in favor of a more fluid version).

<sup>333</sup> *Willis v. UPMC Child.'s Hosp. of Pittsburgh*, 808 F.3d 638, 644 (3d Cir. 2015).

<sup>334</sup> *Loyd v. Saint Joseph Mercy Oakland*, 766 F.3d 580, 590 (6th Cir. 2014).

<sup>335</sup> *Burdine*, 450 U.S. at 256.

<sup>336</sup> 575 U.S. 206 (2015).

<sup>337</sup> *Id.* at 233 (holding that employer's actual reason for taking action, not its asserted justification, is determinative).



incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence."<sup>338</sup>

A plaintiff may establish pretext when the reason asserted by the employer "does not pass the straight-face test."<sup>339</sup> In one case the employer asserted that it fired a worker for "[e]ating a handful of Doritos from an open bag on a countertop in the lunchroom."<sup>340</sup> The court held that a jury could infer pretext, especially because the employer's reason "strikes us as swatting a fly with a sledge hammer."<sup>341</sup>

The plaintiff can show the employer created post hoc rationalizations for the outcome after it occurred or for litigation purposes.<sup>342</sup> The plaintiff might present evidence that the employer provided multiple, inconsistent, or contradictory reasons for the outcome.<sup>343</sup> Pretext can be established when the employer overreacted to the plaintiff's conduct to justify a negative outcome.<sup>344</sup> The "sudden emergence" of new performance problems under a new supervisor can be evidence of pretext.<sup>345</sup> The plaintiff might show that the employer shifted the

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<sup>338</sup> Jones v. Gulf Coast Health Care of Del., LLC, 854 F.3d 1261, 1274 (11th Cir. 2017) (quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)); see Potter v. Synerlink Corp., 562 F. App'x 665, 678 (10th Cir. 2014) (overstating number of times plaintiff was counseled was evidence of pretext); Bekkem v. Wilkie, 915 F.3d 1258, 1268 (10th Cir. 2019) ("Plaintiff must show that the proffered reasons 'were so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude the reasons were unworthy of belief.'" (quoting Young v. Dillon Cos., 468 F.3d 1243, 1250 (10th Cir. 2006))). For a complete discussion of the third step of *McDonnell Douglas*, see SANDRA SPERINO, *MCDONNELL DOUGLAS: THE MOST IMPORTANT CASE IN DISCRIMINATION LAW* ch. 7 (Sandra Sperino ed., 2021), <https://www.bloomberglaw.com/product/blaw/document/28538757672>.

<sup>339</sup> *Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999).

<sup>340</sup> *Id.*

<sup>341</sup> *Id.*

<sup>342</sup> *Kocienski v. NRT Techs., Inc.*, 787 F. App'x 411, 412 (9th Cir. 2019) ("[D]oubt is cast on an employer's proffered reasons for why an employee was laid off where a straightforward answer was not given when he or she was terminated, but later is provided during litigation."); *Gomez v. Haystax Tech., Inc.*, 761 F. App'x 220, 235 (4th Cir. 2019) (explaining that a plaintiff may demonstrate pretext where asserted justifications are invented after the fact).

<sup>343</sup> See, e.g., *Fassbender v. Correct Care Sols., LLC*, 890 F.3d 875, 887 (10th Cir. 2018) (finding that employer's inconsistent assertions about which incidents prompted termination of employee are evidence from which a reasonable jury could infer pretext); see also *Haynes v. Waste Connections, Inc.*, 922 F.3d 219, 226 (4th Cir. 2019) (holding that evidence employer changed reason for termination from job abandonment to plaintiff's bad attitude was sufficient to establish pretext).

<sup>344</sup> *Rowlands v. United Parcel Serv.*, 901 F.3d 792, 802 (7th Cir. 2018) (finding that employer's overreaction to statement by employee about carrying taser can serve as evidence from which jury can reasonably find pretext).

<sup>345</sup> *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 47 (1st Cir. 2002) (finding that trier of fact could reasonably view as suspicious employer's sudden assertion of managerial problems on part of employee given no mention of such in employee's prior work history).

criteria for a job to favor people in a different protected class than the plaintiff.<sup>346</sup> Courts that apply decisionmaker at the time doctrines do not properly understand pretext from a substantive perspective.

The decisionmaker at the time doctrines also fail on procedural grounds. Like the stray remarks doctrine, the decisionmaker at the time doctrines also create a special relevance rule for employment discrimination cases that is different than Federal Rule of Evidence 401. Additionally, these doctrines contradict Federal Rule of Civil Procedure 56 because they prioritize the defendant's version of events over other evidence the plaintiff might have to establish discrimination.<sup>347</sup>

Additionally, judges often do not apply the "decisionmaker at the time" doctrines to the employer's evidence. Judges regularly allow employers to provide evidence of employee mistakes or poor performance across a wide swath of time and even when the employer has also praised or promoted the employee during the time period.<sup>348</sup> Judges allow employers to rely on evidence from a wide range of people, including customers, coworkers, and former managers.<sup>349</sup> Judges typically do not require the employer to even show the decisionmaker knew about past poor performance problems at the time of the decision.

This procedural problem—that courts do not apply the same rules to the plaintiff's and the defendant's evidence—may be a way to show courts a fundamental issue with how they view discrimination. When it comes to the employer, judges do not see the contested action as one decision that is made at a certain period of time. Instead, judges see the decision as accumulating over time through the input of many people. This realization can be beneficial for changing how judges frame discrimination.

One of the more problematic aspects of discrimination jurisprudence is the fiction that a decision is made by one person or a small group of people at a particular point in time. While this may happen in some cases, in many instances the decision is part of a longer process. A rich, scholarly literature explicitly or implicitly criticizes overreliance on models that frame discrimination as individual animus that manifests at specific moments when decisions are made. This literature highlights how decisions happen over time and are affected by organizational structures and choices.<sup>350</sup> The literature discusses how

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<sup>346</sup> *Joll v. Valparaiso Cmty. Schs.*, 953 F.3d 923, 932 (7th Cir. 2020) (shifting job criteria to favor male applicants could be evidence of pretext).

<sup>347</sup> FED. R. CIV. P. 56(a).

<sup>348</sup> *See supra* Section II.A.

<sup>349</sup> *See supra* Section III.A.

<sup>350</sup> Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1, 2 (2018) (exploring the ways in which organizational systems such as word-of-mouth hiring, cronyism, and nepotism contribute to discriminatory employment practices); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007) (reasoning that change at organizational level of employment operations is necessary to minimize discriminatory decision-making).

stereotyping,<sup>351</sup> intersectional discrimination,<sup>352</sup> and unconscious bias might impact outcomes.<sup>353</sup>

The evidentiary inequality reveals that judges are willing to view employment outcomes as part of a long chain of events affected by numerous people—at least with respect to the employer’s evidence. While it may be true to say that a supervisor decides to fire someone, that decision is often only one part of a longer process through which supervisors form opinions and make judgments based on their own conscious and unconscious expectations of people, the feelings and opinions of others, and societal and work-specific expectations. Judges seem to understand this when it comes to viewing how a supervisor forms a negative impression of an employee because judges often allow this evidence to support the employer’s narrative.<sup>354</sup>

Plaintiffs should be afforded the opportunity to show that discrimination happens in similar ways. Pointing out the procedural problems with the evidentiary inequality may lead judges to recognize the larger substantive issues regarding how they view discrimination.

### C. *Procedural Guardrails*

Courts could eliminate evidentiary inequality by eliminating the doctrines and ideas that create it. This could be done by the Supreme Court, appellate courts, or even by individual district court judges when consistent with *stare decisis*.

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given that the greatest problems of discrimination appear to be structural and organizational); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 625 (2005) (framing work culture as means of structural discrimination); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (discussing how work structure pressures employees to behave in certain ways to perform a work identity). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 3 (2006) (noting significant obstacles exist in addressing structural discrimination through current discrimination law).

<sup>351</sup> Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 925 (2016) (arguing that the Supreme Court’s recent recognition of how stereotypes disadvantage transgender people and caregivers in the workplace should be extended to other patterns of stereotyping in workplaces).

<sup>352</sup> Carbado & Harris, *supra* note 315, at 2202 (discussing the inability of employment discrimination doctrine to properly address discrimination of Black women given that Black women’s “experience[s] could not be marked along a single axis”); Kotkin, *supra* note 315, at 1459 (describing a 2006 study of employment discrimination claims in federal district courts that found defendants prevailed on summary judgment 73% of the time, and 93% of the time in cases involving multiple claims). *See generally* Crenshaw, *supra* note 315 (describing contours of intersectional discrimination).

<sup>353</sup> Lawrence, *supra* note 315, at 321 (“Acknowledging and understanding the malignancy [of racism] are prerequisites to the discovery of an appropriate cure.”).

<sup>354</sup> *See supra* note 9.

However, to date, there has not been a consistent effort by courts to rid discrimination law of even the named doctrines.<sup>355</sup>

A procedural path may be more palatable, easier to understand, and easier to implement. The path forward I propose does not rely on any particular theoretical framing but rather on common ideas that underlie many of the theoretical critiques. Almost all of the critiques discussed throughout this Article relate to a tendency to try to reduce discrimination claims to a narrow set of circumstances and to fail to listen to plaintiffs, all while unduly favoring

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<sup>355</sup> For example, there is a robust literature critiquing the *McDonnell Douglas* framework. See, e.g., Deborah A. Widiss, *Proving Discrimination by the Text*, 106 MINN. L. REV. 353, 404 (2021) (referencing courts' reluctance to abandon *McDonnell Douglas* and suggesting path forward); Eyer, *supra* note 9, at 967 ("The lower courts' technical approach to the *McDonnell Douglas* paradigm represents one of the most significant and pervasive obstacles to contemporary anti-discrimination enforcement."); Goldberg, *supra* note 315, at 748 (criticizing *McDonnell Douglas* framework for providing no guidance as to how courts should consider competing accounts of employer action); William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 725 (2010) (referring to the *McDonnell Douglas* framework as "hoary"); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 197 (2009) (setting out to present a simpler proof structure for disparate treatment cases); Jamie Darin Prenekert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 512 (2008) (describing *McDonnell Douglas's* continued prominence as unfortunate); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1564 (2005) (analyzing the "death" of *McDonnell Douglas* in the wake of *Desert Palace*); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887, 1890 (2004) (criticizing how *McDonnell Douglas* and its progeny complicated plaintiffs' ability to get to trial); William R. Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 200 (2003) (referencing how many are "celebrating the death of the *McDonnell Douglas* proof structure"); Jeffrey A. Van Detta, "Le Roi Est Mort; Vive Le Roi!": *An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003) (referring to *McDonnell Douglas-Burdine* framework as a "bland diet"); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time to Jettison McDonnell Douglas*, 2 EMP. RTS. & EMP. POL'Y J. 361, 364 (1998) (stating that *McDonnell Douglas* has taken much criticism over the years by commentators); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 372 (1997) (making the case that *McDonnell Douglas* "muddles the decision-making process"); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1218 (1995) (exploring several ways in which the *McDonnell Douglas* framework proved "inadequate"); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2236 (1995) (arguing for the abandonment of *McDonnell Douglas*); see also Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 745 (2006) (describing the widespread nature of criticism of the value of the *McDonnell Douglas* framework). But see Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 116 (2007) ("[Plaintiffs and commentators] should embrace *McDonnell Douglas* as a true gift to antidiscrimination law.").

employers. I argue that Federal Rule of Civil Procedure 56 and Federal Rule of Evidence 401 try to address similar concerns in litigation more broadly.<sup>356</sup>

For the most impact, the Supreme Court could use its supervisory authority over the federal courts to require lower courts to follow prescribed rules to protect against evidentiary inequality.<sup>357</sup> However, even if the Supreme Court does not create these rules, appellate courts or district courts can still use them to reduce or eliminate this inequality.

Here are three procedural steps that courts can take to diminish evidentiary inequality in discrimination cases.

*Step One: Explicitly Recognize the Problem.* The Supreme Court should explicitly recognize evidentiary inequality and create boilerplate language that courts can use to understand and guard against the problem.

For example, the Court could indicate that over time, the courts have inappropriately narrowed discrimination law through a series of doctrines that favor the employer and disfavor the employee. The Court could note that courts have applied the doctrines inconsistently in ways that expand the employer's evidence and restrict the plaintiff's evidence. The Court could note that evidentiary inequality often contradicts both Federal Rule of Evidence 401 and Federal Rule of Civil Procedure 56.<sup>358</sup>

At first blush this might seem unrealistic. However, the Supreme Court on numerous occasions has repudiated overly narrow constructions of discrimination law.<sup>359</sup> And while the Court has played some role in centering intent and pretext in discrimination jurisprudence,<sup>360</sup> many of the problematic issues discussed in this Article have been repudiated by the Supreme Court or not been explicitly addressed by it. This language would be an explicit reminder to judges that they collectively have not treated employers' evidence and plaintiffs' evidence similarly and that they need to be aware of this problem.<sup>361</sup>

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<sup>356</sup> While it is possible for the core principles of Federal Rule of Civil Procedure 56 and Federal Rule of Evidence 401 to be used in ways that favor or disfavor particular parties, this inequality is not inherently a part of either rule.

<sup>357</sup> See 28 U.S.C. § 2072 (describing Supreme Court's authority to prescribe general rules of practice and procedure for federal district and appellate courts).

<sup>358</sup> In some cases, evidentiary inequality might only violate one of these rules. For example, if a judge admits a plaintiff's evidence as relevant but then inappropriately diminishes the weight of the evidence, this would implicate Federal Rule of Civil Procedure 56 but not Federal Rule of Evidence 401.

<sup>359</sup> See generally Eyer, *supra* note 9 (discussing how Supreme Court has often warned against making *McDonnell Douglas* too narrow).

<sup>360</sup> See Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1222-23 (2018) (analyzing the efficacy of the jurisprudence of discriminatory intent); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1360-61 (2017) (discussing the Court's "cramped focus on discriminatory intent").

<sup>361</sup> Kang et al., *supra* note 7, at 1172-73 (discussing ways to have decisionmakers challenge their biases, including providing information to them about cognitive bias).

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*Step Two: Require Judges to Explain All of the Plaintiff's Evidence.* When granting a summary judgment motion for the employer, judges should be required to completely describe any evidence that might favor the plaintiff. The only way that a court can determine if there is no genuine dispute of fact and read all inferences from the evidence in favor of the nonmoving party is to fully consider all of the evidence submitted by the nonmoving party.

As seen throughout this Article, courts often describe more of the defendants' evidence than the plaintiffs' evidence.<sup>362</sup> They often label the plaintiffs' evidence as irrelevant or as merely an opinion without fully describing the evidence. Courts often describe evidence of a plaintiff's poor performance without describing the plaintiff's good performance. At a minimum, it seems there should be an obligation to explain the plaintiff's good performance in the same level of detail as the judge explains the plaintiff's misconduct or poor performance.

It is impossible to determine whether a court considered evidence related to summary judgment if the court does not describe it. If a judge believes that summary judgment in the employer's favor is appropriate, the judge should be required to completely describe all evidence that favors the plaintiff. This sounds like it would already be a staple of summary judgment order writing, but it is not.

After the judge completely describes the plaintiff's evidence, the judge can then describe why summary judgment is nonetheless appropriate, given the full evidentiary record that favors the plaintiff. This does not mean that a judge must credit all of the plaintiff's evidence. For example, some of the plaintiff's evidence may not meet the definition of relevance, might be hearsay, or might be inadmissible for other reasons. A judge should first be required to describe the evidence and then describe why the evidence is inadmissible or problematic.

*Step Three: Require Judges to Explain Why They Include Evidence That Favors the Defendant.* Judges should be required to explain how they are complying with procedural and evidentiary rules when they describe or rely on a defendant's evidence.

Judges often begin their summary judgment orders by describing the facts of the case. However, as discussed throughout the Article, this description often omits facts that favor the plaintiff. At the same time, judges often describe facts that favor the defendant, even when these facts are contested by the plaintiff, are not relevant to the claim, or are vague or conclusory.

If a judge includes contested facts or irrelevant facts in the order that favors the defendant, the judge should be required to explain why those facts are included and in what way the facts are being used.<sup>363</sup> If the court draws any inferences in favor of the moving party, the court should be required to explain

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<sup>362</sup> See *supra* Section I.B.

<sup>363</sup> Plaintiff's counsel should also explicitly challenge the employer's use of contested, irrelevant, or inadmissible evidence. Special thanks to Professor Minna Kotkin for this suggestion.

why it is allowed to draw those inferences. Courts should be required to determine whether the evidence submitted by the employer is admissible evidence.

This simple step would eliminate some evidentiary inequality. For example, as described above, courts often recite any misconduct or poor performance a plaintiff ever engaged in during their entire tenure with an employer. Much of the time this evidence is not relevant because it does not relate in any way to the plaintiff's claim of employment discrimination or retaliation. If courts are required to describe why they are including this evidence in their summary judgment order, this should encourage courts to be more careful about how they are drawing inferences.

These procedural solutions are easy to understand and do not require judges to wade through complicated employment discrimination doctrines. Importantly, they rely on foundational procedural notions about the way courts must treat evidence fairly to ensure the right to a jury trial, principles Congress included in the federal discrimination statutes.

Even if the Supreme Court refuses to use its supervisory authority to create specific rules to govern how federal courts should consider evidence, the Court should at least reiterate that it rejects inappropriate limits on plaintiffs' evidence in employment discrimination cases.<sup>364</sup>

#### CONCLUSION

There is rampant evidentiary inequality in discrimination cases. Judges routinely favor the defendant's evidence and disfavor the plaintiff's evidence. They often prohibit plaintiffs from relying on evidence while permitting defendants to rely on similar evidence. This Article brought together hundreds of cases to fully describe the evidentiary inequality and identify its sources. It argues that the best way to resolve the inequality is to critique the underlying ideas and doctrines both substantively and procedurally. It also provides a roadmap for resolving the inequality grounded in the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

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<sup>364</sup> See *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456-58 (2006) (rejecting courts' failures to view evidence in light most favorable to the plaintiff); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 140, 150-52 (2000) (rejecting lower court's refusal to fully credit all of plaintiff's evidence related to age discrimination).