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Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace

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Article

Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace

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This Article provides a doctrinal critique of an employment discrimination principle recognized by the courts—the same-actor inference—based on its incongruence with both cognitive psychological research and the social dynamics of the workplace. The same-actor principle, in its most potent form, provides that where the same decision-maker engages in an alleged adverse employment action within a short period of time of making a positive employment decision, such evidence creates a strong presumption that the decision-maker harbored no unlawful discriminatory animus. The same-actor doctrine was first recognized by the Fourth Circuit in Proud v. Stone, *in which the court deemed the nature of the hirer-firer relationship significant on the ultimate question of discrimination. The rationale of the* Proud *court is based on the assumed irrationality of the "psychological costs" incurred by a decision-maker in hiring and thus associating with workers from a group one dislikes only to take some adverse action against them thereafter. The majority of the federal circuits addressing the issue have adopted the same-actor principle, many endorsing the rationale of* Proud *with, if not resounding approval, at least passive acceptance. The circuits are split on the weight that should be afforded same-actor evidence, and the Supreme Court has yet to enter the dialogue. Due to the entrenchment of the doctrine within workplace jurisprudence and its debilitating effects on plaintiffs, it bears assessing its effectiveness as a shorthand reference for identifying discriminatory animus and evaluating the ultimate question of discrimination.*

This Article makes the case that the same-actor principle fails to comport with the realities of the contemporary workplace, specifically, its complexities in structural, cultural, and managerial terms. Expanding on the observations of a small number of scholars, this Article enhances the inquiry by engaging social science (including cognitive psychological research), organizational behavior, and management theory literature relating to organizational design and the workplace decision making process. By informing examination of the doctrine with these interdisciplinary sources, the Article interrogates the underlying psychological assumption of the same-actor principle, demonstrating its incompatibility with contemporary work life and notions of equality under employment discrimination jurisprudence. Due to the historical, social and cultural contingency of law in society, the problematic nature of the same-actor principle is best revealed by drawing on insights from disciplines devoted to the study of corporate culture, human behavior, and power dynamics within organizations. The Article posits that the same-actor inference is anchored in an outdated narrative of the American workplace and an inaccurate view of human motivation.

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NATASHA T. MARTIN*

I. INTRODUCTION

It is further complicated by the fact that the habit of ignoring [difference] is understood to be a graceful, even generous, liberal gesture. To notice is to recognize an already discredited difference. To enforce its invisibility through silence is to allow the [outsider] a shadowless participation in the dominant cultural body.

– Toni Morrison, Nobel Laureate[1]

Employment organizations have become increasingly complex microcosms in relational, cultural, and operational terms. An employee in today's workplace is likely subject to a flattened organizational chart, without a single supervisor, and beholden to a group of peers operating in a palpable institutional culture that emphasizes particular values and norms. As organizations phase out direct reporting lines, the use of work teams, collaborative problem solving, and collective decision-making processes have become mainstream in the contemporary American workplace.[2] Businesses employ various self-management tools and techniques that have transformed the orchestration of work and the utilization of workers. Consequently, these systems of organizational design produce shifting

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[1] TONI MORRISON, PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION 9–10 (1992).

[2] *See* HENRY P. SIMS, JR. & PETER LORENZ, THE NEW LEADERSHIP PARADIGM: SOCIAL LEARNING AND COGNITION IN ORGANIZATIONS 199–216 (1992) (discussing self-managing teams and collaboration).

dynamics that affect interpersonal relations, behavior, and decision-making. Largely, these intricacies are lost on the American judiciary, however, as it attempts to decipher unlawful discriminatory conduct and uphold the anti-discrimination principles of Title VII of the Civil Rights Act of 1964.[3]

Congress established Title VII to promote fair employment practices within the workplace. Intended to serve a curative role and to facilitate equal opportunity, the statute prohibits disparate treatment based on race, color, sex, religion, and national origin.[4] Title VII protects certain classes of workers from discrimination to ensure that an individual's identity does not pose a liability to access, engagement, and advancement in work life. While Title VII expressly prohibits discrimination, it remains within the purview of the courts' authority to filter complex fact-specific controversies and decipher unlawful discriminatory conduct. In engaging Title VII, courts attempt to balance the competing interests of those in the labor force and the organizations that employ them.

Efforts to explore the circumstantial terrain for meaningful markers of discriminatory conduct have produced various interpretational sideshows; formulations that often bear no connection to modern workplace realities. These judicial maneuvers have diminished the statute's effectiveness as a shield for workers from the venom of discrimination. Hence, the courts have created various loopholes that allow organizations to remain relatively autonomous, freely adhere to their particular business goals, and, far too often, escape liability for workplace discrimination.[5]

In 1991, the tension between employment discrimination law and organizational life produced another such protective device—the same-

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[3] Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2000).

[4] *Id.* § 2000e-2. Other federal antidiscrimination statutes modeled on Title VII prohibit disparate treatment based on age and disability. The Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621–34 (2000), prohibits discrimination on the basis of age against applicants and employees who are forty years of age and older. *Id.* § 631(a). Title I of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12111–12117 (2000), prohibits discrimination in employment against qualified individuals with disabilities, who, with or without reasonable accommodation, can perform the essential functions of the job. *Id.* § 12112.

[5] *See generally* Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006) (concluding that plaintiffs in racial harassment litigation are more likely to lose their case than defendants either in summary judgment proceedings or at trial primarily because of conscious or unconscious judge or juror bias); 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 the rampant use of summary judgment and suggesting its inappropriateness and incompatibility with Title VII law); David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003) (concluding that women and minorities have a lower success rate at bringing employment discrimination claims because of juror bias); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation* (Brooklyn Law Sch. Legal Studies Research Papers, Working Paper No. 71, 2007), *available at* http//papers.ssrn.com/sol3/papers.cfm?abstract_id=968834 (arguing that the current summary judgment procedures facilitate gender discrimination and gender-bias in federal courts).

actor principle. In its most potent form, the same-actor principle provides that where the same decision-maker engages in an alleged adverse employment action within a short period of time of making a positive employment decision, such evidence creates a strong presumption that the decision-maker harbored no unlawful discriminatory animus.

More than fifteen years after its formulation, the doctrine is fully entrenched in workplace law. The same-actor principle has received affirmation from most of the courts addressing the issue, with most endorsing the *Proud* court's rationale with, if not resounding approval, at least passive acceptance. The circuits are split on the weight that should be afforded same-actor evidence, and the Supreme Court has yet to enter the dialogue. Most often the courts, however, deem same-actor evidence relevant and significant if the plaintiff fails to rebut it. In fact, in the parlance of workplace discrimination law, the same-actor inference is widely deemed to be *common sense*. All too often, courts adopting some variation of this principle assert how *nonsensical* it is that a decision-maker who hired an individual would engage in discriminatory action in subsequent decisions relating to that same person's terms and conditions of employment.[6] The doctrine is formidable in Title VII law, and often presents an insurmountable challenge for plaintiffs, debilitating their attempts to prove unlawful discrimination.

The premise of this Article is that the same-actor principle constitutes an untenable analytical paradigm that fails to comport with the realities of the contemporary American workplace, specifically, its complexities in structural, cultural and managerial terms. Courts take a snapshot of the plaintiff's work life before and after the alleged adverse employment action, search for a common thread, and assign meaning without any regard for the powerful human and institutional forces at work. Overwhelmingly, the courts' analysis ignores aspects of modern employment settings such as workplace configurations, evaluative models, and corporate culture, all of which influence decision-making in organizations and bear on the underlying motivation for those decisions. To reduce an inquiry that is so embedded with complexity to a shorthand reference based on what may be nothing more than happenstance, that the same decision-maker remains involved, appears nonsensical or at a

[6] For more recent examples, see Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (it makes "*little sense*" to deduce discriminatory motive by most of the same individuals who hired plaintiff ten months earlier) (emphasis added); Nwanna v. Ashcroft, 66 Fed. Appx. 9, 15 (7th Cir. 2002) (deeming same-actor inference based on "common-sense notion that someone who disliked or intended to discriminate against a person would never initially hire that person"); Kassa v. Selland Auto Transport, Inc., No. C05-1304P, 2006 WL 2559865, at *4 (W.D. Wash. Aug. 31, 2006) ("Plaintiff's evidence must be persuasive enough to answer the *obvious question* of how the court is find a racial bias when the person (or persons) who decided to terminate the plaintiff are the same persons who approved the decision to hire him . . . .") (emphasis added); Holmes v. Marriot Corp., 831 F. Supp. 691, 701–02 (S.D. Iowa 1993) (referring to same-actor inference as the "*common sense*" inference) (emphasis added).

minimum, naïve.[7]

The same-actor doctrine is based on several faulty assumptions. First, it presumes that discrimination emanates only from a single bad actor, a biased individual who harbors negative feelings about another. Second, it assumes that voluntary association with one who is different in the context of work means the decision-maker harbors no such negative feelings, or if he did, he has now resolved them and they are incapable of resurrection. This greatly oversimplifies how bias operates and ignores the prevalence of grouping and collective processing in organizations, vectors that create the conditions for bias to flourish. Moreover, it is precisely due to the stratification and collective nature of the decision-making process that the same-actor principle constitutes an unreliable marker for discriminatory motive. Despite the superficial plausibility that one who hires or promotes an employee would not thereafter harbor discriminatory bias towards that same person, literature on organizational behavior, group dynamics, and social psychological forces reveals that bias may not rear its ugly head until after an employee is immersed in a work setting or work group.

Significantly, the same-actor principle exonerates employers from their responsibility to address structural and cultural barriers to workplace equality, forces within the employers' control and which often they employ strategically for business reasons. The same-actor doctrine credits employers for hiring minorities by affording them protection in the event they decide to rid the workplace of individuals in protected categories under Title VII. By "hiring brown" in the first instance, for example, a racist employer is shielded against allegations of racism or somehow incapable of racist tendencies altogether in the eyes of the courts. In this way, the same-actor doctrine operates as a subsidy for those employers that make the effort to diversify their workforces, cheapening notions of acceptability and workplace inclusiveness. This "free pass" represents another misstep by the judiciary based on a fanciful narrative about social and structural dynamics within the contemporary workplace and human motivation more generally.

Overall, the Article seeks to challenge the underlying psychological assumption of the same-actor doctrine and demonstrates its incompatibility

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[7] Prolific legal scholar Richard Delgado has observed that "racism is normal, not aberrant, in American society. Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture." RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: THE CUTTING EDGE xvi (2d ed. 2000). Perhaps, it is precisely this norm highlighted by Delgado that may offer some insight into why the courts so readily subscribe good meaning to acts by the same decision-maker. Similarly, another scholar has argued that the current anti-discrimination regime (including in the employment arena), is based on the view that "discrimination and subordination are anomalies perpetrated by a few bad actors in isolated pockets of society." Jacquelyn L. Bridgeman, *Seeing the Old Lady: A New Perspective on the Age Old Problems of Discrimination, Inequality, and Subordination*, 27 B.C. THIRD WORLD L. J. 263, 267 (2007); *see also* LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE (2006) (explaining that in modern-day society discrimination is becoming the default: an accepted but unintentional standard).

with contemporary work life. By expanding on the surprisingly limited legal literature addressing this issue, the Article enhances the inquiry by engaging interdisciplinary sources including cognitive psychological, organizational behavior, and management theory literature relating to organizational design, decision-making processes, and the socio-cultural forces inherent in workplace dynamics.[8] Twenty years ago, Charles Lawrence pioneered the use of this interdisciplinary lens with respect to racial bias in society.[9] More legal scholars are awakening to the promise that such sociological literature holds for a deeper understanding of the operation of workplace bias.[10] Accordingly, the Article can be seen as

[8] The writings devoted to exploration of the same-actor doctrine consist primarily of student comments and notes. *See* Anna Laurie Bryant & Richard A. Bales, *Using the Same Actor "Inference" in Employment Discrimination Cases*, 1999 UTAH L. REV. 255 (providing a thorough analysis of the case law and policies regarding the same-actor inference); Marlinee C. Clark, Note, *Discrimination Claims and "Same-Actor" Facts: Inference or Evidence?*, 28 U. MEM. L. REV. 183 (1997) (analyzing recent employment discrimination cases in each circuit utilizing the same-actor inference); Bethany M. Gilliland, Comment, *Employment Law*—Wexler v. White's Fine Furniture*: The Sixth Circuit Clarifies and Qualifies the Proper Analysis of ADEA Cases*, 34 U. MEM. L. REV. 975 (2004) (reviewing one of the most recent circuit decisions addressing the same-actor inference in the context of age discrimination); Ross B. Goldman, Note, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Roles of Judges and Juries*, 93 VA. L. REV. 1533 (2007) (criticizing the same-actor inference as applied to summary judgment or directed verdicts for employers in employment discrimination cases); Julie S. Northrup, Note, *The "Same Actor Inference" in Employment Discrimination: Cheap Justice?*, 73 WASH. L. REV. 193 (1998) (discussing the expansion of the same-actor inference and urging for restraining in its application); Jennifer R. Taylor, Student Work, *The "Same Actor Inference": A Mechanism for Employment Discrimination?*, 101 W. VA. L. REV. 565 (1999) (detailing the same-actor inference in Title VII discrimination lawsuits and criticizing its application to summary judgment decisions).

[9] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Several legal scholars have recognized the benefit of social cognition and behavioral literature to workplace law. For other important contributions by legal scholars, see generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J. L. & PUB. POL'Y 415 (2000); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993). Additionally, social science scholars have offered critical insights from the organizational behavior realm as well. *See generally* JOHN F. DOVIDIO & SAMUEL L. GAERTNER, PREJUDICE, DISCRIMINATION, AND RACISM (1986); Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, *in* THE HANDBOOK OF SOCIAL PSYCHOLOGY VOLUME II 357–92 (Daniel T. Gilbert et al. eds., 4th ed. 1998).

[10] *See, e.g.*, Jacquelyn Bridgeman, *The Thrill of Victory and the Agony of Defeat: What Sports Tells Us about Achieving Equality in America*, 7 VA. SPORTS & ENT. L.J. (forthcoming 2008); Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283 (2002) (exploring the difficulties of identifying and managing racial groups at the bottom); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92 (2003) (arguing that workplace discrimination must be conceptualized in terms of workplace dynamics as opposed to existing solely in an actor's state of mind); Susan Sturm, *Race, Gender, and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 645 (1998) (rethinking approaches to regulation of discrimination in the workplace in response to changes in organizational structure and demographics); Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089 (2002) (offering a group-based approach to equal protection law that accounts for intergroup rivalry, social identity and competitive action); *see also Symposium on Behavioral Realism*, 94 CAL. L. REV. 945 (2006) (compilation of articles discussing behavioral realism and implicit bias). Corporate law scholars have

contributing to a larger interdisciplinary movement to conceptualize workplace discrimination as an amalgamation of complex human and organizational dimensions.

This Article proceeds in three parts. To begin, Part II describes the historical basis of the same-actor doctrine, and then reviews its evolution and expansion, highlighting trends critical to its development. This Part begins to set forth the competing narratives of the doctrine, examining it in relation to the prevailing analytical framework for circumstantial evidence cases of discrimination under Title VII.

Part III challenges the legitimacy of the same-actor principle by mapping the doctrine to the complex realities of the modern workplace, building on advances in organizational behavior, management theory, and cognitive psychological research. Canvassing these interdisciplinary sources reveals the shortcomings of courts' current approach.

Part IV evaluates the same-actor doctrine in the context established in Part III and exposes the courts' oversimplification of discriminatory animus. Also, Part IV observes that recent cases exemplify the value of a more nuanced inquiry, one that accounts for the complex human, institutional, structural, and cultural dimensions of the workplace and broadens our understanding of workplace bias. Finally, Part IV calls for the discontinuance of the doctrine, asserting that whatever slight relevance same-actor evidence may have is outweighed significantly by the costs of discrimination in the American workplace.

II. *PROUD* BEGINNINGS AND BEYOND

A. *The* Proud *Beginning: The Origin of the Same-Actor Principle*

The same-actor principle entered the workplace jurisprudential landscape in 1991 with the Fourth Circuit's decision in *Proud v. Stone*.[11] In that decision, the court held that where the same person both hires and fires an employee within a relatively short period of time, the employer is entitled to a strong inference that the alleged adverse employment action was not motivated by discriminatory animus.[12] In this court's view, the fact that the same decision-maker engaged in a positive employment action, shortly before allegedly taking an adverse action, creates a strong presumption that the decision-maker harbored no discriminatory animus. The rationale of the *Proud* court is based on the assumed irrationality of the "psychological costs" incurred by a decision-maker in associating with workers from a group one dislikes, only to take some adverse action

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also applied behavioral theories to understanding legal and organizational dynamics. *See generally* Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002).

[11] Proud v. Stone, 945 F.2d 796 (4th Cir. 1991).

[12] *Id.* at 798.

against them thereafter.[13] That is, one who is predisposed against a particular category would not have hired one who belongs to that group from the outset.

In this case, Warren Proud submitted an application for employment with the Department of Army's Central Accounting Division which indicated his date of birth. The decision-maker, Robert Klauss, selected Proud from a pool of seven candidates, of which Proud was the oldest.[14] Based on several variables, including education, background, and experience, Klauss considered Proud the most qualified.

Proud began working as a Chief Accountant for the division in June 1985. Just about two and a half months later, Klauss's opinion of Proud's capabilities changed. Dissatisfied with Proud's handling of five funds for which the division provided accounting services, Klauss counseled Proud on two occasions. During the second counseling session, Proud received a thirty day warning that he would be terminated if his job performance did not improve. Continued dissatisfaction with Proud's performance prompted Klauss to fire him in October 1985, approximately four and a half months after he hired him.[15]

Almost eighteen months later, the Department filled Proud's former position by promoting a thirty-two year old female from within the organization. Proud filed suit two months later alleging his dismissal was the product of age discrimination. In Proud's view, his alleged performance deficiencies emanated from the Department's failure to provide him adequate training, difficulty in obtaining needed data or the receipt of erroneous data, and ineffective management, including lack of written procedures. Additionally, he claimed that the department did not discharge similarly situated younger employees with comparable performance records.[16]

The district court granted the Army's motion for a directed verdict at the close of plaintiff's evidence at trial. The Fourth Circuit affirmed, focusing its assessment of the ultimate question of discrimination on same-actor evidence—the undisputed fact that the same decision-maker both hired and fired the plaintiff with knowledge of his age. The court deemed this same-actor evidence as creating a strong inference that discriminatory animus did not motivate the decision-maker.[17] In espousing this principle, the court stated that "[o]ne is quickly drawn to the realization that '[c]laims that employer animus exists in termination but not in hiring seem

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[13] *Id.* at 797.

[14] *See id.* at 796 (noting that the other candidates were 63, 62, 56, 37 and 28 years of age while Proud was 68 years old).

[15] *Id.* at 796–97.

[16] *Id.* at 797.

[17] *Id.* at 798.

irrational.'"[18] From the perspective of the putative discriminator, "[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the *psychological costs* of associating with them), only to fire them once they are on the job."[19] Relying on no data points or other guideposts in pronouncing this rule, the *Proud* court made an incredible leap, one that has spawned a virtual cottage industry for employer successes, including summary dismissals[20] and directed verdicts.[21] As one scholar has noted, the judiciary formulated this concept without consideration of the social psychological implications of discrimination.[22] This move is ironic given the court's presumptuous statement in *Proud* regarding the "psychological costs" of one's association with differences in the workplace.

In making its pronouncement, the Fourth Circuit relied on a sentence from an article wherein Professors John J. Donohue III and Peter Siegelman attempted to explain the rise in employment discrimination litigation, in particular, allegations of discriminatory discharge, despite the purported increase in access to employment for women and minorities.[23] In an effort to dispel a myth about workplace management and motive, Donohue and Siegelman made the statement, seemingly in passing, that the *Proud* court relied upon when placing so much value on same-actor evidence.[24] Interestingly, since *Proud*'s beginnings, courts have relied on this statement and the court's rationale.

The Fourth Circuit articulated the same-actor principle in a brief

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[18] *Id.* at 797 (quoting John J. Donohue III & Peter Seigelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1017 (1991)) (emphasis added).

[19] *Id.* (internal quotation marks omitted and emphasis added).

[20] *See, e.g.*, Morrison v. Weyerhaeuser Co., 119 Fed. Appx. 581, 586 (5th Cir. 2004) (affirming summary judgment in favor of employer deeming plaintiff's evidence insufficient, particularly where the same-actor inference comes into play).

[21] *See, e.g.*, Taylor v. Virginia Union Univ., 193 F.3d 219, 231 (4th Cir. 1999) (affirming judgment as a matter of law in favor of employer in light of same-actor inference and employee's failure to establish all elements of a *prima facie* case). The same-actor doctrine even has potential implications for jury deliberations as well. For example, in an effort to frame the inquiry for jurors, employers seek jury instructions regarding same-actor evidence. *See, e.g.*, Banks v. Travelers Cos., 180 F.3d 358, 366–67 (2nd Cir. 1999) (holding that the "district court properly permitted Travelers to urge the jurors to draw this commonsensical inference from the facts," and therefore deeming it unnecessary for "jurors to receive an instruction from the judge in order to consider doing so"); *see also* Kelley v. Airborne Freight Corp., 140 F.3d 335, 351 (1st Cir. 1998).

[22] *See* Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835, 836, 840–41 (2004) (asserting that judges function as "intuitive psychologists," but unlike actual psychologists, use definitions of discrimination that are in many ways inadequate to address modern bias).

[23] *Id.* (quoting Donohue & Seigelman, *supra* note 18, at 984–85).

[24] Donohue & Seigelman, *supra* note 18, at 1017. To put the statement in context, the full passage reads:

> Claims that employer animus exists in termination but not in hiring seem irrational: It hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job. Such behavior seems doubly irrational given that the expected penalties for terminating a worker are probably much higher than for failing to hire her.

Id. (footnote omitted).

opinion using strong language. For example, the court deems evidence that the same person hired and fired the employee to raise a *"strong inference"* of a *"compelling nature,"* therefore creating a *powerful inference* relating to the ultimate question of discrimination.[25] Despite the fact that the factual record in *Proud* reflected documented performance deficiencies on the part of the plaintiff, the court chose to accord particular significance to the fact that the same individual both hired and fired the plaintiff within a short period of time and with knowledge of his age. Though the record also reflected a myriad of contentions from the plaintiff's perspective as to why his discharge constituted age discrimination, the court centered its assessment of plaintiff's claim on the same-hirer-same-firer evidence.[26] Because this competing evidence seemed ripe for jury resolution, the court asserted itself in a manner that broke the tie.

The Fourth Circuit's formulation in *Proud* reinforces the notion that courts refuse to sit as "super personnel review boards" monitoring or dictating the way in which employers engage in workplace management.[27] What emerges from *Proud* is a story about an omniscient and benevolent employer, one who deserves the court's deference because it hired the individual in the first instance. Notwithstanding the court's rationale, a survey of post-*Proud* decisions shows how the judiciary has responded to *Proud*'s call for circumspect evaluation of allegations of workplace discrimination. As explored below in Part B, the Fourth Circuit's decision has manifested a cult-like following by other circuits and their lower courts. This expansion reflects both an unexamined acceptance of the principle, unmoored from workplace realities, and a distortion of the primary question in intentional discrimination cases—the motive of the actor.[28]

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[25] *Proud*, 945 F.2d at 797–98 (emphasis added).

[26] *Id.* at 797. The consistency of the decision-maker holds no more probative value than any other aspect of circumstantial evidence present in the case.

[27] In the employment discrimination context, deference to employers' business judgment is salient. *See, e.g.*, Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984) ("[An] employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."); Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995) (opining that courts do not "sit as super-personnel departments reviewing the wisdom or fairness of the business judgment made by employers, except to the extent that those judgments involve intentional discrimination"); *see also* Millbrook v. IBP, Inc., 280 F.3d 1169, 1181 (7th Cir. 2002); Simms v. Oklahoma *ex rel.* Dep't of Mental Health and Substance Abuse Servs., 165 F.3d 1321, 1330 (10th Cir. 1999); Rabinovitz v. Pena, 89 F.3d 482, 487 (7th Cir. 1996).

[28] State of mind of the actor became center stage in workplace law when the Supreme Court devised a framework for analyzing individual claims of discrimination under Title VII in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 807 (1973). Certainly, much has been made about whether a search for intent is the appropriate inquiry. *See, e.g.*, Krieger, *supra* notes 9, 22. However, this remains the predominant analytical framework under Title VII for disparate treatment cases, and the one in which the same-actor doctrine remains prominent. However, I acknowledge that discovering the mindset of the actor—the unspeakable opinions of decision makers in the workplace—is a difficult task. *See, e.g.*, Green, *supra* note 10, at 112 (observing that the difficulty of the courts to ferret out

B. *The Presumption Superhighway—Same Actor Doctrine's Formidable Presence*

Every federal circuit has adopted some variation of the same-actor principle. To summarize the continuum, there are largely two camps—those that buy, wholesale, the *Proud* principle and rationale, and those that apply some discount to its value. A slight majority of the circuits consider same-actor evidence almost irrebuttable in negating the employer's discriminatory motive. Specifically, the First, Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits have applied the doctrine in its most potent forms.[29] The formulation of the principle in these circuits amounts to a strong inference against discrimination, often warranting summary dismissal of plaintiffs' lawsuits. In this regard, the same-actor evidence in these circuits creates an ostensibly mandatory inference, serving as a dead-end to plaintiffs' hopes of redress for alleged workplace discrimination.

After its initial silence, the Tenth Circuit recently joined the fray, holding that same-actor evidence raises a strong inference against discriminatory intent and affirming summary judgment in favor of the defendant.[30] Therefore, now, in eight of the eleven circuits, same-actor evidence often carries nearly irrebuttable presumptive value with respect to discriminatory motive.[31]

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discrimination is the elusive state of mind, "dissecting the mind of the decisionmaker, searching for signs that discriminatory animus or conscious bias motivated the decisionmaker to take a particular action at a precisely defined moment in time"); *see also infra* note 123.

[29] *See, e.g.*, Coleman v. Quaker Oats Co., 232 F.3d 1271, 1286 (9th Cir. 2000) (arguing that plaintiff's case is "weakened" when the same actor is responsible for both hiring and firing that occurs within a short period of time because a "strong inference arises that there was no discriminatory motive"); Banks v. Travelers Cos., 180 F.3d 358, 366 (2nd Cir. 1999) ("[W]hen the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire. This is especially so when the firing has occurred only a short time after the hiring."); Taylor v. Virginia Union Univ., 193 F.3d 219, 231 (4th Cir. 1999) (noting that "[i]t strains credibility to believe that Chief Wells would have falsely rated Taylor as marginal in one category in her performance evaluation only eight months after he recommended that she be hired, so that he could prevent her from being promoted to the rank of corporal because she was a woman"); EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996) ("The same hirer/firer inference has strong presumptive value."); Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (noting its approval of the same actor inference and quoting Proud); LeBlanc v. Great American Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993) (asserting that there was nothing in the record suggesting why the employer who approved a pay raise for an employee would develop an aversion to older employees less than two years later); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 175 (8th Cir. 1992) (noting that "[i]t is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later").

[30] The Tenth Circuit in *Antonio v. Sygma Network, Inc.*, joined its sister circuits that deem this information significant and persuasive with respect to the ultimate question of discrimination. Antonio v. Sygma Network Inc., 458 F.3d 1177, 1180, 1183 (10th Cir. 2006). While the court declined to recognize a presumption, it viewed same-actor evidence as raising a "strong inference," affirming summary judgment in favor of the employer. *Id.* at 1183.

[31] For a more detailed description of the continuum, see reference to the author's companion work-in-progress that more closely tracks the migration across the circuits and analyzes it in relation to recent developments under Title VII jurisprudence. *See supra* note 62.

The remainder of the circuits, the Third, Sixth, and Eleventh, have shown some restraint in their application of the same-actor principle. While they accept generally the theoretical underpinnings of the doctrine, they have detoured some from *Proud*, approaching it with relative caution. Rather than inferential value, these circuits consider same-actor evidence relevant information, along with all other evidence, from which a fact finder can draw an inference of absence of discriminatory animus.[32]

From "permissible" to "strong"[33] inference; "presumptive"[34] to "inferential"[35] value, the strength and weight accorded same-actor evidence has made understanding this doctrine difficult to say the least. Some courts describe the effect of the doctrine as a "presumption,"[36] while others denote it as an "inference,"[37] and there are others that cast it as both in the same opinion.[38] At its inception, the same-actor factor was deemed to create a "strong inference" against discrimination. In more recent decisions, the courts have attempted to clarify the difference.[39]

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[32] In this band, the Sixth circuit recently retreated from its more restrictive application of same-actor evidence. In *Wexler v. White's Fine Furniture*, an age discrimination case, the Sixth Circuit reconsidered and distinguished its position taken in an earlier case in which it recognized the same-actor inference and underlying premise under *Proud*. *See* Wexler v. White's Fine Furniture, 317 F.3d 564, 572–73 (6th Cir. 2003) (distinguishing the relevant circumstances of the court's earlier decision in *Buhrmaster v. Overnite Transportation Co.*, 61 F.3d 461, 463 (6th Cir. 1995) in which it adopted the same-actor inference). The court has now retreated from its stronger position taken in *Buhrmaster*. Reversing the trial court's grant of summary judgment in favor of the employer, the court clarified that same-actor evidence amounts to a permissive inference, not a mandatory one. *Wexler*, 317 F.3d at 573. Interestingly, *Wexler* was hailed as setting a new curve, reflecting a soft turn in the use of the inference in its most potent forms. However, post-*Wexler* decisions reveal that the inference is still alive and well, continuing to invoke strong inferences against discrimination and result in summary dismissal against plaintiffs. *See, e.g.*, *Antonio*, 458 F.3d at 1177, 1183–84 (affirming summary judgment where plaintiff was fired shortly after being hired by the same-actor).

[33] *Compare* Coghlan v. Am. Seafoods Co., 413 F.3d. 1090, 1098 (9th Cir. 2005) (describing the same actor inference as "neither a mandatory presumption (on the one hand) nor a mere possible conclusion for the jury to draw (on the other hand). Rather, it is a 'strong inference' that a court must take into account on a summary judgment motion."), *with Wexler*, 317 F.3d at 573 (rejecting the idea that same-actor evidence creates a mandatory inference) *and* Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) (permissible inference that no discriminatory animus motivated the defendant).

[34] *See* EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir.1996) (granting same-actor evidence strong presumptive value).

[35] *See, e.g.*, *Williams*, 144 F.3d at 1443 (permissible inference that no discriminatory animus motivated the defendant); Haun v. Ideal Indus., Inc., 81 F.3d 541, 546 (5th Cir. 1996) ("While evidence of [same actor] circumstances is relevant in determining whether discrimination occurred, we decline to establish a rule that no inference of discrimination could arise under such circumstances."); Waldron v. SL Indus., Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995) (noting that the same-actor inference "is simply evidence like any other and should not be afforded presumptive value").

[36] *See* Brown, 82 F.3d at 658 & n.25 (noting "the existence of the *Proud* presumption").

[37] *See* Bradley v. Harcourt, Brace & Co., 104 F.3d 267, 270–71 (9th Cir. 1996) (holding that the plaintiff's evidence was insufficient as a matter of law to rebut the *strong* same-actor inference).

[38] *See Our Lady of the Resurrection Med. Ctr.*, 77 F.3d at 152 (stating that the "same hirer/firer inference has strong presumptive value").

[39] *See, e.g.*, Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (explaining that same-actor evidence creates a strong inference, *not* a presumption); Coghlan v. American Seafoods Co., 413 F.3d 1090, 1098 (9th Cir. 2005) (distinguishing inference and presumption and clarifying that the same-actor inference is "neither a mandatory presumption . . . nor a mere possible conclusion for the jury to draw").

Phraseology aside, the effect of the same-actor doctrine on a plaintiff's case can be damning for sure, depending on the formulation applied by court.[40]

The moral is that the same-actor factor is fully entrenched in the jurisprudential landscape of the burden-shifting framework of Title VII circumstantial evidence cases.[41] The zealotry of the evolution of the theory within workplace law emphasizes the enigma of the same-actor doctrine and its underlying psychological assumption.

C. *Same-Actor Inference and the* McDonnell Douglas *Framework*

The analytical framework, commonly known as the *McDonnell Douglas*-model, provides a mechanism for evaluating claims of alleged workplace discrimination in the absence of the smoking gun. State of mind of the actor became center stage when the Supreme Court devised the framework for analyzing individual discrimination claims of disparate treatment under Title VII. The Court declared and refined this framework in a string of cases beginning with *McDonnell Douglas v. Green*.[42]

To prove unlawful disparate treatment under Title VII, a plaintiff maintains the ultimate burden of proving that the employer engaged in an unlawful employment practice—an adverse employment-related action because of a protected characteristic under Title VII. To begin, the plaintiff has the burden of proving a prima facie case of discrimination. To succeed in doing so, the plaintiff first must show that she (1) belongs to a protected class under Title VII, (2) qualifies for the position in question

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[40] In operational terms, the same-actor inference heightens a plaintiff's burden in a circumstantial evidence case. The Ninth Circuit recently addressed whether plaintiff's standard for prevailing at the summary judgment stage is heightened in the presence of same-actor evidence. *See Coghlan*, 413 F.3d at 1096 & n.10 (describing plaintiff's burden as "*especially steep*" because of the presence of the same-actor evidence and acknowledging that once confronted with it, plaintiff "must present correspondingly *stronger* evidence of bias" to overcome the presumption) (emphases added). Whether the same-actor doctrine comports with recent Supreme Court Title VII law, particularly at the summary judgment stage, bears more thorough engagement that is beyond the purview of this Article, hence, my goal with a current work-in-progress ("work-in-progress"). Suffice it to say that *Coghlan* represents a trend, one that arguably results in the judge invading the province of the jury, deferring to business judgment. *See also* Goldman, *supra* note 8, at 1560 (discussing lower federal courts' improper use of the same-actor inference at the summary judgment stage).

[41] Importantly, the full degree to which this doctrine is embedded in the jurisprudence may be underestimated because so many of the cases are not reported in the Federal Reporter. It appears that the choice not to publish these cases masks the extent to which the same-actor doctrine pervades the Title VII disparate treatment law. As part of the work-in-progress referenced *infra* note 62, the author plans to include an empirical component that better assesses the impact of the doctrine on plaintiffs. As Professors Chew and Kelley have commented with respect to racial harassment cases, such underreporting distorts the credibility of such claims of bias. Chew & Kelley, *supra* note 5, at 62–63. Perhaps similarly, without publication, the same actor doctrine's rationale and continued use are legitimatized in some fashion.

[42] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–03 (1973). *See also* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981) (discussing the *McDonnell Douglas* framework); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575–77 (1978) (discussing a prima facie case under the *McDonnell Douglas* framework).

and applied for it, (3) was rejected, and (4) the position remained open or was otherwise filled by another.[43] Once the plaintiff meets this burden by a preponderance of the evidence, a rebuttable presumption arises that the employer engaged in discrimination.[44] Next, the burden of production shifts to the employer to articulate a legitimate non-discriminatory reason for the alleged adverse employment action, some reasonably specific factual basis for its decision.[45] The respective burdens of the parties at this stage of the process are not particularly onerous.[46] Thus, once the employer meets its burden of production, the presumption that arose from the prima facie case disappears. That is, the "legally mandatory inference of discrimination arising from the plaintiff's initial evidence" no longer exists.[47]

Most often, the final stage of the analytical model constitutes the battleground for the parties. After the employer articulates its justification, without the benefit of the presumption, the plaintiff has an opportunity to prove to the finder of fact that the employer's reason is unworthy of credence, a pretext for unlawful discrimination.[48] The plaintiff will present evidence from which a fact finder can draw an inference of discriminatory animus.[49] Most courts engage in a totality-of-the-evidence assessment to

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[43] Although *McDonnell Douglas* involved a failure to hire, the Court made clear that it intended that the elements of the prima facie case be malleable such that courts adjust the elements to fit the particular cause of action. *McDonnell Douglas*, 411 U.S. at 802 & n.13 (reminding the lower courts of the variability of the factual bases for Title VII actions and, thus, "the specification . . . of the prima facie proof [in a hiring case like *McDonnell Douglas*] is not necessarily applicable in every respect to differing factual situations"). The courts have adapted this proof structure to fit various causes of action. *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 281–83 (1976) (disciplinary discharge context); Mauro v. S. New England Telecomms., Inc., 208 F.3d 384, 386 (2d Cir. 2000) (promotion context); Tuck v. Henkel Corp., 973 F.2d 371, 375 (4th Cir. 1992) (demotion context).

[44] *Burdine*, 450 U.S. at 254 & n.7.

[45] *Id.* at 254–55.

[46] *Id.* at 253. While the respective burdens are not particularly onerous, it is important to note that the plaintiff and employer do carry different burdens. The plaintiff must *prove* a prima facie case by a *preponderance of the evidence*, whereas the employer has only the burden of *production* to articulate some reasonable non-discriminatory basis for its decision. *Id.* at 253–56. From the employer's perspective, the Court explained that it "need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." The employer's evidence must be legally sufficient to justify a judgment for the employer, and must set forth the reasons for the employer's action against the plaintiff. *Id.* at 254–55.

[47] *Burdine*, 450 U.S. at 255 & n.10.

[48] As the Supreme Court has expounded, this rubric serves to organize the evidence to facilitate the court's assessment of the ultimate question of discrimination. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 & n.3 (1983); *see also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (cautioning that the disparate treatment analytical framework was never intended to be "rigid, mechanized, or ritualistic," but instead provides for orderly evaluation of the evidence).

[49] The Supreme Court determined that a plaintiff can prove pretext "either directly . . . or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. The nature of this evidence varies widely, but the plaintiff may use comparative data involving similarly situated individuals, offer statistics reflecting the overall make up of the employer's workforce, or other information surrounding the circumstances of her employment that otherwise raises an inference of discrimination. Although the presumption of discrimination that attached from

determine whether more likely than not, the employer engaged in unlawful discrimination.[50] Despite this seemingly holistic consideration of the evidence, plaintiffs often fail to prove discriminatory motive, even where the employer makes a mistake, relies on a false reason, or one that is pretextual but nonetheless lawful.[51] This phenomenon is explained by the deference courts accord an employer's business judgment and a hesitation to second guess its decisions.[52] The survival of a plaintiff's claims so often hinges on her ability to overcome the legitimate non-discriminatory reason offered by an employer.[53]

It is this third stage of the analysis where same-actor evidence becomes pertinent to the court's search for discriminatory motive under the *McDonnell Douglas* framework. The *Proud* court described the applicability of same-actor evidence at this stage as creating a "strong inference that the employer's stated reason for acting against the employee

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plaintiff's prima facie case disappears, the evidence from which the presumption arose retains evidentiary value in the court's analysis of pretext.

[50] As a result of the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, trial courts must make a holistic assessment of the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147–48 (2000). The decision also suggests that courts should exercise caution in granting wholesale motions for summary judgment filed by employers. *Id.*; *see also* Goldman, *supra* note 8, at 1556–57; McGinley, *supra* note 9, at 459–65 (discussing the implications of *Reeves* at the summary judgment stage).

[51] See Arnold v. Nursing & Rehab Center at Good Shepherd, LLC, 471 F.3d 843 (8th Cir. 2006) (noting that the fact that employer was mistaken that black nurse verbally abused resident does not matter since employer reasonably believed employee had engaged in the action); Maxfield v. Cintas Corp. No. 2, 427 F.3d 544 (8th Cir. 2005) (affirming summary judgment where employer's explanation was false and finding that the plaintiff must show that the reason was false and that discrimination was the real reason); Neal v. Roche, 349 F.3d 1246, 1251–52 (10th Cir. 2003) (finding that employer's decision to give preference to a white employee over a black employee in order to save the white worker from a layoff did not rise to an inference of discrimination); Zimmerman v. Assocs. First Capital Corp., 251 F.3d 376, 381–82 (2d Cir. 2001) (comparing its interpretation of *Reeves* with that of other circuits and opining on plaintiffs' ability to succeed). For an example of an employer's success in light of evidence reflecting inaccuracy, misrepresentation or other seemingly inappropriate action, see, for example, Foster v. Dalton, 71 F.3d 52, 57 (1st Cir. 1995) (rejecting employer's proffered reason that selected candidate was more qualified than plaintiff, but finding that cronyism, while distasteful, was the real reason for the employer's decision-making, and that cronyism was not influenced by racial animus).

[52] *Foster*, 71 F.3d at 57; *see also supra* note 22.

[53] The courts' application of the same-actor doctrine seems in direct contravention to the recent Title VII law. In order to prevail in the face of same-actor evidence, generally, a plaintiff must do more than cast doubt on the employer's justification; a plaintiff must also present additional evidence that discrimination was the real reason. *See supra* note 54. Although *Proud* predated significant Title VII law, it implored courts to resist the temptation to become distracted by the nuances of the framework and forget that the exercise is a search for unlawful discriminatory intent. *See* Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) (declining to engage in detailed analysis of plaintiff's contentions). Post-*Reeves* decisions reflect that courts continue to struggle in evaluating the essence of a plaintiff's claim of unlawful discrimination. *Compare* Evans v. City of Bishop, 238 F.3d 586, 592 (5th Cir. 2000) (noting that the "Supreme Court in *Reeves* emphasized the importance of jury fact finding and reiterated that evidence of the prima facie case plus pretext may, *and usually does,* establish sufficient evidence for a jury to find discrimination") (emphasis added), *with* Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir. 2001) (noting that "the Supreme Court has indicated that only occasionally will a *prima facie* case plus pretext fall short of the burden a plaintiff carries to reach a jury on the ultimate question of discrimination" but that "such occasions do exist") (citing *Reeves*, 530 U.S. at 148).

is not pretextual."[54] Thus, an employer typically argues that because the same individual involved in the alleged adverse action also hired or otherwise treated plaintiff favorably, a reasonable fact finder could not conclude that the basis for the action was discrimination. The plaintiff can offer evidence to counteract the inference, but as the *Proud* court surmised, "in most cases . . . such evidence will not be forthcoming."[55] More than fifteen years later, the court's prediction seems eerily prophetic, as if the court foretold the story that has emerged regarding plaintiffs' efforts to overcome the inference and to confront the underlying assumption of the principle.[56] Very often plaintiffs' efforts to repudiate same-actor evidence prove futile, especially in those jurisdictions that draw a strong inference of non-discrimination, heeding *Proud*'s appeal to "promptly dismiss such insubstantial claims in order to prevent the statute from becoming a cure that worsens the malady of . . . discrimination."[57]

As discussed below, *Proud*'s faulty rationale and underlying assumption have provided the gateway for the evolution of this doctrine, the emergence of another loophole for employers charged with unlawful workplace acts. For sure, the same-actor principle has confused and derailed the inquiry for motive in a dangerous fashion, taking us on a route far from the remedial purposes of Title VII and leading us no closer to remedying unlawful discrimination under the Act.

D. *Wayward Doctrine—The Evolution of the Same-Actor Principle*[58]

Since the formulation of the same-actor principle in 1991, its evolution has been steady and expansive. Within five years of the Fourth Circuit's declaration in *Proud*, the saliency of its force was undeniable. Nearly every circuit had recognized and applied some variation of the principle by then, most with resounding approval of *Proud*'s underlying theme.[59] A minority of these circuits assigned same-actor evidence a supplemental

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[54] *Proud*, 945 F.3d at 798.

[55] *Id.*

[56] In a companion work-in-progress, the author is exploring the nature of the competing narratives that underlie this doctrine. In part, the author seeks to assess the power of the underlying assumption, and why the courts seemingly have been seduced to perpetuate a myth about human motivation and discrimination in society more generally.

[57] *Proud*, 945 F.3d at 798. A recent Ninth Circuit decision exemplifies how the inference operates in the context of the *McDonnell Douglas* framework, heightening the burden for plaintiffs in Title VII cases. Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1093–94 (9th Cir. 2005); *see also* discussion *supra* note 33. In *Coghlan*, the Ninth Circuit explained that a plaintiff's "burden is especially steep . . . because of the so-called 'same actor inference.'" *Coghlan*, 413 F.3d at 1096.

[58] This Part is a subpart of a companion work-in-progress, wherein the author tracks the migration of this doctrine across the circuits, analyzes how it interacts with the landscape of employment discrimination jurisprudence including the *McDonnell Douglas* framework, *Reeves* and *Desert Palace*, and demonstrates its debilitating effects on plaintiffs throughout the litigation process, particularly at the summary judgment stage. *See supra* note 62.

[59] As of 1996, the only circuits that had neither recognized nor issued an opinion on the inference were the Second and the Eleventh Circuits.

role in relation to all other evidence. The majority of those circuits, however, granted this evidence a more prominent position in the analytical framework, making it particularly difficult for plaintiffs to prove discrimination.

When the Fourth Circuit established this principle, its formulation delineated what seemed like clear parameters for its application. Specifically, in *Proud*, the court stated that "in cases where the hirer and the firer are the *same individual* and the *termination* of employment occurs *within a relatively short time span following the hiring*, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."[60] Notwithstanding the fundamentally faulty nature of the inference in my view, the court seemed to contemplate a fairly narrow set of circumstances from which a fact finder could assess discriminatory motivation violative of Title VII. In *Proud*, the same person both hired and fired the plaintiff within a span of only four months. The following year in a case decided shortly after *Proud*, the Eighth Circuit extended the interval to two years in another age discrimination case.[61] Thus, in only a matter of months, courts began expanding the narrow parameters articulated by the Fourth Circuit in *Proud*.

Instead of confining the doctrine to a particularized set of circumstances, *Proud* ignited a phenomenon whose effects are far-reaching. An overview of some of the extensions that are most problematic follows.[62]

1. *Time Interval*

Theoretically, the short time interval between hiring and firing presents the most appealing aspect of the doctrine's rationale. Despite the reasons why an employer hires a candidate initially, any negative action taken against that individual by the same decision-maker shortly thereafter raises at least a plausible case that discriminatory motive was absent.[63] In my

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[60] *Proud*, 945 F.2d at 797 (emphasis added).

[61] *See* Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 175 (8th Cir. 1992) (applying the same-actor doctrine to its analysis of plaintiff's claim of age discrimination). This Eighth Circuit opinion is often cited as a companion case to the Fourth Circuit's decision in *Proud*. In the court's view, the same-actor parameters—"[t]he short time plaintiff worked for the defendant, his age when hired, and the identity of those who hired and fired him"—proved fatal to plaintiff's age discrimination claim. *Id.* The court stated that, "[i]t is simply incredible . . . that the company officials who hired [the plaintiff] at age fifty-one had suddenly developed an aversion to older people less than two years later." *Id.*

[62] While this Article focuses on a few of the extensions I consider most problematic, I expand my exploration of these and other bases for the evolution of the doctrine in a current work-in-progress, *Debunking the Myth of Discriminatory Animus under Title VII Law: Plaintiffs' Plight Against the Same Actor Doctrine*. This companion piece should be seen as a prequel more closely tracking the migration of the doctrine across the circuits and analyzing its relationship to recent developments under Title VII jurisprudence. This endeavor assesses the use of this doctrine at various stages of the litigation process, with particular focus on the summary judgment stage, and it offers a prescription for reigning in this wayward doctrine.

[63] *See, e.g.*, Herr v. Airborne Freight Corp., 130 F.3d 359, 362–63 (8th Cir. 1997) (holding that same-actor evidence raised a strong inference against discrimination when plaintiff's last work

view, it is this aspect of the doctrine that makes it palatable as a starting point for engagement. The persuasiveness of same-actor evidence loses force, however, as the time interval expands.[64] The longer the interval, the more tenuous the argument becomes. While the original expression of the principle involved a shorter time frame, subsequently, the courts expanded it to as much as seven years.[65] While no reported circuit court decision has applied the inference against a plaintiff beyond the seven years, many have applied it well beyond the *Proud* and *Lowe* standards.[66] Moreover, the courts are inconsistent as to what amount of time constitutes a short time frame. Thus, the manner in which the courts have applied and expanded the time frame reflects nothing more than lip service to the rationale of *Proud*'s focus on the brevity of the interval between positive and negative employment decisions.

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assignment occurred *sixteen* days after her first one); Brown v. McDonnell Douglas Corp., 113 F.3d 139, 142 (8th Cir. 1997) (deemed "'simply incredible'" that same decision-maker would engage in discrimination *five months* after hiring plaintiff).

[64] While the short time frame application of the inference appears less problematic at first blush, the rub emanates from the court's discretion in determining what constitutes a short time interval. Such malleability leaves room for expanding the circumstances under which the inference applies. A recent case exemplifies this tension. In *Daub v. Eagle Test Systems, Inc.*, a California federal court declared that "four years is still considered a short time," and "not so long a time as to [weaken] the presumption." Daub v. Eagle Test Sys., Inc., No. C-05-01055, 2006 WL 3782877, at *11 (N.D. Cal. Dec. 21, 2006) (unpublished order granting employer's motion for summary judgment). *See also* Houk v. Peoploungers, Inc., 214 F. App'x 379, 381 (5th Cir. 2007) (claim of age discrimination deemed "tenuous" where plaintiff was fired "only a year and a half after he was hired" by one of the same managers involved in his discharge); Robinson v. American Acryl NA, No. H-06-570, 2007 WL 471121, at *3 (S.D. Tex. Feb. 8, 2007) (rejecting plaintiff's argument that inference inapplicable because a little less than four years is too long a time interval); Myers v. U.S. Cellular Corp., No. 3:05-CV-511, 2007 WL 230100, at *12 (E.D. Tenn. Jan. 26, 2007) (deeming same-actor inference very strong where, within a span of eighteen months, one of the decision makers, before firing plaintiff, promoted her twice and gave her good performance evaluations). *But cf.* Garrett v. Garden City Hotel, Inc., No. 05-CV-0962, 2007 WL 1174891, at *6, 15 n.14 (E.D.N.Y. April 19, 2007) (deeming same-actor inference less compelling where a "significant period of time" of four years elapsed between promotion and firing).

[65] Adreani v. First Colonial Bankshares Corp., 154 F.3d 389, 392 (7th Cir. 1998) (same-actor inference relevant when plaintiff was fired seven years after being hired); Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995) (opining that a jury could draw the inference when the length of time between the hiring and firing was seven and a half years because it is possible that an employer who has nothing against women when hires them, has nothing against women when fires them, "*regardless of the number of years that pass*") (emphasis added). *But cf.* Carlton v. Mystic Transp., Inc., 202 F.3d 129, 138 (2d Cir. 2000) ("The seven years between [plaintiff's] hiring and firing significantly weakens the same-actor inference.").

[66] *See, e.g.*, Williams v. Vitro Services, Corp., 144 F.3d 1438, 1440 (11th Cir. 1998) (reversing summary judgment in favor of employer and declining to accord same-actor evidence presumptive value where eleven-year interval existed between rehiring and second reduction in force); Hansen v. Clark County, No. 2:05-CV-672, 2007 WL 1892127, at **2–3, 8 (D. Nev. June 27, 2007) (seven years; same-actor evidence creates strong inference of non discrimination); Hollingsworth v. Henry County Med. Ctr. EMS, Inc., No. 05-1272 B, 2007 WL 1695303, at *9 (W.D. Tenn. June 12, 2007) (six years interval). *See also* Mitchell v. Superior Court of Cal., San Mateo, Nos. C 04-3135 VRW, C 04-3301 VRW, 2007 WL 1655626, at **14–15 (N.D. Cal. June 7, 2007) (refusing to extend the time period that same actor inference applies to thirteen years, but agreeing with "the *Coghlan* opinion's logic that evidence that a particular actor has developed a bias during the interval should be regarded as more relevant than the length of that interval in defeating the same actor inference . . . .").

2. *Same Decision-Maker*

At its inception, *Proud* required consistency in the decision-maker, that is, that the hiring and firing be initiated by the *same* individual.[67] This element has been significantly broadened as well. Many courts have retreated from requiring the existence of a direct relationship between the decision-maker and the employee.[68] Thus, the courts have applied the inference to employment decisions involving multiple decision-makers, where more than one individual has input into the worker's fate.[69] A larger number of the more recent cases present multiple decision-maker scenarios, which mirror the prevalence of team work and collective processing in contemporary work settings. For example, courts have been willing to apply the inference where even a co-worker influenced the decision-making process or otherwise engaged in the circumstances involving the employee.[70] This extension is perhaps one of the most

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

[68] As long as the decisions were made by the same organization or division, courts have applied the inference. *See, e.g.*, Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1130 (4th Cir. 1995) (indicating that hirer-firer identity satisfied if the *same company* involved in both decisions); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 513 (4th Cir. 1994) (suggesting that a direct relationship between individual hirer and the plaintiff is not necessary to establish the inference so long as the firing official has hired others in plaintiff's protected class); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174 (8th Cir. 1992) (considering evidence that "same people" or "same company officials" hired and fired plaintiff in less that two years "compelling" . . . in light of the weakness of the plaintiff's evidence otherwise").

[69] *See, e.g.*, Houk v. Peoploungers Inc., 214 F. App'x 379, 381 (5th Cir. 2007) (noting that plaintiff was hired by *one* of the same managers that was ultimately involved in firing him) (emphasis added); Keri v. Bd. of Trs. of Purdue Univ., 458 F.3d 620, 648 (7th Cir. 2006) (applying the same actor inference because *one of the members of the tenure committee* was instrumental in both hiring and firing the plaintiff, and noting that an inference against discrimination on that member's part existed, even if limited) (emphasis added); Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (noting that "[m]ost of the same individuals-including Johnson-who decided to terminate Antonio for job abandonment had also hired her twice"); Jetter v. Knothe Corp., 324 F.3d 73, 74–75 (2d Cir. 2003) (noting that *four individual defendants*, in addition to the defendant corporation, were involved in the decision to terminate plaintiff) (emphasis added); Wofford v. Middletown Tube Works, Inc., 67 F. App'x 312, 318 (6th Cir. 2003) (noting that Mr. Lamb and Ms. Phillips were the sole actors involved in plaintiff's hiring and termination, and that under the same actor inference, "the fact that the same person *or group of people* did both the hiring and firing over a short time frame is strong evidence that there was no discrimination involved in the later termination") (emphasis added); Waterhouse v. District of Columbia, 298 F.3d 989 (D.C. Cir. 2002) (finding persuasive the fact that the *same group of management officials* who hired plaintiff also fired her only a short time before, thereby raising a presumption or inference of non-discrimination); Lewis v. 20th-82nd Judicial Dist. Juvenile Prob. Dep't, 190 F.3d 538, No. 99-50189, 1999 WL 642898, at *3 n.1 (5th Cir. 1999) (noting that Mr. Ortega terminated the plaintiff, but that Mr. Ortega performed the termination at the instruction of Ms. Dillenberger); Sreeram v. La. State Univ. Med. Ctr.-Shreveport, 188 F.3d 314, 317 (5th Cir. 1999) (noting that plaintiff's expulsion from the medical program was recommended by the *Residency Review Committee*, composed of members of the medical staff) (emphasis added); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1442–43 (11th Cir. 1998) (noting that the employer has pointed to evidence that the same individual was responsible for both positive and negative employment actions toward the plaintiff, while at the same time acknowledging that the evidence shows that the same individual was *involved* with these actions and *identifying other individuals* that were also involved in these decisions) (emphasis added).

[70] *See, e.g.*, Jean-Baptiste v. K-Z, Inc., 442 F. Supp. 2d. 652, 665 (N.D. Ind. 2006).

troubling because it fails to account for the complexity of work structures and institutional practices characteristic of the modern workplace, namely team work and collective decision-making.[71] For example, a decision-maker may receive input from a biased team member or become privy to information suggesting bias by someone who can potentially influence the the decision. Ferreting discriminatory motive becomes a more difficult task when a decision-maker receives input data from others regarding an employee.[72] While some courts have acknowledged the intricacies of bias in layered work settings, their awareness has not spurred the collective following to significantly weaken the nature of the doctrine.[73]

3. *Same Protected Category*

In an equally troubling variation of the decision-maker expansion highlighted above, courts have deemed the inference strengthened when the same-actor belongs to the same protected class as the plaintiff[74] or hires another in the same protected category as the plaintiff.[75] The rationale is

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[71] Not only have the courts significantly loosened their formulation of the inference with respect to the same-actor requirement, they have invoked the principle in situations where there exists ambiguity about the role of the alleged discriminator in the favorable treatment and the alleged adverse action. *See, e.g.*, Nieto v. L & H Packing Co., 108 F.3d 621, 623–24 (5th Cir. 1997) (noting that the plaintiff was hired based on the recommendation of a supervisor and it was this same supervisor that recommended that the plaintiff's employment be terminated). This variation provides a more fundamental diversion from the premise of *Proud*. To augment the doctrine where the circumstances leave some doubt—not only about the identity of the decision-maker but even whether that person provides the continuity that is so fundamental to the doctrine's underlying assumption—adds to the doctrine's suspect nature.

[72] Part III of the Article more fully explores this premise with respect to the structural, operational, and cultural terms. For example, Part III engages this doctrine in an exploration of various work structures and evaluative models used in the workplace. Moreover, the manner in which the courts have loosened the parameters with regard to the actors involved, contradicts other recent developments under Title VII. Specifically, the *cat's paw* theory recognizes, to some degree, the complexities of the decision-making process. Under this doctrine, courts acknowledge the influence of biased individuals beyond the putative decision-maker. This doctrine is based on the notion that bias may reside outside the actual decision-maker, but infect the process nonetheless. Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

[73] See *infra* Part III, which maps the doctrine to the contemporary workplace realities including work structures, evaluative models, and powerful relational forces that affect decision-making processing and bears on motivation.

[74] *See, e.g.*, Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (opining that the inference that discrimination was not the motive for an employer's action is strengthened when the same-actor is also in plaintiff's class); Stover v. Hattiesburg Pub. Sch. Dist., No. 2:05CV388, 2007 WL 465664, at *9 n.25 (S.D. Miss. Feb. 8, 2007) (citing *Brown* for this same proposition); Robinson v. American Acryl NA, No. H-06-570, 2007 WL 471121, at *1, *3 (S.D. Tex. Feb. 8, 2007) (applying presumptive value to same-actor evidence where the one decision-maker belongs to the same racial category as plaintiff and another is over forty like plaintiff); *cf.* Feingold v. New York, 366 F.3d 138, 155 (2d Cir. 2004) (rejecting the assertion that "an inference of discrimination cannot be drawn because [plaintiff] was fired by another Jew").

[75] *See, e.g.*, Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 513 (4th Cir. 1994) (suggesting that as long as the decision-maker has hired others in plaintiff's protected class, a showing of a direct relationship between the decision-maker and the plaintiff is unnecessary); Collins v. Sailormen Inc., 512 F. Supp. 2d 502, 507 (W.D. La. 2007) (holding no discrimination occurred when five of the six managers who reported to plaintiff's boss were black). However, in a recent Sixth Circuit decision, the court declined to accept this same-group version of the inference as a mandatory inference. Wexler v.

similar to that of the same-actor inference—that a member of the same protected class is unlikely to harbor bias against one of the same class. This seems to be in contravention of Supreme Court authority reflecting the fact that plaintiff and her replacement are in the same protected is generally irrelevant to the search for intentional motive.[76]

Without a doubt, the same-actor doctrine has experienced quite a transformation in a short period of time. A pithy phrase with one-liner doctrine has swept the circuits, establishing a formidable presence in the employment discrimination jurisprudence. We should be particularly concerned in light of the realities of the modern workplace, as explored in Part III. Using same-actor evidence as a decision-making apparatus with respect to claims of unlawful workplace treatment, courts avoid thinking about discrimination in any real sense, reducing the complex inquiry to an insufficient shorthand reference. Through reflexive and unrestrained application of this doctrine, the courts have subverted notions of equality and diversity in the American workplace.

III. THE MODERN WORKPLACE—IT IS A WHOLE NEW WORLD

There is no question that the structure of our workplaces has changed tremendously over the last several decades. This is due in part to the growth of global initiatives, technological advances, the changing demographic of the available labor pools, and target customer bases.[77] As recognized by several legal scholars including Professors Linda Hamilton-Krieger, Susan Sturm, Cheryl Wade, and Tristin Green, the modern workplace is a tangled web of complex human, institutional, structural, and cultural dimensions.[78] Additionally, business scholars offer an array of

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White's Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003). In *Wexler*, the primary decision-maker was older than the plaintiff. The court's rejection may well soften the blow of the same-actor inference, but the inference remains viable under the court's view. Willing to accept that one's brethren could discriminate against one another, the court is less convinced that the same-actor could engage in biased behavior. The court seems to stretch this logic.

[76] *See* O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) (unanimous opinion holding that "[the] fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost because of [his status in the protected class]"). The trend in the lower courts reflects a heeding of the Court's view on this issue. *See, e.g.*, Stella v. Mineta, 284 F.3d 135, 145–46 (D.C. Cir. 2002) (collecting cases). Some courts have recognized exceptions to this rule. *See, e.g.*, Brown v. McLean, 159 F.3d 898, 905–06 (4th Cir. 1998), *cert. denied sub nom*, 526 U.S. 1099 (denoting some circumstances when it would apply an exception to this rule).

[77] *See generally* THE NEW MODERN TIMES: FACTORS RESHAPING THE WORLD OF WORK (David B. Bills ed. 1995); *see also* Catherine Romano, *Managing Change, Diversity and Emotions*, MGMT. REV., July 1995, at 6 (highlighting that a significant percentage of American companies are transforming their business including in three major areas—information technology (84.2 %), process reengineering (80.3%) and strategic planning (65.6%)); H. Weiss, *Managing in a Changing World*, SUPERVISION, 2006, at 1, 17–20 (exploring the challenge or companies to remain viable in a globally competitive marketplace).

[78] *See generally* Green, *supra* note 10; Tristin K. Green, *Work Culture and Discrimination*, 93 CAL. L. REV. 623 (2005); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495 (2001); Susan Sturm,

literature on the transformation of the American workplace, documenting successes and failures as businesses adjust strategies and structure to ensure their viability.[79]

This Part lays the ground work for my thesis that the same-actor doctrine fails to comport with the realities of the contemporary workplace. Specifically, exploration of three aspects of contemporary work environments—work structure, evaluative models, and relational dynamics—illuminates the social complexity of organizations, and demonstrates how these facets serve as vectors for the injection of bias into the decision-making process between the time an individual is hired and fired, or otherwise subjected to adverse treatment.

A. *Corporate Structures and Evaluative Models*

The manner in which organizational goals are accomplished through the utilization of human capital has expanded from a seemingly individualistic endeavor to a team-based collaborative. Increased variation in the conceptions of work produces changes in the decision-making processes within work environments. Employers have replaced hierarchical and vertical decision trees with more horizontal and collective processing.[80] Additionally, the emergence and salience of workplace culture impact significantly interaction among workers and the motivations of decision-makers. The use of such workplace management tools causes one to question the validity of the same-actor inference.

1. *Organizing around Work Teams*

To reenergize the American workforce, and thereby increase productivity, American companies began experimenting with new business tools, including the use of work groups or self-directed work teams in the late 1970s and early 1980s.[81] At this time, American companies contended with the increase of foreign competition from their Japanese and European

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Second Generation Employment Discrimination: A Structural Approach, 101 COLUM. L. REV. 458 (2001); Susan Sturm, *supra* note 10; Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004).

[79] *See, e.g.*, Yves Doz & Mikko Kosonen, *The New Deal at the Top*, HARV. BUS. REV., June 2007, at 98, 98–104 (discussing how companies transform from the top down by altering business strategies and employing business models that stress collective responsibility and collobaration); Rosabeth Moss Kanter, *Transforming Giants*, HARV. BUS. REV., Jan. 2008, at 43, 43–52 (demonstrating the effect of global corporations' use of "internal guidance systems" that promote autonomy of workers on the front lines).

[80] *Id; see also* Aleksander P. J. Ellis et al., *Team Learning: Collectively Connecting the Dots*, 88 J. APPLIED PSYCHOL. 821, 821–35 (2003); John R. Hollenbeck et al., *Multilevel Theory of Team Decision Making: Decision Performance in Teams Incorporating Distributed Expertise*, 80 J. APPLIED PSYCHOL. 292, 292–316 (1995).

[81] While there is documented use of the work team concept as early as the 1960s, work teams were not mainstreamed into the American workplace until nearly a decade later. This was after Japanese businesses reflected major success with work team implementation and use. *See* JACK ORSBURN ET AL., SELF-DIRECTED WORK TEAMS: THE NEW AMERICAN CHALLENGE 13–14 (1990).

counterparts abroad. Attempting to amass the building blocks to revitalize their businesses and become a force within the global economy, American businesses awakened to their human problem—pervasive workplace discord marked by low employee morale. In short, American workers felt devalued, mismanaged, and unrewarded.[82] Without productive human capital, American businesses could not compete, let alone lead, in a global market characterized by a level of quickness and pliability antithetical to post-World War American business operations. To accommodate the evolving norms of business strategy, transformation took place in worker utilization and workplace management, including the use of self-directed work teams and collective decision-making processes.

A hallmark of the self-directed work team is a mass of active, rather than passive workers. That is, distinct from the conventional manner in which businesses utilized workers, work teams resulted in "institutionalized participation" of the workforces.[83] Through cross-functional training, and information and resource sharing, for example, organizations empower employees to take ownership interest in corporate success. No longer responsible for task-specific assignments or functions, work teams command the entire work flow process from beginning to end. Since they share equal responsibility for producing a finished product, each member fully vests in the work, which breeds a sense of entitlement, ownership, and greater overall job satisfaction.[84] Such integration affords employees greater decision-making authority over their daily work activities, problem solving, and interpersonal issues.[85]

Not only do self-directed work teams serve as tactical directors for business goals, but they also supplant many of the functions of supervisors and middle managers, such as handling personnel matters like hiring and performance-related discipline.[86] As a self-directed work team evolves, the supervisor or manager recedes into the backdrop.[87] The team charts its

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[82] This strife illuminated the ineffectiveness of the American legacy of corporate bureaucracy, hierarchical work structures, and rigid operations. The conundrum for American companies became how to motivate the workforce, and thereby provide quality goods and services, all while minimizing costs.

[83] ORSBURN ET AL., *supra* note 81, at 13.

[84] *Id.* at 13–16.

[85] For example, work teams "solve problems, schedule and assign work, and in many cases handle personnel issues like absenteeism or even team selection and evaluation." *Id.* at 8–9.

[86] *See, e.g.*, RICHARD S. WELLINS ET AL., SELF-DIRECTED TEAMS: A STUDY OF CURRENT PRACTICE 23–25 (1990) (showing that self-directed teams aid in "[h]andl[ing] individual performance problems" and "[s]elect[ing] team members"); Richard Saavedra & Seog K. Kwan, *Peer Evaluation in Self-Managing Work Groups*, 78 J. APPLIED PSYCHOL. 450, 459–60 (1993) (discussing the advantages of using peer evaluations in work group settings); *see also* Andrew Pollard, *The Emergence of Self-Directed Work Teams and Their Effect on Title VII Law*, Comment, 148 U. PA. L. REV. 931, 933 (2000) (discussing the rise and operation of work teams and commenting that a team "may control the production process, hiring, promotions, discipline, evaluations, and layoffs").

[87] The self-regulatory nature of organizations in cultural terms presents positive attributes undeniable to anyone familiar with supervising individuals. In particular, a strong corporate culture frees up managers and supervisors, disposing of the need for micro-managerial techniques. *See, e.g.*,

own path, sometimes awkwardly, through the current of daily work life.[88] Thus, they are sustained only by their individual involvement and collective strength and judgment.

Through work teams of any type, employees, released from the reigns of micromanagement strategies, embrace their independence. This emancipation from bureaucracy enlivens workers, and greatly increases productivity and effectiveness.[89] Notwithstanding the sense of self-determination and control manifested through work teams, such highly integrated business structures require tremendous collaboration, coordination, and the exercise of collective judgment by team members.[90]

This simultaneous independence and interdependence among team members hails as its strength. Yet, it is precisely this interplay that breeds tension in work groups allowing bias to manifest and stifle an individual's upward mobility. Once the terms and conditions of a worker's employment no longer depend on the relationship with an individual manager, interpersonal dynamics become more integral to one's employability. The juxtaposition of such systematic evaluative models and the informal relational context in which they exist present challenging workplace dynamics.[91]

The metamorphosis of conventional employees into self-directed work groups is a process all its own. The various stages of transition of work teams, from concept to maturity, present challenges in human engagement and management. From organizational research, we know the life cycle of teams begins with initial encounters in which members seek to orient themselves in terms of role and function within the unit.[92] Studies reflect that these initial encounters involve reciprocal information exchange, self-

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Jennifer A. Chatman & Sandra Eunyoung Cha, *Leading by Leveraging Culture*, 45 CAL. MGMT. REV. 20, 24 (2003). This attribute is not without risk, however. Empowerment of workers through the phenomenon of organizational culture leaves employees to their own devices, often with the unfettered discretion to wield upon any number of workplace matters. For further discussion on the relational dynamics in workplace decision-making, see *infra* Part III.B.2. *See also* Green, *supra* note 78, at 643–46 (offering examples of the ways in which culture can manifest discrimination).

[88] In work team environments, the role of the traditional manager and supervisor can take many forms. Depending upon the level of autonomy of the organization's teams, the supervisor may serve as a technical consultant, facilitator, or coach. In fact, the supervisor may serve in a transitional role and phase out altogether. ORSBURN ET AL., *supra* note 81, at 17–19. (discussing the transition process for supervisors and middle managers in self directing work team environments).

[89] Self-directed work groups may also emerge through employee self-initiative. Employees may organize themselves into networks around particular common interests, expertise, or experiences. Such informal work groups have become known as "communities of practice," and "quality circles." *See* Green, *supra* note 10, at 103 n.53. Technological advances, such as the internet, email conclaves, blogs, and listservs, have assisted such groupings. *See id.*

[90] For more information regarding the evolution process of teams and team performance see SIMS, JR. & LORENZ, *supra* note 2, at 209–13.

[91] For more discussion of work team conflicts, see Part II.B. *See generally* Karen A. Jehn, *Managing Workteam Diversity, Conflict, and Productivity: A New Form of Organizing in the Twenty-First Century Workplace*, 1 U. PA. J. LAB. & EMP. L. 473 (1998) (exploring conflict within work teams and identifying potential personality clashes).

[92] *See* ORSBURN ET AL., *supra* note 81, at 18–23.

disclosure, and more chivalrous engagement as excitement about the joint venture builds amongst team members.[93] As the transition is underway, the organization invests in cross-training to equip each member of the team with the necessary skills to contribute to team effort.[94] Such training enhances the team's technical, communication, and administrative skills.[95] By organizing work around teams, employers create environments that energize workers, enhance productivity, and encourage commitment to company goals, including sustained quality output and customer satisfaction.[96] The full transformation of workers into self-directed work teams requires interdependence and takes time.[97]

Like other social and functional units, work groups reflect the deeply held assumptions, beliefs, and values of its members. Thus, the interdependence of work groups produces a "system of shared values (defining what is important) and norms (defining the appropriate attitudes and behaviors)."[98] This complex and powerful force is known in the organizational behavioral and management worlds as corporate culture. It is this cultural overlay that commands the climate of any organization and group, setting expectations, influencing organizational learning, and informing attitudes and behaviors.

The essential nature of culture is its deeply embedded, unconscious shared learning.[99] These shared assumptions become ingrained in the fabric of organization or group life—it's "DNA," and it thrives as it is passed on to new members, shaping the way they think, feel, and act.[100] At its core,

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[93] *See* Bradley J. Alge et al., *When Does the Medium Matter? Knowledge-building Experiences and Opportunities in Decision-making Teams*, 91 ORGANIZATIONAL BEHAV. & HUM. PROCESSES 26, 27 (2003) (citing C.R. Berger, *Beyond Initial Ineraction: Uncertainty, Understanding, and the Development of Interpersonal Relationships*, in LANGUAGE & SOCIAL PSYCHOLOGY 122, 122 (Howard Giles & Robert N. St. Claire eds. 1979)). For additional general information on organizational socialization, group bonding, and norm development, see generally Kenneth Bettenhausen & J. Keith Murnighan, *Emergence of Norms in Competitive Decision-Making Groups*, 30 ADMIN. SCI. Q. 350 (1985).

[94] ORSBURN ET AL., *supra* note 81, at 19.

[95] *Id.* at 18–19.

[96] *Id.* at 14–17.

[97] Transitioning employees into work groups includes several stages. One author has identified five stages in team transformation: Start Up, State of Confusion, Leader-Centered Teams, Tightly Formed Teams and Self-Directed Teams. ORSBURN ET AL., *supra* note 81, at 19.

[98] *Id.* at 21.

[99] Renowned social science scholar Edgar H. Schein makes the amorphous quality of corporate culture accessible. Acknowledging the abstract quality of organizational culture, Schein provides a helpful framework for understanding the powerful phenomenon at play in work groups and organizations. According to Schein, because organizations are made up of various groups of individuals, it is inevitable that culture will form in work life. EDGAR H. SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 1–2 (3d ed. 2004). Management literature also reflects that organizations desire to enhance organizational productivity through the strategic use of culture. In the business world, managing corporate culture and effective leadership of people in organizations are intertwined, and in the views of some, they are synonymous. An article by scholar Jennifer Chatman illuminates the entrenchment of culture within organizations and its effect on corporate strategy and decision-making. In her article, she effectively relays the meaning of culture, how it develops, and how culture best utilized by organizations to motivate workers. *See* Chatman & Cha, *supra* note 87, at 20–34.

[100] SCHEIN, *supra* note 99, at 21–23.

organizational culture operates as a form of social control. The established norms, if violated, can "produce discomfort, anxiety, ostracism, and eventually excommunication."[101] The normative aspects of a strong workplace culture affect the manner in which group members perceive, engage, "approach decisions, and solve problems."[102] Once the climate of an organization is defined, basic assumptions are transmitted and entrenched. Employers expect employees to interpret the values and add their own layers of meaning to them, taking ownership to create additional extensions of the culture.[103]

In an attempt to integrate, cohabit, and effectively function within organizations, culture becomes a self-generating and self-regulating paradigm, whether for the good or bad of an organization. Because organizational identity is mirrored through its culture, work groups act to preserve that identity because it is the stabilizer in the midst of the daily chaos of work life—marked by deadlines, negotiations, meetings, travel, budgets, and the like. Simply, it is the force around which goals are strategized, articulated, and executed.[104] So even, as employers organize around teams, emphasize collaboration, and move workers around, a strong corporate culture maintains its power because it is deeply embedded, unconscious, and self-perpetuating. Organizational culture survives physical, cosmetic, and personnel changes within groups.[105]

The interdependency of work groups combined with the fluid platform upon which culture operates in organizations manifests self-regulated workplace environments. Employee-on-employee policing replaces hands-on management within the workplace.[106] As organizational literature reflects, individuals are not only motivated to be productive, but to ensure that their fellow co-workers are as well. Strong corporate cultures cultivate a kind of familial tie so strong that an employee engages in behavior that

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[101] *Id.* at 16.

[102] Jennifer A. Chatman et al., *Being Different Yet Feeling Similar: The Influence of Demographic Composition and Organizational Cutlure on Work Processes and Outcomes*, 43 ADMIN. SCI. Q. 749, 751 (1998).

[103] The danger is that such basic assumptions become normalized such that a group member who does not hold them is deemed foreign, or downright "crazy," and "automatically dismissed. SCHEIN, *supra* note 99, at 25.

[104] *See id.* at 14 (stating that "[c]ulture is pervasive; it influences all aspects of how an organization deals with its primary task, its various environments, and its internal operations").

[105] *See id.* (stating that "culture survives even when some members of the organization depart"); *see also generally* Barbara Levitt & James G. March, *Organizational Learning*, 14 ANN. REV. SOCIOL. 326 (1998) (discussing the transfer of organizational memory notwithstanding the passage of time and attrition).

[106] *See, e.g.*, James R. Barker, *Tightening the Iron Cage: Concertive Control in Self-Managing Teams*, 38 ADMIN SCI. Q. 408, 425 (1993) (studying the emergence of norms in self-managing team settings and accounting the effect of "concertive control" on team perceptions of group members and their responsive behavior).

preserves his place in the community.[107] Not wanting to "let down" fellow workers or be shunned from a social unit, such as a work team, employees conform and cloak themselves in the fabric of that particular organizational culture.[108] Thus, corporate cultures that are strategically relevant allow employers to replicate a particular identity and atmosphere despite turnover or movement.[109]

2. *Collective Decision-making and Peer Assessments*

With remodeled work structures and enhanced utilization of workers, the decision-making process within the American workplace has evolved. Characteristic of an integrated workplace is collective decision-making. As legal and business scholars have documented, multiple players now make or influence a significant amount of personnel decisions.[110] For instance, before a worker is hired, promoted, or discharged, several people have shared their input about this individual's future within an organization. Thus, more collective decision-making has become implanted into the operational protocol of determining the terms and conditions of a worker's livelihood.

The use of flattening techniques like self-directed work teams and other group configurations affects the manner in which employers evaluate and reward workers. One's job security often resides in the hands of a collective rather than any particular supervisor. For example, such practices include 360-degree reviews that involve input from a spectrum of those affected by an employee's job performance, from supervisors to customers.[111] These comprehensive reviews may include some aspect of self-critique, but the most striking aspect of this approach is the layered

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[107] *See generally* Helen Bernhard et al., *Group Affiliation and Altruistic Norm Enforcement*, 96 AM. ECON. REV. 217 (2006) (discussing the social norm setting and enforcement based on group affilation).

[108] In managing culture beyond selection of individuals who "fit," organizations focus on socialization through orienting and training, processes not mutually exclusive of selection. Much has been written about this socialization process through which individuals acquire knowledge about values, expected behavior, and social mores of an institution or group. Organizations begin creating loyalty from the outset, ensuring that newcomers bond with others in the organization. Once the individual identifies with the new environment, the individual will work hard to uphold the organizational norms. In fact, some organizations go to great lengths to build cohesiveness. For some illustrations of organizations striving towards strong cultures, see Chatman & Cha, *supra* note 87, at 28–29.

[109] Culture within organizations is deeply ingrained such that it is sustained even where changes in personnel persist. *See generally* SCHEIN, *supra* note 99.

[110] *See, e.g.*, Sturm, *supra* note 78.

[111] *See* ORSBURN ET AL., *supra* note 81, at chs. 12 & 17 (presenting a model for the operation of a peer disciplinary review committee and peer performance appraisals within a organizations). *See also* Green, *supra* note 10, at 103 n.59; Michael M. Harris & John Schaubroeck, *A Meta Analysis of Self-Supervisor, Self-Peer, and Peer-Supervisor Ratings*, 41 PERSONNEL PSYCHOL. 43–62 (1988); Sue Bowness, *Full-Circle Feedback*, PROFIT, May 2006, at 77, *available at* LEXIS, News Library, CANPRF File (use of multi-rater reviews as 360-degree reviews for leaders in organizations); *Make Employee Appraisals More Productive*, HR FOCUS, Sept. 2007, at 1, 11, 13–15 (suggestions from Paul Falcone, a human resources executive for Nickelodeon Studios, for improving performance evaluations).

nature of the appraisal. Employers have even resorted to more controversial evaluative models such as ranking and grading systems, and even unstructured review processes.[112] Additionally, an employee's compensation or advancement may be based, in whole or in part, on peer review.[113] The use and prevalence of peer-to-peer assessments often emanates from employers' search for evaluative models that comport with the structural changes and evolving mores of team-based work.[114] Through frequent engagement in team meetings and other collaboration, team members possess first-hand knowledge of a worker's contributions, strengths and weaknesses, unlike a supervisor or manager now removed from the core of the workers' daily existence.[115] Thus, as Professor Green has noted, performance evaluations are "more decentralized, subjective and contextual."[116]

Employment discrimination scholars including Professors Krieger, Selmi, and McGinley have engaged the complexities of multiple-actor decision-making in relation to the analytical paradigm of disparate treatment cases under Title VII.[117] In her article, *Whose Motive Matters? Discrimination in Multi-Actor Employment Decision Making*, Professor Krieger asserts, rather convincingly, that the factual inquiry in a disparate treatment case, for example, should be whether an individual's race, sex, gender, disability, etc., played a role in the employer's decision.[118] Krieger sharpens her lens on multiple decision-making processes to advocate that a search of the elusive intention is seemingly futile in a group decision-making context. Exploring comparisons of vertical (i.e. up-the-chain) and horizontal (i.e. group) decision-making processes, Krieger captures the essence of this quandary—that one should not mistake the absence of animus with lack of intentionality due to the subtleties of bias, particularly

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[112] *See, e.g.*, Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 281 (1994); Reed Abelson, *Companies Turn to Grades, and Employees Go To Court*, N.Y. TIMES, Mar. 19, 2001, at A1, *available at* LEXIS, News Library, NYT File.

[113] *See* ORSBURN ET AL., *supra* note 81, at 321. *See also* Saavedra & Kwun, *supra* note 86, at 450, 460.

[114] *See* Green, *supra* note 10, at 103–04 (explaining the rise and prevalence of peer review models).

[115] *See* DALE E. YEATTS & CLOYD HYTEN, HIGH-PERFORMING SELF-MANAGED WORK TEAMS: A COMPARISON OF THEORY TO PRACTICE 77–102 (1998) (highlighting how peer appraisals assist companies in leveraging their workers in a manner that produces competitive advantage).

[116] Green, *supra* note 10, at 103.

[117] In this context, these scholars have commented on Title VII's obsession with the search for conscious intentionality to find unlawful discrimination. For example, Professor Selmi suggests that the inquest should not revolve around the search for the conscious state of mind of a particular decision maker, but whether a protected characteristic made a difference in the decision-making process. *See* Michael Selmi, *Proving Intentional Discrimination : The Reality of Supreme Court Rhetoric*, 86 GEO. L. J. 279, 289 (1997); *see also* Bridgeman, *supra* note 7, at 267; McGinley, *supra* note 9, at 478–79; White & Krieger, *supra* note 78, at 498; *see generally* Krieger, *supra* note 9.

[118] White & Krieger, *supra* note 78, at 498.

in collective decision-making processes.[119] I agree with Krieger and others who acknowledge that conscious intentionality has little to do with discrimination, particularly in workplace settings comprised of complex individual and group dynamics.

While groups do not think, per se, group members are influenced by group membership. In light of this, Krieger's prescription of a causation inquiry, for example, where the plaintiff need only show that the protected characteristic was at play in the decision-making process seems appropriate.[120] Even in this regard, however, plaintiffs are somewhat disadvantaged due to the complexities of workplace structures like work teams and group decision-making processes. The reality is that the root of the discrimination remains concealed in the web of modern workplace design, including work teams and collective decision-making processes. As observed in Part I, courts have been willing to allow employers an inference against discrimination under the same-actor doctrine when the same group of decision makers was involved.[121] In fact, courts have allowed employers the use of the inference even where the decision arises from the same work group, such as a department or division, albeit one with different players at the time the adverse employment decision takes place.[122] What gives the courts such assurance that discrimination fails to

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[119] *See id.* at 502. With respect to collective decision-making, in particular, Professor Krieger advocates that Title VII's intent requirement is more appropriately deemed a search for causation rather than conscious discrimination. *Id.* at 499–501. In this article, Krieger explores the case of *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), as an example of how the Supreme Court sidestepped the issues of discriminatory intent in cases involving multiple decision-makers. In *Reeves*, the discharge of plaintiff emanated from both vertical recommendation and horizontal (group) process. *Id.* at 137–38. The person who actually fired the plaintiff was not the same individual who the Court deemed to harbor discriminatory animus through actions including age-biased remarks. *Id.* at 151–52. Notwithstanding the lack of apparent intention by the ultimate decision-maker, the Court deemed that the person harboring unlawful animus was also an actual decision-maker. *Id.* at 151–54.

[120] *See* White & Krieger, *supra* note 78, at 498.

[121] *See, e.g.*, Waterhouse v. District of Columbia, 298 F.3d 989, 996 (D.C. Cir. 2002) (deeming it persuasive that the same group of management officials who fired plaintiff also fired her only a short time before, thereby raising a presumption or inference of non-discrimination); Buhrmaster v. Overnite Transp. Corp., 61 F.3d 461, 463 (6th Cir. 1995) (perceiving it as "'simply incredible . . . that the company officials who hired [an employee] at age fifty-one had suddenly developed an aversion to older people two years later'"); Lowe v. J.B. Hunt Transport, Inc., 963 F.2d 173, 174 (8th Cir. 1992) (finding it critical to the inquiry that the "same people" who hired plaintiff also fired him). *See also* discussion *infra* Part III.

[122] *See, e.g.*, Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (noting that "*[m]ost* of the same individuals-including Johnson-who decided to terminate Antonio for job abandonment had also hired her twice") (emphasis added); Sreeram v. La. State Univ. Med. Ctr.-Shreveport, 188 F.3d 314, 317–21 (5th Cir. 1999) (noting that plaintiff's expulsion from the residency program was recommended by the Residency Review Committee, composed of members of the medical staff, while the positive decision that is cited was made only by one individual, Dr. McDonald, who granted plaintiff's request to stay in the residency program for an additional year); Nieto v. L&H Packing Co., 108 F.3d 621, 623 (5th Cir. 1997) (addressing the identity of the decision makers and accepting the argument that organization decisions often made by management groups); *Lowe*, 963 F.2d at 174 (finding "compelling" evidence that "same people" or "same company officials" hired and fired plaintiff in less than two years). There have been a few instances, however, when the courts express unwillingness to apply the inference when the players are different. *See, e.g.*, Chuang v. Regents of Univ. of Cal., No. CIV-S97-0613, 1998 WL 1671745, at *7 (E.D. Cal. Oct. 30, 1998)

operate under these circumstances? It is precisely this intergroup configuration and its attendant socio-cultural phenomena that can serve to camouflage the discriminatory bias.[123] Multi-level decision-making snarls the quest of motive and undercuts the psychological assumption of *Proud*. As addressed in the next subpart, advances in organizational behavior, management theory, and organizational culture analysis assist in clarifying just how incompatible the same-actor doctrine is with the modern workplace.[124]

Retooling through the implementation of work teams, flattened organizational structures, and collective evaluative processes empowers workers to meaningfully participate in their work-life destinies and the trajectory of an organization like never before. The use of such organizational structures and institutional practices is pervasive in contemporary work environments. While the various tools appear cooperative, healthy, and productive, they can be laced with a social-relational force far more powerful and potentially volatile than any five-point review conducted by a single manager. For example, by their nature, work teams serve as a structural stimulant that produces complex behavioral patterns and inter-relational phenomena, due largely to social and cultural forces inherent in their design. As set forth below in Subpart B, workplace discrimination derives from the complex organizational structures and institutional practices characteristic of the modern workplace.[125] Hence, there exist numerous avenues for bias to infect the decision-making process well after an individual is hired.

(declining to apply the inference where the "institution may be the same, but the actors operating it are not"); *see also* Madel v. FCI Mktg., Inc., 116 F.3d 1247, 1253 (8th Cir. 1997) (declining to infer non discrimination when derogatory comments made by plaintiff's supervisor could have influenced employer's decision to fire plaintiff); E.E.O.C. v. First Midwest Bank, N.A., 124 F. Supp. 2d 1028 (N.D. Ill. 1998) (declining to apply the doctrine where he person who hired the employee was not the sole decision maker); Towns v. Chi-Chi's, Inc., No. 5:96-CV-203, 1997 WL 816294 (W.D. Mich. Oct. 30 1997) (deeming same actor inference not dispositive "because Nagele was not the sole decision maker").

[123] As Krieger has noted, there is a "disjunction" in perspectives on intergroup bias between those in the social science realm, those for whom it is a lived experience, and the narrative that pervades Title VII doctrine. White & Krieger, *supra* note 78, at 508.

[124] While the courts have formulated and expanded the same-actor principle without attention to complex workplace dynamics, they have not totally ignored such developments in workplace jurisprudence altogether. In fact, in the development of another doctrine, the courts have acknowledged the complexities of the modern workplace and their effect on judgment and evaluation of workers under a theory known as the *cat's paw* doctrine. As discussed more fully in Part III, through this doctrine courts hone in on the influential nature of the relationships between the decision-makers involving groups, subordinate employees, and managers.

[125] *See* Green, *supra* note 10, at 92–111; *see also* Green, *supra* note 78, at 625.

B. *How the Vectors of Contemporary Work Life Can Create or Activate Conditions for Bias to Flourish*

1. *The Team Effect*

In considering work teams and other such structural devices, it is important to further contextualize this concept to better illuminate the effect of work groups and related configurations on the engagement and perceptions amongst team members, and workplace decision-making processes in particular. Research on teams and theories of group interaction reflect that the orchestration of work through team networks can affect the manner in which teams communicate and make quality decisions.[126] The highly integrated and productive workteam can face tremendous challenges.[127]

a. Team Life Cycle and Internal Conflict

Initial team or group formation can produce a euphoric atmosphere charged with excitement, hope, and anticipation for the collaborative journey. However, once the novelty wears off, and a team settles in to find its identity, the intersection of individuality and collectivity creates tension. This is when the dysfunction of team operation can emerge. At this juncture, since team objectives can become commingled with self-interested goals, a decision-maker can easily alter her view of a worker's value and performance.[128]

It can take a group of employees up to five years to reach self-directed maturity.[129] This gestational period can create fierce competition within a team and even lead to its deterioration.[130] The seeds of bias can begin to germinate as the perils of group transformation set in.[131] Thus, those aspects that reap strong team efforts become liabilities to the relative stability of the network as it matures. For example, as work teams evolve and become entrenched in the workplace, the deep involvement and intense loyalty of workers "can mask internal unrest and outright dysfunction."[132] Simultaneous growth of intense loyalty can produce a kind of zealotry that can incite unhealthy rivalry manifesting in distrust and backstabbing, such as the withholding of critical information and

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[126] *See generally* ORSBURN ET AL., *supra* note 81; Alge et al., *supra* note 93; *see also generally* Caesar Douglas et al., *Communication in the Transition to Self-directed Work Teams*, 43 J. BUS. COMM. 295 (2006) (discussing the relationship of team communication and team effectiveness).

[127] *See generally* Jehn, *supra* note 91.

[128] Pollard, *supra* note 86, at 935 (commenting that evaluative systems like self-directed work team "encourage team members to align their personal goals with that of the team").

[129] See ORSBURN ET AL., *supra* note 81, at 18.

[130] *Id.*

[131] Research shows fairly predictable stages of transition for workers into self-directed work teams with inevitable perils. *Id.* at 19–23.

[132] *Id.* at 22.

resources.[133] Often work teams comprise salaried and hourly workers.[134] Blurred lines with regard to various classes of employees and job responsibilities can become fertile ground for interpersonal strife and contentious subjectivity. Such factions can produce bias in the decision-making processes.

Certainly, in the midst of a team's growing pains, a worker could be deemed an outsider to such a degree that the tide and support turn against her. Thus, a valued member of a team could become an ostracized outsider. After a worker is hired, for example, she may matriculate to a group during a particularly vulnerable time in the team's life cycle. Once the honeymoon stage ends, confusion sets in as team members seek to negotiate their new roles and absorb the reality of collective responsibility.[135] Even after a work group establishes and appears cohesive in operation and spirit, the introduction of a new member, for example, has provoked unrest.[136] In such instances, the team has experienced difficulty in accepting the new member.[137] One can imagine how this might result in negative feedback towards, or unsuccessful integration of, the new member.[138] Once an employee is unable to successfully integrate, the perception of that individual can change so much that it influences the decision-making process.[139]

In an essay on work teams, Professor Karen Jehn explores the various types of conflict that arise from group work and links the various conflicts to team diversity.[140] She addresses several types of clashes that often emanate from team efforts—relationship conflicts, task conflicts and process conflicts.[141] Relationship conflicts arise from differences in personalities, also known as "interpersonal antagonism." While unrelated to work products, these conflicts can amplify the incompatibility of members and disrupt the communal spirit relating to interpersonal tension, friendliness, and commitment.[142] Research reflects that diversity negatively influences group conflict.[143] Moreover, the dysfunction of a team can result from "task conflicts," as well as "process conflicts," that

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[133] *Id.*

[134] *Id.* at 21.

[135] *Id.* at 19–23.

[136] *Id.* at 22.

[137] *Id.*; *see also* Bettenhausen & Murnighan, *supra* note 93, at 369 (discussing the integration of a new member into a group setting with respect to acceptance of group norms).

[138] Interestingly, research has shown that a newcomer attempting to manage the group's impression of her may be reluctant to seek feedback or vital information necessary to fully integrate into or contribute to an organization. *See, e.g.*, Svetlana Madzar, *Feedback Seeking Behavior: A Review of the Literature and Implications for HRD Practitioners*, 6 HUM. RESOURCES DEV. Q. 337, 339–41 (1995) (reviewing literature reflecting that "[s]ocial expetations and communication norms can, in some organizational environments, also make individuals reluctant to seek feedback").

[139] *See* Barker, *supra* note 106, at 425–27.

[140] Jehn, *supra* note 91, at 476–77.

[141] *Id.*

[142] *Id.* at 477–78.

[143] *Id.* at 477.

drive how work goals are accomplished.[144] This work indicates that social category information can negatively affect team processing and decision-making, all due to the demographics of work groups.[145]

b. Team Typology, Group Processing and Interpersonal Dynamics

The typology and tasks of a particular team constitute additional facets of teamwork that can potentially upset equilibrium of team processing and collaboration. Employers use different types of team configurations, the scope of which may depend on organizational goals, available skills sets, and mechanisms for engagement, to name a few. For example, a business may create ad hoc teams or project-specific teams to accomplish more short-term goals. To more fully integrate a service, product, or other offering into the company's overall strategy, it may create divisions or other work units comprised of teams to focus on more long-range plans. Irrespective of the type of team, its members may constitute individuals who have worked together in the past or bring together workers who have no more than a casual knowledge, if any, of each other's existence in the organization. Nevertheless, strategic composition of teams can affect team interaction, information exchange, and levels of openness and trust.[146]

For example, unencumbered by history and shared knowledge, a team without an appreciable future or that anticipates only brief engagement (i.e. ad hoc teams, project-specific teams) may engage effectively to accomplish the work task, such as designing a product or problem solving.[147] But the lack of fidelity and incentive to endure that may accompany transitory work relationships makes it easier for an evaluator to change his mind about a worker. As one study shows, team members without an expectation for future contact lack accountability to one another.[148] In these situations, there is less incentive for openness and sharing of vital information, characteristics that typically make teams more effective. Such indifference may result in the projection of various

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[144] *Id.*

[145] *See id.* at 484–86 (reflecting that the more surface-level diversity in a team, the more conflict the group experiences). Jehn conducted a field study that bears out the complexity of diverse team engagement and processing dependent on the type of diversity (informational, social categorical, value-laden) and types of conflicts (task, relationship and process). She offers some assessment on how groups can mediate the tension that arises from diversity in composition.

[146] *Compare* Alge et al., *supra* note 93, at 27 (reporting a study that illustrates that "[t]he causal relationship between communication effectiveness and decision-making effectiveness . . . is moderated by task interdependence"), *with* Susan Mohammed & Linda C. Angell, *Surface- and Deep-level Diversity in Workgroups: Examining the Moderating Effects of Team Orientation and Team Process on Relationship Conflict*, 25 J. ORGANIZATIONAL BEHAV. 1015, 1015–17, 1033–34 (2004) (analyzing a longitudinal study reflecting that team orientation and team process moderates the conflict caused by surface-level diversity, specifically, gender, and ethnicity).

[147] *See, e.g.*, Bettenhausen & Murnighan, *supra* note 93, at 369 (discussing the benefit of a lack of shared history to on the ability of ad hoc committees and special work teams to resolve differences).

[148] Alge et al., *supra* note 93, at 32.

stereotypes and judgments about an individual's job performance.[149]

Due to a shared history of experienced teams with a past, however, there arguably exists a greater capacity for more effective communication and productivity. Team members' skills, abilities, personalities and behavioral tendencies are common knowledge. This shared history can serve to increase coordination amongst members and result in more accurate decision-making and problem solving by the team.[150] Yet, research on social processing in groups reveals, while inherently intimate with respect to particular team dynamics and idiosyncrasies, teams with past experience had lower degrees of effective exchange and openness as compared to groups without any historical reference but that anticipated a future together.[151] While a lack of shared experience can serve as an impediment to effective collaboration in a group setting, such intimacy is not a shield from dysfunction. Familiarity breeds a certain complacency that irritates the cohesiveness of the unit and disturbs the unit's problem solving capacity. Significantly, as team processing theory reveals, the existence of a past association alone does not guarantee positive relations.[152] Thus, negative experiences with a team member, even after positive experiences such as increased job responsibility or promotion after a worker is hired, can affect interpersonal relations amongst team members. Additionally, if a team is unwilling to openly share information, an individual worker without the critical details to accomplish her assigned task is unable to effectively contribute to the group effort. In the eyes of the team, this member adds less value and may be cast as a hindrance to the group, particularly where there is a high level of task interdependence.[153] Studies have shown that white women and minorities suffer most from such interpersonal dynamics.[154] Moreover, technological

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[149] *See* Sturm, *supra* note 10, at 663–69 (analyzing work teams and group decision-making processes reflecting the manner in which dysfunction can set in when teams are unable to effectively resolve conflict that may result from "[u]narticulated racial and gender dynamics" and well as team typology). What seems clear is that team processing convolutes the identity of the true decision-maker, and therefore confounds the search for unlawful motive.

[150] Alge et al., *supra* note 93, at 33. One might argue that experience affords teams an advantage, even in the typical life cycle. That is, a team with a past, and perhaps once marked by fairly positive experiences, can work out dissention. But this perspective fails to account for other variables at play within team dynamics, such as demographic differences, power imbalances, and stereotypes.

[151] *Id.* at 28, 32.

[152] As the authors of this study concluded, "teams with a history of positive experiences might perform very differently than teams with negative a history." *Id.* at 34.

[153] *See generally* Cristina B. Gibson, *Do They Do What They Believe They Can? Group Efficacy and Group Effectiveness Across Tasks and Cultures*, 42 ACAD. MGMT. J. 138 (1999) (demonstrating how high group efficacy is not always beneficial); Ruth Wageman, *Interdependence and Group Effectiveness*, 40 ADMIN. SCI. Q. 145 (1995) (analyzing different workplace group models).

[154] Social demography literature indicates that outsiders in an organizational setting experience exclusion for information networks, and by extension, upward mobility in their careers. *See* Michàl E. Mor Barak & Amy Levin, *Outside of the Corporate Mainstream and Excluded from the Work Community: A Study of Diversity, Job Satisfaction and Well-being*, 5 COMMUNITY, WORK & FAM. 133, 136 (2002) (referencing the work of Cox and Ibarra). The use of work teams does not diminish the use and operation of stereotypes of those individuals from groups considered outsiders. *See, e.g.*, Curtis

advances have profoundly impacted (or transformed) the way in which work goals are coordinated, communicated, and accomplished in our work environments.[155] Paradoxically, the heightened state of connectivity that pervades all aspects of our work, whether in form or substance, may not have the production-inducement effect employers intend, and in fact may constitute a vector that exacerbates the spread of bias.[156]

The body of team processing literature continues to evolve. Without a doubt, this body of work illuminates the intense social strata and contextual forces inherent in team settings. This work demonstrates the complexity and fragility of workplace engagement, and the manner in which biased subjectivity can infiltrate the evaluative and decision-making practices in work settings well after an individual is hired.[157] The notion that a

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Simmons et al., *Does Your Company Discriminate?*, BLACK ENTERPRISE MAG., July 2003, at 80 (reporting that a company utilized segregated work teams and that a team comprised solely of African-American employees was reportedly referred to as the "Soul Train Team"). This kind of perception can breed discriminatory attitudes and decision-making within the workplace. Moreover, as management theorists have shown empirically, the quality and effectiveness of decision-making may be quite sensitive to media type and task interdependence. For example, remote supervision of workers may result in the evaluator's resolution of various personnel-related issues without adequate information, and thus resort to stereotypes or biased perceptions. Moreover, without the communication cues more easily discernable in face-to-face contact, the virtual manager unilaterally makes employment decisions. Problem solving in the team setting adds to this complexity. Once conflict arises in the group setting, negotiation and resolution will require exchange of "maximally rich information, including not only facts, but also values, attitudes, affective messages, expectations, commitments, and so on." Alge et al., *supra* note 93, at 29.

[155] *See generally* Terri L. Griffith et al., *Virtualness and Knowledge in Teams: Managing the Love Triangle of Organizations, Individuals, and Information Technology*, 27 MIS Q. 265 (2003) (discussing the effect of technology on the transfer of knowledge in organizational settings); Raymond F. Zammuto, *Information Technology and the Changing Fabric of Organization*, 18 ORG. SCI. 749 (2007) (exploring the technological revolution on organizational practices such as employee collaboration).

[156] Business theorists, as well as social science scholars, realize the need for increased study on virtual teams, and have begun to engage in comparative study with face-to-face involvement. Some recent organizational behavioral studies on team processing reveal interesting dichotomies that can affect group interaction and judgment. While the research in these areas continues to evolve, recent advancements increasingly seek to contextualize team processes in order to further understand the nexus between productive team engagement and numerous variables such as temporal scope and communication media. The gravity of these connections is demonstrated by one such study in which business scholars theorized the effect of temporal scope on team engagement. Building on various team processing theories, these scholars test the effect of various characteristics of temporal scope on face-to-face and virtual teams, as well as communication and decision-making effectiveness. *See* Alge et al., *supra* note 93, at 26 ("The purpose of this study is to look at one critical contextual factor that is likely to impact team processes: *temporal scope*, or the extent to which teams 'have pasts together and expect to have futures.'") (citing Joseph E. McGrath, *Time, Interaction, and Performance (TIP): A Theory of Groups*, 22 SMALL GROUP RES. 147, 149 (1991)). *See also* Griffith et al., *supra* note 155, at 279–82 (exploring how technology can operate as a debstabilizing force between employers and employees).

[157] Tracing the evolution of various workplace structural changes in the United States, scholar Tristin Green has thoroughly documented the organizational trends including the use of work teams. Green, *supra* note 10, at 99–108. In her exploration, Green has asserted, rather convincingly, that workplace discrimination derives from the complex organizational structures and institutional practices characteristic of the modern workplace. With respect to work teams in particular, Green asserts that implementation of work teams (whether self-directed or led by a coach), flattened organizational structures, and collective evaluative processes "may facilitate the subtle, often unconscious, operation of discriminatory bias." *Id.* at 102–04; *see also* Green, *supra* note 78, at 625–27 (identifying work culture as a basis of workplace discrimination and suggesting legal incentives to change organizational

decision-maker who hires an individual has no capacity to discriminate thereafter is quite unsettling, particularly in light of the turbulent maturation and collaborative problem-solving processes of group work. As the literature on self-directed work teams and group processing reveals, the underlying assumption of the same-actor doctrine, premised on a single evaluator making a decision within a short time period, is simply wrong. It neither aligns nor reflects the complexities that pervade many workplaces.[158]

2. *Relational Forces and Decision-making*

The relationship between people in organizations and the environments in which they function further informs what can motivate decision-makers. This ecological knowledge is critical to understanding how bias generates and operates. The interplay of relational demography and organizational culture, for example, provides additional explanation for dysfunction in work groups, and serves as a catalyst for the complex psychological dynamics that manifest in work settings. These group theories on social processing and interpersonal dynamics, combined with research on corporate culture, demonstrate the relational influence on decision-making.[159] This vector and its situational factors produce various manifestations of discrimination that *Proud* and its progeny have ignored.

a. Group Composition and In-Group Favortism

Social science teaches that groups develop identities and personalities, orientations that may be heavily influenced by the culture of an organization. Additionally, in-group favoritism can occur both within and

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structures in order to influence work cultures). I agree with Green and believe this work supports my view with respect to the same-actor inference in particular. Structural complexities of the modern workplace manifest into even more complex interpersonal dynamics, such that the courts' reliance on the same-actor principle is strikingly illogical and quite problematic.

[158] I will concede that not all work environments follow this new group-based model or utilize such collaborative processes. The history of work teams in the American workplace is well documented. *See generally* ORSBURN ET AL., *supra* note 81; SIMS, JR. & LORENZ, *supra* note 2. For sure, affinity for and implementation of these and other organizational designs is simply undeniable in the modern workplace. *See, e.g.*, Angela Clinton, *Flexible Labor: Restructuring the American Work Force*, MONTHLY LAB. REV., Aug. 1997, at 3, 3.

[159] For example, Congruence Theory focuses on cooperation within organizations based on organizational behavioral and psychological dimensions. This theory connects with social categorization processes elicited by demographic similarity in groups and organizational cultures. *See, e.g.*, Jennifer A. Chatman & Sigal G. Barsade, *Personality, Organizational Culture, and Cooperation: Evidence from a Business Simulation*, 40 ADMIN. SCI. Q. 423, 423–27 (1995); Jennifer A. Chatman & Sandra E. Spataro, *Using Self-Categorizational Theory to Understand Relational Demography-based Variations in People's Responsiveness to Organizational Culture*, 40 ACAD. MGMT. J. 321, 321–22 (2005). Similarly, the contact hypothesis focuses on the attendant situational factors that influence engagement. *See generally* Francis J. Flynn et al., *Getting to Know You: The Influence of Personality on Impressions and Performance of Demographically Different People in Organizations*, 46 ADMIN. SCI. Q. 414 (2001). Additionally, behavioral decision theory, distinct from social cognition theory, illuminates the relational conflict groups. *See generally* Langevoort, *supra* note 10. All of these bodies of literature further contextualize the contemporary workplace in an important fashion.

between teams. The familial nature of group processing produces informality in engagement that can inhibit the integration and acceptance of people of color and women.[160] There is empirical support for the proposition that racial composition significantly affects team performance and attitudinal perceptions.[161] Even in teams that meet organizational goals, racial differences permeate individually held attitudes with regard to team cohesion, valance, and achievement.[162] Self-directed work teams and the collective processing thereof can exacerbate these attendant aspects for those not considered part of the "in" group in any work setting.[163] For instance, fearing a lawsuit, management may hesitate to provide minority employees with honest feedback regarding work performance. Without such input, the employee who fails to improve her deficiencies and becomes a more likely candidate for demotion, reassignment, or discharge.[164] Thus, a well-qualified and capable minority employee can be fired, for example, due to the deliberate actions of a manager, team leader or other decision-maker who hired them at the outset and participated in earlier positive decisions with respect to that individual.[165] The worker hired to meet a diversity goal, for example, remains an outsider from the perspective of the reviewer. Once the saliency of that individual's identity becomes pronounced in a work setting, we know from the well-established work in cognitive social psychology, unconscious bias by the reviewer can be triggered.[166]

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[160] This is not limited to the most common outsiders in workplace settings. For example, the dynamic even applies to persons with disabilities and those of various religious backgrounds.

[161] *See* Anthony M. Townsend & K. Dow Scott, *Team Racial Composition, Member Attitudes, and Performance: A Field Study*, 40 INDUS. REL. 317 (2001) (analyzing a field study of 1200 workers on self-directed work teams demonstrating that "racial composition affects team performance and racial differences in team and performance-related attitudes").

[162] *Id.* at 332. *See also* Taylor Cox et al., *Effects of Ethnic Group Cultural Differences on Cooperative and Competitive Behavior on a Group Task*, 34 ACAD. MGMT. J. 827, 839 (1991) (noting that "ethnic group differences affect at least some aspects of behavior in task groups"); Richard A. Guzzo & Marcus W. Dickson, *Teams in Organizations: Recent Research on Performance and Effectiveness*, 47 ANN. REV. PSYCHOL. 307, 307–08 (1996) (commenting on the relationship between team composition and demographics on performance outcomes). *See also generally* W. Gary Wagner et al., 29 ADMIN. SCI. Q. 74 (1984).

[163] *See* Green, *supra* note 78, at 640–43 (discussing the manifestations of a relationally dependent work environment including the informality of promotion decisions and other aspects of one's work life).

[164] Diversity scholars have addressed this fear by whites in corporate America to engage blacks in constructive feedback on work performance. *See generally* ANCELLA B. LIVERS & KEITH A. CAVER, LEADING IN BLACK AND WHITE: WORKING ACROSS THE RACIAL DIVIDE IN CORPORATE AMERICA (2003) (addressing, in part, how the hesitancy by corporate America to fully and fairly engage with black workers affects overall diversity); Keith A. Caver & Ancella B. Livers, *"Dear White Boss . . ."*, 80 HARV. BUS. REV. 76 (2002) (explaining, in the form of a letter, the many issues that black employees wish their managers would understand in order to promote true equality in the workplace).

[165] This lack of feedback and mentorship may serve as a barrier to the advancement of minorities within the workplace.

[166] A self-directed work team comprised of collectivist raters may engage in favoritism of in-group members because they are unwilling to "distinguish between the good and bad performance of in-group members." Carolina Gómez et al., *The Impact of Collectivism and In-Group/Out-Group Membership on the Evlauation Generosity of Team Members*, 43 ACAD. MGMT. J. 1097, 1103 (2000).

Further, studies reflect that peer evaluation in a team setting is affected by whether the team members hold a collectivist or individualistic orientation. This cultural stance influences the qualities and types of contributions valued by those who review a worker's job performance. According to recent literature exploring evaluation generosity of collectivist reviewers, where an individual was perceived to be an "in-group" member, collectivists gave more generous assessments to that worker.[167] Generally, collectivists, who value shared identity and interdependence, "discriminate against out-group members and tend to favor in-group members."[168] One could argue that an employer could inoculate a team from these dynamics by altering the composition of the team or, as a few scholars propose, employing a *recategorization strategy*[169]—emphasizing shared characteristics rather than physical attributes and backgrounds which tend to differentiate workers. However, as is well recognized in social science generally, and social identity theory in particular, such reframing is likely to be futile so long as demographics and cultural salience significantly influence perceptions.[170]

Additionally, in organizational literature, much has been made of the cognitive and psychological processing of evaluators in performance appraisals.[171] Studies have found that perceptions such as "similarity" and "liking" influence performance ratings.[172] This research also reveals that

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This is a negative consequence of the self-directed work team and social processing theory that goes undetected in the court's application of the same-actor doctrine. The paradox here is that overall team effectiveness is compromised by under-performing in-group members who receive generous reviews, and little to no feedback for improving their performance. It is important to note that unconscious bias operates in these vectors as described in this section. Building on the groundbreaking insight of Charles Lawrence, much of Professor Krieger's seminal work focuses on highlighting the operation of unconscious bias in workplace decision-making. *See, e.g.*, Krieger, *supra* note 9, at 1161 (suggesting "that a large number of biased employment decisions result from . . . a variety of unintentional categorization related judgment errors"). Krieger masterfully engages the social cognition literature to demonstrate that stereotypes operate beyond the surface and affect human processing particularly with respect to judging others. *Id.* at 1189–99. Because of the existence of unconscious bias and the difficulty of uncovering such motivation under the prevailing interpretation of Title VII law, Krieger prescribes an inquiry focusing on the nexus between a worker's difference and the work-related decision. *Id.* at 1242–43.

[167] Gómez et al., *supra* note 166, at 1098.

[168] *Id.*

[169] *See id.* at 1103.

[170] *See, e.g.*, Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1324–25 (asserting the ineffectiveness of Title VII to eradicate racial discrimination in a labor market saturated with the use of race-based proxies invoking negative imaging).

[171] *See generally* Caren B. Goldberg, *Relational Demography and Similarity-Attraction in Interview Assessments and Subsequent Offer Decisions: Are we Missing Something?*, 30 GROUP & ORG. MGMT. 597 (2005) (tracking similarity attraction in the interview process and observing significant race similarity effects for white recruiters on overall interview assessment and offer decisions).

[172] *Id.*; *see also* Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1473 (2002) (asserting that "[w]hite men are hired more easily, promoted more frequently, and paid more than people of color and women because they are most similar to the white men who make these corporate decisions").

friendship affects inclusion within organizations.[173] Cognitive psychological literature also suggests that workplace decision-makers may gain awareness of the lack of cultural fit only after some time has passed.[174] This means that even if an individual is hired, it is just as likely that with greater exposure, the decision-maker's view of the worker changes. Much of this relational demography literature is rooted in social identity theory focusing on categorization of individuals based on social constructs. This phenomenon results in decision-makers attaching value to different categories, with "similarity" serving as a referent for positive impressions.[175]

b. Power Dynamics, Corporate Culture, and Evaluator Self-Interest

Like any social schema, organizations and groups are not utopian enterprises in which everyone consistently shares the same vision, values, or execution of ideas. As explored in the previous subpart, imbalances in a work unit's culture can result in "warring factions."[176] Such divisiveness, coupled with group members' desires to conform to an organization's culture, can result in an employee's discharge for seemingly neutral, yet biased reasons, even if that employee was ostensibly hired under legitimate pretenses. For example, in order to avoid his own excommunication from a group, a decision-maker could be influenced by a biased superior, peer, or subordinate, then engage in an employment decision, couched in neutral terms, but nonetheless discriminatory. Additionally, sub cultures can develop within larger organizational cultures producing additional tension.[177] Such factions can result in the ultimate decision-maker serving as the *cat's paw*, for the biased member in a collective or within an organization.[178]

The organizational behavior and management literature emphasize the effect of the socio-psychological forces present in group formation which are inextricably linked to one's quest for identity, communion, and meaning—the dynamics from which culture arises.[179] Submerged in a strong corporate culture with high levels of agreement with regard to

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[173] Goldberg, *supra* note 171; *see also* Elizabeth Wolfe Morrison, *Newcomers' Relationships: The Role of Social Network Ties During Socialization*, 45 ACAD. MGMT. J. 1149, 1151–52, 1157–58 (2002) (discussing friendship ties and newcomer assimilation in work environments).

[174] *See generally* Joel Lefkowitz, *The Role of Interpersonal Affective Regard in Supervisory Performance Ratings: A Literature Review and Proposed Causal Model*, 73 J. OCCUPATIONAL & ORG. PSYCHOL. 67 (2000) (confirming that "liking" may impact performance appraisals by supervisors and suggesting that "relationship tenure" may serve as a helpful variable to buttress studies).

[175] *Id.*

[176] Chatman & Cha, *supra* note 87, at 23.

[177] *See* SCHEIN, *supra* note 99, at 20 (acknowledging the existence of cultures within a culture and the growth of tension therein).

[178] *See infra* Part IV.A.1 (generally discussing the *cat's paw* doctrine).

[179] *See generally* SCHEIN, *supra* note 99 (discussing how culture emerges in groups).

values, decision-makers strongly desire to assimilate.[180] This phenomenon of belonging results in the "cognitive tendency" to judge others harshly, and perhaps unfairly.[181] Moreover, the deeply held assumptions inherent in an organization's culture become "embedded in the incentive, reward, and control systems of an enterprise."[182] This entrenchment affects decision-makers on an individual level, not just collectively. In an effort to preserve their reputation, credibility, and professional growth within an organization, a decision-maker may change his mind about a worker or justify a biased decision in a non-discriminatory manner. In fact, those with the power to decide a worker's fate may do so for many reasons, including public accountability, fear of invalidity, mandates, and even their own performance identity struggles.[183] As the relational demography literature demonstrates, organizational culture does more than inspire a workforce; it directs how employees perceive, think, and feel about work-related matters, including their co-workers.[184]

The discourse on workplace culture suggests that such "impression management" falls most harshly on those deemed outsiders within an organization or group, due to the well documented predisposition to categorize and stereotype along demographic lines, in-group favoritism, similarity attraction, and other such theories.[185] Professor Susan Fiske has documented power dynamics in work settings and offered an explanation of how within strong organizational cultures, depending on the saliency of particular values, stereotypes operate as "implicit anchor[s]" for the body as a whole.[186] Individuals that harbor no activated discriminatory animus per se will likely (or potentially) know the "content[]" of a particular stereotype.[187] Thus, such powerful information becomes the working definition housed in the minds of decision-makers as dormant bias-triggers with respect to those with whom she associates in the workplace. In her article entitled *Controlling Other People: The Impact of Power on Stereotyping*, Fiske found that since the most powerful in an organization

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[180] *See generally* Gary G. Hamilton & Nicole Woolsey Biggart, *Why People Obey: Theoretical Observations on Power and Obedience in Complex Organizations*, 28 SOC. PERSP., 3 (1985) (theorizing on the sociological studies regarding power in organizations using an organizational lens and highlighting how power and obedience are inextricably linked in organizations); Monica J. Harris et al., *Awareness of Power as a Moderator of Expectancy Confirmation: Who's the Boss Around Here?*, 20 BASIC & APPLIED SOC. PSYCHOL. 220 (1998) (exploring the relationship between expectancy confirmation to show that people in organizations tend to defer to those in positions of power).

[181] Chatman et al., *supra* note 102.

[182] *See* SCHEIN, *supra* note 99, at 174 (discussing various theories about human nature).

[183] Thus, organizational cultures in which employees are motivated by fear, for example, transmit feedback that a particular hiring or promotion decision was risky.

[184] Culture, in the organizational sense, serves as the platform upon which organizational design and control systems thrive.

[185] For a discussion of such phenomena, see, e.g., Green, *supra* note 78, at 647–50.

[186] *See, e.g.*, Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOLOGIST 621, 623–24, 627 (1993).

[187] *Id.* at 623.

are likely the most overburdened, those elevated in hierarchical terms are most likely to stereotype when they are "distracted," that is, "when their cognitive capacity is limited."[188] The consequences of attention deficit stereotyping is likely to fall more harshly upon the powerless in organizations, particularly women, people of color, those challenged with physical or mental disabilities, or other outsiders.[189] The complex entanglement of power and stereotyping, particularly in environments imbued with cultural cues, potentially affects engagement and decision-making within organizations in profound ways.

c. Subjective selection and performance identity

This social construction of identity bears on selection of individuals when organizations make decisions based on cultural fit. By aligning employees with environmental factors, employers focus less on the candidate's skill set, and more on the intangibles that make uncovering discriminatory motive more difficult. For example, suppose an employer seeks to promote a few workers from within the organization, and the charge is to promote those who "relish change," "possess passion for exceptional quality," "confront risks," or "think creatively."[190] While descriptive enough on some level, such "qualifications" hold such an amorphous quality because they are generalized and undefined with respect to any particular job task or role. The promotion decision can quickly disintegrate to selection because "I just like that candidate," or "he just feels right"—ultimate decisions that appeal to one's senses.[191] Ad hoc

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[188] *Id.* at 624.

[189] Such attitudes can permeate all levels of organizational life from the top down. A 1994 lawsuit filed against Texaco provides a stark example of the dangerous mix of power and stereotypes infiltrating a corporate culture. Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996, at A1, *available at* LEXIS, News Library, NYT File. In this action, some employees alleged they were called "orangutans," "porch monkeys," "uppidity," and "systemically passed over for promotions" in a racially toxic culture fostered by the organization. *Id.* Plaintiffs' claims were apparently aided significantly by tape recordings of senior Texaco executives referring to black employees as "black jellybeans," "niggers," and bemoaning the integration of minorities into the environment including having to consider such cultural identity issues like "Kwanzaa." *Id.* One executive was recorded as stating "I'm still having trouble with Hanukkah . . . . Now we have Kwanzaa." *Id.*

[190] *See* Chatman & Cha, *supra* note 87, at 26 (noting job descriptions used in a Fortune 100 company reflecting, with intensity, the desire for candidates that match a corporate culture full of challenge and change).

[191] This type of subjective evaluation and decision-making is commonplace as employers attempt to distinguish candidates, especially those that seem to possess substantially similar paper credentials. For example, in *Millbrook v. IBP, Inc.*, the Seventh Circuit went through painstaking analysis to disavow any claim that subjective employment decisions are contrary to Title VII. In fact, according to the court, "[a]bsent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext under Title VII." Millbrook v. IBP, Inc., 280 F.3d 1169, 1176 (7th Cir. 2002) (quoting Denney v. City of Albany, 247 F.3d 1172, 1185 (11th Cir. 2001)). *See also* Baron, *supra* note 112, at 281 (highlighting the problematic nature of subjective hiring systems which allow the decision-maker to wield "considerably more personal discretion," making the decisions "more susceptible" to unconscious bias).

decision-making based on how one feels is what occurs particularly when an organization seeks candidate-to-culture alignment.[192] At first blush, promoting the individual who most closely aligns with the values seems to make good business sense, and reflects quite a natural human instinct. The problem with a preoccupation with cultural fit in the selection process lies in the imperceptibility of such characteristics, and the conscious and unconscious layering of meaning on such abstract terms by the decision-maker. In fact, in *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, Professor Lawrence observed that where an "employer perceives the white candidate as 'more articulate,' 'more collegial,' 'more thoughtful,' or 'more charismatic[,]' [h]e is unaware of the learned stereotype that influenced his decision."[193] Thus, the rub comes when "cultural fit" is based on a highly contingent perception of who belongs.[194] By developing "culturally consistent selection criteria" beyond the hiring phase, employers ensure that their halls, cubicles, and conference rooms remain filled with those who will toe the corporate line.[195] For example, in the fast-paced contemporary workplace, an employer must make decisions with incomplete and multi-dimensional information about each candidate. A decision-maker may hire an individual who seems to be a good fit based on paper credentials and limited staged interview interaction. Later that same employee might be deemed unfit in cultural terms and not selected for a promotion or other opportunity because he failed to attune to the organization's culture.[196] People of color and other workplace minorities are often encouraged to assimilate, mask their true identity or ethnic salience, for example, to adapt to an organization's culture.[197] Professors Devon Carbado's and Mitu

[192] The employer is able to create a paper trail early on that reflects this cultural stance, while simultaneously injecting the decision-making process with subjectivity.

[193] Lawrence, *supra* note 9, at 343.

[194] It becomes easy for a decision-maker to assess a candidate based on externalities such as appearance, dress, hair style, visible disability, perceived race or gender, information relating to religious background, or linguistic characteristics including accent, speech cadence or enunciation. A decision-maker imports the messaging of his own identity and cultural-fit alignment and deems candidates who are different in some way unqualified for the job, promotion or assignment. Such selection pervades the American workplace. A recent example of such cultural-fit decision making involves a 2003 class action lawsuit against the retailier Abercrombie and Fitch wherein plaintiffs alleged that the companies brand of "culture & lifestyle" operated to exclude employees of color from certain positions. Press Release, The United States Equal Employment Opportunity Commission, EEOC Agrees to Landmark Resolution of Discrimination Case Against Abercrombie & Fitch (Nov. 16, 2004), *available at* http://www.eeoc.gov/press/11-18-04.html.

[195] *See* Chatman & Cha, *supra* note 87, at 27 (illustrating how various companies, including Cisco Systems, are able to develop selection criteria commensurate with goals).

[196] For example, a decision-maker may decide that the older, female, Muslim or black worker no longer benefits an organization. Desiring to conform to the cultural dance and consumed with the undulations of the dynamic relational forces, the decision-maker's commitment to the organization and desire to remain integral to it may overshadow any consideration of fairness or value of diversity within the workforce.

[197] *See, e.g.*, Emily Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 910 (2006) ("[M]embers of outsider groups in the workplace often feel compelled to perform and signal loudly against negative identity-related stereotypes in order to prevent discrimination based on those stereotypes.")

Gulati's working identity theory highlights this phenomenon.[198] As long as the worker's difference is innocuous and unobtrusive, then the worker benefits from efforts to belong.[199] Conversely, once the employee fails to sufficiently cover, he may be deemed inconsistent with the organization and no longer befitting of inclusion.[200] Thus, how a worker performs her identity, particularly in ethnic or racial terms, "matters almost as much as how one looks in the post-Civil Rights era."[201]

In sum, the social and relational phenomena shed considerable light on the employment decision-making process. The prevalence and variability of work structures and evaluative models alone produce complex interpersonal relations. The social and psychological dynamics add layers of complexity. As organizations and their climates evolve and shift, so do the behavioral and attitudinal expectations for workers. Such movement may be spurred by organizational changes, mergers, acquisitions, research and development, business development, product design, service goals, and even generational tension.[202] The possible catalysts for shifting norms are

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[198] *See generally* Carbado & Gulati, *supra* note 9, at 1262–63 (arguing that in order to fully understand workplace discrimination one has to examine and raise questions about both the employer's conduct and the employee's conduct); *see also* Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 655 (2005) (discussing the concept of "racial naturalization": to link racism and Americanization through the use of models of naturalization).

[199] *See* Carbado & Gulati, *supra* note 9, at 1270 ("A positive relationship increases workplace standing and advancement opportunities.").

[200] *See id.* at 1269–70 ("A negative relationship between a stereotype about an employee's identity and a certain institutional criterion diminishes [the] employee's workplace standing and advancement opportunities in that institution."). For example, once the black employee acts too black, the tide may turn. Such "outing" may cause a decision-maker to believe that the employee no longer culturally fits with the organization, that the employee is not sufficiently primed or socialized. *See, e.g.*, Natay v. Murray Sch. Dist., No. 04-4084, 2005 WL 44965, at *1 (10th Cir. Jan. 11, 2005) (describing where a decision-maker told the plaintiff that she was "geographically, racially, culturally, and socially out of place"). *See also generally* Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002) (addressing how outsiders deliberately downplay or "cover" their differences to make themselves more palatable to insiders). It is important to note that recently, in the legal realm, some have begun to take corporate culture more seriously. Legal scholars have expanded the social science foundation and begun to engage these interdisciplinary concepts to advocate new theories of workplace discrimination and reconcile established anti-discrimination doctrine. Notably, Professor Tristin K. Green has traced the evolution of concepts of culture in management discourse and its transference to the theoretical and practical aspects of the modern American workplace. In her article *Work Culture and Discrimination*, she ventures towards law reform proposing workplace culture as a potential source of discrimination within organizations. Green, *supra* note 78. Green maintains that work culture is, at its core, a social relations phenomenon. That is, a human process, as well as a structural one, subject to power dynamics and a "myriad of cognitive and motivational biases." *Id.* at 628. Green's work provides a strong foundation lending credence to my view that relying on same-actor evidence to ferret discriminatory animus misses the mark. From the view of the finder of fact, when viewed from cultural terms, the same-actor evidence distorts the inquiry for discriminatory motive. Culture enforces boundaries set by the ongoing relational interaction whereby the decision-makers perceive and frame expectations in society, creating an incubator for bias to flourish.

[201] KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 21–22 (2006) (asserting that discrimination is less dependent on how white one looks, but how white one acts); Angela Onwuachi-Willig, *Volunteer Discrimination*, 40 U.C. DAVIS L. REV. 1895, 1908 (2007) (exploring the social construction of race).

[202] *See, e.g.*, James A. Johnson et al., *The Intergenerational Workforce, Revisited*, 26 ORG. DEV. J. 31 (2008).

endless, and any organization is as fragile as the culture that defines it and the situational forces it confronts. Therefore, a decision-maker (individual or collective) will undoubtedly be influenced by the shifting sands within any setting.

Moreover, the demographic influence on an employment decision may be most reliable when one contextualizes a worker's experience in a particular setting over time. As one study suggests, perhaps "only through aggregating data across decisions and across decision-makers can most conclusions about the effects of race [or other characteristics] be offered with any degree of confidence."[203] Thus, relying on a shorthand reference, like same-actor evidence, tells us nothing meaningful, and certainly nothing determinative, about the motivation of the decision-makers involved.

Through use of the same-actor doctrine, the courts often paint a picture of a benevolent employer, filled with workers who enter and exit the workplace on an even playing field. Underneath this broad view lies a complex web of behavioral, emotional, and cognitive elements that create a unique, pervasive, and influential energy which permeates and gives life to work groups. That salient force produces complex social and cultural dynamics. Business tools such as work teams and collective problem solving constitute vectors through which bias can infect the decision-making process in any organization. The interplay of relational, environmental, and psychological forces cannot be denied. Due to these phenomena, discrimination is far more complex than courts are willing to recognize.

IV. LET'S STOP "PLAYING IN THE DARK"[204]: EVALUATION OF THE SAME-ACTOR FACTOR IN CONTEXT

Workplace discrimination emanates from a complex mosaic of social interactions, perceptions, and dynamics—bearing on the assessment of a worker's worth—creating the climate for bias in decision-making. The result is a kind of discrimination that the most equitably articulated workplace policies and good faith efforts cannot dismantle. Professor Lawrence first recognized this phenomenon twenty years ago in his ground-breaking work, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.[205] As Lawrence posited, "a motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to hide."[206] Conscious intentionality has little to do with

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[203] Michael I. Norton et al., *Mixed Motives and Racial Bias: The Impact of Legitimate and Illegitimate Criteria on Decision Making*, 12 PSYCHOL. PUB. POL'Y & L. 36, 52 (2006).

[204] MORRISON, *supra* note 1.

[205] Lawrence, *supra* note 9.

[206] *Id.* at 319 (footnote omitted).

discrimination, particularly in settings comprised of complex group structures. Thus, judicial formulations like the same-actor doctrine that are premised on intentional discriminatory motives further debilitate plaintiffs' efforts in seeking redress for unlawful discrimination.

Professors Belton and Krieger, for example, observe that the "implicit assumption in the same-actor principle is that discriminatory animus, if it exists, manifests itself in all aspects of the employment relationship from initial hire through termination and [with respect to] all other terms and conditions of employment."[207] However, the same actor may be unaware that his or her bias is operating when a particular employee is hired, but such sentiment is subsequently triggered by the behavior of the employee. I agree with these scholars that this assumption is flawed. Additionally, as I have demonstrated, organizational behavior and management theory further reflect the dynamic nature of workplace engagement and decision-making, particularly where work teams and collective problem solving practices exist. Significantly, organizations themselves are not static, even those with strong corporate visions and values, particularly in today's economic climate. Part II of the Article explored three facets of organizational life that affect workplace decision-making and interpersonal relations—work structure, evaluative models, and social-psychological forces. Each of these aspects illuminates the contingent, relational, and subjective nature of human interaction and bears significantly on an employer's motivation in any the workplace context. *Proud*'s blind reliance on the underlying false psychological assumption of the same-actor principle represents a desire to refrain from coercive constraint on employers and accord deference to business judgment.[208]

A. *Debunking the Myth of* Proud*: Association as Acceptance and Other Flawed Assumptions*

I have engaged the problematic nature of the same-actor principle and sought to demonstrate the danger of the doctrine's underlying assumptions as its expansion reflects, particularly *Proud*'s requirement that the *same decision-maker* engage in the positive as well as negative decisions within a *short time period.* The idea that one decision-maker exists and that a short time period between the positive and negative employment decisions removes any possibility that bias can occur simply fails to mirror the modern workplace.

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[207] ROBERT BELTON ET AL., EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE 137 (7th ed. 2004); *see also* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1314–16 (1998) (arguing that the same-actor defense is flawed because it is "simply not how discrimination works").

[208] *See, e.g.*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1039–52 (2006) (asserting that judicial reaction to discrimination allegations often reflects a tendency to accord business judgment deference to employers).

1. *The Elusive Same Actor: Work Configuration and Decision-making*

As explored in Part II, the American workplace has undergone tremendous changes in the last few decades, particularly with respect to the orchestration of work and utilization of workers. As this research shows, discrimination is a human process made more complex by social, cultural, structural, and operational phenomena of organizations and groups. Thus, the courts' adoption of the same-actor inference in the modern era, without any exploration of social science, organizational behavior, and management systems, was wrongheaded but seemingly deliberate.[209] The notion that "the same actor" exists at all is contrary to the structure so prevalent in today's work environments where several individuals contribute to a decision.

Ironically, the flawed assumptions behind the same-actor doctrine have not tainted completely employment discrimination law. The courts have not ignored contemporary workplace realities altogether under Title VII law, including group dynamics. For example, under a theory known as the "cat's paw" doctrine, courts have declared that a collective can serve as a "conduit of [the supervisor's or even suborindate's] prejudice—his *cat's paw*."[210] The courts applying this doctrine seem to recognize the complexities of group decision-making,[211] namely its multifarious and interdependent nature.[212]

As studies of group processing reveal, a committee does not serve as a buffer to preserve the integrity and fairness of the decision-making process where bias may penetrate due to the proclivities of those on the work team

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[209] *See supra* Part II.A (discussing *Proud v. Stone* and the origins of the same-actor doctrine).

[210] *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (emphasis added). The court found discriminatory animus where a hiring committee's decision to discharge a worker was "tainted" by the supervisor's bias.While the committee was unaware of the plaintiff's age at the time of its decision, the court found that the supervisor's biased age-related comments that shed him in the "worst possible light" to the committee served to set up the plaintiff to fail. *Id.* Thus, the court recognized the consequential and possibly determinative nature of the supervisor's input. Instead of disregarding the influence of such biased input, the court declared it significant with regard to the employer's intent to discriminate. *Id.* At the most basic level, the court's embrace of a more contextualized view of behavior in organizations concedes that discrimination can arise when one acts on the preferences or bias of another. *See* White & Krieger, *supra* note 78, at 511–15 (discussing examples of *cat's paw* doctrine operating in recent cases). *See also* BELTON ET AL., *supra* note 207, at 148.

[211] The courts have even adopted the *cat's paw* theory in circumstances where a subordinate or peer-level employee expresses bias that influences the ultimate decision-maker. *See, e.g.*, Schreiner v. Caterpillar, Inc., 250 F.3d 1096, 1100 (7th Cir. 2001) (deeming that there must be a nexus between the biased input and the ultimate decision-maker's actions); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000) (collecting cases adopting the *cat's paw* theory); Griffin v. Wash. Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998) (stating that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence"). The Supreme Court has even recognized such complexities in imposing liability on employers for sexual harassment by supervisors. *See, e.g.*, Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 764–65 (1998).

[212] EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007) (applying cat's paw theory where the human resources official who decided to discharge plaintiff worked in a different city and did not know plaintiff was black, but relied exclusively on information provided by plaintiff's immediate supervisor who allegedly harbored bias evidenced by discriminatory remarks).

or manifest from the group dynamic itself.[213] Doctrines such as *cat's paw* demonstrate that courts are not totally oblivious to these phenomena either.[214] This is just the type of nuanced analysis largely missing under the same-actor inference.[215]

Why do the courts take such a shortsighted attitude toward such phenomena and find it difficult to impute an invidious motivation in presence of same-actor evidence? I believe, in part, the answer is that same-actor evidence tends to support a theme that lies at the heart of many aspects of employment discrimination law—the employer knows best how to operate its business, and the law ought not to infringe on its ability to do

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[213] *See* Sturm, *supra* note 10, at 659–63 (pursuing the manner in which decision-making occurs regarding a worker's status and asserting that courts' analyses "assume[] that the power to make decisions affecting employment status correlates with the level of formal power in the organization"). *See also* Alge et al., *supra* note 93 (noting differences between teams using traditional face-to-face meetings and those meeting through electronic media and how the results differ based on whether a team has a history or future together).

[214] While one could argue that a collective decision-making process mediates any bias harbored by others within the group or outside of it, organizational behavior literature shows us differently. For example, research on the contact hypothesis (that increased contact between members of different groups positively affects the impressions they develop about one another) shows that interpersonal contact often fails to reduce conflict between different groups. Flynn et al., *supra* note 159, at 414. This research is important because it demonstrates that teamwork does not necessarily minimize the use of stereotypes and other social psychological factors. Employers utilize all sorts of work structures and evaluative models that bear on human motivation and engagement. While employers often use such processes to increase productivity, improve employee morale, and secure survival of an organization, such strategic decisions can become breeding grounds for bias. It is this amorphous, "relationally dependent" work environment that can illuminate, and even mask, discriminatory bias. The bottom line is that this entanglement complicates the search for motive in Title VII disparate treatment cases generally, and with regard to the same-actor inference, particularly. A recent federal district court opinion illuminates this concern. In *Lim v. Franciscan Health Systems*, with goals of improving hospital processes and influencing patient safety, defendant maintained a Quality Improvement Monitoring Program (QIM) through which employees report deficiencies in patient care without risk of discipline. QIM contains an anti-retaliation component to encourage employees to report their co-workers. *Lim v. Franciscan Health Sys.*, No. C06-5191 FDB, 2007 WL 764726, at *1 (W.D. Wash. Mar. 9, 2007). Through this self-policing mechanism, plaintiff's co-workers complained of errors and other problems relating to plaintiff's performance. *Id.* The use of the internal QIM system sparked the investigations and a series of events that ultimately led to plaintiff's discharge. *Id.* at **1–2.

[215] Workplace reporting structures and decisionmaking processes are quite complex in contemporary settings, particularly those that involve multiple work locations and varied input data upon which a supervisor makes decisions regarding the terms and conditions of a worker's employment. *See, e.g.*, Feingold v. New York, 366 F.3d 138, 144–48 (2d Cir. 2004) (Plaintiff's co-workers, who were predominantly minorities, and were Christian and heterosexual, allegedly discriminated against him because he was white, Jewish, and homosexual. Plaintiff worked in the Manhattan office, while his supervisor, who was also Jewish, worked in the Brooklyn office. After plaintiff complained of his co-workers treatment of him, his supervisor met with one of the co-workers and agreed to terminate plaintiff. The trial court found that the only party that had a material role in plaintiff's termination was his immediate supervisor.). There are courts that apply the same-actor doctrine in a group decision-making context without any recognition of this difference or consideration of just how this may encumber the search for motive. *See, e.g.*, Mischer v. Erie Metro Hous. Auth., 168 F. App'x 709, 710–13 (6th Cir. 2006) (noting that board terminated black female plaintiff two months after naming her Executive Director, in part because of her "confrontational" management style that resulted in numerous complaints from staff about her curt and acrimonious treatment of them); Ako-Doffou v. Univ. of Texas at San Antonio, 71 F. App'x 440, at *2 (5th Cir. 2003) (noting that plaintiff argued that same actor inference was inapplicable because his supervisor merely "rubber-stamped" the recommendations of his subordinates).

so, particularly where the employer voluntarily diversifies its workforce.[216] The courts cast the employer as a "diversity do-gooder." Unsurprisingly, rational organizations actively employ, and even exploit, the same-actor doctrine to escape sanctions under Title VII.[217] This immunity-for-hire is problematic, precisely because, as a more microscopic view reveals, employment discrimination is a multi-dimensional problem that emanates from the intersection of complex systems.

2. *Timing and Workplace Realities*

Much can transpire during an employee's tenure, and those circumstances can be the catalyst to an employer's change of heart resulting in an adverse employment action. The cases that apply the inference in circumstances involving longer time periods between the positive and negative employment actions are far more troubling. Discriminatory attitudes may dwell just below the surface triggered only through increased engagement as the employment relationship evolves.[218] These dynamics are amplified in complex group settings or other structural designs. Additionally, organizations change over time, and in today's economic climate, more readily at a quicker pace, due to competition and technological advances. For example, changing business conditions may arise through mergers, acquisitions, financial crises, or high-level administrative changes. Significantly, structural and operational changes that occur over time spur complex relational dynamics that can affect the terms and conditions of a worker's employment. Such circumstances may provide the impetus for a decision-maker to take biased action and a way for employers to couch these decisions in a non-discriminatory manner.

Interestingly, some courts have recognized such dynamics and their effect on decision-making, expressly or by implication, in declining to

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[216] Krieger has explored the stray remarks doctrine and business judgment rules—concepts that have grown out of the courts' accommodating posture towards organizations. Krieger, *supra* note 9, at 1184, 1228.

[217] Organizations and their lawyers even encourage their supervisors, managers, and human resource professionals to use the inference. They often direct them to determine the relevant actors and engage the same decision-makers in firing and other workplace decisions in order to preserve the use of this defense if litigation ensues. *See, e.g.*, Jay P. Levy-Warren, "Same Actor" Role Must Be Considered, N.Y.L.J., Nov. 24, 1998, at 2 (advising that "[b]oth plaintiffs' attorneys and defendants' attorneys need to take the role of the same actor into account. For a defendant's attorney, this requires assessing the extent to which the facts can support reliance on the role of the same actor."). An internet search reveals that employers are well aware of the significance of same actor evidence. *See, e.g.*, Rick Kaiser, *Retaliation Claims—The Ticket to Trial*, Navigator (Lake Washington Human Resource Association), Apr. 2006, at 5, *available at* http://www.lwhra.org/wasamasnhr/doc.nsf/files/566D973F93A8319C8725714500598577/$file/April%202006%20Navigator.pdf; Donald J. Spero, *Age Discrimination in Employment Act*, HR-GUIDE.COM, http://www.hr-guide.com/data/A07301.htm (last visited Apr. 15, 2008). The sociological perspective of organizational response to law indicates that law and organizations are "dynamically interwined." Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOC. 479, 479 (1997). "Thus, organizations instrumentally invoke or evade the law, in a strategic effort to 'engineer' legal activities that bring the largest possible payoff at the least possible cost." *Id.* at 482.

[218] *See, e.g.*, Krieger & Fiske, *supra* note 208, at 1048–50.

apply the inference.[219] For example, in *Jetter v. Knothe Corp.*, the Court of Appeals for the Second Circuit opined that the same-actor principle has "far less applicability" where the employer has a "collateral incentive" to hire the plaintiff in the first instance.[220] In *Jetter*, the defendant desired to acquire plaintiff's apparel company, and to do so, plaintiff came as part of the package along with his two brothers with whom he co-founded the company.[221] Shortly after the acquisition, "significant work-related tensions" arose between defendant and plaintiff, who received performance counseling by a group of decision-makers, the same individuals who ultimately terminated his employment.[222] The court ultimately affirmed the summary dismissal in favor of the employer due to plaintiff's failure to proffer sufficient evidence of age discrimination.[223] What stands out, however, is the court's acknowledgement that the initial hiring decision alone bears scrutiny in relation to the same-actor doctrine[224] and recognition of the complexity of changing business conditions, particularly where strategic business-oriented matters such as acquisitions and mergers are at stake.[225] This shows that an employer may hire an individual for any number of self-interested reasons, including collateral incentive as reflected in *Jetter*, and importantly, remain entirely capable of discrimination.[226] Thus, *Jetter* cautions against allowing an initial positive decision to become a proxy for another without some consideration of related business inertia that occurs over time and the social dynamics that such conditions may produce.[227]

There are numerous other reasons why an employer might hire an employee or grant some favor upon her, including low expectation of that individual to begin with, diversity goals, or impression management of the

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[219] *See, e.g.*, Tellepsen Pipeline Servs. Co. v. NLRB, 320 F.3d 554, 569 (5th Cir. 2003) (acknowledging that a change in circumstances can occur between time of hiring and firing); Mitchell v. Superior Court of Cal., County of San Mateo, Nos. C 04-3135 VRW, C 04-3301 VRW, 2007 WL 1655626, at *14–15 (N.D. Cal. June 7, 2007) (hesitating to apply the same-actor inference as requested by employer where thirteen years elapsed between promotion and termination in a case where inference is helpful but unnecessary for employer to obtain summary judgment); Bardales v. Western Stone and Metal, No. 05-cv-01435-WDM-BNB, 2007 WL 1087096, at *6 n.8 (D. Colo. Apr. 10, 2007) (declining to apply the same-actor inference where six years existed between hiring and promotion); Thomas v. iStar Fin., Inc., 438 F. Supp. 2d 348, 361 (S.D.N.Y. 2006) (declining to apply same-actor inference because three years elapsed between hiring and firing). For discussion of organizational realities in the contemporary workplace, see *supra* Part III, pp. 1138–39.

[220] Jetter v. Knothe Corp., 324 F.3d 73, 76 (2d Cir. 2003).

[221] *Id.* at 74, 76.

[222] *Id.* at 74–75. While *Jetter* was an age discrimination case, the court applied the same burden-shifting framework of *McDonnell Douglas* used in Title VII cases. *Id.* at 75–76.

[223] *Id.* at 73, 76.

[224] *See id.* at 76 (noting that "[t]he same-actor rationale has far less applicability in these circumstances").

[225] *See id.* (noting the influence of internal reorganization, job performance, and non-compete issues).

[226] *See id.* (upholding the district court's finding of a prima facie case of discrimination).

[227] Beyond hiring in accordance with a diversity goal, for example, courts have no real way to assess the soundness of the employer's initial decision to hire such that it becomes a signal of non-bias.

decision-maker's career as addressed in Part III.[228] Thus, the favorable action ought not to inoculate an employer from allegations of bias. As the employment relationship evolves with the passage of time, whether three months or three years, a decision-maker remains capable of discriminatory animus. As one court has recognized, "the enthusiasm with which the actor hired the employee years before may have waned with the passage of time because the relationship between an employer and an employee, characterized by reciprocal obligations and duties, is, like them, subject to time's 'wrackful siege of battering days.'"[229] Suffice it to say, anything is possible in the world of the contemporary workplace.

B. *The Clarity of Context: An Illustration of How Courts Can Get It Right*

In my view, race claims illuminate particularly well just how flawed the doctrine's underlying assumptions are in relation to the complexity of contemporary workplace dynamics. A striking example of these phenomena appears in *Johnson v. Zema Systems Corporation*.[230] Perceptively, the Seventh Circuit determined that the same-actor assumption may not hold true in certain contexts, particularly those involving organizational dynamics produced by stereotypical attitudes held by decision-makers, stagnant corporate cultures, and realities of business development and growth.[231] In this matter, the defendant, a distributor for Miller Brewing Company, had acquired and merged two distribution companies, one that had a predominantly black workforce serving the south side of Chicago, and the other with a predominantly white workforce serving north Chicago.[232] Despite the shared facilities, each faction until 1995 maintained its pre-merger demographic identity and worked in separate rooms of the company's corporate offices.[233]

Plaintiff, a forty-one-year-old African-American male, became Vice President of Sales and Marketing of the new entity after the merger, overseeing the entire sales staff.[234] Even post-merger, however, the company maintained essentially a segregated workforce with disparities with regard to various working conditions.[235] For instance, racial isolation

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[228] *See supra* Part III.B.2.

[229] Carlton v. Mystic Transp., Inc., 202 F.3d 129, 132 (2d Cir. 2000) (quoting WILLIAM SHAKESPEARE, Sonnet LXV, *in* THE COMPLETE WORKS OF WILLIAM SHAKESPERE, (W.J.Craig ed., Oxford Univ. Press 1928)).

[230] Johnson v. Zema Sys. Corp., 170 F.3d 734 (7th Cir. 1999).

[231] *See id.* at 745 (noting circumstances involving race and gender where the same-actor inference may not apply).

[232] *Id.* at 737.

[233] *Id.* at 738.

[234] Defendant actually hired plaintiff one month before the merger to serve as Vice President of Sales and Marketing for the distributing arm that served south Chicago and comprised a predominantly black workforce. *Id.* at 737.

[235] For example, during the plaintiff's tenure, the company paid African-American sales managers less than their white peers. The work environment also included a level of racial hostility with alleged use of the "N" word by white workers. *Id.* at 738.

extended beyond the physical office space; it also existed with respect to servicing of the distribution accounts in that black employees were responsible primarily for the accounts of black owners or providers.[236] Within months of his tenure, plaintiff began complaining about the various inequities that he observed—that the employer provided company cars to white sales managers, but not the black ones, laid off black workers more frequently and rehired them far less, and allowed a racially hostile work environment to persist that included use of racial epithets uttered by employees including representatives of management.[237] The company acknowledged several of these disparities and its efforts to address them once plaintiff brought the issues to its attention.[238] Despite favorable performance evaluations and other indications of plaintiff's successful job performance, defendant fired him three years after it hired him.[239]

In reversing the trial court's grant of summary judgment in favor of the employer, the court deemed the same-actor doctrine inapplicable in light of the evidence marshaled to show racial discrimination.[240] Despite the company's assertion that it fired plaintiff for legitimate business reasons upon receiving the advice of an outside consultant, the court found plaintiff's evidence sufficient to show that the employer's reasons—cost cutting and organizational flattening—a pretext for racial discrimination.[241] This racially isolated work environment produced a social dynamic that influenced the perception of the black workers as inferior and incapable. The court suggested that those in the management ranks harbored an expectation that the black workers would stay in their place, including the plaintiff in his management-level position, whom company officials expected to "comply with the race-based limitations of the job."[242] Once it was clear that plaintiff would not help maintain the segregated workforce, the company fired him.[243] Accordingly, the court rejected the trial court's

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[236] The division of accounts based on racial lines resulted in the black workers receiving lower pay in comparison to their white peers. *Id.*

[237] *Id.* Deposition testimony reflected that the company's comptroller and warehouse manager "regularly referred to African-American employees and job applicants as 'niggers.'" *Id.* A black secretary even overheard another employee refer to her as a "nigger." *Id.*

[238] The employer acknowledged the existence of a racially-charged atmosphere based on the conduct of some employees. *See id.* at 738–39 (noting that the defendant corrected the disparity by providing cars to both African-American and Hispanic sales managers after plaintiff complained, and the defendant claimed it was preparing to rectify salary discrepancies as well).

[239] Plaintiff was hired in June 1991 and fired in October 1994. *Id.* at 737–38. The record reflected two performance appraisals that described plaintiff's work quality in "superlatives." *Id.* at 737. Additionally, the President of the company prepared a letter of recommendation on plaintiff's behalf upon termination, which described plaintiff as "'a serious and dedicated worker, whose reliability and integrity are above question.'" *Id.* at 737–38. Additionally, deposition testimony of a company official admitted that plaintiff's termination was not based on poor job performance. *Id.* at 738.

[240] *Id.* at 745.

[241] *Id.* at 744.

[242] *Id.* at 745.

[243] *Id.*

reliance on the same-actor doctrine in granting the employer's motion for summary judgment.[244]

In its analysis of the same-actor doctrine, the court opined on the tenuousness of the underlying psychological assumption first articulated in *Proud.* Acknowledging various ways in which bias may infect the decision-making process after the positive hiring decision, the Seventh Circuit stated:

> For example, a manager might hire a person of a certain race expecting them not to rise to a position in the company where daily contact with the manager would be necessary. Or an employer might hire an employee of a certain gender expecting that person to act, or dress, or talk in a way the employer deems acceptable for that gender and then fire that employee if she fails to comply with the employer's gender stereotypes. Similarly, if an employee were the first African-American hired, an employer might be unaware of his own stereotypical views of African-Americans at the time of hiring. If the employer subsequently discovers he does not wish to work with African-Americans and fires the newly hired employee for this reason, the employee would still have a claim of racial discrimination despite the same-actor inference.[245]

The court's observations comport with social science, organizational, behavioral, and management literature revealing not only the existence of unconscious bias, but also that our workplaces mirror the social and cultural realities of our larger society.[246] In my view, the Seventh Circuit's

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[244] *Id.*

[245] *Id.*

[246] One body of research bears out the Seventh Circuit's observations. For example, the work of Dovidio and Gaertner regarding aversive racism strongly suggests that a white decision-maker motivated by self-interest could hire a minority employee but simultaneously discriminate unconsciously, and harbor negative feelings. *See* John F. Dovidio & Samuel L. Gaertner, *Changes in the Expression and Assessment of Racial Prejudice, in* OPENING DOORS: PERSPECTIVES ON RACE RELATIONS IN CONTEMPORARY AMERICA 119, 131–34 (Harry Knopke et al. eds., 1991). This allows the white decision-maker, for example, to maintain individual positive self-esteem and his "egalitarian self-image" because he initially hired, or otherwise acted favorably toward, this worker. *See* McGinley, *supra* note 9, at 426–28 & n.61 (discussing how unconsciously rooted biases may be even for those self-identified white liberals due to the complex cognitive biases and environmental factors); Krieger, *supra* note 207, at 1314–16 (deeming the the same-actor doctrine flawed because "[c]ognitive forms of intergroup bias will not operate consistently, even in the same decision maker" because such bias "var[ies], according to the specific situation in which the decision maker finds himself"). Dovidio and Gaertner developed this theory of aversive racism that focuses on the unconscious nature of decision-making. Dovidio & Gaertner, *supra*, at 131. In my view, what complicates this phenomenon are the attendant relational forces at work in organizations, namely corporate culture, power dynamics, and stereotyping. Thus, aversive racism and variations of unconscious bias only tell part of the story with regard to the same-actor principle. As Professor McGinley cautions, bias constitutes a complex alchemy and an understanding of "such phenomena as a product of one process alone is probably misguided." McGinley, *supra* note 9, at 424; *see also generally* Krieger, *supra* note 9; Brant T. Lee,

opinion represents an understanding of, or at least openness to, the relational, cultural, and structural realities of our contemporary settings, including stereotypes, power dynamics, and the value of difference. Interestingly, the court surmised that the doctrine offers limited utility as a heuristic for discriminatory animus.[247] Thus, the court saw the doctrine for what it is—a "convenient shorthand"—one, in my view, that constitutes no basis for summary dismissal, especially in cases where racial hostility is rampant.[248]

C. *Playing Fair: Prescription for the Same Factor in Title VII Disparate Treatment Cases*

Contextualizing the dynamism of the work environment was absent in the formulation and expansion of the same-actor principle and remains largely absent in the widespread continued use of the doctrine.[249] My point is that the courts should engage the shifting and complex nature of any particular work setting instead of proclaiming the existence of same-actor evidence determinative of, or even pertinent to, the ultimate question of discrimination, and thereby summarily dismissing plaintiff's claims.[250] Management and organizational behavioral literature regarding work

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The Network Economic Effects of Whiteness, 53 AM. U. L. REV. 1259, 1278 (2004) ("In this regard, note the prevalence of 'private' social discrimination that is often described as 'benign' or 'natural.' Commentators have noted that Black and White Americans lead lives that are publicly integrated but privately segregated; they may work at an integrated workplace, but often go home to segregated neighborhoods, worship in segregated congregations, and enjoy different forms of cultural entertainment.").

[247] *See* Johnson v. Zema Syss. Corp., 170 F.3d 734, 745 (7th Cir. 1999) (stating that same-actor inference "is unlikely to be dispositive in very many cases").

[248] There are a few other courts that have recognized these complexities. *See, e.g.*, Feingold v. New York, 366 F.3d 138, 154–55 (2d Cir. 2004) (vacating in part summary dismissal of plaintiff's Title VII claims and deeming the same-actor inference inapplicable given the "changes in circumstances during the course of [plaintiff's] employment"—plaintiff, a white, Jewish, gay male, had complained about discrimination, and those complaints "could be found to have altered circumstances of his employment." That is, after plaintiff lodged the complaints, he "became not merely a white Jew *but a white Jew who . . . would not tolerate a discriminatory office culture*") (emphasis added); Taylor v. Va. Union Univ., 193 F.3d 219, 247 (4th Cir. 1999) (dissenting judge opining that "[t]he thought of an employer hiring an individual in a protected class and, for discriminatory reasons, keeping that person in an entry-level [position], i.e., hindering the employee from advancing to the ranks of management or into a higher paying position, *is not nearly as incredulous as the majority urges. It does not require a stretch of the imagination to discern such a possibility. . . . [T]he fact that [an employer] hired [the plaintiff] does not necessarily mean that he did not act with discrimination in evaluating her or in considering her for promotion*") (emphasis added).

[249] Admittedly, there are some courts that have explicitly failed to apply the inference in these contexts as reflected in this section. *Id.* at 240; *see also* Olufowobi v. Cardinal Health 200, Inc., No. 3:03CV1161 (PCD), 2006 WL 1455625, at *12 n.14 (D.Conn. May 25, 2006) (noting that "[i]t is not clear that the 'same-actor' inference should apply when Plaintiff was hired or fired by committee"); *see also* note 248. Others, however, have applied it across groups, subgroups, and even divisions within an organization. *See, e.g.*, *supra* notes 68, 69, 215.

[250] In the organizational behavior arena, no less, scholars continue to invite more contextualization of human engagement and the decision-making processes within organizations—specifically, the psychological mechanisms, shared cognition, processing of work teams, and the effect of demographics. Legal analysis with respect to the same-actor inference can learn much from a parallel reflection.

structure and practice lend considerable insight to understanding the operation of bias in employment settings. The nexus between the adverse employment action and the plaintiff's protected characteristic under Title VII will be contingent upon the variation, temporality, and scope of various contemporary workplace tools.[251] Relying on a shorthand reference like the same-actor inference amounts to a surface-level inquiry at best. At its worst, the device offers an illusion of fairness and inclusion, and serves as a barrier to equality.

One who deems himself objective, fair, and open to difference could imagine a circumstance where the same-actor principle and its attendant inference seem intuitive, especially if the same decision-maker acts shortly after engaging favorably with another worker. However, application of the inference to even the short-term situation warrants skepticism, especially when the workplace climate appears racially toxic. For example, a federal court in Indiana recently applied the same-actor inference in a matter involving racial epithets uttered by plaintiff's co-workers and participation by plaintiff's team leader in telling racial jokes on the job.[252] Despite this evidence suggestive of a hostile environment, the court in *Jean-Baptiste v. K-Z, Inc.* applied the inference, in part, apparently because plaintiff was fired within twenty-one days of being hired.[253] In this case, the court's perfunctory application of the principle exemplifies its potential for covering up a racially venomous workplace. The court stated, "that [the decision-maker] fired the first black person he hired [was] clearly insufficient to overcome this presumption and establish animus because [this manager] 'could have refused to hire [plaintiff] in the first place.'"[254] In this case, the court should have engaged in more critical examination of the context of plaintiff's circumstances precisely because of the biased comments in a work setting where plaintiff was the first African American hired. Instead, the court portrayed the employer as inclusive and unbiased simply because it knew the plaintiff was black when it hired him—in this instance, pretending that the decision-maker is incapable of discriminatory animus because he hired the plaintiff less than a month before is wrongheaded. *Jean-Baptiste* is a stark example of the complexities of

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[251] *See* Sturm, *supra* note 10, at 669–72 (arguing there is a disconnect between law and the "embedded patterns of relationships" in organizations).

[252] Jean-Baptiste v. K-Z, Inc., 442 F. Supp. 2d 652, 656–57, 665 (N.D. Ind. 2006).

[253] *Id.* at 656.

[254] *Id.* at 666 (quoting EEOC v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 152 (7th Cir. 1996)). The court ultimately denied the employer's motion for summary judgment under a pure circumstantial evidence framework. Yet, it spent considerable time assessing whether racial epithets, slurs and jokes constituted a convincing "mosaic" of evidence directly pointing to discriminatory animus to overcome the "strong" same-actor presumption. *Jean-Baptiste*, 442 F. Supp. 2d at 663–66. In deciding that the plaintiff's evidence of racial bias failed to constitute a convincing mosaic, (despite deposition testimony by plaintiff's group leader that he frequently told racial and national origin jokes), the court discounted much of the evidence of racial hostility due to the existence of multiple decision-makers and the same-actor doctrine.

workplace bias in relational and cultural terms.[255] As explored in Part II, workplace environments are complex schema wherein bias remains dormant until activated or concealed altogether. An employer should not receive credit for its decision to hire a worker, particularly in a workplace where diversity is non-existent at the outset.

Just because an employer decides to hire, promote, or otherwise associate with a diverse candidate does not preclude discriminatory animus from infecting the work relationship even in the short-term case. Granting same-actor evidence "strong presumptive value" under such circumstances exposes the illegitimacy of the principle's underlying assumption. Labeling the principle a rebuttable presumption is disingenuous in light of the hurdles a plaintiff experiences in overcoming such evidence. As numerous other scholars in the workplace arena have asserted, a search for motive without attention to the human and organizational influences is likely to remain unproductive.[256] *Proud* and its progeny simply focus on a largely inconsequential aspect in light of workplace complexities. Thus, same-actor evidence is of no real value. That a manager relays, "I was there at the beginning and end," (or even beginning *to* end) should be of no real consequence simply due to that consistency alone. Rather than inquiring about who played a role, the courts should determine under what circumstances the player(s) acted.

By promoting an historical reference in the tenure of a worker, courts oblige employers in the application of the proof structure in disparate treatment cases. In an increasingly competitive business world as employers seek to increase productivity while minimizing costs, however, it is inappropriate for courts to afford employers a kind of bias-free stamp of approval based on a past favorable decision. For this to work, the courts must attribute a great deal to the employer's initial decision and the credibility of the decision-maker(s), and ignore the vectors that make discrimination possible in any work setting. In this regard, the court yields to the imagination of an equally just society in which we revel in a feel-good story about how manner presupposes motive.[257] Why does the court

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[255] This matter involved racial epithets and jokes, some of which were uttered by co-workers, and the group decision-making process, where only one of those decision-makers had participated in telling racial jokes in the workplace. The court stated that "because [plaintiff's] termination was effectuated by multiple decision-makers, [he] [could] not rely on evidence of just one decision maker's animus alone." *Id.* at 665. Similarly, the court was not persuaded by the co-workers' hostile conduct because they "played no role in making or influencing the decision to fire him." *Id.*

[256] *See* McGinley, *supra* note 9, at 418–19 ("'[D]iscriminatory intent' represents an outdated view of human behavior . . . ."); Sturm, *supra* note 10, at 642 ("[A]nalysis based solely on motivation ignores the role of cognition in shaping and producing bias."); Wade, *supra* note 172, at 1468 (arguing that "[a]s long as corporate racial hierarchies persist, and as long as boards and managers ignore them, societal racism will be entrenched").

[257] Other scholars have recognized the judiciary's ability to discount the very existence of workplace discrimination. *See, e.g.*, Krieger, *supra* note 9, at 1247–48 (suggesting that Title VII's disparate treatment theory has "labored to long under a rhetoric of invidiousness that has outlived its social utility"); McGinley, *supra* note 9, at 471 (theorizing that a counter-revolution in employment

so want to believe in the altruism of the employer? The underlying psychological assumption of *Proud* encompassed the view that the principle benefited notions of diversity and inclusiveness.[258] That assertion constitutes a contradiction, however, that not only cheapens notions of inclusion, but legitimizes window dressing by employers. The same-actor doctrine operates as a subsidy of the cost of employers' efforts to diversify their workplaces. In fact, under-informed analysis frustrates not only diversity, but genuine inclusion and acceptance in the American workplace.

Same-actor evidence and the significance courts accord it establish a guideline for good organizational behavior. Such evidence inaccurately signals to the fact finder that the employer values difference. As explored in this Article, that may not be further from the truth. Moreover, business operations are fluid bodies that react to market pressures and profit goals. Thus, change is inevitable, and it is precisely this workplace evolution that can manifest discriminatory animus. Accordingly, the doctrine has no place in employment discrimination jurisprudence.

V. CONCLUSION

Workplace discrimination is difficult to uncover. In 1991, *Proud* further impeded plaintiffs' quest when it proclaimed that the nature of the hirer-firer relationship bears significantly on the ultimate question of discrimination where the same person engages in favorable action toward the plaintiff. The same-actor doctrine pervades workplace law, but it offers far less with respect to human motivation than its rapid evolution would indicate. Importantly, in relying on the benign fact of consistency in those involved in a decision-making process, the courts have reified a myth about organizational structure and how humans behave in workplace settings. Shifts in the power dynamics, organizational structures and cultures complicate workplace decision-making, and that interplay has been far too removed from the courts' application of the doctrine.

In this Article, I endeavored to demonstrate that the notion of one employment decision serving as a proxy for another is misguided in our contemporary workplace.[259] Interdisciplinary sources, including management theory, organizational behavior, and cognitive psychological

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discrimination law exists whereby courts develop various doctrines, such as the lack of interest defense, because "judges do not believe discrimination is prevalent in today's workplace").

[258] *Proud*, 945 F.2d at 798.

[259] Interestingly, Professor Onwauchi-Willig recently has commented on the weight given by courts to the use of black-on-black testimony by employers. Perceptively, she inquires "why one minority's view that he has not experienced discrimination in the workplace is relevant to another minority's individual disparate treatment claim. Instead, the question, I ask, or rather the claim I make, is that factfinders also should consider how identity performance—in particular the immense pressures that Blacks have in our society to perform their identities in ways that are racially palatable—may be motivating the contradicting black witnesses's testimony." Onwauchi-Willig, *supra* note 201, at 1928.

literature, all lend sophisticated insight by which to evaluate the shortcomings of this doctrine. My exploration reveals that the same-actor principle is anchored in an outdated narrative of the American workplace and an inaccurate view of human motivation. Bias may only occur with the passage of time during the employment relationship and often arises from the very corporate structures and practices employers use to empower workers. The courts' willingness to revert to a shortcut reflects a misunderstanding and undervaluing of how organizations function in contemporary society, and human motivation, more generally. This contextualization was absent in the formulation and expansion of the doctrine and remains largely absent in its continued widespread use.[260] This doctrine derails the search for discriminatory animus considerably, through fixation on the actors involved in the decision-making process. By reducing intricacies of the modern workplace and the complex inquiry of discrimination to a shorthand reference, the courts avoid thinking about discrimination in any real sense, relying instead on an insufficient marker of bias.

A more sophisticated understanding of people and organizations should result in legal doctrines that enhance fairness and justice in the workplace. By immunizing the employer against discrimination claims based on its initial decision to hire or otherwise act favorably toward a worker, the doctrine thwarts workplace equality, including the upward mobility of workers and the promise that a pluralistic work environment holds. Moreover, embedded in the misguided psychological assumption is a counter-narrative, one that constructs persons of color, women and other outsiders, not as victims of workplace discrimination, but as threats to employer autonomy and workplace tranquility. A doctrine that insists on casting employers as bias-free discounts the experiences of those victimized and traumatized by the perniciousness of discrimination. The same-actor doctrine is unwieldy and unreliable—simply unjust.

The bottom line is the same-actor doctrine is an overused legal mechanism unmoored from the realities of the modern workplace. The continued and unreflective application of it threatens workplace equality, in large measure making businesses resistant to the antidote of Title VII. This is a call for courts to cease playing in the dark and begin evaluating disparate treatment in employment consistent with the realities of contemporary work life.

[260] *See supra* Part II.