

THE TROUBLE WITH *TORGERSON*: THE LATEST EFFORT TO SUMMARILY ADJUDICATE EMPLOYMENT DISCRIMINATION CASES

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I. INTRODUCTION

Legal scholars have lamented the use of summary judgment by both courts and defendants in employment discrimination cases.¹ In spite of court statements that employment discrimination cases are not well suited for summary judgment,² summary judgment is often granted.³ Breaking its own precedent on

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¹ See Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 795–96, 806–19 (2002); 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, 205–09 (1993); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN’S STUD. 311, 311–17 (1999) (discussing summary judgment in hostile environment sexual harassment context); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 537–51 (2010); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007). A study of seven federal district courts sponsored by the American Bar Foundation found that 18 percent of plaintiffs lost their cases on summary judgment. Laura Beth Nielsen, *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary U.S.*, RESEARCHING L., Spring 2008, at 1, 3. Fifty percent of the cases studied were settled early. *Id.* Only 2 percent of plaintiffs won at trial. *Id.* These cases generally have higher rates of summary judgment and lower rates of settlement when compared to other cases brought in the federal court system. *See id.* at 7.

² See, e.g., *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004).

³ See, e.g., *Doner-Hedrick v. N.Y. Inst. of Tech.*, 874 F. Supp. 2d 227, 232, 239 (S.D.N.Y. 2012) (acknowledging “greater caution” in granting summary judgment in employment discrimination cases, while granting summary judgment for employer on Title VII claims); see also Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1032–33 (study of summary

this point, the Eighth Circuit recently has taken what some might call the “ultimate” step in increasing the potential for summary judgment in employment discrimination cases. In 2011, in *Torgerson v. City of Rochester*,⁴ that court held that “[t]here is no ‘discrimination case exception’ to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial.”⁵

While the *Torgerson* court might well have been correct that there is no “discrimination case exception” to summary judgment, federal courts have long voiced reluctance in granting summary judgment in cases involving intent—whether those cases involve the intentions of contracting parties, securities fraud, or the motives of alleged conspirators in an antitrust case.⁶ Indeed, the premier treatise on federal practice and procedure, Wright, Miller, and Kane, has an entire section devoted to the difficulties in granting summary judgment in “actions involving state of mind,”⁷ in which they discuss discrimination and employment cases as part of this category.⁸

With the exception of disparate impact cases,⁹ all employment discrimination cases require a plaintiff to show the state of mind of the defendant-

judgment rates for cases in 2006 showing courts granted 80 percent of summary judgment motions in whole or in part). Employment discrimination plaintiffs win pretrial adjudications far less often than other plaintiffs. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128 (2009) (“Over the period of 1979–2006 in federal court, employment discrimination plaintiffs have won 3.59% of pretrial adjudications, while other plaintiffs have won 21.05% of pretrial adjudications.”).

⁴ *Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011).

⁵ *Id.* at 1043 (citing *Fercello v. County of Ramsey*, 612 F.3d 1069 (8th Cir. 2010)).

⁶ See 10B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2730 (3d ed. 1998) (citing cases in these areas as examples). The other influential treatise on Federal Practice—Moore’s Federal Practice—has noted that this once “bright-line” rule is no longer quite so “bright” after *Matsushita v. Zenith*. See 11 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 56.25[2][b] (3d ed. 2013). However, it does note that, “[n]evertheless, summary judgment will still be difficult to obtain in many cases in which a party’s state of mind is a material issue.” *Id.* The Private Securities Litigation Reform Act changes the pleading requirements in Securities Fraud Cases. See 15 U.S.C. § 78u-4 (2012). As a result of this statute, with some exceptions:

in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u-4(b)(2)(A). Thus, plaintiffs often lose on the pleadings in these cases. This reform was largely in response to purportedly abusive litigation tactics used by plaintiffs’ counsel in these cases. For an overview of the history of the Act and criticism of it, see generally Laura A. McDonald, *Restoring the Balance After the Private Securities Litigation Reform Act of 1995*, 38 FLA. ST. U. L. REV. 911 (2011); Neil Pandey-Jorin, *A Case for Amending the Private Securities Litigation Reform Act: Why Increasing Shareholders Rights to Sue Will Help Prevent the Next Financial Crisis and Better Inform the Investing Public*, BUS. L. BRIEF, Spring 2009, at 15–19.

⁷ WRIGHT ET AL., *supra* note 6.

⁸ *Id.*

⁹ These cases do not require the plaintiff to show that the defendant had the intent to discriminate, but instead the impact alone of an employment practice is sufficient to prove discrimination. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

employer, or of one or more of its employees.¹⁰ In addition, because actors so rarely voice their discriminatory preferences aloud, employment discrimination plaintiffs often rely on inferences from circumstantial evidence. Making inferences is a traditional jury function that courts have held is not well-suited for summary judgment. Thus, the *Torgerson* court misapprehends those cases that seemingly require a “special” summary judgment standard for employment discrimination cases. Rather, these cases involve a standard commonly used in cases that involve drawing inferences in an effort to determine the defendant’s intent.¹¹

While other courts have adopted holdings similar to *Torgerson*, the circuits are in a state of confusion in assessing how intent in employment discrimination cases affects summary judgment.¹² Some courts still state that employment discrimination cases are poor candidates for summary judgment when issues of intent are present, and in some instances, seemingly make it easier for defendants to obtain summary judgment in employment discrimination cases than in other cases. Still other courts simply follow the summary judgment trilogy—*Celotex Corp. v. Catrett*,¹³ *Anderson v. Liberty Lobby, Inc.*,¹⁴ and *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*¹⁵—without ever discussing how intent may play a role in the efficacy of summary judgment. Indeed, one might assume that the Eighth Circuit and other courts changed their analyses as a result of the summary judgment trilogy. However,

¹⁰ This is court-made doctrine and not necessitated by the language of the statute. See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 756–58, 761–66 (2005) (arguing that Title VII does not require an “either-or” evaluation in employment discrimination cases, but instead can be used to remedy unconscious bias); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1168 (1995) (noting “[i]t would be reasonable to interpret this language [in Title VII] as simply requiring proof of causation without proof of intent”); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1004 & n.22, 1029, 1053–54 (2006) (citing scholars who suggest same and arguing same). Title VII, among other things, makes it an unlawful employment practice “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2012). What “because of” means in this context is subject to judicial interpretation. The Civil Rights Act of 1991 broadened the statute’s reach by making such actions actionable if race, color, religion, sex, or national origin was a “motivating factor.” 42 U.S.C. § 2000e-2(m).

¹¹ See WRIGHT ET AL., *supra* note 6 (“Inasmuch as a determination of someone’s state of mind usually entails the drawing of factual inferences as to which reasonable people might differ—a function traditionally left to the jury—summary judgment often will be an inappropriate means of resolving an issue of this character.”).

¹² See *infra* notes 136–44 and accompanying text.

¹³ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

¹⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

¹⁵ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 574–75 (1986). The Court decided these three cases in 1986, thereby reformulating the standard for summary judgment. See Suja A. Thomas, Professor of Law, Univ. of Ill. Coll. of Law, Keynote Speech at the Seattle University School of Law Colloquium on the 25th Anniversary of the Summary Judgment Trilogy: Before and After the Summary Judgment Trilogy (Sept. 16, 2011), in 43 LOY. U. CHI. L.J. 499, 500–01 (2012).

Eighth Circuit case law, as well as cases from other circuits, establishing the difficulties of summary judgment in employment discrimination cases persisted after the trilogy, suggesting that this concept survives these cases.¹⁶

In addition, there is good reason, based on the psychology of bias, for letting these cases get to the fact finder. Some courts' language suggesting reluctance to grant summary judgment in cases involving intent is consistent with what is known about the manner in which discrimination operates. While instances of overt discrimination are relatively rare,¹⁷ more subtle forms of discrimination flourish. What psychology tells us about the manner in which bias operates suggests that courts that were hesitant in deciding intent at the summary judgment stage were not wrongheaded, in spite of what recent Eighth Circuit case law suggests.

This article argues that the *Torgerson* court, and courts who decide these cases similarly, have got it wrong as both a matter of law and policy. Case law has long recognized the difficulties in determining intent and making inferences from circumstantial evidence at the summary judgment stage not only in discrimination cases, but also in other cases in which intent is at issue. This is especially true for employment discrimination cases, in which a variety of psychological theories, including heuristics and cognitive biases, by way of example, suggest that judges might have difficulty assessing employer motivations on a motion for summary judgment. Indeed, there is reason to believe that the judges themselves may be biased.

This article proceeds in three parts. First, this article describes how summary judgment is conceptualized in intent cases, including employment discrimination cases. This includes a brief history of summary judgment in intent cases as well as a description of the summary judgment trilogy. Second, the psychology of discrimination is discussed, with an eye toward what this might mean for summary judgment in these cases. Finally, this article argues for returning to the original cautious standard used in intent cases, which should cause courts to pause before granting summary judgment in employment discrimination cases.

¹⁶ See, e.g., *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364–65 (8th Cir. 1987) (noting that “[s]ummary judgments should seldom be used in cases alleging employment discrimination”). The trilogy came down in 1986—a year before the Eighth Circuit’s decision in *Hillebrand*.

¹⁷ See Susan T. Fiske, *What We Know About the Problem of the Century: Lessons from Social Science to the Law, and Back*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES* 59, 59–60 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (suggesting “perhaps 10%” are openly discriminatory). *But see* Laura Beth Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH*, *supra*, at 3, 17 (describing study showing that 33% of blacks and Hispanics reported that they were not offered a job that went to a white person because of race discrimination and 31% reported being passed over for a promotion that went to a white person because of discrimination).

II. SUMMARY JUDGMENT CASE LAW

A. *The Reasoning Behind Torgerson*

The en banc Eighth Circuit court in *Torgerson* reversed an entire line of cases dating back to at least 1987.¹⁸ Indeed, one of the interesting things the court did in this case is provide an appendix of the cases—numbering sixty-two—that it, in effect, abrogated.¹⁹ This list shows how well entrenched this position was in the Eighth Circuit.

Torgerson involved allegations of sex and national origin discrimination leveled at a fire department. The en banc court characterized the plaintiffs' requested relief from the trial court's grant of summary judgment as based on a "separate standard for these cases." However, the standard advocated by the plaintiffs and used by the panel that first heard the case was consistent with Eighth Circuit precedent.²⁰ Reasoning that "statements asserting a different standard of review for summary judgment in employment discrimination cases are contrary to Supreme Court precedent," the court declared, "[t]here is no 'discrimination case exception' to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial."²¹

The Supreme Court precedent relied upon by the *Torgerson* court included *Reeves v. Sanderson Plumbing*,²² *St. Mary's Honor Center v. Hicks*,²³ and *USPS Board of Governors v. Aikens*.²⁴ The *Torgerson* court relied on a particular quote taken from *Aikens*, a 1983 case involving a race discrimination claim made by a postal service employee. *Aikens* dealt with the interaction between the *McDonnell Douglas* prima facie case and summary judgment. The *Aikens* Court held that once an employer met its burden of coming forth with a legitimate nondiscriminatory reason for its adverse actions, the issue that remained was whether or not the employer did discriminate.²⁵ The trial court, instead, required the plaintiff to submit direct evidence of discrimination while also focusing on the plaintiff's prima facie case, which the Court held to be "erroneous" on appeal.²⁶ Thus, the Court vacated a judgment in the defendant's favor, holding that the plaintiff did not need to submit direct evidence of discrimination.²⁷

In this context, the Court explained:

All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult. The prohibitions against discrimination contained in the Civil Rights Act of 1964 reflect an important national policy. There will seldom be "eyewitness" testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differ-

¹⁸ *Torgerson v. City of Rochester*, 643 F.3d 1031, 1058–60 (8th Cir. 2011).

¹⁹ *See id.*

²⁰ *Id.* at 1043.

²¹ *Id.* (citing *Fercello v. County of Ramsey* 612 F.3d 1069 (8th Cir. 2010)).

²² *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000).

²³ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993).

²⁴ *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983).

²⁵ *Id.* at 715.

²⁶ *Id.* at 717.

²⁷ *Id.*

ently from other ultimate questions of fact. . . . The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago: "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."²⁸

While this quote certainly stands for the proposition that state of mind is an issue of fact for the fact finder, it does not say much about the efficacy of determining this at summary judgment. Indeed, the *Aikens* Court reversed the lower court's grant of summary judgment for the postal service.²⁹ The main point of the case concerned how *McDonnell Douglas* burden shifting fits into the analysis.

The Supreme Court in both *St. Mary's* and *Reeves* picked up on this language from *Aikens*. The *St. Mary's* Court addressed whether a plaintiff automatically wins a case using the *McDonnell Douglas* burden-shifting analysis if he or she discredits the employer's legitimate non-discriminatory reason. The Court concluded that it was up to the fact finder, at that point, to determine whether or not discrimination played a role in the adverse employment action. The fact finder was free to determine, even after the plaintiff discredited the employer's legitimate non-discriminatory reason, that discrimination was not the cause of the adverse employment action.³⁰ This case did not involve summary judgment; instead, it was an appeal from a bench trial.³¹ The Court quoted *Aikens* in response to the plaintiff's argument that the Court's position was problematic, given that Congress had recently amended Title VII to permit jury trials.³² Thus, when the Court referred to *Aikens*, it was discussing situations involving the actual trial before a fact finder—not summary judgment.³³ Indeed, the *St. Mary's* Court emphasized that whether discrimination was the cause of the employer's action "remains a question for the factfinder to answer."³⁴

Reeves, however, did arise in a context more akin to summary judgment—an appeal from the court of appeals granting a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50.³⁵ Rule 50 motions are analo-

²⁸ *Id.* at 716–17 (quoting *Edgington v. Fitzmaurice*, (1885) 29 Ch. 459 at 483 (Eng.)). Certainly, the many cases decided after *Aikens* suggesting caution in granting summary judgment in employment discrimination cases suggest that *Aikens* was not seen as a case encouraging widespread use of summary judgment in these cases. *See, e.g.*, *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), *abrogated by* *Torgerson v. City of Rochester*, 643 F.3d 1031, 1060 (8th Cir. 2011); *see also infra* notes 91–113 and accompanying text (describing cases that suggest caution).

²⁹ *See Aikens*, 460 U.S. at 717.

³⁰ *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 519 (1993).

³¹ *Id.* at 505.

³² *Id.* at 524.

³³ The Court of Appeals in *St. Mary's* determined that the plaintiff was entitled to judgment as a matter of law once the fact finder determined that the employer's legitimate, non-discriminatory reason was pretextual. *Id.* at 508–09. The Supreme Court disagreed with the Court of Appeals' analysis on this point. *See id.* at 509.

³⁴ *Id.* at 524.

³⁵ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 137 (2000). Interestingly, the trial court had denied the motion. *Id.* at 139.

gous to summary judgment motions,³⁶ and therefore the analysis of the *Reeves* Court is more relevant to summary judgment motions. The Court in *Reeves* addressed an issue that lingered after *St. Mary's*; namely, whether the fact finder can find for the plaintiff if the plaintiff discredits the employer's legitimate non-discriminatory reason, but does not offer additional evidence of discrimination. The Court answered this question in the affirmative: the fact finder *could* find for the plaintiff based on finding the employer's legitimate, non-discriminatory reason unfounded, but it was not compelled to do so.

The Court used *Aikens* for the general proposition that there might be cases in which the plaintiff discredited the employer's legitimate, non-discriminatory reason, but the fact finder might still believe that discrimination was not the cause of the adverse employment action.³⁷ Citing *Aikens*, the Court explained that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'"³⁸ The use of *Aikens* in these two cases does not lead to the inevitable conclusion that intent is easy to determine at the motion for summary judgment stage. In addition, even courts that take the position that intent can be difficult to determine on summary judgment still maintain that summary judgment is available in the right case.³⁹ That some courts of appeals continue to express reluctance in granting summary judgment in employment discrimination cases even after *St. Mary's* and *Reeves* suggests that these cases did not address the issue sufficiently to resolve it.

B. *The Traditional View of Summary Judgment in Cases Involving Motive or Intent*

Cases in which the Court directly addressed the efficacy of summary judgment where the defendant's intent is at issue have historically viewed the matter differently. One of the cases courts relied on in supporting their reluctance to grant summary judgment in cases involving motive or intent involved anti-trust law. In *Poller v. CBS, Inc.*,⁴⁰ the Supreme Court considered allegations that CBS entered into a conspiracy to put a Milwaukee UHF channel out of business.⁴¹ In reversing the lower court's grant of summary judgment, the Court explained:

³⁶ *Id.* at 150. *See also* *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (" '[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . . ' " (alterations in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986))).

³⁷ *Reeves*, 530 U.S. at 148.

³⁸ *Id.* (quoting *St. Mary's*, 509 U.S. at 524).

³⁹ *See, e.g.*, *Feingold v. New York*, 366 F.3d 138, 152 (2d Cir. 2004); *Doner-Hedrick v. N.Y. Inst. of Tech.*, 874 F. Supp. 2d 227, 239–40 (S.D.N.Y. 2012).

⁴⁰ *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962), *implied overruling recognized* by *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 344 n.38 (S.D.N.Y. 2009).

⁴¹ The theory was that CBS was heavily invested in VHF stations and therefore had reason to put competing UHF stations out of business in this market, and the United States more generally. *See id.* at 466–67.

We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of “even handed justice.”⁴²

While the Supreme Court has not specifically overruled *Poller*, other courts have acknowledged its obsolescence in the antitrust context when the purported conspiracy makes no economic sense.⁴³ However, it still is useful to examine why courts have difficulty determining issues of motive and intent at the summary judgment stage.

Courts provide several reasons why issues of motive and intent are often difficult to determine on a dry record. To begin with, in such cases, it is the defendant who is in the unique position to describe why he or she engaged in some act.⁴⁴ Because such acts might lead to liability, there is a distinct incentive for defendants to lie, or, at least, to emphasize the most benign explanation.

Aside from the defendant’s explanation for its behavior, fact finders are asked to make inferences from the circumstances to try to determine what actually motivated the defendant.⁴⁵ Making intent determinations, though an issue of fact, is meaningfully different than determining what factually happened, e.g., determining whether the defendant fired the plaintiff. Fact finders must assess credibility and draw inferences from the circumstances in intent cases. Yet, even in the summary judgment trilogy cases described below, the Supreme Court held firm that credibility determination and drawing inferences are uniquely within the sphere of the fact finder—not the non-fact-finding judge⁴⁶—in assessing a motion for summary judgment.⁴⁷

While the *Poller* case arose in the context of antitrust, courts in a variety of contexts in which the defendant’s state of mind is at issue have shown similar reluctance to grant summary judgment. Included within these cases are determinations as to the intent of contracting parties, state of mind in defamation cases, motives in civil rights and discrimination cases, and patent litiga-

⁴² *Id.* at 473 (footnote omitted).

⁴³ *See, e.g.*, *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 747–48 (3d Cir. 1996) (recognizing abrogation by *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 468–69 (1992) in the antitrust context); *Emigra Grp., LLC v. Fragomen, Del Rey, Bernsen & Loewy, LLP*, 612 F. Supp. 2d 330, 344 n.38 (S.D.N.Y. 2009) (recognizing that *Poller* was impliedly overruled); *Ne. Educ. Television of Ohio, Inc. v. Educ. Television Ass’n of Metro. Cleveland*, 758 F. Supp. 1560, 1564–65 (N.D. Ohio 1990) (abrogation recognized in antitrust context).

⁴⁴ *See* WRIGHT ET AL., *supra* note 6 (“[I]nformation relating to state of mind generally is within the exclusive knowledge of one of the litigants and can be evaluated only on the basis of circumstantial evidence . . .”).

⁴⁵ *See id.*

⁴⁶ Of course the parties can opt to have a judge as their fact finder. However, there has been a decided rise in jury trials in these cases since the Civil Rights Act of 1991 permitted trial by jury under Title VII. *See* Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 698; Wendy Parker, *Juries, Race, and Gender: A Story of Today’s Inequality*, 46 WAKE FOREST L. REV. 209, 218–19 (2011).

⁴⁷ *See* *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

tion.⁴⁸ When it comes to employment cases, Wright, Miller, and Kane devote a sub-section of their summary judgment volume to these cases, explaining: “summary judgment often has been denied because of the presence of material fact questions involving motive or intent.”⁴⁹

It is not a great surprise, therefore, that many circuits, at least initially, concluded that summary judgment often was inappropriate in employment discrimination cases.⁵⁰ The Eighth Circuit cases reaching this conclusion used a variety of rationales for this position. For example, in *Crawford v. Runyon*, Judge Richard Arnold explained that, “[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.”⁵¹ The court in *Hillebrand v. M-Tron Industries, Inc.*, a case from 1987, provided a slightly different explanation for reluctance in granting summary judgment in employment discrimination cases:

Summary judgments should seldom be used in cases alleging employment discrimination because of the special category in which Congress and the Supreme Court visualized these cases. Knowing that discrimination is difficult to prove by direct evidence, the Supreme Court has interpreted employment discrimination cases as requiring simplified proof from a claimant in order to create an inference of discrimination and thereby establish a prima facie case.⁵²

Perhaps this is where the *Torgerson* court found its “special” language. However, when read closely, these cases reveal nothing “special” about employment discrimination cases; instead these cases are consistent with other cases involving inferences and intent. Thus, there was not a “special” rule for employment

⁴⁸ See *Hutchinson v. Proxmire*, 443 U.S. 111, 114, 120 n.9 (1979) (state of mind in defamation cases); WRIGHT ET AL., *supra* note 6.

⁴⁹ WRIGHT ET AL., *supra* note 6, § 2732.3 (citing cases in support of this).

⁵⁰ See, e.g., *Talanda v. KFC Nat'l Mgmt. Co.*, 140 F.3d 1090, 1095 (7th Cir. 1998); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364–65 (8th Cir. 1987), *abrogated by* *Torgerson v. City of Rochester*, 643 F.3d 1031, 1059 (8th Cir. 2011); *Ballinger v. N.C. Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir. 1987) (finding summary judgment “seldom appropriate” in cases involving state of mind, such as employment discrimination cases). Indeed, as explained below, some courts continue to be reluctant to grant summary judgment in these cases. See, e.g., *Acevedo-Parrilla v. Novartis Ex-Lax, Inc.*, 696 F.3d 128, 140 (1st Cir. 2012) (“[C]ourts should exercise particular caution before granting summary judgment for employers on such issues as pretext, motive, and intent.” (quoting *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 54 (1st Cir. 2000))); *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004) (urging “caution” in granting summary judgment in retaliation context); *Delville v. Firmenich Inc.*, 920 F. Supp. 2d 446, 458 (S.D.N.Y. 2013) (“[I]t is worth noting that ‘summary judgment must be granted only with caution in employment discrimination cases’ ” and “ ‘especially those that turn on the employer’s intent.’ ” (quoting *Harding v. Wachovia Capital Mkts., LLC*, No. 10 Civ. 3496(JPO), 2012 WL 4471543, at *6 (S.D.N.Y. Sept. 21, 2012))); *Hernandez v. City of Corpus Christi*, 820 F. Supp. 2d 781, 800 (S.D. Tex. 2011) (“Summary judgment in employment discrimination cases is rarely appropriate.”).

⁵¹ *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minn. Historical Soc’y*, 931 F.2d 1239, 1244 (8th Cir. 1991), *abrogated by* *Torgerson v. City of Rochester*, 643 F.3d 1031, 1059 (8th Cir. 2011)) (discrimination in Rehabilitation Act context).

⁵² *Hillebrand*, 827 F.2d at 364–65.

discrimination cases—there was a rule for cases involving inferences about intent.⁵³

Indeed, even the United States Supreme Court has suggested that at least certain types of employment discrimination claims present difficult credibility determinations that should be left to the fact finder. In *Meritor v. Vinson*, then Chief Justice Rehnquist explained that determinations regarding whether a plaintiff found particular acts of sexual harassment unwelcome “present[] difficult problems of proof and turn[] largely on credibility determinations committed to the trier of fact.”⁵⁴ Interestingly, the Court decided the summary judgment trilogy the same year that it decided *Meritor*. The Court decided *Meritor* on June 19, 1986.⁵⁵ It decided *Matsushita* on March 26, 1986—before *Meritor*.⁵⁶ It decided *Celotex* and *Anderson* a week after *Meritor*—on June 25, 1986.⁵⁷ Certainly, the Court was aware of these cases when Justice Rehnquist rendered this decision for the majority. Yet, it still noted in *Meritor* that a determination that sexual harassment is unwelcome was particularly within the realm of the fact finder.

Meritor was decided in the context of a bench trial, so, once again, it is not directly on point to summary judgment. However, in 1999 the Court in *Hunt v. Cromartie*, a voting rights case brought under the Equal Protection clause based on race discrimination, set out why summary judgment is difficult in discrimination cases. The Court explained: “[o]utright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence. Summary judgment in favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.”⁵⁸ This Court was discussing summary judgment for the plaintiffs, the party with the burden of proof. However, courts should approach summary judgment motions in intent cases with the same reluctance, regardless of which party brings the motion. This does not mean that summary judgment is never appropriate in these cases, but courts should be sensitive to the difficulties of drawing inferences about motivation appropriately at the summary judgment stage.

C. *The Summary Judgment Trilogy*

One possible explanation for some circuit court shifts from caution to embrace of summary judgment in employment discrimination cases may lie with the summary judgment trilogy. In three landmark cases, the United States

⁵³ See Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL’Y REV. 813, 821–22 (1999) (Caution in granting summary judgment in Title VII cases “is merely a pragmatic recognition that a defendant’s intent to discriminate is, like any other subjective state of mind, difficult to prove directly.”).

⁵⁴ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 59, 68 (1986).

⁵⁵ *Id.* at 57.

⁵⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

⁵⁷ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

⁵⁸ *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). In this case, the lower court granted the plaintiffs’ motion for summary judgment. *See id.* at 545.

Supreme Court transformed the “disfavored” summary judgment motion⁵⁹ to one of the principal motions that helps clear court dockets.⁶⁰ Known as the “summary judgment trilogy,”⁶¹ these cases moved summary judgment from a disfavored motion⁶² to a mainstay in an employment-discrimination defendant’s arsenal.⁶³ However, none of the trilogy cases arose in the context of employment discrimination. *Celotex* was a tort case;⁶⁴ *Anderson* was a libel case;⁶⁵ and *Matsushita* was an antitrust case.⁶⁶ Of these cases, *Matsushita*, which arose in a context in which summary judgment is generally disfavored because of intent, might be the most important to any discussion of the applicable standard in employment discrimination cases. Yet, there is language in all three that has relevance to the efficacy of summary judgment in employment discrimination cases.

The Court in *Celotex* addressed the burden on a party moving for summary judgment when that party did not have the burden of proof at trial. The District of Columbia Circuit had ruled that a defendant must produce evidence of some sort in support of its motion for summary judgment.⁶⁷ The Court held that a defendant needed only to show that there was insufficient evidence to raise a genuine issue of material fact on an essential element of the plaintiff’s claim for the court to grant summary judgment in favor of the defendant.⁶⁸ The moving party still needed to demonstrate the absence of a genuine issue of material fact, but it did not need to do so with affidavits or other evidence that “negates” a plaintiff’s claim.⁶⁹ In the course of this ruling, the Court put its imprimatur on summary judgment, explaining that “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’ ”⁷⁰ As

⁵⁹ See, e.g., *Unlaub Co. v. Sexton*, 568 F.2d 72, 76 (8th Cir. 1977) (calling summary judgment an “extreme remedy”); *Mut. Fund Investors, Inc. v. Putnam Mgmt. Co.*, 553 F.2d 620, 624 (9th Cir. 1977) (noting summary judgment is “disfavored” in antitrust cases involving intent); *Johnson v. Richmond Cnty.*, 507 F. Supp. 993, 996 (S.D. Ga. 1981) (noting that summary judgment is “disfavored” in employment discrimination cases).

⁶⁰ The Court in *Celotex* explained that “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’ ” *Celotex*, 477 U.S. at 327 (quoting FED. R. CIV. P. 1).

⁶¹ See Thomas, *supra* note 15, at 500–01.

⁶² See *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011) (citing *Celotex*, 477 U.S. at 327).

⁶³ See Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886–89 (2007); Clermont & Schwab, *supra* note 3, at 128. (“Of course, defendants make many more motions for summary judgment, and succeed on them more often, than do plaintiffs.”).

⁶⁴ Specifically, the plaintiff alleged negligence, breach of warranty, and strict liability. *Celotex*, 477 U.S. at 319.

⁶⁵ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245 (1986).

⁶⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986).

⁶⁷ *Celotex*, 477 U.S. at 321.

⁶⁸ *Id.* at 322–23.

⁶⁹ *Id.* at 323.

⁷⁰ *Id.* at 327 (quoting FED. R. CIV. P. 1).

discussed earlier, it is this endorsement of summary judgment that courts often rely upon in granting a defendant-employer's motion.⁷¹

In the second trilogy case, *Anderson*, the Court had the opportunity to overturn the language in *Poller* that discussed intent cases. Citing *Poller*, the plaintiff in *Anderson* argued that courts should "seldom if ever" grant summary judgment when the defendant's state of mind is at issue.⁷² Rather than overturning or even questioning this aspect of *Poller*, the Court stated that *Poller* did not mean that a plaintiff could withstand a motion for summary judgment "without offering any concrete evidence from which a reasonable juror could return a verdict in his favor and by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy or of legal malice."⁷³ While this suggests that summary judgment would be appropriate in a case in which a plaintiff had no evidence of conspiracy or malice, it does not suggest disagreement with the general approach to summary judgment on issues of intent as set out in *Poller*.

In addition, the *Anderson* Court did set out some limitations on summary judgment. The main issue in *Anderson* was whether and how the standard of proof factored into a court's determination of a summary judgment motion. *Anderson* involved a libel case brought by a public figure. In such cases, the plaintiff must show actual malice with clear and convincing evidence in order to bring a successful claim.⁷⁴ The Court of Appeals held that the clear and convincing evidence standard was irrelevant for purposes of determining a summary judgment motion.⁷⁵ The Supreme Court disagreed, holding that "the judge must view the evidence presented through the prism of the substantive evidentiary burden."⁷⁶ However, the Court also explicitly explained that even in cases involving a higher burden of proof, summary judgment should not be used to "denigrate the role of the jury." As the Court explained:

It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.⁷⁷

⁷¹ See, e.g., *Torgerson v. City of Rochester*, 643 F.3d 1031, 1043 (8th Cir. 2011); *Dority v. City of Chicago*, 50 F. App'x 760, 765 (7th Cir. 2002); *Seely v. Runyon*, 166 F.3d 348 (10th Cir. 1998); *Merriell v. Dep't. of Transp.*, 22 F.3d 1095 (5th Cir. 1994).

⁷² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

⁷³ *Id.*

⁷⁴ *Id.* at 244.

⁷⁵ *Id.* at 247.

⁷⁶ *Id.* at 254.

⁷⁷ *Id.* at 255 (citation omitted). The Court cited *Kennedy v. Silas Mason Co.* at the end of the quoted material. Interestingly, in *Kennedy*, the Court overturned summary judgment granted for the defendant in a Fair Labor Standards Act case. In doing so, the Court noted: "But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice." *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) (footnote omitted).

Thus, even after the trilogy cases, credibility determinations and drawing inferences—two frequently necessary fact finding components of employment discrimination cases—were still left to the jury. It is unsurprising that courts continued to proceed with “caution” in considering summary judgment in employment discrimination cases that involved drawing inferences about intent.

Perhaps *Matsushita*, involving antitrust—an area in which the courts have traditionally acted with caution in granting summary judgment—will provide additional insight into summary judgment in intent cases. In this case, the Court determined the appropriate summary judgment standard for an antitrust conspiracy case.⁷⁸ While acknowledging that “[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion,”⁷⁹ the Court went on to explain that antitrust law itself limited the “range of permissible inferences from ambiguous evidence” in Sherman Act Section 1 cases.⁸⁰ The Court noted that predatory pricing schemes, the alleged conspiracy in the case, are particularly nonsensical, because they require conspirators to suffer significant losses before achieving any gains and those gains are quite speculative.⁸¹ Thus, the Court explained that “if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.”⁸² Thus, this holding is antitrust-specific, and not very generalizable to other types of lawsuits. As explained below, bias in employment does not operate like an antitrust pricing conspiracy. Instead, acting on stereotypes and biases about various groups comes quite naturally to human beings and tends to be a default mechanism.⁸³

D. Recent Cases Involving Employment Discrimination

It is not surprising, given the history described above, that the lower courts are in a state of confusion, at least theoretically,⁸⁴ about the proper role of summary judgment in employment discrimination cases. Several circuits still hold to—or at least pay lip service to—the old standard and express reluctance to grant summary judgment in employment discrimination cases. Other circuits appear to apply a tougher standard to plaintiffs who are trying to overcome a

⁷⁸ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576 (1986).

⁷⁹ *Id.* at 587.

⁸⁰ *Id.* at 588.

⁸¹ *Id.* at 594–95.

⁸² *Id.* at 596–97.

⁸³ See *infra* notes 170–93 and accompanying text.

⁸⁴ I write “theoretically,” because even in circuits that use cautionary language in this context, summary judgment is often granted for defendants. In a study of summary judgment in six federal district courts, summary judgment was more frequently granted for defendants in civil rights case than other categories of cases studied (which included torts, contracts, and other). Cecil et al., *supra* note 63, at 886–88. This data included courts in Pennsylvania (Third Circuit), California (Ninth Circuit), Maryland (Fourth Circuit), Louisiana (Fifth Circuit), New York (Second Circuit), and Illinois (Seventh Circuit). See *id.* at 877–78. My “plaintiff-friendly” circuits include the Second, Fourth, Fifth, and Ninth. See *infra* notes 92–114 and accompanying text.

defendant's motion for summary judgment. And still others are simply confused, with some courts within the circuit favoring summary judgment and others still expressing reluctance. However, regardless of what a lower court says about the standard it is applying, defendants are often successful when moving for summary judgment in employment discrimination cases.⁸⁵ Thus, even in circuits that exercise caution, defendants frequently win summary judgment motions.⁸⁶

Pretext is a key issue of fact that often is the subject of summary judgment motions in employment discrimination cases. Under the *McDonnell Douglas* framework, a plaintiff can raise a prima facie case of discrimination circumstantially by showing that: (1) he or she is a member of a group protected by Title VII or some other antidiscrimination law; (2) he or she applied for and was qualified for the job and there was an opening; (3) he or she was not hired; and (4) after his or her rejection, the job remained open and the employer continued to seek applicants.⁸⁷ After raising such a case, the defendant has the burden of articulating a legitimate, non-discriminatory reason for its action.⁸⁸ Once the defendant does so, the prima facie case drops out. The burden then shifts to the employee to show that the legitimate, non-discriminatory reason is not credible, either by showing that it is not worthy of belief or that other facts suggest that discrimination was the real motivating factor.⁸⁹ At the summary judgment stage, many cases come down to the pretext issue, namely determining if the plaintiff raised a genuine issue of material fact on the issue of pretext.⁹⁰ At the summary judgment stage, the plaintiff need not prove that the employer's legitimate, non-discriminatory reason is a pretext for discrimination—he or she just needs to raise a genuine issue of material fact on the issue. What follows in this section are examples of how the various circuits speak about summary judgment in these cases.

1. *Seemingly Plaintiff-Sympathetic Circuits*

Courts in the Second,⁹¹ Fourth,⁹² Fifth,⁹³ Sixth,⁹⁴ and Ninth⁹⁵ Circuits continue to urge caution in granting summary judgment in employment dis-

⁸⁵ See Cecil et al., *supra* note 63, at 886–89. This study showed that defendants won these motions in civil rights cases between 40 and 49 percent of the time during the study period. *Id.* at 887. By way of comparison, plaintiffs, who make far fewer summary judgment motions overall than defendants, won summary judgment motions in these cases between 29 and 36 percent of the time. *Id.* at 888.

⁸⁶ See *id.* at 877–78, 887.

⁸⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁸⁸ *Id.*

⁸⁹ *Id.* at 804–05.

⁹⁰ See, e.g., *infra* notes 101–02, 119–23, and accompanying text. Some plaintiffs lose on summary judgment because they are unable to raise a prima facie case. This sometimes occurs in cases in which the court requires a comparator who was treated more favorably than the plaintiff in order to make out a prima facie case. See, e.g., *Doner-Hedrick v. N.Y. Inst. of Tech.*, 874 F. Supp. 2d 227, 242–43 (S.D.N.Y. 2012).

⁹¹ *Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 178 (2d Cir. 2012) (when “fact questions such as ‘state of mind or intent are at issue,’ summary judgment ‘should be used sparingly’ ” (quoting *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55, 61 (2d Cir. 1998))); *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008); *Delville v. Firmenich Inc.*, 920 F. Supp. 2d 446, 458 (S.D.N.Y. 2013) (“At the outset, it is worth noting that ‘summary judgment must be granted

crimination cases. This section is titled “Seemingly Plaintiff-Sympathetic Circuits,” because several of these circuits, contrary to their cautious rhetoric with respect to granting summary judgment in employment discrimination cases, are reputed as being not so employment discrimination plaintiff friendly.⁹⁶ Thus, even though courts in these circuits may advocate circumspection in granting summary judgment in these cases, that does not mean in actuality that they do not do so with some frequency.

The Second Circuit provides a useful example of this approach. The Second Circuit Court of Appeals in *Holcomb v. Iona College* articulated the need for caution in granting summary judgment motions in employment discrimination cases.⁹⁷ The case involved allegations of race discrimination brought by a white associate head coach of the men’s basketball team at the college. Specifically, he alleged that the college discriminated against him because he married an African American woman.⁹⁸ In this context, the court described its approach to summary judgment:

only with caution in employment discrimination cases, especially those that turn on the employer’s intent.’ ” (quoting *Harding v. Wachovia Capital Mkts., LLC*, No. 10 Civ. 3496(JPO), 2012 WL 4471543, at *6 (S.D.N.Y. Sept. 21, 2012))).

⁹² The case law in the Fourth Circuit is a bit confusing. While there are cases noting that courts should exercise caution when considering summary judgment in employment discrimination cases, *see, e.g.*, *Ballinger v. N.C. Agric. Extension Serv.*, 815 F.2d 1001, 1005 (4th Cir. 1987); *Tawwaab v. Va. Linen Serv., Inc.*, 729 F. Supp. 2d 757, 768 (D. Md. 2010); in *Darvishian v. Geren*, 404 F. App’x 822, 831 (4th Cir. 2010), the Fourth Circuit cited the Third Circuit standard from *Fuentes*, which is described below in section II(d)(2). Adding to the confusion is the court’s failure to officially publish *Darvishian*, making it not official precedent in the circuit, even though local rules permit it to be cited. *See* 4TH CIR. R. 32.1 (permitting unpublished cases decided after January 1, 2007 to be cited). Thus, *Darvishian* is not binding precedent. In addition, *Ballinger* has been cited many times in the circuit on headnote one, the one relevant to the caution analysis. Thus, *Ballinger* appears to remain binding precedent in this circuit. *See* *Ballinger*, 815 F.2d at 1001.

⁹³ *Hayden v. First Nat’l Bank of Mount Pleasant, Tex.*, 595 F.2d 994, 997 (5th Cir. 1979) (“When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party, granting of summary judgment is especially questionable.” (footnote omitted)); *Hernandez v. City of Corpus Christi*, 820 F. Supp. 2d 781, 800 (S.D. Tex. 2011) (“[O]nce an employment discrimination case devolves into nebulous questions of motivation and intent, summary judgment upon the claims is rarely appropriate.” (quoting *Turco v. Hoechst Celanese Chem. Grp., Inc.*, 906 F. Supp. 1120, 1126 (S.D. Tex. 1995))).

⁹⁴ *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 721 (6th Cir. 2006); *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555, 564 (6th Cir. 2004) (“Courts have recognized that in discrimination and retaliation cases, an employer’s true motivations are particularly difficult to ascertain, thereby frequently making such factual determinations unsuitable for disposition at the summary judgment stage. . . . We agree that caution should be exercised in granting summary judgment once a plaintiff has established a prima facie inference of retaliation through direct or circumstantial evidence.” (citation omitted)).

⁹⁵ The Ninth Circuit is somewhat of a special case. It is described *infra* in notes 102–04 and accompanying text.

⁹⁶ *See* *Clermont & Schwab, supra* note 3, at 119 (noting that lawyers describe the fourth, fifth, and sixth circuits as “hostile to employment discrimination plaintiffs”). *See also* *Cecil et al., supra* note 63, at 877–78, 887.

⁹⁷ *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008).

⁹⁸ *Id.* at 131–32.

We have repeatedly expressed the need for caution about granting summary judgment to an employer in a discrimination case where, as here, the merits turn on a dispute as to the employer's intent. Where an employer has acted with discriminatory intent, direct evidence of that intent will only rarely be available, so that "affidavits and depositions must be carefully scrutinized for circumstantial proof which, if believed, would show discrimination."⁹⁹

Picking up on this language, the trial court in *Malena v. Victoria's Secret Direct, LLC* explained:

"To avoid summary judgment in an employment discrimination case, the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors."¹⁰⁰

This does not mean that the courts in the Second Circuit refuse to grant summary judgment in these cases. As the court in *Feingold v. New York* explained:

Although "[i]t is now beyond cavil that summary judgment may be appropriate even in the fact-intensive context of discrimination cases," "[i]n discrimination cases where state of mind is at issue, we affirm a grant of summary judgment in favor of an employer sparingly because 'careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination.'"¹⁰¹

Thus, while these courts are cautious about granting summary judgment in employment discrimination cases because of the issues of intent involved, they will do so if necessary in appropriate cases.

The Ninth Circuit initially took a slightly different approach. The court distinguished between cases in which the plaintiff used direct and indirect evidence to show pretext, holding that it takes " 'very little evidence to survive summary judgment' in a discrimination case" involving direct evidence.¹⁰² Indirect evidence cases, on the other hand, required pretext evidence that was "specific" and "substantial."¹⁰³ More recently, the Ninth Circuit began to question this approach, with some courts holding that a lesser showing should suffice in circumstantial cases.¹⁰⁴

The Supreme Court's decision in *Desert Palace, Inc. v. Costa*¹⁰⁵ caused the Ninth Circuit to question its initial approach. In *Desert Palace*, the Court held that the plaintiff need not produce direct evidence of discrimination in order to obtain mixed motive jury instructions.¹⁰⁶ Instead, a strong circumstantial case could likewise create the basis for a mixed motive instruction. In

⁹⁹ *Id.* at 137 (citations omitted) (quoting *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994)).

¹⁰⁰ *Malena v. Victoria's Secret Direct, LLC*, 886 F. Supp. 2d 349, 358 (S.D.N.Y. 2012) (quoting *Holcomb*, 521 F.3d at 138).

¹⁰¹ *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004) (citation omitted) (quoting *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir. 2001); *Mandell v. Cnty. of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003)).

¹⁰² *EEOC v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009).

¹⁰³ *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998); *Hotchkiss v. CSK Auto Inc.*, 918 F. Supp. 2d 1108, 1128 (E.D. Wash. 2013).

¹⁰⁴ *See Hotchkiss*, 918 F. Supp. 2d at 1128 (citing *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1030 (9th Cir. 2006); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004); *Godwin*, 150 F.3d at 1222).

¹⁰⁵ *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

¹⁰⁶ *Id.* at 92.

deciding to treat direct and circumstantial evidence the same in this instance, the Ninth Circuit explained: “circumstantial evidence is routinely used to support criminal convictions, even though a conviction requires proof beyond a reasonable doubt.”¹⁰⁷ In addition, “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”¹⁰⁸ In *Cornwell v. Electra Cent. Credit Union*, the Ninth Circuit relied on this language from *Desert Palace* along with its earlier decision in *McGinest v. GTE Service Corp.*, to “conclude that in the context of summary judgment, Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce more, or better, evidence than a plaintiff who relies on direct evidence.”¹⁰⁹ The *McGinest* court likewise used very plaintiff-friendly language in the summary judgment context, explaining: “[w]e have held that ‘very little[] evidence is necessary to raise a genuine issue of fact regarding an employer’s motive; any indication of discriminatory motive . . . may suffice to raise a question that can only be resolved by a fact-finder.’ ”¹¹⁰

Summary judgment is still available in these courts, but courts must keep in mind the difficulties associated with proving intent circumstantially.¹¹¹ Thus, a plaintiff’s “conclusory allegations” of discrimination are insufficient to defeat such a motion.¹¹²

2. Defendant-Sympathetic Circuits

Other circuits not only eschew the “caution” standard, but also go one step further by placing a high burden on plaintiffs trying to prevail against a summary judgment motion. In particular, the Third,¹¹³ Eighth,¹¹⁴ Tenth,¹¹⁵ and

¹⁰⁷ *Cornwell*, 439 F.3d at 1030 (citing *Desert Palace*, 539 U.S. at 100).

¹⁰⁸ *Desert Palace*, 539 U.S. at 100 (quoting *Rogers v. Mo. Pac. R.R.*, 352 U.S. 500, 508 n.17 (1957)).

¹⁰⁹ *Cornwell*, 439 F.3d at 1030 (citing *Desert Palace*, 539 U.S. at 100; *McGinest*, 360 F.3d at 1124). Interestingly, the *Cornwell* court ultimately decided that the plaintiff in that case had raised an issue of fact under either standard. *Id.* at 1031.

¹¹⁰ *McGinest*, 360 F.3d at 1124 (quoting *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1409 (9th Cir.1996)). The District of Columbia Circuit uses the old Ninth Circuit direct versus indirect evidence distinction. Recently, the court explained that in cases involving direct evidence of discriminatory intent, the plaintiff is “generally entitle[d]” to a jury trial. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 576 (D.C. Cir. 2013).

¹¹¹ *See, e.g., Doner-Hedrick v. N.Y. Inst. of Tech.*, 874 F. Supp. 2d 227, 238–39 (S.D.N.Y. 2012) (“Summary judgment may be proper even in workplace discrimination cases, . . . [h]owever, greater caution must be exercised in granting summary judgment in employment discrimination cases where the employer’s intent is genuinely at issue and circumstantial evidence may reveal an inference of discrimination.”). Courts likewise consider issues such as the existence of a hostile environment in sexual harassment cases similarly difficult to assess on a motion for summary judgment. *See, e.g., Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 178 (2d Cir. 2012).

¹¹² *See, e.g., Malena v. Victoria’s Secret Direct, LLC*, 886 F. Supp. 2d 349, 358 (S.D.N.Y. 2012) (citing *Britt v. Merrill Lynch & Co.*, No. 08 CV 5356(GBD), 2011 WL 4000992, at *5 (S.D.N.Y. Aug. 26, 2011)).

¹¹³ *See, e.g., Fuentes v. Perskie*, 32 F.3d 759, 762 (3d Cir. 1994); *Alred v. Eli Lilly & Co.*, 771 F. Supp. 2d 356, 363 (D. Del. 2011).

¹¹⁴ *Torgerson v. City of Rochester*, 643 F.3d 1031, 1052 (8th Cir. 2011).

¹¹⁵ *See, e.g., Jones v. Okla. City Pub. Sch.*, 617 F.3d 1273, 1280 (10th Cir. 2010); *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1197 (10th Cir. 2008). There is some confusion in

Eleventh¹¹⁶ Circuits no longer invoke any type of caution in describing the standard for granting summary judgment in employment discrimination cases.

One of the leading cases in the Third Circuit advocating tougher plaintiff standards is *Fuentes v. Perskie*.¹¹⁷ The *Fuentes* court made clear that it is not enough that the employer's reason for its decision was "wrong or mistaken," but instead the plaintiff must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them 'unworthy of credence,' and hence infer 'that the employer did not act for [the asserted] non-discriminatory reasons.'"¹¹⁸ As one district court put it, a plaintiff must "show a defendant's reasons are so weak, incoherent, implausible, or inconsistent that they lack credibility."¹¹⁹ Put yet another way by another district court, "a plaintiff may satisfy this standard by demonstrating, through admissible evidence, that the employer's articulated reason was not merely wrong, but that it was so plainly wrong that it cannot have been the employer's real reason,"¹²⁰ or "the employer's stated reason for termination is so implausible that a reasonable fact-finder could not believe it."¹²¹

So what is wrong with such a standard? After all, it will likely dispose of many employment discrimination cases at the summary judgment stage. Instead of treating employment discrimination cases like other cases, these circuits

the Tenth Circuit. While the Court of Appeals has followed a similar standard to that of the Third Circuit in *Fuentes*, there are still lower courts that express the need for caution. *See, e.g., Stanphill v. Health Care Serv. Corp.*, 627 F. Supp. 2d 1244, 1248–49 (W.D. Okla. 2008); *Green v. Sears, Roebuck & Co.*, 434 F. Supp. 2d 1025, 1028 (D. Colo. 2006); *Mayo v. Dillard's Dept. Stores, Inc.*, 884 F. Supp. 417, 421 (D. Kan. 1995). These cases might be holdovers from earlier precedent in the circuit that did hold that summary judgment was in appropriate in discrimination claims that turn on an employer's intent. *See, e.g., Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 530 (10th Cir. 1994). In addition, the Tenth Circuit has explained that the severity or pervasiveness determination in sexual harassment cases is "unsuited for summary judgment because it is quintessentially a question of fact." *Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 958 (10th Cir. 2012) (quoting *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1098 (10th Cir. 1999)). Perhaps sexual harassment cases and other harassment cases are in a category of their own.

¹¹⁶ *Chapman v. AI Transp.*, 229 F.3d 1012, 1025–26 (11th Cir. 2000).

¹¹⁷ *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994).

¹¹⁸ *Id.* at 765 (citations omitted) (quoting *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 531, 533 (3d Cir. 1992); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993)). *Jones*, 617 F.3d at 1280 (10th Circuit case using similar standard). For the Third Circuit, this standard goes back to the *Ezold* case, which I would characterize as a "bad precedent leads to bad precedent" case. *See THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 28, 29 (2005). The plaintiff in *Ezold* had a strong case, with the trial court holding in her favor. *See also Burton v. Teleflex Inc.*, 707 F.3d 417, 427 (3d Cir. 2013) (recent case using same standard).

¹¹⁹ *Alred v. Eli Lilly & Co.*, 771 F. Supp. 2d 356, 363 (D. Del. 2011). Interestingly, in *Alred* the court denied the defendant's motion for summary judgment in a case involving allegations of discrimination under the ADEA, FMLA and Delaware state law. *Id.* at 362, 371.

¹²⁰ *Ashley v. Bayhealth Med. Ctr., Inc.*, 869 F. Supp. 2d 544, 553 (D. Del. 2012) (citations omitted) (quoting *Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 413 (3d Cir. 1999)).

¹²¹ *Ramanna v. Cnty. of Beaver*, No. 05-1738, 2008 WL 4204713, at *11 (W.D. Pa. Sept. 11, 2008); *see also Wildi v. Alle-Kiski Med. Ctr.*, 659 F. Supp. 2d 640, 669 (W.D. Pa. 2009).

appear to make it easier to grant a defendant's summary judgment motion than it is in cases involving other claims. Using a standard that requires a plaintiff to show that the defendant's legitimate non-discriminatory reason possesses "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions"¹²² appears to be a higher standard than simply raising a genuine issue of material fact as to the credibility of the employer's legitimate non-discriminatory reason—the standard that Rule 56, by its language, imposes.¹²³ While showing "inconsistencies, incoherencies, or contradictions" in the employer's legitimate non-discriminatory reason would no doubt be one method of meeting this burden, all a plaintiff is required by the rule to do is raise a genuine issue of material fact as to the credibility of it.¹²⁴ As one district court in Texas put it, "[i]n the summary judgment setting, the plaintiff's burden is not to persuade the court that defendant's explanation is incorrect but, rather, to raise a genuine issue of material fact for trial."¹²⁵ Thus, it appears that these circuits are requiring more of plaintiffs in an effort to grant more summary judgment motions.

The *Fuentes* court also required a plaintiff to discount every reason given by the defendant for the adverse action, explaining, "the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that *each* of the employer's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment action."¹²⁶ This encourages employers to assert every potential legitimate non-discriminatory reason they can think of, hoping that the plaintiff cannot produce evidence showing "inconsistencies, incoherencies, or contradictions"¹²⁷ as to at least some of them. The *Fuentes* court buries a caveat in a footnote, explaining: "If the defendant proffers a bagful of legitimate reasons, and the plaintiff manages to cast substantial doubt on a fair number of them, the plaintiff may not need to discredit the remainder."¹²⁸ This is not much of a concession. What if the employer only offers three, and the plaintiff can only discredit two? Does this fall within the exception?

The Eleventh Circuit does not use the same language as that of the Third and Tenth Circuits. Instead, in *Chapman v. AI Transport*, it simply makes clear that there is no reason for using caution in granting summary judgment in employment discrimination cases. Like the court in *Fuentes*, it does require plaintiffs to create issues of fact as to every pretextual reason that the employer supplies.¹²⁹ However, it discusses this in terms of raising a "genuine issue of material fact" and does not use *Fuentes*'s "inconsistencies, incoherencies, or contradictions" language, which appears to raise the standard for plaintiffs. Still, the Eleventh Circuit is quite clear that it does not believe caution is necessary, directly noting prior decisions of the circuit that so held and explaining

¹²² *Fuentes*, 32 F.3d at 765.

¹²³ FED. R. CIV. P. 56(a).

¹²⁴ *See id.*

¹²⁵ *Gerdin v. CEVA Freight, LLC*, 908 F. Supp. 2d 821, 827 (S.D. Tex. 2012).

¹²⁶ *Fuentes*, 32 F.3d at 764 (emphasis added) (citations omitted). *Accord* *Chapman v. AI Transp.*, 229 F.3d 1012, 1024–25 (11th Cir. 2000).

¹²⁷ *Fuentes*, 32 F.3d at 765.

¹²⁸ *Id.* at 764 n.7.

¹²⁹ *Chapman*, 229 F.3d at 1024–25.

that the trend has been away from such a position.¹³⁰ Relying on *St. Mary's*, the court in *Chapman v. AI Transport* concluded that “[n]o thumb is to be placed on either side of the scale.”¹³¹

3. *The Confused Circuits*

Still, other circuits appear confused, the Seventh and First Circuits among them. While some lower courts in these circuits espouse caution when granting summary judgment in employment discrimination cases,¹³² others seem to use a more defendant-friendly standard.¹³³ One trial court simply used the wrong standard for summary judgment.¹³⁴ Other cases follow the summary judgment trilogy, citing and quoting those cases for the appropriate standard for summary judgment without any allusion to different or specific applications in employment discrimination cases.¹³⁵ *Talanda v. KFC Nat. Management Co.*¹³⁶ is the main Seventh Circuit case suggesting caution in approaching summary judgment in employment discrimination cases. Yet, the case is rather old, with the court ruling dating back to 1998. In addition, the case is only cited by five other cases for this proposition.¹³⁷

The First Circuit suggests caution, but then uses the more difficult *Fuentes* standard when assessing a defendant’s motion for summary judgment. The circuit explains: “ ‘courts must be particularly cautious about granting the employer’s motion for summary judgment.’ ”¹³⁸ Further, First Circuit case law supports the notion that summary judgment is available if “the non-moving party rests only upon conclusory allegations, improbable inferences, and un-

¹³⁰ *Id.* at 1025–26. The Court specifically relies on statements by the Seventh Circuit that “[s]ummary judgment is hardly unknown, or for that matter rare, in employment discrimination cases, more than 90 percent of which are resolved before trial, . . . many of them on the basis of summary judgment.” *Id.* at 1025 (second alteration in original) (quoting *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997)).

¹³¹ *Id.* at 1026.

¹³² *See, e.g.*, *Talanda v. KFC Nat’l Mgmt. Co.*, 140 F.3d 1090, 1095 (7th Cir. 1998) (“When the case before us is a summary judgment ruling in an employment discrimination case, in which credibility and intent are crucial issues, we review the record with heightened scrutiny.”); *EEOC v. RJB Props., Inc.*, 857 F. Supp. 2d 727, 739 (N.D. Ill. 2012) (“[b]ecause intent and credibility are typically crucial issues in employment discrimination cases, summary judgment must be approached with caution, and heightened scrutiny of the record is appropriate.” (quoting *EEOC v. Int’l Profit Assocs., Inc.*, 654 F. Supp. 2d 767, 783 (N.D. Ill. 2009))); *Int’l Profit Assocs.*, 654 F. Supp. 2d at 783.

¹³³ *See, e.g.*, *Collins v. Am. Red Cross*, 715 F.3d 994, 1000 (7th Cir. 2013) (holding that it is irrelevant that the employer’s legitimate non-discriminatory reason was wrong).

¹³⁴ In *Teninty v. Geren*, the court opined “[t]o avoid summary judgment, Plaintiff must show by a preponderance of the evidence that this proffered reason is pretextual.” *Teninty v. Geren*, 776 F. Supp. 2d 725, 738 (N.D. Ill. 2011). This is the standard a plaintiff must meet at trial, but is not the standard used at summary judgment, which only requires a plaintiff to raise a genuine issue of material fact. *See* FED. R. CIV. P. 56(a). Perhaps it’s no great surprise that the motion was granted in this case.

¹³⁵ *See, e.g.*, *Dority v. City of Chi.*, 50 Fed. App’x 760, 765 (7th Cir. 2002).

¹³⁶ *Talanda*, 140 F.3d 1090.

¹³⁷ This is based on a citing references search of headnote 4, the headnote that addresses this issue, on Westlaw. *Id.* (see Westlaw headnote #4).

¹³⁸ *Kelley v. Corr. Med. Servs., Inc.*, 707 F.3d 108, 116 (1st Cir. 2013) (quoting *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 167 (1st Cir. 1998)) (internal quotation marks omitted).

ported speculation.”¹³⁹ The court also explained that trial courts should use “restraint” when a plaintiff has produced more than “ ‘conclusory allegations, improbable inferences, acrimonious invective, or rank speculation.’ ”¹⁴⁰ When it comes to showing pretext, “ ‘weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer’s proffer[]’ can give rise to an inference of pretext”¹⁴¹—the same standard used by the defendant-friendly Third Circuit. Thus, the First Circuit appears to support caution in granting summary judgment in these cases, while also applying a very defendant-friendly standard used in the Third Circuit—hence, its status as a confused circuit. All of these cases beg for some clarity regarding what standard courts should be using. This is where studies about bias provide useful information.

III. PSYCHOLOGY, BIAS, AND JUDICIAL DECISIONMAKING

There are two ways in which psychology is useful in assessing whether courts should exercise caution in granting summary judgment in employment discrimination cases involving intent. The first is based on studies of judges as decision makers. Studies have shown that judges demonstrate an anti-plaintiff bias in employment discrimination cases.¹⁴² If judges have a predisposition to see these cases as unmeritorious, those biases could well impact their decisions with respect to summary judgment. Second, judges act as normal human beings. Social psychologists have studied the nature of how bias operates in human beings. This bias not only exists in employers who make decisions about their workers, but also in judges who are tasked with making decisions about motions for summary judgment.¹⁴³ Former federal judge Nancy Gertner and Melissa Hart refer to this as the “two stories” that employment discrimination lawsuits tell: one involving discrimination by the employer and one involving potential discrimination by the judge.¹⁴⁴ While there are a variety of theories that try to account for the continuing disparate treatment of women and people of color in the workplace,¹⁴⁵ how these theories interact with the elusive concept of intentional discrimination necessary for a plaintiff’s success in an

¹³⁹ *Alvarado v. Donahoe*, 687 F.3d 453, 458 (1st Cir. 2012) (citing *Dennis v. Osram Sylvania, Inc.*, 549 F.3d 851, 855–56 (1st Cir. 2008)) (retaliation case context).

¹⁴⁰ *Harrington v. Aggregate Indus.-Ne. Region, Inc.*, 668 F.3d 25, 33 (1st Cir. 2012) (quoting *Ahern v. Shinseki*, 629 F.3d 49, 54 (1st Cir. 2010)).

¹⁴¹ *Id.* (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)).

¹⁴² See Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1966–67 (2009) (summary of plaintiff win rates in employment cases compared to other case categories suggests “a legal system biased against employment discrimination plaintiffs”).

¹⁴³ See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) (“conclusions drawn from psychological research on human judgment and choice likely apply to judges as well” and finding similar cognitive biases in a study of federal magistrate judges).

¹⁴⁴ Nancy Gertner & Melissa Hart, *Employment Law: Implicit Bias in Employment Litigation*, in *IMPLICIT RACIAL BIAS ACROSS THE LAW* 80, 80 (Justin D. Levinson & Robert J. Smith eds., 2012). This second story involves not only the bias of the judge in viewing the facts but also the development of legal doctrine that is biased against plaintiffs. See *id.* at 87.

¹⁴⁵ For an overview of evidence of the persistence of discrimination in the workplace, see *id.* at 81–83.

employment discrimination case can be difficult to discern. Nevertheless, biases most of us have (of which we are often unaware) suggest that courts should exercise caution when granting summary judgment.

A. *Bias by Judges*

One significant problem with arguing that judges should not grant summary judgment because of their own biases is that jurors are human beings too and might well exhibit the same biases.¹⁴⁶ Indeed, because jurors do not have legal training, they might engage in more biased behaviors than someone who is trained to “neutrally” apply the law. However, studies show that plaintiffs in employment discrimination cases fare better before jurors than before judges.¹⁴⁷ Kevin Clermont and Stewart Schwab have studied the success—or more properly, the lack thereof—of employment discrimination plaintiffs in court.¹⁴⁸ The data is rather compelling. In a study of federal employment discrimination cases from 1979 to 2006, they found that overall plaintiff win rates in trials before juries was 37.63 percent—a number fairly close to plaintiff win rates in other cases.¹⁴⁹ However, plaintiff win rates in trials before judges were an anemic 19.62 percent.¹⁵⁰ This is an 18 percent difference in win rates over this period of time. Plaintiff win rates in bench trials in other cases are much

¹⁴⁶ Indeed, studies of jurors show that they employ a variety of heuristics that can lead to errors. See Robert J. MacCoun, *Experimental Research on Jury Decision-Making*, 244 SCIENCE 1046, 1047 (1989) (reviewing jury studies).

¹⁴⁷ See Clermont & Schwab, *supra* note 3, at 130; In her study of 102 jury trial and ten bench trial outcomes in employment discrimination cases, Wendy Parker disturbingly found that plaintiff win rates before juries varied by the race of the plaintiff, with African American and Latino plaintiffs less likely to win. Parker, *supra* note 46, at 228–29 & fig.2.

¹⁴⁸ See Clermont & Schwab, *supra* note 3, at 110 display 2, 111–12 (noting defendants’ reversal rate on appeal for exceeds that of plaintiffs); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 947, 958. See generally Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL’Y J. 547 (2003). The difference in reversal rates on appeal is stark. Reversal rates for defendants from plaintiff pretrial wins is 30 percent compared to an 11 percent reversal rate for plaintiffs who appeal defendant pretrial wins. Clermont & Schwab, *supra* note 3, at 111. The reversal rate from trial wins is 41 percent for defendants when plaintiffs win at trial compared to 9 percent for plaintiffs when the defendant wins at trial. *Id.* Clermont and Schwab note that the 41 percent to 9 percent spread in reversal rates is more extreme than the difference between plaintiff and defendant reversal rates in non-job cases. *Id.* at 111–12.

¹⁴⁹ Clermont & Schwab, *supra* note 3, at 130. The plaintiff win rates before juries in other cases during this time was 44.41 percent. *Id.* In a study of undergraduates that has implications for jury decisionmaking, Justin D. Levinson found that his participants misremembered facts in racially biased ways. See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398 (2007). The specter of jury bias has led scholars to argue in favor of juror education about implicit bias. See, e.g., Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1276–79 (2002); Levinson, *supra* at 413–14. Indeed, federal judge Mark Bennett uses jury instructions on implicit bias in his cases. See Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 500–01 & n.166 (2010) (describing Judge Bennett’s instructions).

¹⁵⁰ Clermont & Schwab, *supra* note 3, at 130.

higher—45.53 percent.¹⁵¹ While the gap between win rates in jury trials versus bench trials decreased through 2001, the discrepancy began to increase again after that year.¹⁵² Thus, while jurors are not perfect,¹⁵³ there is something different about the way judges view employment discrimination cases. This has led Clermont and Schwab to opine that low plaintiff win rates in bench trials might also explain lower plaintiff win rates in pretrial adjudications—that trial judges “lean” against plaintiffs in employment discrimination cases in a way they do not in other cases.¹⁵⁴

To use an example from one study in the context of summary judgment, Professor Joseph Seiner conducted a study of summary judgment motions in all employment discrimination cases terminated in fiscal year 2006 in which a defendant made a motion for summary judgment.¹⁵⁵ Of the 3,983 summary judgment orders issued in these cases, courts granted 62.6 percent of the motions, granted 18.2 percent in part, and denied only 19.2 percent.¹⁵⁶ Thus, in over 80 percent of the cases in which a defendant made such a motion, it was granted in whole or in part.¹⁵⁷ Employment discrimination plaintiffs also do not

¹⁵¹ *Id.*

¹⁵² *See id.* at 130 display 16.

¹⁵³ *See generally* Levinson, *supra* note 149.

¹⁵⁴ *See* Clermont & Schwab, *supra* note 3, at 131. They also suggest that trial judges may be disposed against these cases because of the rates of reversals on appeal of judgments for plaintiffs. *See id.*

¹⁵⁵ *See* Seiner, *supra* note 3, at 1033. This data came from the Federal Judicial Center, so it’s quite inclusive; it does not just include those that were reported either officially or electronically. *Id.*

¹⁵⁶ *Id.* at 1033 tbl.C.

¹⁵⁷ *See id.* While this study does not provide information about how many defendants in employment discrimination cases make summary judgment motions, anecdotal as well as other evidence suggests they are frequent. *See, e.g.,* Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 48 (2005); Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335, 335–36. Professor Vivian Berger, who is a mediator, has noted that most employers’ counsel state they will file a summary judgment motion if the case doesn’t settle. Berger et al., *supra*. Likewise, using data from fiscal year 2006, the Federal Judicial Center took a random sample of 1500 cases from most of the US district courts. JOE CECIL & GEORGE CORT, THE FEDERAL JUDICIAL CENTER, REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES 4–5 (2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/sujulrs2.pdf>. This study was designed to determine if the manner in which the movant and non-movant had to proceed with motions for summary judgment, based on local rule, appeared to have an impact on outcomes of summary judgment motions. It did not include certain types of cases, such as class actions, and excluded three district courts from which it could not obtain usable data (Western District of Wisconsin, District of the Northern Marianas Islands, and the District of the Virgin Islands); *See id.* at 3–4. The Center designed the study to determine the impact on summary judgment practice in federal courts based on the structure of summary judgment motions, if any, set out in local rules. The study found that in 35 percent, 34 percent, or 37 percent of employment discrimination cases studied (depending on summary judgment motion structure), defendants filed at least one summary judgment motion. *Id.* at 12 tbl.7. The percentage of employment discrimination plaintiffs filing summary judgment motions was decidedly low—3 percent of employment discrimination cases. *Id.* at 13 tbl.8. This is a quite higher percentage of motions in these than other types of cases. For example, defendants moved for summary judgment in 10 percent, 13 percent, or 14 percent (depend-

fare well in the appellate courts, where the reversal rates for judgments in their favor are much higher than those for judgments in the defendants' favor.¹⁵⁸

Not surprisingly, commentators have suggested that this results from judicial hostility to civil rights cases.¹⁵⁹ Indeed, former federal district court Judge Nancy Gertner described her experience:

Federal courts, I believed, *were* hostile to discrimination cases. Although the judges may have thought *they* were entirely unbiased, the outcomes of those cases told a different story. The law judges felt "compelled" to apply had become increasingly problematic. Changes in substantive discrimination law since the passage of the Civil

ing on structure) of contracts cases and 9 percent, 11 percent, or 12 percent (depending on structure) of torts cases. *See id.* at 12 tbl.7. Indeed, of the categories of cases studied (contracts, torts, employment discrimination, other civil rights, and other), employment discrimination cases had the highest percentage of defendants filing at least one summary judgment motion. *Id.* Not surprisingly, employment discrimination cases also had the highest percentage of such motions being granted in whole or in part. *Id.* at 16 tbl.11. Depending on the structure of the summary judgment motion, such motions were granted either 20 percent of the time or 16 percent of the time. *Id.* Taking contracts again as point of comparison, such motions were granted in whole or in part in only 6 percent or 7 percent of cases studied. *Id.* Thus, the anecdotal evidence is borne out by this study. Defendants appear to make motions for summary judgment more often in employment discrimination cases when compared to other types of civil filings, and courts are granting them. An earlier study by Theodore Eisenberg and Charlotte Lanvers attempted to assess if the 1986 summary judgment trilogy had an effect on summary judgment rates. Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 2–3 (Cornell Law Sch., Research Paper No. 08-022, 2008), available at <http://ssrn.com/abstract=1138373>. Studying three federal district courts, the Eastern District of Pennsylvania, the Northern District of Georgia, and the Central District of California, they found a marked increase (nearly doubling) in summary judgment rates in employment discrimination cases in the Northern District of Georgia. *Id.* The summary judgment rates in these cases reached approximately 25 percent for cases terminated in 2001–02. *Id.* at 3. There was not a similar increase for other categories or other districts, although the rate increased in other civil rights cases in the Northern District of Georgia. The increase, however, was not statistically significant. *Id.* at 3, 16.

¹⁵⁸ Clermont and Schwab found that the reversal rate for defendants who appeal a plaintiff victory at trial is 41 percent, whereas the plaintiffs' reversal rate when they appeal a defendant's trial victory is 9 percent. Clermont & Schwab, *supra* note 3, at 110 display 2. As they note, plaintiffs' chances of retaining a victory on appeal "cannot meaningfully be distinguished from a coin flip," whereas defendants who prevail at trial "can be assured of retaining that victory after appeal." *Id.* at 112. *See also* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 103, 108 (1999) (similar findings in a study of ADA cases). Clermont and Schwab explain that this discrepancy in reversals after trial on the merits is particularly disturbing because the issues of intent relevant in these cases usually entail judgments about witness credibility—something appellate courts should not be second-guessing on appeal. Clermont & Schwab, *supra* note 3, at 112.

¹⁵⁹ *See, e.g.*, Clermont & Schwab, *supra* note 3, at 113. Clermont and Schwab explain: "plaintiffs suffer most of the losses at the district court level." *Id.* at 109. Further, plaintiffs in these cases have one of the worst win rates of all civil cases. *Id.* at 113. Clermont and Schwab attribute this in part to "attitudinal explanation[s]." *Id.* at 112. *But see* Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 482–83 (2008) (arguing that judicial aversion to these claims is a result of caseload, not ideology).

Rights Act of 1964 were tantamount to a virtual repeal. This was so not because of Congress; it was because of judges.¹⁶⁰

Gertner posits that judges' approaches to employment discrimination cases are skewed by the cases that they see—the cases that do not settle. Because the best cases settle, judges come to believe that all employment discrimination cases in front of them are weak, and that there is no significant need for anti-discrimination law.¹⁶¹ This, combined with asymmetric decision-making, whereby judges write detailed decisions when they grant summary judgment but do not write opinions when they deny the motions, result in judges adopting what Gertner characterizes as “Losers’ Rules”—manipulations of the legal rules essentially to get rid of these cases, whether by using motions to dismiss or motions for summary judgment.¹⁶² Indeed, she relates that in the beginning of her judicial career, “the trainer teaching discrimination law to new judges announced, ‘[h]ere’s how to get rid of civil rights cases.’ ”¹⁶³

Judge Gertner and Melissa Hart take the judicial bias argument one step further, arguing that bias is reflected in the legal rules developed by the courts to evaluate and ultimately decide these cases.¹⁶⁴ They specifically identify three commonly used doctrines—stray remarks, honest belief, and same decision-maker—that courts use to undermine the efficacy of plaintiffs' cases.¹⁶⁵ Yet social science suggests that these doctrines are inconsistent with what is known about how discrimination operates.¹⁶⁶ There is a case for judicial bias playing a role in these cases, which begs the question of why judges and employers would be biased. Cognitive psychology provides some explanations.

B. *The Human Tendency to Bias*

Well-intentioned people—including employers and judges—are not free from bias. There are a variety of psychological phenomena that help account

¹⁶⁰ Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 109 (2012) (footnote omitted).

¹⁶¹ *Id.* at 111, 114–15.

¹⁶² *Id.* at 110.

¹⁶³ *Id.* at 117. I would take her argument one step further. While good cases used to settle, emboldened by success in motion practice, defense lawyers have stopped trying to settle cases that formerly would reach early settlement. Indeed, given the prevalence of defendants' success using summary judgment, defense counsel would be foolish not to attempt a summary judgment motion. Clermont and Schwab's research reflects that “employment discrimination plaintiffs manage fewer resolutions early in litigation compared to other plaintiffs, and so they have to proceed toward trial more often. Defendants' resistance reflects awareness of their good chances in court.” Clermont & Schwab, *supra* note 3, at 121. Whatever the reason, summary judgment is a fruitful avenue for defendants to use to take these cases out of the court system.

¹⁶⁴ See Gertner & Hart, *supra* note 144, at 90–93.

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*; Krieger & Fiske, *supra* note 10, at 1034–38 (criticizing honest belief based on social science), 1042–46, 1051–52 (criticizing same actor doctrine as inconsistent with social science); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1314–16 (1998) (discussing the same actor doctrine); Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1162–67 (2008) (discussing the same actor doctrine). Note that the same actor doctrine is also known as the same decision-maker doctrine.

for this, including aversive racism, heuristics,¹⁶⁷ cognitive biases,¹⁶⁸ as well as motivated cognition,¹⁶⁹ to name a few. The purpose of this section is not to review in detail all the psychological theories and studies that may have an impact on how women and people of color are perceived; instead, it is to provide enough information about the research to suggest that it may be difficult to discern on a motion for summary judgment whether an employer discriminated against an employee. And to show, given evidence of possible judicial bias, judges are likely not in the best position to be making this decision in the first instance.

Research on implicit bias suggests that people, in general, are not “color-blind.”¹⁷⁰ Instead, people exhibit implicit attitudes in favor of one group over another based on a variety of factors relevant to anti-discrimination laws, including race, gender, and religion.¹⁷¹ In addition, people link positive or negative attributes with members of particular groups.¹⁷² While reliance on research based on implicit bias, such as the Implicit Association Test,¹⁷³ is not without its detractors,¹⁷⁴ the research on the existence of implicit bias is

¹⁶⁷ For example, hindsight bias, a type of heuristic or cognitive bias, has been linked to faulty decision making in sexual harassment cases. See Theresa M. Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 117–18 (2001); see also Guthrie et al., *supra* note 143, at 784 (describing study of magistrate judges showing that judges are susceptible to common heuristics); Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 306–07 (2007) (discussing representative heuristic); see generally DANIEL KAHNEMAN ET AL., JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (1982).

¹⁶⁸ Employment discrimination scholars refer to these phenomena by a variety of names. See, e.g., Herald, *supra* note 167, at 304 (“cognitive bias”); Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427, 427, 429 (2007) (“implicit biases”); Ann C. McGinley, [*j*]Viva La Evolución!: Recognizing Unconscious Motive in Title VII, 9 CORNELL J.L. & PUB. POL’Y 415, 420 (2000) (“unconscious bias”); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993) (referring to it as “negligent” discrimination); Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 542–44 (2003) (examples of “subtle” discrimination); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 509 (2001) (“unconscious discrimination”). Implicit bias in particular has received a lot of scholarly attention recently. See, e.g., Kang & Lane, *supra* note 149, at 473. For an excellent sum-up of extant studies available at the time on unconscious race and gender discrimination, see McGinley, *supra*, at 421–46.

¹⁶⁹ See, e.g., Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 307–09 (2013).

¹⁷⁰ See Kang & Lane, *supra* note 149, at 473 (explaining that “[i]mplicit biases—by which we mean implicit attitudes and stereotypes—are both pervasive (most people show evidence of some biases), and large in magnitude, statistically speaking. In other words, we are not, on average or generally, cognitively colorblind”).

¹⁷¹ See *id.* at 474.

¹⁷² See *id.* at 477.

¹⁷³ See PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> (last visited Apr. 13, 2014) (listing various Implicit Association Tests).

¹⁷⁴ See, e.g., Philip E. Tetlock & Gregory Mitchell, *Implicit Bias and Accountability Systems: What Must Organizations Do to Prevent Discrimination?*, 29 RES. ORGANIZATIONAL BEHAV. 3, 16–18 (2009); see also Kang & Lane, *supra* note 149, at 504–09 (describing Mitchell & Tetlock’s criticisms).

solid.¹⁷⁵ Indeed, there are studies that specifically link implicit bias to simulated employment-related decisions.¹⁷⁶

In terms of theories that help explain this, aversive racism is helpful in understanding how well-intentioned people end up discriminating.¹⁷⁷ Some studies show that 80 percent of Western democratic populations display unexamined bias against certain groups even though they believe they have benign intent with respect to those groups.¹⁷⁸ While it is estimated that perhaps 10 percent of the population are blatant biased extremists, most people do not hold such extreme views.¹⁷⁹

In particular, researchers posit that aversive racism affects a majority of white individuals who state that they are not prejudiced toward black individuals and that they try not to discriminate against minorities.¹⁸⁰ Aversive racism is characterized by feelings of “anxiety and uneasiness” around individuals who are members of minority groups.¹⁸¹ An aversive racist’s behavior is often inconsistent (sometimes they discriminate; sometimes they don’t) when dealing with members of minority groups. As Gaertner and his colleagues explain in *Aversive Racism: Bias Without Intention*:

[D]iscrimination will occur in situations in which normative structure is weak, when the guidelines for appropriate behavior are vague or when the basis for social judgment is ambiguous. In addition, discrimination will occur when an aversive racist can justify or rationalize a negative response on the basis of some factor other than race.¹⁸²

¹⁷⁵ See Kang & Lane, *supra* note 149, at 488–90.

¹⁷⁶ See, e.g., *id.* at 484–85 (describing studies); Jonathan C. Ziegert & Paul J. Hanges, *Employment Discrimination: The Role of Implicit Attitudes, Motivation, and a Climate for Racial Bias*, 90 J. APPLIED PSYCHOL. 553 (2005).

¹⁷⁷ See Hart, *supra* note 10, at 747 (noting that aversive racism has implications for employment discrimination law).

¹⁷⁸ See Fiske, *supra* note 17, at 59–60.

¹⁷⁹ See *id.* at 60. Interestingly, these extremists are, as Fiske puts it, “outfront”—“salient, vocal, and dangerous.” *Id.* Krieger and Fiske note that more extreme forms of prejudice “do tend to run in ‘packs,’” suggesting that it has a group dynamic to it. Krieger & Fiske, *supra* note 10, at 1040. It is noteworthy that employment discrimination law assumes that discriminators are this type of evil actor—that people who engage in such acts have character flaws—when discrimination really is much more situational. See LU-IN WANG, *DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE* 25–35 (2006); Krieger & Fiske, *supra* note 10, at 1039–40; Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 821 (2005) (arguing that court interpretations of Title VII in the sexual harassment context assume that harassers are the “one bad apple” at the workplace instead of looking at workplace situational explanations for the behavior). Krieger and Fiske note that 9 percent of the variance in a person’s behavior is predicted by stable personality traits. See Krieger & Fiske, *supra* note 10, at 1048 (citing WALTER MISCHEL, *PERSONALITY AND ASSESSMENT* (1968)).

¹⁸⁰ Samuel L. Gaertner et al., *Aversive Racism: Bias Without Intention*, in *HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH*, *supra* note 17, at 377, 378–79. Research on implicit bias supports the disconnect between a person’s perception of his or her own bias and his or her actual implicit bias. See, e.g., Levinson, *supra* note 149, at 360–62 (describing studies); see also Kang & Lane, *supra* note 149, at 474–75 tbl.1 (showing differences between IAT results and self-reports).

¹⁸¹ Gaertner et al., *supra* note 180, at 379; see also Krieger & Fiske, *supra* note 10, at 1042.

¹⁸² Gaertner et al., *supra* note 180, at 380.

Where right and wrong are clear, Gaertner and his colleagues posit that aversive racists will not discriminate.¹⁸³ Many employment decisions are made under conditions of uncertainty, and the legal standard that employers must meet under Title VII—the articulation of a legitimate nondiscriminatory reason—lends itself to just the type of non-race-based rationalizations characteristic of aversive racism. Similarly, judges make decisions with respect to summary judgment using vague legal standards.¹⁸⁴ They likewise could slip into the same behaviors.¹⁸⁵

Unconscious biases and stereotypes also can play a role in these cases. Linda Hamilton Krieger examined the role of stereotypes in employment discrimination cases nearly twenty years ago in her influential work, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Employment Opportunity*.¹⁸⁶ Krieger set out the extant psychological research on stereotypes explaining how they operate to influence decision making:

Stereotypes are viewed as social schemas or person prototypes. They operate as implicit expectancies that influence how incoming information is interpreted, the causes to which events are attributed, and how events are encoded into, retained in, and retrieved from memory. In other words, stereotypes cause discrimination by biasing how we process information about other people.¹⁸⁷

Krieger explained how stereotypes distort perceptions of women and members of minority groups, and feed into the discrimination they experience in the workplace.

More recently, Lu-in Wang has explained that many people will not realize they are discriminating because these biases and stereotypes are unconscious or ingrained.¹⁸⁸ Once again, decision makers will have a

¹⁸³ *Id.* at 379; see also WANG, *supra* note 179 at 37 (explaining that when what is appropriate in a particular situation is unclear, this tends to increase discrimination or mask it with reasons other than race).

¹⁸⁴ See D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 281–83 (2010) (describing the complexity involved in summary judgment motions); see also Guthrie et al., *supra* note 143, at 783 (“[J]udges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.”). In an interesting study of decision-making in the discrimination context, Professors Braman and Nelson found that participants viewed prior cases more applicable to the case they were asked to consider if it was consistent with their policy preferences. However, this effect only occurred where the prior precedent was neither clearly similar nor clearly dissimilar to the scenario the participants were asked to evaluate. See Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940, 949 (2007).

¹⁸⁵ Marybeth Herald opines that judges, because of their legal expertise, “are probably more confident of their abilities to disregard biases than they should be.” Herald, *supra* note 167, at 303. Perhaps this explains poor plaintiff win rates in bench trials. See Clermont & Schwab, *supra* note 3, at 130–31.

¹⁸⁶ See generally Krieger, *supra* note 10. The early catalyst for this discussion is provided in Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the impact of unconscious bias on antidiscrimination law).

¹⁸⁷ Krieger, *supra* note 10, at 1199.

¹⁸⁸ See WANG, *supra* note 179, at 49–52. Stereotypes are particularly pernicious, because they “act not only as erroneous judgments of those groups but also lead to the production of objective facts to support their own accuracy.” *Id.* at 52. For a recent example in the federal

nondiscriminatory reason for their actions. This, however, does not mean that bias did not play a role:

The normative ambiguity studies show that racially biased treatment and legitimate, nondiscriminatory justifications are likely to coexist in many cases. More specifically, they show that the existence of a legitimate justification for a negative decision does not necessarily discredit racial bias as an explanation for that decision. The presence of such a justification may, instead, be cause to suspect that the decision in fact was racially biased, because racial discrimination today seems most likely to occur through the *racially biased application* of a *nondiscriminatory reason*.¹⁸⁹

This would make evidence of comparators who were treated better than members of traditionally discriminated-against groups particularly important in any legal analysis.¹⁹⁰

IV. MODERN PROOF OF DISCRIMINATION AND SUMMARY JUDGMENT

When people are not conscious of their biases, it is difficult to show that discrimination is intentional in the legal sense that courts are using intent. Given that discrimination based on race, sex, religion, and other protected characteristics is considered socially unacceptable in our society, most people would not admit to such biases even if they were aware of them.¹⁹¹ This requires one to infer the intent of the actor. Interestingly, early Title VII case law accounts for this in the *McDonnell Douglas* standard, which provides that a plaintiff need only show that she was a member of a protected class, was qualified for the job, was turned down for the job, and the position remained open or was filled by someone else.¹⁹² The Court's mechanism for inferring intent assumes that discrimination is a common operating procedure. Absent the two most common reasons for not getting a job—it was unavailable or the candidate did not have the appropriate qualifications—one can assume discrimination played a role. Of course, the light burden that the employer must meet in

courts of appeals, see Stephanie Condon, *Conservative Judge Edith Jones Up for Rare Review*, CBS NEWS (June 13, 2013, 4:41 PM), <http://www.cbsnews.com/news/conservative-judge-edith-jones-up-for-rare-review/> (recounting that judge was referred by Chief Justice Roberts for investigation based on allegations that “she called certain racial groups like African-Americans and Hispanics ‘predisposed to crime’ and called defendants’ claims of racism nothing more than ‘red herrings.’ ”); Janet Elliott, *Judge Says Bias Suits Undermine Rule of Law*, HOUSTON CHRON., Jan. 31, 2001, at 2 (quoting Judge Jones as stating that employment discrimination cases “ ‘seldom turn on evidence of race- or sex-based discrimination’ but more likely involve ‘petty interoffice disputes, recrimination, second-guessing and suspicion’ ”).

¹⁸⁹ WANG, *supra* note 179, at 44 (emphasis in original).

¹⁹⁰ But there are currently problems with case law involving comparators. Courts have been too stringent in who they will permit plaintiffs to use as comparators. See generally Tricia M. Beckles, Comment, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage If They Have No “Similarly Situated” Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459 (2008); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009) (noting problems with comparators in court and suggesting a solution).

¹⁹¹ See Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, in UNINTENDED THOUGHT 253, 274 (James S. Uleman & John A. Bargh eds., 1989).

¹⁹² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

response—the legitimate nondiscriminatory reason—greatly undermines the efficacy of this assumption in actual litigation. Given the prevalence of unconscious bias, the Court was on the correct track in inferring intent from such simple circumstances.

In recent years, courts have increasingly adopted a narrow view of discrimination. Modern antidiscrimination law emphasizes “discrimination as a wrong perpetrated by a discriminator who acts self-consciously and irrationally.”¹⁹³ As Gertner and Hart point out, “[b]oth the legal doctrine and its application by trial and appellate judges reflect the often unrealistic search for a rogue, guilty decision-maker in the workplace, whose biases are overt. Anything short of that—any more subtle form of discrimination—will not pass muster.”¹⁹⁴ Indeed, even when courts acknowledge that unconscious discrimination might have played a role in a particular case, they are compelled to decide summary judgment motions in favor of the defendant given the legal standards currently in use.¹⁹⁵

When it comes to discrimination, what we know about human behavior makes this unfortunate phenomenon all too common. Krieger and Fiske provide excellent links:

Several . . . meta-analyses have been done on phenomena pertaining to prejudice and discrimination. Stronger field than laboratory effects have demonstrated the real world generality of favoring members of one’s ingroup, remembering stereotypic more than counterstereotypic information, judging the outgroup as more homogeneous than the ingroup, and liking people one sees frequently.¹⁹⁶

¹⁹³ Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 480 (2007).

¹⁹⁴ Gertner & Hart, *supra* note 144, at 81.

¹⁹⁵ A telling example of this is *Thomas v. Troy City Bd. of Educ.*, 302 F. Supp. 2d 1303 (M.D. Ala. 2004). In this case, an African American candidate for a school superintendent position sued when a white applicant got the job. *Id.* at 1306. While the trial court granted the motion for summary judgment, holding that the school district decisionmakers “honestly” believed that the candidate they chose was better for the job, *see id.* at 1309, the trial judge believed that unconscious bias might have played a role, given the subjective nature of the decision. The judge explained:

Such subjective decision-making processes are particularly susceptible to being influenced not by overt bigotry and hatred, but rather by unexamined assumptions about others that the decisionmaker may not even be aware of—hence the difficulty of ferreting out discrimination as a motivating factor. “Thus,” Professor Lawrence explains, “an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race. The employer perceives the white candidate as ‘more articulate,’ ‘more collegial,’ ‘more thoughtful,’ or ‘more charismatic.’ He is unaware of the learned stereotype that influenced his decision. Moreover, he has probably also learned an explicit lesson of which he is very much aware: Good, law-abiding people do not judge others on the basis of race. Even the most thorough investigation of conscious motive will not uncover the race-based stereotype that has influenced his decision.”

Id. (quoting Lawrence, *supra* note 186, at 324–25). For a detailed analysis of the *Troy* case in light of unconscious bias, see generally Hart, *supra* note 10.

¹⁹⁶ Krieger & Fiske, *supra* note 10, at 1023 (footnotes omitted). Preferences for in-group members tend to run in favor of socially dominant groups. In other words, people from minority groups tend to implicitly favor those of more socially dominant groups. *See, e.g.*, Kang & Lane, *supra* note 149, at 476 (“[T]hose who belong to social groups deemed to be ‘good’ . . . show strong preference for their own group. On the other hand, those who come

Yet, disparate treatment theory as seen through the lens of summary judgment continues to rely on the assumption of transparent mental processes.¹⁹⁷

Krieger and Fiske specifically have made the case that judges should have difficulty granting summary judgment in employment discrimination because of what social science tells us about how discrimination operates. Krieger and Fiske argue that judges already use models of how people behave in assessing employment discrimination claims.¹⁹⁸ This is especially so when it comes to drawing inferences about discrimination. As they explain:

In the adjudication of summary judgment motions, judges use implicit theories of human behavior to determine, among other things, what inferences would be “reasonable” or “unreasonable” to draw from a particular factual pattern, since only “reasonable” inferences need be drawn in favor of the non-moving party (usually the plaintiff) and against the moving party (usually the defendant).¹⁹⁹

Using theories of human behavior helps inform what are and are not “reasonable” inferences from a given set of factual circumstances. Krieger and Fiske advocate for providing jurors with this information to help them decide.²⁰⁰ Both judges and jurors will employ their own theories. Why not assist them with theories that have empirical support?

Krieger and Fiske’s position is bolstered by the dissent in *Torgerson*. The dissent in *Torgerson* agreed that there was no “special” summary judgment standard for employment discrimination, but disagreed with the majority that summary judgment was appropriate in that case.²⁰¹ Somewhat ironically, in its analysis of why summary judgment was improper, it highlighted why caution is appropriate in granting summary judgment where intent is at issue.

The *Torgerson* plaintiffs sought jobs as firefighters with the city of Rochester, Minnesota. One piece of evidence suggesting that the city’s legitimate nondiscriminatory reason for not hiring the plaintiffs was actually pretextual was a statement made by a Fire Commissioner that a fact finder could construe as evidence of discrimination. The positions the plaintiffs applied for were funded by a federal grant that expressed a preference for women and members of minority groups. The Commissioner remarked that he “would have recommended that the City not take the grant” if he had known about the preference.²⁰² The dissent explained its disagreement with the majority’s interpretation of this comment:

The court usurps the jury’s function by construing this comment in the light most favorable to the City, not [plaintiffs] Torgerson and Mundell. The court interprets Commissioner Field’s comment as nondiscriminatory because “Congress explicitly commands that Title VII shall not be interpreted to require preferential treatment because of sex or national origin on account of an imbalance in the number or percent of those employed, compared to the relevant number of percent in the commu-

from groups that the culture assigns as ‘bad’ . . . do not show strong ingroup preference.”); Levinson, *supra* note 149, at 362–63 (citing studies).

¹⁹⁷ Krieger & Fiske, *supra* note 10, at 1030.

¹⁹⁸ *Id.* at 1006.

¹⁹⁹ *Id.* at 1013.

²⁰⁰ *Id.*

²⁰¹ *Torgerson v. City of Rochester*, 643 F.3d 1031, 1054, 1056 (8th Cir. 2011) (Smith, J., dissenting).

²⁰² *Id.* at 1056.

nity.” Thus, according to the court, Commissioner Field’s comment must be interpreted as merely evidencing his disagreement with the *mandatory* hiring of persons based on their sex or national origin. That may well be what he intended, but a reasonable jury with the benefit of cross-examined testimony from Commissioner Field could also interpret the comment as indicating that Commissioner Field was opposed to hiring women and minorities under any circumstances, mandatory or otherwise. Ultimately, a jury—not this court—should determine Commissioner Field’s intended meaning. Delving into Commissioner Field’s thought processes and explaining away his comment so as to avoid any inference of discriminatory animus is inappropriate and in direct conflict with the summary judgment standard.²⁰³

While the *Torgerson* dissent may have eschewed the “special” standard for intent cases, it provided an example of why it is so difficult to determine issues of intent on a dry record. In this case, the comment by Commissioner Field was a key piece of evidence suggesting intentional discrimination by a decision maker. Yet, the statement was in some ways ambiguous. Was Commissioner Field objecting to hiring any women or members of other national origin groups or to mandatory hiring quotas for these groups? A fact finder could infer a discriminatory motive from the Commissioner’s statement and certainly would benefit from Commissioner Field’s own explanation for his statement in open court, subject to cross-examination, to determine his intent. It is because intent cases often involve fact patterns like this that makes them well suited for the fact finder and not so well suited for summary judgment.

V. CONCLUSION

One need not read all of the voluminous research committed to unconscious bias to realize that determining an employer’s intent on a motion for summary judgment might be a difficult decision for a judge to make. Indeed, there is some reason to believe that judges might have their own sets of biases that are implicated in employment discrimination cases, making the possibility of a judge rendering an unbiased decision in these cases even more suspect. Yet, lower court rhetoric, thanks to cases like *Torgerson*, makes it increasingly easy for courts to grant such motions. The psychology of bias suggests that the courts are acting too soon. Until legal rules and decision-making processes incorporate what is known about implicit bias and other common human characteristics that lead people to discriminate, courts should be reluctant to grant summary judgment in employment discrimination cases.

²⁰³ *Id.* (citations omitted) (citing *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376–77 (8th Cir. 1996)) (reh’g denied).