SUMMARY JUDGMENT PRINCIPLES IN LIGHT OF *TOLAN V. COTTON*: EMPLOYMENT DISCRIMINATION IMPLICATIONS IN THE FIFTH CIRCUIT

INTRODUCTION

Proving pretext[1] is the crux of virtually every employment-discrimination case brought under Title VII of the Civil Rights Act:[2] an act intended to discourage discrimination in the

1. Pretext is generally defined as "A false or weak reason or motive advanced to hide the actual or strong reason or motive." *Pretext*, BLACK'S LAW DICTIONARY (10th ed. 2014). In the narrower context of employment discrimination, pretext means a false explanation that serves to mask discrimination.

2. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–16, 78 Stat. 241, 253–

workplace and provide a remedy for those subject to this hurtful, heinous conduct.[3] The effectiveness of this remedy has, however, been hamstrung by a judiciary that is often unwilling to give proper credence to evidence offered by employees attempting to prove pretext at the summary-judgment stage. The result has been the pre-trial disposal of the vast majority of employment discrimination claims.

This problem is not unique to the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit). Nationwide, 73% of employment-discrimination cases are being disposed of via summary judgment in favor of defendant employers.[4] The rules of civil procedure and

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66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-15 (2012)); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973). Significantly, since 1964, the Civil Rights Act has been revised several times. *E.g.*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, secs. 2–8, 10–11, 13, §§ 701–07, 709–10, 714–15, 717–18, 86 Stat. 103, 103–13 (codified as amended at §§ 2000e(j), -4(b), -6(c) to (e), -16 to -17 (2012)); Civil Rights Act of 1991, Pub. L. No. 102-66, secs. 104–14, §§ 701–03, 705–06, 717, 105 Stat. 1071, 1074–79 (codified as amended at §§ 2000e(l) to (n), -1(b) to (c), -2(k) to (n), -4(h)(2), (j), -5(e)(2), g(2)(B) (2012)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, secs. 3, 5(c)(2), (f), §§ 706(e), 717, 123 Stat. 5, 5–7 (codified as amended at §§ 2000e-5(e)(3)(A), -16(f) (2012)); *see* Civil Rights Act of 1991, Pub. L. No. 102-66, § 2–3, 105 Stat. 1071, 1071; Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5, 5.

3. *See, e.g.*, §§ 2–3, 105 Stat. at 1071 ("The purposes of this Act are . . . to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace . . . ."); § 2, 123 Stat. at 5 (stating that Congress passed the Act because the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*. "significantly impair[ed] statutory protections against discrimination . . . . and [was] at odds with the robust application of the civil rights laws [that] Congress intended"); *see also* Civil Rights Act of 1991, Pub. L. No. 102-66, secs. 101(a), 102(a)(1), § 1977, 105 Stat. 1071, 1071–74 (codified at 42 U.S.C. §§ 1981(a), 1981a(a)(1) (2012)).

4. *See* Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 942–47 tbl.A1 (2006) (showing that: (1) of plaintiffs claiming *non-employment discrimination*, (a) those alleging racial-discrimination won the most cases—prevailing 27.6% of the time, (b) those alleging disability-discrimination won the least—just 19.6%, and (c) the average success rate was just above 25% overall; (2) of plaintiffs claiming *employment-discrimination*, (a) those alleging "failure to reinstate" had the highest success rate—winning a modest 33.3% of their cases, (b) those alleging "failure to hire" had the worst—winning only 11.1%, and (c) the average success rate was just about 17.8% overall; and (3) of the 393 motions for summary judgment filed, plaintiffs prevailed in only 24.7% of the cases); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1594 (2003) (finding that, out of an annual 30,700 civil rights case filings, pretrial resolution favored the defendant in 24,800 cases—a success rate of roughly 82%—while plaintiffs were only favored in 250 cases—or about a 0.9% success rate); *see also* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 HARV. L. & POL'Y REV. 103, 127–28 (2009) ("Over the period of 1979–2006 in federal court, the plaintiff win rate for jobs cases (15%) was much lower than that for non-jobs cases (51%) . . . . [, and] employment discrimination plaintiffs . . . won [only] 3.59% of pretrial adjudications, while other plaintiffs . . . won

how they are employed has been poignantly described as "a mirror held up against the legal system itself."[5] The reflection cast by the U.S. legal system's use of summary judgment is far from a pretty picture. Our federal court system is finding that in nearly three-quarters of employment-discrimination cases, when viewing all the facts and reasonable inferences in favor of the employee, there is no genuine issue of material fact indicating even a slight possibility of discrimination. This unwillingness of the court system to confront the ongoing problem of discrimination in the American workplace is deeply troubling. However, a recent Supreme Court decision signals a need to scale back this overuse of summary judgment.

In *Tolan v. Cotton*,[6] the Supreme Court admonished the Fifth Circuit for its misapplication of fundamental summary-judgment principles. This Comment argues that the Fifth Circuit should embrace *Tolan*, and ensure all reasonable inferences are drawn in favor of the non-moving party when examining pretext at the summary-judgment stage by giving proper credence to the perceptions and recollections of employees. Embracing such a position would align the court with the correct posture at the summary-judgment stage, lessen the influence of judges, and result in a less panel-centric application of the law.

I. THE FRAMEWORK AND ITS ARENA

This section provides background information on the framework used to prove unlawful discrimination in the employment context, as well as the history and present state of the judiciary's view and use of summary judgment. Section A outlines the framework established in *McDonnell Douglas Corp. v. Green* (*McDonnell Douglas*)—the burden-shifting schema utilized by federal courts in hearing cases of employment discrimination.[7] This subsection also discusses the Supreme Court's major decisions affecting the final stage of the framework

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21.05% . . . ."); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Hon. Michael Baylson 2 (Apr. 12, 2007, revised June 15, 2007) (citations omitted) [hereinafter Cecil & Cort Memo], http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf ("Over 70 percent of the summary judgment motions in employment discrimination cases are granted . . . , with considerable variation across circuits and across districts within circuits.").

5. David Bamford et al., *Learning the 'How' of the Law: Teaching Procedure and Legal Education*, 51 OSGOODE HALL L.J. 45, 75 (2013).

6. 134 S. Ct. 1861 (2014).

7. *See* 411 U.S. 792 (1973).

(proving pretext) and the implications of these decisions in the Fifth Circuit. Section B briefly discusses the evolution of summary-judgment procedure, with a special focus on the Fifth Circuit. As summary judgment is the juncture at which many discrimination cases are decided, a background of this procedural tool is necessary to understand how pretext is proven within the *McDonnell Douglas* framework.

A. THE FRAMEWORK

1. THE ESTABLISHMENT OF THE *MCDONNELL DOUGLAS* FRAMEWORK

Congress enacted Title VII of the Civil Rights Act of 1964 to eliminate discrimination based on protected traits in the employment context.[8] Actions may be brought using either direct or circumstantial evidence as proof of discrimination; in the modern workplace, employers rarely discriminate in an overt fashion, making the use of circumstantial evidence more prominent.[9] Where only circumstantial evidence is available, courts apply the well-established burden-shifting framework first laid out in *McDonnell Douglas* over forty years ago.[10]

The plaintiff in *McDonnell Douglas*, Percy Green, an African-American activist in the civil rights movement, was laid off from his job for what was said to be a general reduction in the work

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8. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 703(a), 705(a), 706(a), 78 Stat. 241, 255, 258–59 (codified as amended at 42 U.S.C §§ 2000e-2(a), -4(a), -5(a) (2012)) (providing that an employer engages in an unlawful-employment practice (UEP) against an individual when, "because of [her] race, color, religion, sex, or national origin," the employer either (1) "fail[s] or refuse[s] to hire . . . discharge[s] . . . or otherwise discriminate[s] against [her regarding the] compensation, terms, conditions, or privileges of [her] employment," or (2) "limit[s], segregate[s], or classif[ies her] employees in any way [that] deprive[s] or tend[s] to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . ."); §§ 101–02, 105 Stat. at 1071–74.

9. *See* Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y. L. SCH. L. REV. 749, 753 n.25 (2013); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 320 (2010) ("In modern American work environments, savvy employers know that blatant statements of bias should be neither memorialized in writing nor uttered by their employees, particularly decision makers. Without such smoking gun evidence, most Title VII plaintiffs attempt to demonstrate unlawful disparate treatment using circumstantial evidence.").

10. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Donald & Pardue, *supra* note 9 (2013) (noting that most employment discrimination cases are analyzed under the *McDonnell Douglas* framework).

force.[11] A few weeks later, however, his employer placed advertisements seeking applicants for Green's former position.[12] Green applied for reemployment, but the company rejected his application.[13] Green filed suit alleging that the reason he was fired and not subsequently re-hired was racial discrimination.[14] Eventually, his case was taken up by the Supreme Court to clarify the standards governing employment discrimination claims.[15] While the framework articulated in *McDonnell Douglas* was tailored for a racial-discrimination claim, it has been adapted to a wide variety of employment-discrimination actions.[16] A general articulation of the framework follows, which would be tailored to the particular facts of the case to which it would be applied.

Under the *McDonnell Douglas* framework, the plaintiff must first prove a prima-facie case of discrimination by showing that: (1) she is a member of a protected class; (2) she met the qualifications for the position; (3) the employer did not hire or promote her; and (4) the employer hired someone from a non-protected class.[17] If the plaintiff succeeds in establishing a prima-facie case, a rebuttable presumption of discrimination arises.[18] The employer can easily dispense with this presumption by articulating a valid non-discriminatory reason.[19] While employees are required to establish their prima-facie case by a preponderance of the evidence, the employer's burden is only one of production, not persuasion.[20] Hence, employers seldom have

11. *McDonnell Douglas Corp*., 411 U.S. at 794.

12. *Id.* at 796.

13. *Id*.

14. *Id*. at 797.

15. *Id.* at 797–98.

16. *See McDonnell Douglas Corp*., 411 U.S. at 802 n.13 (reminding the lower courts of the variability of the factual bases for Title VII actions and, thus, that "the specification of the prima facie proof required [here] is not necessarily applicable in every respect to differing factual situations").

17. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981) (citing *McDonnell Douglas Corp*., 411 U.S. at 802).

18. *Id*. at 254 & n.7 (citations omitted) ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee."); *McDonnell Douglas Corp*., 411 U.S. at 802.

19. *Burdine*, 450 U.S. at 254 (citations omitted); *McDonnell Douglas Corp*., 411 U.S. at 802 & n.14.

20. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993) (internal quotations omitted) ("By producing evidence (whether ultimately persuasive or not) of nondiscriminatory reasons, [the employer] sustained [its] burden of production, and thus placed [itself] in a better position than if [it] had remained silent.").

difficulty rebutting this presumption.[21] If these first two steps are satisfied, the burden then shifts back to the plaintiff who is tasked with proving that the defendant's proffered reason is a mere pretext for discrimination.[22] This final stage of the analytical framework is where the parties most frequently lock horns.[23]

2. PROVING PRETEXT

In the context of employment discrimination, pretext means a false explanation that serves to mask discrimination.[24] To prove pretext, the plaintiff must present evidence "from which an inference of discriminatory animus" may be drawn.[25] The most common evidentiary avenues include "the use of comparative data involving similarly situated individuals, statistics reflecting the overall composition of the employer's workforce, inconsistencies or contradictions in the employers explanation, [and] other information surrounding the circumstances of the plaintiff's employment that raise an inference of discrimination."[26] That is, the plaintiff must show that the

21. *See Burdine*, 450 U.S. at 254 (citations omitted) ("The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."); Martin, *supra* note 9, at 321–22 (quoting *Tex. Burdine*, 450 U.S. at 253–56) ("The respective burdens of the parties at this stage of the process are not particularly onerous. . . . Per *Burdine*, the employer . . . [carries its burden] by simply explaining what it has done or by 'produc[ing] admissible evidence' of a legitimate basis for its decision—evidence that would allow a fact-finder 'rationally to conclude that the employment decision' was not the result of discriminatory bias.").

22. Martin, *supra* note 9, at 323 (citations omitted) ("After the employer articulates its justification . . . the plaintiff has an opportunity to prove . . . that the employer's reason is unworthy of credence—a pretext for unlawful discrimination.").

23. *Id.*; *see Burdine*, 450 U.S. at 255–56 ("Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and *to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext*.") (emphasis added).

24. *McDonnell Douglas Corp.*, 411 U.S. at 805 ("[O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision.").

25. Martin, *supra* note 9, at 323; *see McDonnell Douglas Corp.*, 411 U.S. at 804–05.

26. Martin, *supra* note 9, at 323; *see McDonnell Douglas Corp.*, 411 U.S. at 804–05 ("[E]vidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment. On the

defendant–employer's proffered reason is either patently false or unworthy of credence.[27]

For example, pretext may be established by demonstrating that the plaintiff is "clearly better qualified" than the person the employer favored.[28] However, proving such is difficult. At one time the qualification difference in the Fifth Circuit was required to be such as to "leap from the record and cry out to all who would listen that he was vastly—or even clearly—more qualified for the subject job."[29] While the Supreme Court disposed of this standard in *Ash v. Tyson Foods, Inc.*,[30] the new standard employed in the Fifth Circuit is no less arduous. The standard of clearly better qualified is now "understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."[31] This standard allows courts to ignore questionable disparities in the qualifications of individuals unless grossly unreasonable. As is discussed below, heightened evidentiary standards, such as the one articulated above, run counter to the

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latter point, statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks.").

27. *See* Martin, *supra* note 9, at 326 (citations omitted) ("[In certain jurisdictions], if the plaintiff demonstrated a prima facie case and evidence that the employer's reason was false or not credible, for example, she was entitled to judgment as a matter of law.").

28. *See, e.g.*, Taylor v. Runyon, 175 F.3d 861, 868 (11th Cir. 1999) (noting that plaintiff's evidence of superior qualifications "certainly could give a jury a reason to disbelieve [defendant's] proffered reasons" for the alleged gender discrimination against plaintiff), *abrogated by* Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006) (per curiam).

29. Price v. Fed. Express Corp., 283 F.3d 715, 723 (5th Cir. 2002) (quoting Odom v. Frank, 3 F.3d 839, 847 (5th Cir. 1993)), *abrogated by Tyson Foods, Inc.*, 546 U.S. 454; *see* Martin, *supra* note 9, at 326 & n.154 (noting the contrast between (1) "Deines v. Tex. Dep't of Protective & Regulatory Servs., 164 F.3d 277, 279 (5th Cir. 1999) (deeming jury instruction appropriate where it reflected that disparity alone is insufficient as evidence of pretext unless the 'disparit[y is] so apparent as to virtually "jump off the page and slap you in the face')," and (2) "Raad v. Fairbanks N. Star Borough Sch. Dist., 323 F.3d 1185, 1194 (5th Cir. 2003) (rejecting the 'jump and slap' standard and deeming the plaintiff's superior qualifications compared to the employer's choice sufficient evidence of pretext)").

30. 546 U.S. at 458 ("It suffices to say here that some formulation other than the test the Court of Appeals articulated . . . would better ensure that trial courts reach consistent results.").

31. Churchill v. Tex. Dep't of Criminal Justice, 539 F. App'x 315, 321–22 (5th Cir. 2013) (per curiam) (quoting Bright v. GB Bioscience Inc., 305 F. App'x 197, 205 n.8 (5th Cir. 2008) (per curiam)).

core summary-judgment principal that all reasonable inferences should be given to the non-moving party. Unfortunately for plaintiffs, the above is but one example of an employer-friendly standard that has made proving pretext a challenging endeavor in the Fifth Circuit.[32]

3. VARIATIONS ON A THEME: VIEWS OF PRETEXT

After the Supreme Court decided *McDonnell Douglas*, a split arose among the federal appellate courts in determining the evidentiary burden necessary to prove pretext.[33] The circuits grouped themselves into three camps: "pretext-only," "pretext-may," and "pretext-plus."[34] Those circuits in the pretext-only camp held that a plaintiff is automatically entitled to a favorable judgment as a matter of law, if she can successfully show that the defendant–employer's nondiscriminatory reason is false.[35] Those circuits adopting the intermediate standard of pretext-may did not allow for this per-se entitlement to a plaintiff verdict upon proving pretext.[36] Rather, in the pretext-may circuits, sufficient evidence of pretext resulted only in an inference of discrimination sufficient to overcome summary judgment, but not a judgment as a matter of law.[37] A jury trial would be needed to determine the ultimate issue of whether unlawful discrimination occurred and to enter a final judgment.[38] Finally, those circuits utilizing the pretext-plus approach necessitated a showing of pretext *and* additional evidence of discrimination.[39] Essentially, the pretext-

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32. For more examples, see discussion *infra*, Section II.

33. Donald & Pardue, *supra* note 9, at 754.

34. *Id.*

35. *Id.* at 754 & nn.35–36 (citing Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994) ("According to [pretext-only] courts, a finding by the district court that the employer's proffered justification is false is 'itself *equivalent* to a finding that the employer intentionally discriminated.'") (emphasis in original)).

36. *Id.* at 754.

37. *Id.* at 754 & n.38 (citing *Anderson*, 13 F.3d at 1123 ("Under [the pretext-may] rule, '[i]f the employer offers a pretext—a phony reason—for why it fired the employee, then the trier of fact is permitted, although not compelled, to infer that the real reason was age.'")).

38. Donald & Pardue, *supra* note 9, at 754 ("Unlike the pretext-only rule, the pretext-may rule does not entitle the plaintiff to a favorable judgment as a matter of law; instead, the issue goes to the jury to determine whether the prima facie case and evidence of pretext show unlawful discrimination.").

39. *Id.* at 754 & nn.39–40 (citing *Anderson*, 13 F.3d at 1123 ("The 'pretext-plus' courts require more than a simple showing that the employers' proffered reasons are false."); Martin, *supra* note 9, at 326 ("[U]nder the defendant-friendly 'pretext-plus' rule, the plaintiff must not only prove a prima facie case and pretext, but also provide additional evidence of discrimination; merely establishing that the

plus circuits required that the plaintiff show the defendant's *real* motive by answering the question, "Pretext for what?"[40]

The Supreme Court first attempted to resolve this circuit split in *St. Mary's Honor Center v. Hicks.*[41] In a 5–4 decision, the Court explicitly rejected the pretext-only standard, finding a mandatory judgment as a matter of law for the plaintiff based on evidence of pretext alone to be inappropriate.[42] While clearly laying waste to the pretext-only camp, the Court was less successful in resolving which of the other two interpretations lower courts should employ. Specifically, those backing pretext-may found a firm endorsement for their interpretation in the Court's statement that:

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) *may*, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.[43]

Essentially the Court affirmed that evidence of pretext coupled with the elements of a plaintiff's prima-facie case could be sufficient to not only overcome a motion for summary judgment, but could also *perhaps* be sufficient for summary judgment in favor of the plaintiff–employee.

However, the Court left open the possibility of a viable pretext-plus interpretation, with those in support of such an interpretation finding support in the following statement: "But a reason cannot be proved to be "a pretext *for discrimination*"

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employer's proffered reason is false is not enough to give rise to an inference of discrimination.").

40. Martin, *supra* note 9, at 326 (citations omitted); *see* Chaffin v. John H. Carter Co., 179 F.3d 316, 320 (5th Cir. 1999) (citations omitted), *partially abrogated on other grounds by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

41. 509 U.S. 502 (1993).

42. *Id.* at 517–18 (1993) (criticizing the Court's reasoning in *Burdine* as contradicting or "render[ing] inexplicable" various statements of the law governing pretext in employment-discrimination cases, writing specifically that "*McDonnell Douglas* does *not* say . . . that all the plaintiff need do is disprove the employer's asserted reason," and concluding that "the dictum [in *Burdine*] must be regarded as an inadvertence, to the extent that it describes disproof of the defendant's reason as a totally independent, rather than an auxiliary, means of proving unlawful intent") (emphasis in original).

43. *Id.* at 511 (emphasis added).

unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."[44] While the dissent found this incongruity problematic,[45] the majority opinion noted in a footnote that it saw no inconsistency between the two statements.[46]

In 2000, seven years after *Hicks*, the Court again revisited the issue of pretext's role in employment-discrimination cases in an appeal from the Fifth Circuit, *Reeves v. Sanderson Plumbing Products, Inc.*, which remains the most recent Supreme Court case addressing the subject in depth.[47] In a unanimous opinion written by Justice Sandra Day O'Connor, the Court upheld the pretext-may approach, stating that "[a] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[48] Such an inference of discrimination, the Court noted, "[I]s consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt."[49] While wholeheartedly endorsing the pretext-may rule, the Court failed to fully repudiate pretext-plus, stating, "This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability."[50] The Court went on to provide two examples of when proof of pretext alone may be insufficient to overcome summary judgment:

> [1] [I]f the record conclusively revealed some other, nondiscriminatory reason for the employer's decision.[51]
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> [2] If the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no

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44. *St. Mary's Honor Ctr.*, 509 U.S. at 515 (emphasis in original).

45. *Id.* at 533 (Souter, J., dissenting) ("The Court today decides to abandon the settled law that sets out this structure for trying disparate-treatment Title VII cases, only to adopt a scheme that will be unfair to plaintiffs, unworkable in practice, and inexplicable in forgiving employers who present false evidence in court.").

46. *Id.* at 511 n.4 ("Even though . . . rejection of the defendant's proffered reasons is enough at law to sustain a finding of discrimination, there must be a finding of discrimination.").

47. 530 U.S. 133 (2000).

48. *Id.* at 148.

49. *Id.* at 147.

50. *Id.* at 148 (emphasis in original).

51. *Id.*

discrimination had occurred.[52]

By noting that a prima-facie case, in combination with evidence of pretext, may not always be adequate to forestall summary judgment for the defendant, these passages created what some scholars have described as a "cryptic loophole."[53]

The effect of this "cryptic loophole" has been inconsistency.[54] A 2005 survey of the circuit courts of appeals found that the First, Eighth, and Eleventh Circuits, along with our own Fifth Circuit, tend to favor and utilize a pretext-plus approach.[55] Conversely, the Second, Third, Fourth, Seventh, Ninth, and Tenth Circuits tend to apply either a pretext-only or pretext-may approach.[56] However, this survey was only able to show "more or less" the *tendencies* of the circuits.[57] Drawing clean, firm lines among circuits is all but impossible because further inconsistences appear within *intra*-circuit splits.[58] Thus, the applicable standard depends not only on the circuit hearing the case, but also on "the panel members, the facts, and the type of case."[59]

4. THE FIFTH CIRCUIT POST-*REEVES*

Post-*Reeves,* the Fifth Circuit struggled to determine what, if

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52. *Reeves*, 530 U.S. at 148.

53. Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 544–45 (2001); Martin, *supra* note 9, at 334.

54. *See Reeves*, 530 U.S. at 154 (Ginsburg, J., concurring) ("I write separately to note that it may be incumbent on the Court, in an appropriate case, to define more precisely the circumstances in which plaintiffs will be required to submit evidence beyond these two categories in order to survive a motion for judgment as a matter of law."); Lanctot, *supra* note 53, at 545 ("Anyone who has examined the evolution of the pretext issue over time can anticipate the confusion likely to be caused by the Court's waffling on this issue."); Martin, *supra* note 9, at 335 (citations omitted) ("This lack of a definitive stance relieves the Court from offering what may result in a more workable standard. It also leaves the field open for lower court manipulation, effectively reinstating, or at least not foreclosing, a viable pretext-plus interpretation.").

55. Steven H. Adelman et al., *Summary Judgment Standards Following* Reeves v. Sanderson Plumbing Products *and Its Progeny*, SL021 A.L.I.–A.B.A. CONTINUING LEGAL EDUC. 301, 304, 309, 313, 316 (2005) (citations omitted).

56. *Id.* at 305, 307, 311–12, 313–15 (citations omitted).

57. *See id.* at 317 ("Some Circuits may be (more or less) firmly in the camp of a pretext-only or a pretext-plus analysis.").

58. *See id.* at 316–17 (citations omitted) ("[A] review of post-*Reeves* decisions involving summary judgment leads inexorably to one conclusion—the standards to be applied by the lower courts are still unclear . . . . [and] there are often contradictions within a Circuit . . . .").

59. *Id.* at 317.

anything, had changed. This can be seen in examining the implications different panels saw emanating from *Reeves.* Prior to *Reeves,* the Fifth Circuit often cited to one of its earlier en banc opinions, *Rhodes v. Guiberson Oil Tools*,[60] to articulate the circuit's standard for examining pretext.[61] In *Reeves*, the Supreme Court found fault with the *Rhodes* opinion, noting that it stood for the proposition that the "plaintiff must introduce sufficient evidence for [the] jury to find both that [the] employer's reason was false and that [the] real reason was discrimination."[62] Despite this admonishment, the Fifth Circuit initially struggled to determine whether *Rhodes* was still valid. For example, in *Vadie v. Mississippi State University*, a case heard one year after the Supreme Court issued the *Reeves* opinion, the Fifth Circuit held that *Reeves* was simply an admonishment of one panel's misapplication of pretext-plus, and found *Rhodes* to be consistent with *Reeves* and thus still the governing standard in the Fifth Circuit.[63] However, six months later, a different panel, in *Russell v. McKinney Hospital Venture,* explicitly stated that *Reeves* "repudiate[ed] the pretext-plus approach" and rejected *Rhodes* insofar as it is inconsistent with *Reeves.*[64]

After overcoming this initial confusion as to their continued validity, *Rhodes* and the term pretext-plus fell out of favor in the Fifth Circuit. *Rhodes* has been cited by the Fifth Circuit a mere nine times since 2002,[65] and pretext-plus has been mentioned

60. 75 F.3d 989 (5th Cir. 1996) (en banc), *abrogated by* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

61. *See, e.g.*, Casarez v. Burlington N./Santa Fe Co., 193 F.3d 334, 337 (5th Cir. 1999) ("In Rhodes, we held that even if a plaintiff offered evidence of pretext, a verdict in his favor would still be subject to sufficiency of the evidence review."); Lewis v. 20th–82nd Judicial Dist. Juvenile Prob. Dep't, No. 99-50189, 1999 WL 642898, at *2–3 (5th Cir. July 29, 1999) (per curiam) (citing *Rhodes* to support, *inter alia*, statement outlining the requirements for establishing prima facie case under Title VII); Henderson v. Abilene Reg'l MHMR Ctr., No. 98-10172, 1998 WL 699400, at *1 (5th Cir. Sept. 25, 1998) (per curiam) (citing *Rhodes* to support statement that "the procedural framework necessary to determine this case would be the same for race, sex, or age discrimination").

62. *Reeves*, 530 U.S. at 140.

63. 218 F.3d 365, 373 n.23 (5th Cir. 2000) (citations omitted). Jim Waide was plaintiffs' counsel in both *Reeves* and *Vadie*. After convincing the Supreme Court to rule for his client in *Reeves*, a mere five months later, Waide's client in *Vadie* was thrown out by a panel of the Fifth Circuit that refused to follow *Reeves*. *Reeves*, 530 U.S. at 136; *Vadie*, 218 F.3d at 367.

64. 235 F.3d 219, 223 & n.4 (5th Cir. 2000) (internal quotations omitted).

65. *See* Jurach v. Safety Vision, LLC, 642 F. App'x 313, 322 (5th Cir. 2016); Powers v. Woodlands Religious Cmty. Inc., 323 F. App'x 300, 303 n.17 (5th Cir. 2009) (per curiam); Fallon v. Potter, 277 F. App'x 422, 425 n.13 (5th Cir. 2008) (per

only seven times.[66] Despite the unpopularity of the term pretext-plus in Fifth Circuit jurisprudence, its presence is still felt. As noted in the above survey, the pretext-plus approach lives on in the Fifth Circuit.[67] Such evidence is seen in cases where certain panels have been willing to entertain the exceptions beyond those offered by the Supreme Court, maintaining an additional evidentiary standard that smacks of pretext-plus.[68]

B. THE ARENA

1. A BRIEF HISTORY OF SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Procedure lays out the rules for summary judgment and the burdens imposed upon litigants. Under Rule 56, "The court shall grant summary judgment if the movant shows that there is *no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law*."[69] For much of our judicial system's history, this standard was aggressively applied; the "paradigm for resolving a legal dispute was a trial," with summary judgment being used sparingly.[70]

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curiam); Bregon v. Autonation USA Corp., 128 F. App'x 358, 361 (5th Cir. 2005); Campbell v. City of Jackson Miss., 118 F. App'x 788, 791 (5th Cir. 2004) (per curiam); Rang v. Schlumberger Tech. Corp., No. 01-21201, 2002 WL 31687657, at *1 (5th Cir. Oct. 21, 2002) (per curiam); Williams v. Office Depot, Inc., No. 02-50373, 2002 WL 31415166, at *1 (5th Cir. Oct. 9, 2002) (per curiam); Washington v. Valspar Indus. Coatings Grp., No. 01-60458, 2002 WL 753503, at *1 (5th Cir. Apr. 9, 2002) (per curiam); Carter v. Farmers Rice Milling Co., No. 01-30999, 2002 WL 432586, at *2 (5th Cir. Feb. 28, 2002) (per curiam).

66. *See* Cervantez v. KMGP Servs. Co., 349 F. App'x 4, 10 (5th Cir. 2009) (per curiam) (citations omitted); Warren v. City of Tupelo Miss., 332 F. App'x 176, 181–83 (5th Cir. 2009) (per curiam) (citations omitted); McArdle v. Dell Prods., L.P., 293 F. App'x 331, 339 (5th Cir. 2008) (per curiam) (citations omitted); Willis v. Coca Cola Enters., Inc., 445 F.3d 413, 420 (5th Cir. 2006) (citations omitted); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 573–74, 573 n.4, 578–79 (5th Cir. 2004) (citations omitted); Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 n.3 (5th Cir. 2002); Shannon v. Himont USA Inc., No. 00-21062, 2002 WL 1973174, at *2 (5th Cir. July 30, 2002).

67. Adelman et al., *supra* note 55, at 309–10.

68. See discussion *infra*, Section II(A).

69. FED. R. CIV. P. 56(a) (emphasis added). Although Rule 56 was recently amended, such revisions did not affect the core provision of section (a). FED. R. CIV. P. 56(a) advisory committee's note to 2010 amendment ("The standard for granting summary judgment remains unchanged. The language of subdivision (a) continues to require that there be no genuine dispute as to any material fact and that the movant be entitled to judgment as a matter of law.").

70. *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 522 & n.1 (2007) (citing Stephan Landsman, *The Civil Jury Trial in America*, 62 L. & CONTEMP. PROBS. 285, 285 (1999) ("Americans have relied on juries of ordinary citizens to resolve their civil disputes since the beginning of the colonial period.")).

Summary judgment was seen as a "somewhat awkward tool that invited judicial distrust."[71] Many appellate courts strictly adhered to the standard articulated above and, out of a fear of stripping parties of the opportunity to prove a case at trial, objected to summary judgment as "trial by affidavits."[72] Dismissal via summary judgment was seen as especially inappropriate for resolving state-of-mind issues, such as actual malice.[73] In the not-so-distant past, the Fifth Circuit was especially well known for disfavoring the use of summary judgment.[74] The Fifth Circuit's tendency to reverse a grant of summary judgment was so great that "one district judge in New Orleans posted the sign, 'No Spitting, No Summary Judgments'" in an attempt to dissuade litigants from even filing such motions.[75]

2. THE SUMMARY JUDGMENT TRILOGY

Although Rule 56 was not formally amended, the Supreme

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71. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 862 (2007) (citations omitted), http://www.fjc.gov/public/pdf.nsf/lookup/jels1207.pdf/$file/jels1207.pdf ("[E]arly appellate court decisions yielded a number of frequently quoted passages emphasizing the drastic nature of summary judgment and the extreme care that should be exercised in granting such a motion.").

72. Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 L. & CONTEMP. PROBS. 144, 158 (1948), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4227&context=fss_papers ("The summary judgment is of . . . ancient lineage. It was quite fully developed in England and in some of the states, particularly New York, where it appeared as a civil practice rule in 1921. But the federal procedure does not follow the earlier practice of restricting the remedy to debt and contract claims. It allows such a judgment in any civil action upon a motion supported by affidavits, pleadings, or depositions . . . . Some appellate judges in their anxiety lest a plaintiff be deprived of full opportunity of attempting to prove his case have expressed objection to 'trial by affidavits,' overlooking the simple justice of affording a defendant protection against the expense and at times cruelty of a long trial on perfectly footless claims.").

73. *See, e.g.*, Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979) (citations omitted) ("The proof of 'actual malice' calls a defendant's state of mind into question, . . . and does not readily lend itself to summary disposition.").

74. *See* Cecil et al., *supra* note 71, at 864 & n.8 (2007) (citing Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940) ("Summary judgment procedure is not a catch penny contrivance to take away unwary litigants into its toils and deprive them of a trial, it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer in advance of trial by inquiring and determining whether such evidence exists.")).

75. *See* Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 183 (1987).

Court's 1986 opinions in *Celotex Corp. v. Catrett*,[76] *Anderson v. Liberty Lobby, Inc.*,[77] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[78] made clear that its application was changing. In these three cases, which came to be known collectively as the "summary judgment trilogy," the Supreme Court addressed the discretionary authority held by judges conducting pretrial evidentiary reviews at the summary-judgment stage.[79] "These three cases, despite their disclaimers of applying settled law, at least clarified issues in a *res nova* way."[80] Regardless of whether the Supreme Court intended to create new law or simply settle old law, scholars and members of the plaintiffs' bar have argued the summary-judgment trilogy has resulted in a marked increase in the use of summary judgment.[81]

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76. 477 U.S. 317 (1986).

77. 477 U.S. 242 (1986).

78. 475 U.S. 574 (1986).

79. Samuel Issacharoff George, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 84 (1990) ("By directing lower courts to inquire into evidentiary sufficiency at the summary judgment stage, the Supreme Court opened the door to pretrial adjudication on the merits, regardless of whether the district judge would be constitutionally empowered to sit as the ultimate trier of fact . . . . [*Celotex*, *Anderson*, and *Matsushita*] move decisively beyond the position that the district court . . . acts primarily as a guarantor that some issues of material fact will be in dispute prior to submission of the case to the trier of fact. Rather, they expand the discretionary authority given to the district courts by allowing broad pretrial evidentiary review."). For a more complete overview of the summary-judgment trilogy, see, e.g., EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE §§ 5.6–5.9, at 153–76, § 9.6, at 415–31, § 9.9, at 440–51 (6th ed. 2016).

80. Childress, *supra* note 75, at 191.

81. *See* Howard M. Wasserman, *Mixed Signals on Summary Judgment*, 2014 MICH. ST. L. REV 1331, 1332 (citations omitted) ("Since the Supreme Court's 1986 trilogy, summary judgment has been identified as the great cause of the decline of civil trials. Although precise statistics about rates of summary judgment are lacking, there is a general gestalt that summary judgment has accounted for a rising portion of motions and case dispositions."); *see also* Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) ("Changes in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials. To be sure, this is likely far too simplistic an answer to so complex an inquiry . . . . But developments in the law of summary judgment that correspond temporally to the dramatic decline in federal trials strongly suggest a causal connection."); Bronsteen, *supra* note 70, at 523 & n.8 (citing Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592 (2004) ("[T]he rate of case termination by summary judgment in federal civil cases nationwide increased substantially in the period between 1960 and 2000 . . . .")) ("[Summary judgment] has recently become so prominent as to mirror the focus attracted by settlement in the early 1980s . . . . Judges now grant these motions so often that summary judgment stands alongside trial and settlement as a pillar of our system."). Nevertheless, scholars continue to debate whether the

Many commentators have accused district courts, and appellate courts that review such judgments de novo, of being too willing to grant summary judgment in the post-summary-judgment-trilogy environment.[82] This trend, they argue, tends to "chew plaintiffs up and spit them out with rapidity."[83] Many circuits have interpreted the trilogy "to permit summary judgment in cases where plaintiffs' claims appear weak or unpersuasive."[84] One scholar colorfully described the summary-judgment trilogy as transforming summary judgment into a "full dress-rehearsal for trial."[85]

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summary-judgment trilogy caused an increase in the rates of summary judgment motions granted by district courts. *See, e.g.*, Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, at i, 19 (May 28, 2008) (citations omitted) (unpublished manuscript) (on file as Paper No. 08-022 with the Cornell Law School Legal Studies Research Paper Series), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1201863_code887293.pdf?abstractid=1138373&mirid=1&type=2 (finding "no evidence of a broad-based increase in summary judgment rates" in a study of the Eastern District of Pennsylvania and the Northern District of Georgia); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 568 (2012) (citations omitted) ("[W]hether [the trilogy] has affected summary judgment rates is disputed . . . . [and r]eliable empirical evidence regarding the percentage of cases resolved on summary judgment has proven difficult to obtain."); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1048 (2003) (Noting that 1991 study by the FJC "showed no statistically significant increase in summary judgment motions immediately after the trilogy"); Cecil et al., *supra* note 71 at 862–63 (examining "summary judgment activity in six federal district courts, measured at six time periods over a span of 25 years," and concluding that "the likelihood of one or more summary judgment motions being filed began to increase *before* the trilogy") (emphasis in original).

82. Wasserman, *supra* note 81, at 1332 & n.4 (citing Bronsteen, *supra* note 70, at 539 ("In theory, a judge will grant a motion for summary judgment only when no reasonable jury could reach the opposite result at trial. But . . . theory is different from practice . . . . [and] judges sometimes grant summary judgment motions even if the outcome at trial might have been different . . . . [However, m]y concern is not with judicial fallibility. Instead, I think that summary judgment inherently causes judges to skew their judgments in a predictable pattern.")).

83. Donald & Pardue, *supra* note 9, at 750.

84. 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, 207 & n.15 (1993) (quoting Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990)) (writing that "Seventh Circuit Judge Richard Posner . . . acknowledged that growing docket pressures on trial courts make the courts of appeal extremely reluctant to overrule grants of summary judgment by lower courts 'merely because a rational factfinder *could* return a verdict for the nonmoving party, if such a verdict is highly unlikely as a practical matter . . . .'") (emphasis original).

85. George, *supra* note 79, at 87 (citations omitted) ("As a consequence of the trilogy, the Court appears to have transformed summary judgment from a

The Fifth Circuit certainly has taken the trilogy to permit such, as can be seen in the following comparison of how the summary-judgment standard was articulated in pre- and post-trilogy jurisprudence. The pre-trilogy standard for summary judgment was simply stated as, "In reviewing a summary judgment we must view all evidence and the inferences to be drawn from the evidence in the light most favorable to the party opposing the motion."[86] Post-trilogy, caveats were added, such as in the following description of the summary-judgment standard:

> [W]e resolve factual controversies in favor of the nonmoving party, *but only* when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts . . . . We do not, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts . . . . *Moreover*, unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment.[87]

A comparison of these two statements reveals the increased, trial-like evidentiary burdens that were imposed after the summary-judgment trilogy.

While a wealth of scholarship has dissected and argued over the implications of the summary-judgment trilogy, the Supreme Court has rarely revisited issues concerning summary judgment.[88] One exception was *Scott v. Harris*, where the Court considered the role of video evidence at the summary-judgment stage.[89] Otherwise, summary judgment seemed to be "settled and forgotten by the High Court."[90] In 2014, however, summary

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mechanism for assuring a modicum of genuine dispute in cases set for trial to a full dress-rehearsal for trial with legal burdens and evidentiary standards to match those that would apply at trial.").

86. Marshall v. Victoria Transp. Co., 603 F.2d 1122, 1123 (5th Cir. 1979) (citations omitted).

87. McCallum Highlands, Ltd. v. Washington Capital Dus, Inc., 66 F.3d 89, 92 (5th Cir. 1995) (emphasis added) (citations omitted), *quoted in* Cecil et al., *supra* note 71, at 901 n.96.

88. *See* Wasserman, *supra* note 81 ("[T]he contours and standards of summary judgment's broad reach were established . . . long ago, however, the Roberts Court has had little to add.").

89. 550 U.S. 372, 378 (2007) ("There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question."). The Supreme Court recently considered another case concerning summary-judgment principles and video evidence. *See* Plumhoff v. Richard, 134 S. Ct. 2012 (2014).

90. Wasserman, *supra* note 81 (citations omitted).

judgment made an unforeseen return to the Supreme Court docket in *Tolan v. Cotton*.[91]

3. RECENT JURISPRUDENCE: *TOLAN V. COTTON*

Tolan arose from an ill-fated incident involving typos and a high-strung police officer.[92] On New Year's Eve of 2008, Robert Tolan and his cousin, returning home, parked in front of the home of Tolan's parents in Bellaire, Texas.[93] A police officer patrolling the neighborhood ran the license plate of the car Tolan was driving.[94] However, the officer erroneously entered the plate number as 695BGK—the plate of a stolen vehicle bizarrely matching the make and model of Tolan's vehicle—rather than the correct 696BGK.[95] As Tolan and his cousin walked to the front door of his parent's home, they were confronted by the officer, gun drawn, ordering them to lie on the ground, and accusing them of having stolen the car.[96]

Startled by the commotion, Tolan's parents came outside to the sight of their son lying face down on the front porch, in compliance with the officer's demand.[97] The officer told Tolan's parents that he believed the car to have been stolen, to which they responded by identifying Tolan as their son, and explaining that the vehicle in fact belonged to their family.[98] It was at this time that Sergeant Jeffrey Cotton arrived at the scene, pistol drawn.[99] Tolan's parents reiterated that they were the owners of the car and that no theft had occurred.[100] Cotton then ordered Tolan's mother to stand against the home's garage door.[101] In response, Mrs. Tolan asked, "[A]re you kidding me? We've lived her[e] 15 years. We've never had anything like this happen before."[102] Cotton then moved her in the direction of the garage door.[103] The amount of forced used by Cotton was disputed by the

91. 134 S. Ct. 1861 (2014) (per curiam).
92. *Id.* at 1863.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Tolan*, 134 S. Ct. at 1863.
97. *Id.*
98. *Id.*
99. *Id.* at 1863–64.
100. *Id.* at 1864.
101. *Tolan*, 134 S. Ct. at 1864.
102. *Id.*
103. *Id.*

parties; Tolan and his mother claimed that she was forcibly grabbed by the arm and slammed against the garage door, leaving bruises on her arm and back, which they corroborated with photos after the incident.[104] Cotton, on the other hand, claimed that while escorting her "she flipped her arm up, and told him to get his hand off her," and that he did not believe he could have left bruises.[105]

Seeing the treatment of his mother, Tolan, rising to either his knees (Tolan's testimony) or his feet (Cotton's testimony), told Cotton to "get your fucking hands off my mom."[106] Cotton responded, firing three shots with one hitting Tolan in the chest.[107] Tolan survived, but the injury was life altering, causing him pain on a daily basis and ending a future career in professional baseball.[108] Between Cotton's arrival and shots being fired, a mere half-minute had elapsed.[109]

In the subsequent § 1983 action, a Fifth Circuit panel affirmed the district court's granting of summary judgment for Cotton.[110] In reaching this conclusion, the court relied on the following facts: (1) the area where the shooting occurred was "dimly-lit"; (2) Tolan's mother was very agitated and had "refus[ed] orders to remain quiet and calm"; (3) Tolan's words had amounted to a "verba[l] threa[t]"; and (4) that Tolan was "moving to intervene in" Cotton's handling of his mother.[111] Taken together, under these facts, the Fifth Circuit concluded, Cotton could reasonably have feared for his life and was thus entitled to summary judgment in his favor.[112] A petition for a rehearing en banc was denied, with only three judges voting in favor of such.[113]

The Supreme Court, in a single order accompanied by a per curiam opinion, granted certiorari, vacated the judgment, and remanded the case for further consideration.[114] Examining each

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104. *Tolan*, 134 S. Ct. at 1864.

105. *Id.*

106. *Id.* The content of Tolan's statement was not disputed by the parties. *Id.*

107. *Id.*

108. *Id.*

109. Tolan v. Cotton, 713 F.3d 299, 303 (5th Cir. 2013), *overruled by* 134 S. Ct. 1861 (2014), *aff'd in part*, *vacated in part*, 573 Fed. App'x 330 (5th Cir. 2014).

110. *Tolan*, 134 S. Ct. at 1864–65. Summary judgment was granted on the basis of qualified immunity, the intricacies of which are beyond the scope of this Comment.

111. *Id.* at 1865.

112. *Id.*

113. *Id.* (citing 538 F. App'x 374, 377 (5th Cir. 2013) (per curiam)).

114. *Id.* at 1863, 1868. The case subsequently settled. *See* Michael Barajas, *Robbie*

of the "facts" relied upon by the Fifth Circuit, the Supreme Court found a failure to "credit evidence that contradicted some of its key factual conclusions," and that "the court improperly 'weigh[ed] the evidence' and resolved disputed issues in favor of the moving party."[115] The Supreme Court then identified record evidence contradicting each "fact": (1) Tolan and his parent's testimony that floodlights illuminated the area; (2) his mother's testimony that while insistent, she was neither aggravated or agitated; (3) Tolan's testimony that he was not screaming, and that his words could be reasonably inferred as a plea rather than a threat; and (most critically) (4) Tolan's testimony that he was on his knees, not his feet, and thus had not moved to intervene.[116] This failure of the Fifth Circuit to credit the evidence of the nonmoving party was summed up by the Court as being "a clear misapprehension of summary judgment standards in light of our precedents."[117]

Finally, the Court concluded with the following emotive statement on the limitations of summary judgment and the benefits of trials.

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.[118]

II. WHY IT MATTERS

The above section discussed the framework utilized to prove pretext and the evolution of summary judgment. This section discusses why that framework matters, i.e., the resulting effect. In brief, the result has been the pre-trial dismissal of many cases for inadequate evidence of pretext. The demise of the jury trial

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Tolan's Police Brutality Case Might Be Precedent-Setting—But So What?, HOUSTON PRESS (Sep. 16, 2015), http://www.houstonpress.com/news/robbie-tolan-s-police-brutality-case-might-be-precedent-setting-but-so-what-7769001.

115. *Tolan*, 134 S. Ct. at 1866 (citations omitted).

116. *Id.* at 1866–67.

117. *Id.* at 1868.

118. *Id.*

and the marked increase in the use of summary judgment is not unique to employment-discrimination cases. However, its effect has been felt most acutely in this area of the federal docket. One study found that 73% of summary judgment motions in employment-discrimination cases are granted in favor of defendant employers[119]—the "highest of any type of federal civil case."[120]

Next, to better illustrate the inadequacies of summary judgment as a vehicle to dispose of employment-discrimination cases, subsection A analyzes a pair of recent Fifth Circuit cases that exemplify the difficulties plaintiffs face in proving pretext. Then, subsection B concludes with a brief discussion about implicit biases against employment-discrimination plaintiffs and the increased impact such biases can have at the summary-judgment stage.

A. CASE EXAMPLES

Two recent cases, *Valderaz v. Lubbock County Hospital District*[121] and *Wilson v. Exxon Mobile Corp.*,[122] highlight the difficulties plaintiffs face in proving pretext in the Fifth Circuit.

1. *VALDERAZ V. LUBBOCK COUNTY HOSPITAL DISTRICT*

Central to *Valderaz* was a dispute over what occurred during

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119. *See* Parker, *supra* note 4, at 895, 910, 928–29 (citations omitted); *see also* 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, 550 (2010) (citations omitted) ("[S]cholars have reported the special use of summary judgment to dismiss sexual harassment and hostile work environment cases, race and national origin discrimination cases, Americans with Disabilities Act (ADA) cases, age-discrimination cases, and prison-inmate cases.").

120. Schneider, *supra* note 119, at 549 & n.150 (citing Cecil & Cort Memo, *supra* note 4, at 8 tbl.3, 9 tbl.4 ("In some judicial districts, grants of summary judgment in employment discrimination cases were as high as 93%[, which] confirms the anecdotal reports . . . suggest[ing] that the application of summary judgment in employment discrimination cases is problematic."); *see* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101–02 (1999) (citations omitted) ("Courts are abusing the summary judgment device and failing to defer to agency guidance in interpreting the ADA. Abuse of the summary judgment device takes two forms. First, district courts are refusing to send 'normative' factual questions to the jury . . . . Instead, trial courts are substituting their own normative judgments for that of the jury . . . . Courts are also abusing the summary judgment device by creating an impossibly high threshold of proof for defeating a summary judgment motion.").

121. 611 F. App'x 816 (5th Cir. 2015).

122. 575 F. App'x 309 (5th Cir. 2014).

a meeting between management and the plaintiff–employee. Valderaz was a male nurse who claimed that his female coworkers continually made sexual remarks to him and questioned his ability, as a man, to work as a nurse.[123] Because of this treatment he filed a complaint of sexual discrimination with management.[124] Valderaz requested a transfer and claimed that he was offered one by hospital management at a meeting that was also attended by his wife.[125] However, the hospital claimed that it had not offered a transfer, but only the opportunity to apply for other positions within the hospital system.[126] Valderaz contended that his meeting with the hospital's management to discuss a transfer was merely a pretext for firing him in retaliation for his sexual-discrimination complaint, and attempted to show that the defendant's later statement that it had not offered him a transfer was false or unworthy of credence.[127] The Fifth Circuit rejected the plaintiff's claim that he was offered a transfer based on supposed inconsistencies in the plaintiff's testimony, and affirmed the district court's grant of summary judgment for the defendant.[128] The majority opinion found that, while the plaintiff's affidavit stated that he was promised a transfer, his deposition testimony indicated that he would quit his job no matter what.[129] The

123. *Valderaz,* 611 F. App'x at 818 ("He claims that his coworkers made frequent jokes about him having a homosexual relationship with Fausto Montes, [another nurse]. For example, female coworkers would make remarks to Valderaz, a married heterosexual, such as: 'Where's your boyfriend, Fausto?' and 'Your man, Fausto, just texted me.' Valderaz claims that even doctors and residents joined in on the charade at times.").

124. *Id.*

125. *Id.* at 819.

126. *Id.*

127. *See id.* at 823 ("Valderaz argues that [defendant] misled him into giving up his full-time position so that it could eventually terminate him. He also asserts that misrepresentations were made to him during the April 11 meeting so that he would agree to a transfer. In short, the April 11 meeting was a ruse in order for him to be terminated, says Valderaz."); *see also id.* at 827 (Dennis, J., dissenting) ("Valderaz's testimony, corroborated by his wife's, is that the hospital, in direct response to his discrimination complaint, made a false promise to him that it did not keep and instead terminated his full-time employment, leaving him with lesser status, salary, and benefits.").

128. *See Valderaz,* 611 F. App'x at 823–24 & n.6.

129. *See id.* at 823 n.6 ("In concluding that there is a genuine fact dispute, the dissent points to Valderaz's affidavit . . . . [But t]he affidavit contrasts with [his] deposition testimony [in which] Valderaz acknowledge[d] that his decision not to return to [his original position] was not dependent upon any promise that he be transferred to another job with the hospital. [Rather, he] testified that . . . he did not go back . . . because of the perceived hostile work environment.").

dissent, however, highlighted the majority's oversimplification of Valderaz's deposition, which did not state that he would quit no matter what, but rather that he would not return to work unless his complaint was addressed.[130] Accordingly, the dissent found no inconsistencies in the plaintiff's testimony.[131]

In confecting a conflict between the plaintiff's statements, the majority essentially construed evidence *against* the non-moving party, ignoring the principles of summary judgment and the holding in *Tolan*. Cases such as *Valderaz* should go to a jury because the outcome ultimately depends on which party is being deceitful. In other words, because the outcome hinges upon the parties' credibility, and because judges are explicitly forbidden from making credibility determinations at summary judgment, a jury rather than a judge should have decided Valderaz's fate.

2. *WILSON V. EXXON MOBILE CORP.*

Prentiss Wilson, an African-American male, worked at a refinery operated by Exxon in Chalmette, Louisiana.[132] During the course of Wilson's employment, a gas leak occurred causing damage in excess of $300,000.[133] An investigation conducted by Exxon revealed that Wilson and another employee caused the leak by failing to follow company procedures.[134] Wilson and the other employee were offered a chance to resign; an opportunity Wilson denied and his colleague accepted.[135] Wilson was subsequently fired and thereafter filed suit, claiming the reason proffered for his termination was a pretext for racial discrimination.[136] The district court entered summary judgment

130. *Valderaz,* 611 F. App'x at 828 (Dennis., J., dissenting).

131. *Id.* ("The majority's statement that Valderaz testified to leaving his department based entirely on perceived hostility and irrespective of any promise to transfer to another department is clear error . . . . Instead, Valderaz testified that he would continue working in his department if the hostile environment . . . were resolved. And that testimony is entirely consistent with his affidavit attesting that he agreed to transfer to a different department based upon the hospital's promise that he would actually be given such a transfer. In fact, immediately after this part of the deposition, Valderaz proceeded to testify . . . that the hospital promised him a transfer during the April 11 meeting . . . . There is, in short, no conflict between Valderaz's deposition testimony and his affidavit.").

132. Wilson v. Exxon Mobile Corp., 575 F. App'x 309, 310–11 (5th Cir. 2014) (per curiam).

133. *Id.* at 311.

134. *Id.*

135. *Id.* at 312.

136. *Id.* at 312–13.

for the employer.[137] On appeal, Wilson argued that he was not responsible for the leak; rather, Exxon was pinning the blame on him as a pretext for discrimination.[138] Wilson put forth substantial evidence showing that Exxon's investigation, the basis for his termination, was erroneous.[139] However, the Fifth Circuit dismissed these arguments stating, "[T]he true question before this court is not whether Exxon performed a stellar investigation or whether its investigative findings were correct. Our inquiry is focused on whether Wilson presented substantial evidence to demonstrate that Exxon's proffered reasons were pretext for racial discrimination."[140] Thus, the court did not analyze any of Wilson's evidence as to the validity of the investigation that led to his termination.[141] With a simple statement that such evidence was lacking, the Fifth Circuit affirmed the district court's summary-judgment ruling in favor of Exxon.[142]

The above reasoning illustrates a clear remnant of pretext-plus that continues to rear its ugly head in the Fifth Circuit. The court required that Wilson do more than prove his employer's reason is false. Furthermore, while it is certainly true that—to ultimately prevail—the evidence offered by Wilson must be sufficient to warrant an inference of discrimination, he should necessarily benefit from such an inference at the summary-judgment stage, where all inferences are to be drawn in Wilson's favor. Accordingly, the Fifth Circuit should have reversed and remanded for trial, so a jury could ultimately determine whether

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137. *Wilson*, 575 F. App'x at 312.

138. *Id.* at 313.

139. *See* Brief of Appellant Prentis Wilson at 36–41, *Wilson*, 575 F. App'x at 312 (No. 13-30985) (asserting, *inter alia*, that: (1) "Wilson insisted that [they] stop the . . . shutdown procedure once [he] realized that [the other employee] had not verified the fluid level . . . ."; (2) the "investigative team never demonstrated that Wilson, personally, deviated from the prescribed shutdown procedures"; (3) "Wilson never admitted to violating any procedure"; and (4) the "investigative team failed to obtain statements from at least two witnesses . . . whose testimony is favorable to and exculpatory of Wilson").

140. *Wilson*, 575 F. App'x at 313–14 (citations omitted).

141. *Id.* (citations omitted).

142. *Id.* ("Viewing the facts in the light most favorable to Wilson, we conclude that . . . [no] reasonable factfinder could conclude that Exxon's proffered explanation . . . was false [because] . . . . [1] [t]he record is devoid of any persuasive evidence that Exxon utilized this dangerous and costly incident as pretext to terminate Wilson based on his race [and] . . . . [2] Wilson proffered no evidence that creates a genuine issue of material fact [as] to whether Exxon acted with discriminatory animus toward him in the context of his termination.").

Exxon's proffered reason for Wilson's termination was false and, thus, a pretext for discrimination.

Also troubling was the amount of deference the court in *Wilson* gave to the employer's explanation. The court failed to consider any evidence offered by the plaintiff, much less give it its due deference.

B. CREEPING IN OF IMPLICIT BIASES

Another issue implicated by the overly prevalent summary disposition of employment-discrimination cases is the possible effect of implicit judicial biases. Judges, as human beings, carry implicit biases.[143] As one noted scholar found, despite extensive training and an assumed good-faith effort by the judiciary to counter implicit biases, they still "strongly influence how courts decide particular cases especially in the discrimination context."[144] Biases can creep into a judge's decision-making in a variety of ways. The life experience of the judge is but one example that has been noted by scholars as being a determinative factor in judicial outcomes.[145] Moreover, as one scholar noted, "[J]udges who hail from different social or cultural backgrounds may provide a more nuanced understanding of facts, evidence,

143. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1221 (2009) ("[J]udges, like the rest of us, carry implicit biases concerning race."); *see* Hon. Mark W. Bennett, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y. L. SCH. L. REV. 685, 706–07 (2013) (citations omitted) ("Of course, '[m]ost judges view themselves as objective and especially talented at fair decisionmaking.' For instance, one study found that 97% of judges consider themselves to be in the top 25% of all judges in 'avoid[ing] racial prejudice in decisionmaking.' While this statistic reflects a hilariously impossible self-confidence among judges, it should also . . . alarm . . . readers[] . . . , as empirical research has shown that, 'when a person believes himself to be objective, such belief licenses him to act on his biases.' So, is it any wonder that . . . judges have increased antipathy to employment discrimination cases, either on an overt, conscious level or . . . in an implicit, unconscious way?").

144. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 562 (2001) (citations omitted).

145. *See* Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 346 (2012) ("[Current data] suggest that judges' assessments of employment discrimination cases vary. We contend that this variation is the result of the different attitudes, opinions, and experiences that stem from being white or a person of color. White judges are far more likely to dispose of any employment discrimination case at the summary judgment phase than are minority judges . . . . Equally compelling is the finding [of] a higher predicted probability that minority judges dismiss cases involving minority plaintiffs than cases involving white plaintiffs . . . .").

and credibility determinations than judges who lack such experience."[146] This subtle form of bias can have an outsized influence on a plaintiff's chances of successfully proving pretext for discrimination. Such proof is often subtle,[147] as blatant discrimination has become increasingly rare in the workplace. It thus requires a willingness to engage with the evidence presented and the inferences that can be drawn therefrom, a willingness that can be hindered by a judge's predispositions.

Scholars have also noted that plaintiffs are harmed by a deep skepticism in the wider public that discrimination still persists in the modern workplace[148]—despite empirical evidence of its continued existence.[149] This skepticism of discrimination in the wider public in turn affects how the judiciary operates. For example, as one scholar has posited:

> Because [employment-discrimination] claims are premised on the continuing presence of racism, they are now counter to society's normative beliefs. Thus, it is not surprising that they are met with suspicion and skepticism. If judges believe that discrimination is rare and aberrant, then they will perceive no need to probe deeply an employer's justifications, even when those justifications are specious and proved false. Rather, a burden will be placed on plaintiffs to come forth with additional proof to counter the colorblind, post racial presumption.[150]

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146. Weinberg & Nielsen, *supra* note 145, at 324.

147. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524, (1993) (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716, (1983)) ("[T]he question facing triers of fact in discrimination cases is both sensitive and difficult.").

148. *See* Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 433 (2010) (citations & internal quotations omitted) ("[S]ince the election of Barack Obama . . . , Americans seem to have moved one step beyond colorblindness to . . . post-racialism[, which posits] that the United States is beyond race: that racism is largely a relic of the past as evidenced by America's pronounced racial progress . . . . [This] does not bode well for plaintiffs [alleging] racial discrimination."); Weinberg & Nielsen, *supra* note 145, at 351 ("For skeptics who believe that legal claims are frivolous or are simply meant to further political objectives . . . , scientific research provides a level of objectivity and reliability to the discourse that goes beyond one judge's opinion—for example, showing objective data that organizational practices have the power to substantially exacerbate or mitigate bias in pay and promotion practices.").

149. *See Charge Statistiscs: FY 1997 through FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Mar. 20, 2017) (stating that 91,503 discrimination charges were filed with the EEOC in 2016).

150. Jones, *supra* note 148, at 433–34.

In addition to the two potential sources of bias discussed above, an additional source may exist for appellate courts. Recent scholarship has suggested appellate judges may be biased against employment-discrimination plaintiffs because of a belief that lower courts are too plaintiff-friendly.[151] This belief is especially harmful because statistics have shown trial courts are in fact *not* favorable to employment-discrimination plaintiffs.[152] Because summary judgment necessarily requires an active role of the judiciary, the likelihood that their implicit biases will skew the outcome is heightened. This risk could be curtailed by allowing a jury to determine the outcome, rather than cutting juries out of the equation via summary judgment.

III. PROPOSAL

The Fifth Circuit should embrace *Tolan* and adopt a broader view of what constitutes "genuine dispute as to [a] material fact."[153] While centered around a § 1983 action, *Tolan* at its heart is fundamentally a decision on summary-judgment principles (as has been noted by such scholars as Howard M. Wasserman, Ed Brunet, and John Parry),[154] and is highly "instructive regarding summary judgment mechanics."[155] Consequently, its effect should be felt wherever a motion for summary judgment is being considered, regardless of the myriad of factual scenarios that

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151. Clermont & Schwab, *supra* note 4, at 113 (stating that appellate courts "may perceive trial courts as pro-plaintiff").

152. *Id.* (citations omitted) ("[A]ppellate favoritism [towards defendants] would be appropriate if the trial courts were in fact biased in favor of plaintiffs. Yet employment discrimination cases constitute one of the least successful categories at the district court level . . . ."); *see* discussion, *supra* notes 4, 119–20.

153. FED. R. CIV. P. 56(a).

154. Ed Brunet & John Parry, *Guest Post: Brunet and Parry on* Tolan v. Cotton, L. PROFESSOR BLOGS NETWORK: CIV. PROC. & FED. CTS. BLOG (May 8, 2014), http://lawprofessors.typepad.com/civpro/2014/05/guest-post-brunet-and-parry-on-tolan-v-cotton.html ("It is tempting to assess [*Tolan*] as a major summary judgment decision [because it was] the first summary judgment victory in the Supreme Court for a civil rights plaintiff in some time . . . ." If the Court had only wanted to correct the appellate court's mistake "it could have simply vacated and remanded . . . with instructions . . . , without detailing the facts and the Fifth Circuit's errors. [Thus, a]t the very least, [*Tolan*] should embolden courts to identify disputed facts."), *quoted in* Wasserman, *supra* note 81, at 1344 (citations omitted) (describing the Court's decision in *Tolan* as "marking at least a slight move from a long-standing defense-centric approach to Rule 56," and characterizing the passage in *Tolan* addressing the Fifth Circuit's failure "to adhere to the fundamental principle" of summary judgment as "a strong statement, reminiscent of Justice Black's criticism of 'trial by affidavit and the sterile bareness of summary judgment'").

155. Brunet & Parry, *supra* note 154.

might arise in any particular case. In *Tolan*, the Supreme Court was attempting to pull the Fifth Circuit back in line with respect to the proper standards of summary judgment, while also "telling other circuits that they could be next, so proceed with caution."[156] The Fifth Circuit should heed this call.

This proposal to liberally construe facts and inferences in the favor of the moving party is not new.[157] Scholars have opined on the benefits of such a proposal.[158] However, the *Tolan* opinion has given an increased impetus to the proposal's merits, especially here in the Fifth Circuit, where *Tolan* originated. For other circuits, the persuasiveness of *Tolan* can be diminished by arguing that it is only a per curiam opinion, which traditionally have had less precedential power than cases resolved on the merits after full briefing and oral argument.[159] But this argument should not be as effective in the Fifth Circuit, as it was the circuit targeted and called to task by the Supreme Court.

In addition, *Tolan* has an added clout in the Fifth Circuit because it corrected the *entire* circuit, not just one individual panel. The Fifth Circuit had the opportunity to correct itself by granting a rehearing, but this opportunity was rebuffed with only three judges willing to entertain a rehearing en banc. Accordingly, one might argue that blame for the errors rebuked in *Tolan* belongs to the entire circuit, not just the individual panel

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156. Wasserman, *supra* note 81, at 1346.

157. *See* Donald & Pardue, *supra* note 9, at 762–63 (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)) ("[J]udge[s] should liberally construe the Supreme Court's instruction to draw all reasonable inferences in favor of the non-moving party, usually the plaintiff. If the plaintiff's interpretation of the evidence is plausible, raises a question of fact, and would, if proven, support a jury verdict in the plaintiff's favor, then the motion for summary judgment should be denied. This is not a radical solution. In fact, you could argue it is already the standard."); *see also* Brunet & Parry, *supra* note 154 (stating that the reasonable-inferences "rhetoric used by the Court" in *Tolan* is "hardly new law").

158. *See, e.g.*, Donald & Pardue, *supra* note 9, at 763–64 (citations omitted) ("A liberal application of reasonable inference-drawing would alleviate, or altogether eliminate, many of the barriers federal courts have placed in the path of employment discrimination plaintiffs.").

159. *See* Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707, 708 (1956) (citations omitted) (writing that, although early per curiam opinions were "thought to have great precedential weight," the early-twentieth-century "Court decided few novel questions of law per curiam," and further noting the general assumption that "at least until 1925 . . . the Court took summary action on appeal almost exclusively in cases" that: (1) failed "to raise a substantial federal question"; (2) lacked either "finality of judgment below" or "some similar technical requirement"; or (3) "present[ed] palpably frivolous issues").

that issued the opinion.

Furthermore, *Tolan* was a unanimous opinion, in which every Justice of the U.S. Supreme Court, regardless of his or her leanings, recognized and admonished the Fifth Circuit's failure "to adhere to fundamental summary judgment principles."[160] Thus, there should be no place for a judge to hide under the belief that they were not wrong, but merely of a valid differing opinion.

There are numerous benefits to the Fifth Circuit embracing *Tolan* and being more willing to entertain the existence of disputed facts. First, doing so would lead to a much more consistent application of the law as judges would necessarily play less of a role. In effect, litigants appealing to the Fifth Circuit would no longer feel they are playing a game of "panel roulette," where their fates are dependent upon which three judges are assigned their appeal. Instead, the law and facts of each case would determine the outcome.

Moreover, embracing *Tolan* would limit the potential harms resulting from implicit biases held by judges, as they would have less of a determinative effect on the ultimate outcome. As discussed above, these harms can be great. Despite the good-faith efforts of the judiciary, studies have shown that biases can and do creep in. It is for this reason that the summary-judgment standard exists: to safeguard against such ills that can result from a single person determining the outcome when there is a genuine dispute as to a material fact. While jury members undoubtedly hold similar biases, the process of juror discussion and deliberation lessens the impacts of these biases. Further limiting the effect of these biases is the mere fact that a jury is composed of multiple people who will bring a diverse set of values and backgrounds to the table.

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160. *See* Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) (per curiam) (containing no dissenting opinions, and one concurring opinion authored by Justice Alito, and joined by the late-Justice Scalia); *Glossary of Legal Terms*, SCOTUSBLOG.COM, http://www.scotusblog.com/reference/educational-resources/glossary-of-legal-terms/ (last visited Mar. 20, 2017) ("An unsigned opinion, written for the Court as a whole by an unidentified Justice, is called a per curiam opinion. (In Latin, 'per curiam' means 'by the court.') Written dissents from per curiam opinions are signed."); *see also* Ira Robbins, *Scholarship Highlight: The Supreme Court's Misuse of Per Curiam Opinions*, SCOTUSBLOG.COM (Oct. 5, 2012, 11:13 AM), http://www.scotusblog.com/2012/10/scholarship-highlight-the-supreme-courts-misuse-of-per-curiam-opinions/ ("[Per-curiam] decisions are truly unanimous; the result is so obvious that no Justice feels compelled to write separately . . . [However, the practice of] Justices dissenting from or concurring with . . . per curiam opinion[s] ha[s] become well-established.").

Finally, if the Fifth Circuit were to more strictly adhere to the proper role of the judiciary at the summary-judgment stage, district judges would fall in line as well. Summary judgments, as findings of law, are reviewed de novo. Thus, the Fifth Circuit views the case in the same fashion as the district court; stepping into their shoes so to speak. In effect, the instructive quality of appellate review is heightened, allowing the Fifth Circuit's behavior to more readily shape how the district courts approach summary judgment. Also, as no judge enjoys being reversed, an increased number of reversals of summary judgments would certainly result in district judges taking a more cautious approach at the summary-judgment stage.

There are also potential concerns in assuming a broader view of what constitutes a disputed fact. In addressing these concerns it is important to first ask, why have the results in the Fifth Circuit and the district courts therein been so unfavorable for employment-discrimination plaintiffs? Implicit bias must be one reason; however, this Comment posits a more likely explanation: efficiency. Undoubtedly, one reason summary judgment is employed is the belief that its use serves judicial efficiency. A necessary result of granting fewer summary judgments to defendants would be more trials. This result would certainly strike fear in the hearts of district judges, concerned that their docket would become further burdened by Title VII claims.

However, an increased number of Title VII trials may not necessarily result in an increased strain on judicial resources. First, summary-judgment proceedings for employment-discrimination claims are considered tedious and time-consuming.[161] The time saved at the summary-judgment stage by liberally construing reasonable inferences in favor of the non-moving party could balance out the time spent in trials. Furthermore, a certain consequence of more cases surviving summary judgment would be more settlements. In such a scenario, judicial resources would have been saved by streamlined summary-judgment hearings, and no resources would be spent at trial, as the case had settled.[162] Thus, there is good reason to believe that the increased number of settlements, and less time spent at the summary-judgment stage, could offset

161. Donald & Pardue, *supra* note 9, at 764.

162. *Id.* (citations omitted) ("[Given that] summary judgment orders can be tedious and time-consuming[, f]orcing more cases to trial could . . . save judicial resources by freeing time and perhaps causing more cases to settle.").

the increased judicial resources that would potentially be spent on trials if the judiciary were to draw all possible reasonable inferences in favor of the nonmoving party. Finally, an additional benefit that would result from an increase in jury trials is that fewer cases would likely be appealed, lessening the strain on the appellate-court docket.[163]

An increased willingness to identify disputed facts need not result in an end to the use of summary judgment. There will undoubtedly be cases in which the inferences sought by the plaintiff are so manifestly unrealistic that no reasonable person would draw them. In such cases summary judgment would of course be appropriate for the defendant employer. However, these situations should seldom progress to summary judgment, considering the various avenues for disposition via Rule 12 motions.[164] Under this rule, a defendant may assert as a defense, among others, the plaintiff's "failure to state a claim upon which relief can be granted."[165] The Supreme Court's two recent opinions in *Bell Atlantic Corp. v. Twombly*[166] and *Ashcroft v. Iqbal*[167] further burdened plaintiffs wishing to initiate a civil action in federal court. Taken together, these two cases established a plausibility pleading standard that requires plaintiffs to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[168] This vigorous pleading standard necessitates more than "labels and conclusions," "unadorned, the-defendant-unlawfully harmed-me accusation[s]," "naked assertions," or "a formulaic recitation of the elements of a cause of action."[169] Several empirical studies have found that these more-robust pleading standards have resulted in the disposal of more frivolous, unmerited cases via motions to dismiss.[170] Accordingly,

163. Donald & Pardue, *supra* note 9, at 764 (citations omitted).

164. *See generally* FED. R. CIV. P. 12.

165. FED. R. CIV. P. 12(b)(6).

166. 550 U.S. 544 (2007).

167. 556 U.S. 662 (2009).

168. *Id.* at 678 (citing *Twombly*, 550 U.S. at 566).

169. *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

170. *See, e.g.*, Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127, 132 (2012) (citations omitted) ("The data reveal that the rationale for dismissals is more heavily weighted toward factual insufficiency after *Iqbal* . . . . [and further] show that the factual-insufficiency dismissal rate . . . has increased in all categories of cases, and significantly so in most . . . . [Also], for any given claim subject to a motion to dismiss, the likelihood that the claim will be dismissed for factual insufficiency is higher after *Iqbal*. This is true, and statistically

summary judgment no longer needs to be utilized as the primary mechanism to dispose of cases seen as unfit for trial. While the use of Rule 12 to dispose of cases elicits many of the same concerns as the overuse of summary judgment, the increased use of Rule 12 appears to be here to stay. The Roberts Court in *Twombly* and *Iqbal* appears to have fully endorsed the use of Rule 12. Thus, despite its ills, Rule 12 will be employed pervasively for the foreseeable future.

In addition, another reason that the Fifth Circuit, and other circuits as well, fail to give proper credence to evidence of pretext derives from a desire to avoid second-guessing the decisions of employers. Coupled with the common sentiment that discrimination is no longer a problem, this unwillingness to scrutinize the decisions of employers makes proving pretext extraordinarily difficult. One of the primary reasons the judiciary seeks to avoid second-guessing employers is because of the longstanding American tradition of minimizing business regulation. This desire is not ill-natured. It is motivated by the capitalist principle that growth and posterity is hindered by pervasive, systematic government regulation.

Despite the merits of the intention, the result is harmful in the context of employment discrimination. As has been articulated, proving pretext is a delicate task that takes a curious, searching fact finder. If courts are unwilling to see it, pretext will not be found—it necessarily requires a searching inquiry beyond the proffered reason to what the hidden reason is,

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significant . . . for all categories of claims."); Patricia Hatamyar Moore, *An Updated Quantitative Study of* Iqbal*'s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 603 (2012) ("The updated data reveals several empirical trends. First, [this] study finds a statistically significant increase . . . in the likelihood that a court will grant a 12(b)(6) motion without leave to amend, as compared to denying the motion. Second, . . . courts are now more likely to entirely dismiss cases through . . . a 12(b)(6) motion."); *see also* Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss*, 6 FED. CTS. L. REV. 1, 7 (2012) (citations omitted) ("[T]he rate of dismissal motions that were filed increased substantially. After Iqbal, a plaintiff was twice as likely to face a motion to dismiss as compared with the period before Twombly . . . . As for dismissal orders, [a study] found . . . in every case category . . . examined [that] [1] there were more orders granting dismissal after Iqbal than there were before Twombly . . . . [and] [2] it was more likely that a motion to dismiss would be granted."); *but see* William H. J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. LEGAL STUD. 35, 37 tbl.1, 57 (2013) (citations omitted) (finding only a slight increase in dismissal rates for all cases post-*Twombly*, and concluding that "[the data] support the view that Twombly effected no (significant) change in the willingness of courts to dismiss cases . . . .").

which is rarely obvious at first blush. Also, the desire to limit regulation in this area is arguably harming the economy. The purpose of Title VII is to prohibit discrimination, requiring that people be considered based on their abilities, education, and skills, and not their gender, skin color, sexual orientation, or age. Thus, it ensures that the best person for the job gets that job. Uncompromisingly ensuring such would be helpful to the American economy, as it would result in a more able and better-prepared workforce.

Finally, employment discrimination is one area where the desire to limit regulation should yield to the need for protectionist measures. Other countries, indeed capitalist countries, have recognized this and not shied from enforcing regulations to stymie illegal discrimination. For example, as explained above, a U.S. employer must only state a non-discriminatory reason to rebut a plaintiff's prima-facie case of discrimination. Conversely, in European countries, the employer bears the burden of *persuasion*, not merely *production*, once the employee establishes a prima-facie case of discrimination.[171] France has taken an additional step, and has made employment discrimination based on race a criminal offense.[172] The actions other developed, capitalist, countries have taken to curb the tide of discrimination is all the more reason that the U.S. should at the very least enforce its own laws that have much-less bite.

CONCLUSION

Discrimination remains a problem in the modern American workplace. Title VII of the Civil Rights Act was intended to provide a remedy for those targeted by this ugly, hurtful, deprecating, and unlawful activity.

The Fifth Circuit has long held that "the salutary function of

171. Jarrett Haskovec, Note, *A Beast of Burden? The New EU Burden-of-Proof Arrangement in Cases of Employment Discrimination Compared to Existing U.S. Law,* 14 TRANSNAT'L L. & CONTEMP. PROBS. 1069, 1103 (2005) ("In the EU, . . . once the employee establishes a prima facie case of discrimination, the burden of persuasion shifts to the employer . . . . who will often have to bear the ultimate burden of persuading that he or she did not discriminate on an unlawful basis. Thus, plaintiff employees will likely be successful more often in bringing discrimination claims than their American counterparts, especially when the question is a close one.").

172. Donna M. Gitter, Comment, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LAB. L.J. 488, 502–03, 503 n.87 (1994) (citations omitted) (detailing the French legislature's steps to criminalize discrimination in employment in 1991).

summary judgment in the employment discrimination arena [is that it] allows patently meritless cases to be nipped in the bud."[173] Its use however has been extended far beyond this purpose. In *Tolan v. Cotton*, the Supreme Court, speaking with one unanimous voice, admonished the Fifth Circuit and issued a reminder of the importance of adhering to fundamental summary judgment principles. The Fifth Circuit should embrace this lesson from *Tolan*. Doing so would better allow for Title VII to be the enforcement mechanism against discrimination that it was intended to be.

Randall John Bunnell

173. Amburgey v. Corhart Refractories Corp., 936 F.2d 805, 814 (5th Cir. 1991) (quoting Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 645 n.19 (5th Cir. 1985), *abrogated on other grounds by* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)).