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Disbelief Doctrines

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Disbelief Doctrines

Sandra F. Sperino†

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INTRODUCTION

Employment discrimination law is riddled with doctrines that tell courts to believe employers and not workers. Judges often use these disbelief doctrines to dismiss cases at the summary judgment stage.[1] At times, judges even use them after a jury trial to justify nullifying jury verdicts in favor of workers.[2]

This article brings together many disparate discrimination doctrines and shows how they function as disbelief doctrines, causing courts to believe employers and not workers. The strongest disbelief doctrines include the stray comments doctrine, the same decisionmaker inference, and the same protected class inference. However, these are not the only ones. Even doctrines that facially appear to perform other functions often serve as disbelief doctrines. Courts often rely on the honest belief doctrine and the idea that courts do not sit as super-personnel departments to impermissibly favor an employer's evidence over that presented by the worker. And even

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† Associate Dean of Faculty and Professor of Law, University of Cincinnati College of Law. This article relies on initial research about discrimination doctrine reflected in SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW (2017).

1. *See infra* Part I.

2. *See infra* Part I.

outside of the more formalized doctrines, courts often apply evidentiary preferences that disfavor workers by excluding relevant evidence.

Although many of these doctrines have received scholarly criticism and attention,[3] this article examines how the various disbelief doctrines work together to tilt employment discrimination jurisprudence to favor employers over workers. When plaintiffs try to survive summary judgment or maintain a jury verdict in their favor, the disbelief doctrines often improperly instruct courts not to believe them. While the disbelief doctrines are problematic because they rely on faulty factual premises, they are also worrisome because of three underlying structural problems.

First, the disbelief doctrines upend the normal rules of litigation. In individual cases where trial courts apply the disbelief doctrines, judges are often violating the Federal Rules of Civil Procedure related to summary judgment or post-trial motions.[4] And appellate courts often disregard rules designed to respect jury verdicts.[5]

Second, it is unclear whether judges even possess the power to create the doctrines in the first place. Each of the doctrines discussed is a court-created doctrine not contained within the text of the federal discrimination statutes. Many of the doctrines have no statutory basis and even contradict Supreme Court precedent. It is questionable whether the courts have valid power to create facially substantive rules outside of a statutory regime that act as disbelief doctrines, thus contradicting the Federal Rules of Civil Procedure.

Finally, the disbelief doctrines are part of a much larger development in federal discrimination jurisprudence. When a court examines a federal discrimination case at a procedural juncture such as summary judgment, the judge follows a different set of analytical constructs than those used if the same case was given to a jury. For example, under the Federal Rules of Civil Procedure, a judge may allow a case to proceed past summary judgment or judgment as a matter of law if a reasonable jury could find for the non-moving party. However, judges and juries approach discrimination cases very differently, making it difficult to understand how a judge can reasonably approximate a jury's analysis. Not only are judges demographically different than juries, but, as discussed later in detail, judges use different analytical frameworks than juries to consider cases. As a result, judges and juries may not arrive at the same answers because they are asking different questions.

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3. *See, e.g.*, Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012); Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1135 (2008).

4. FED. R. CIV. P. 50(a), 56(a).

5. *See, e.g.*, Smith v. Heritage Ranch Owners Ass'n, 655 F. App'x 567, 568 (9th Cir. 2016).

This article proceeds as follows. Part II describes the disbelief doctrines. Part III demonstrates how these doctrines violate the Federal Rules of Civil Procedure and appellate norms designed to preserve the function of the jury. Part IV discusses structural problems with the disbelief doctrines, focusing on how the Federal Rules of Civil Procedure substantively limit a court's ability to create doctrines that tell judges to favor one party over another.

I.
THE DISBELIEF DOCTRINES

This section describes the disbelief doctrines: (1) the stray remarks doctrine; (2) the same protected class inference; (3) the same decisionmaker inference; (4) the honest belief doctrine; and (5) the idea that the courts do not sit as super-personnel departments.

A. Stray Remarks

The stray remarks doctrine is a court-created doctrine that allows courts to declare that certain discriminatory remarks are not relevant to an underlying claim of discrimination. Some examples are helpful. In a race discrimination case, a worker presented evidence that his supervisor referred to African-Americans as "lazy," "worthless," and "just here to get paid."[6] The judge refused to consider these comments as supporting the plaintiff's claim that he was fired because of his race, reasoning that they were stray remarks not probative of race discrimination.[7] In an age discrimination case, a court similarly rejected a claim where the worker presented evidence that his supervisor told him "you are too damn old for this kind of work" two weeks before he was fired.[8] As further explored below, judges commonly invoke the stray remarks doctrine to exclude evidence presented by workers, allowing the court to grant summary judgment or other motions in favor of the employer.[9]

The stray remarks doctrine is not contained within the text of any of the main federal discrimination statutes. Instead, the stray remarks doctrine is a special evidentiary rule that courts created and apply in discrimination cases. Through this doctrine, judges can refuse to consider discriminatory comments in the workplace if the court deems the comments too remote in time from the contested decision, not made in the context of the decision, or

6. Chappell v. The Bilco Co., 2011 WL 9037, at *9 (E.D. Ark. 2011), *aff'd sub nom.* Chappell v. Bilco Co., 675 F.3d 1110 (8th Cir. 2012) (granting summary judgment).

7. *Id.*

8. O'Connor v. Consol. Coin Caterers Corp., 56 F.3d 542, 551 (4th Cir. 1995) (Butzner, J., dissenting), *rev'd*, 517 U.S. 308 (1996).

9. *See* Stone, *supra* note 3 (more examples of the stray remarks doctrine).

too ambiguous to show discriminatory bias.[10] The stray remarks doctrine first appeared in a concurring opinion by Justice Sandra Day O'Connor in the 1989 case of *Price Waterhouse v. Hopkins*.[11] In that case, Justice O'Connor noted:

> Thus, stray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard . . . .[12]

Importantly, Justice O'Connor's discussion of stray remarks did not rely on or even purport to draw from the statutory language of Title VII of the Civil Rights Act of 1964 ("Title VII"), its legislative history, or its purpose. Nor was Justice O'Connor claiming that the purported stray remarks were not relevant in intentional discrimination cases. Rather, she was making a narrow claim related to the specific issue raised in *Price Waterhouse* about whether a plaintiff could proceed under a mixed-motive framework without what she called "direct evidence" of discrimination.[13]

While her remarks were part of a concurring opinion and are not controlling law, courts have expanded on the idea. As Professor Kerri Lynn Stone has noted, after *Price Waterhouse*, "the so-called stray comments doctrine . . . had a groundswell of usage, building in popularity year after year."[14] The stray remarks doctrine has been used in a wide range of cases to exclude comments from which one could infer bias. Most often, courts use it at the summary judgment stage. When the judge grants summary judgment in favor of the employer, it often explains away evidence presented by the plaintiff by characterizing it as a stray remark. For example, in a sex discrimination case, a judge found that a supervisor's references to female workers—and to the plaintiff in particular—as "bitch," "cunt," "whore," "slut," and "tart" were stray remarks and not evidence of sex discrimination.[15] In age discrimination cases, courts have used the stray remarks doctrine to

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10. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring); Perez v. Thorntons, Inc., 731 F.3d 699, 716 (7th Cir. 2013); Mosberger v. CPG Nutrients, 2002 WL 31477292, at *7 (W.D. Pa. 2002) ("Discriminatory stray remarks are generally considered in one of three categories—those made (1) by a non-decisionmaker; (2) by a decisionmaker but unrelated to the decision process; or (3) by a decisionmaker but temporally remote from the adverse employment decision.") (internal quotations and citations omitted). *See also generally* Stone, *supra* note 3.

11. 490 U.S. 228, 277 (O'Connor, J., concurring) (internal citations omitted).

12. *Id.* (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–69 (1976)).

13. *Id.* at 270–71.

14. Stone, *supra* note 3, at 170.

15. Ferrand v. Credit Lyonnais, at *10–11 (S.D.N.Y. Sept. 2003), *aff'd*, 110 F. App'x 160 (2d Cir. 2004).

exclude evidence that managers wanted to hire "young blood,"[16] when a supervisor referred to an employee as an "old and ugly woman,[17] and when co-workers described plaintiff as an "old man," "old fart," "old son of a bitch," and "fat old bastard."[18]

Like many of the doctrines discussed in this article, in limited circumstances it may be appropriate for a judge to use the underlying intuition of the stray remarks doctrine to rule in the employer's favor. If there is no possible way that any reasonable juror could infer discrimination from a comment and there is no other evidence suggesting discrimination, the worker's case should not be allowed to proceed.[19] However, this is not because of any special function of the stray remarks doctrine. Rather, the worker simply has no evidence of discrimination. The federal courts do not need to rely on any special, discrimination-specific rule to find for the employer in such a case. Unfortunately, when judges invoke the stray remarks doctrine, the allegedly stray remarks are often ones that a jury might credibly use (especially along with other evidence) to find in favor of the worker.

Courts do not uniformly apply the stray remarks doctrine and some judges have criticized it.[20] Strangely, the Supreme Court has decided numerous cases where it has at least implicitly rejected the stray remarks doctrine, yet the doctrine has continued vitality in the lower courts. For example, in *Ash v. Tyson Foods, Inc.*,[21] the lower courts nullified a jury's verdict in favor of two men who claimed the employer refused to promote them because of their race. The men presented evidence that the plant manager, who made the promotion decision, referred to each of them as "boy."[22] Although a jury found race discrimination, the trial court judge, on a post-trial motion, ruled that the supervisor's use of the word "boy" was not racial in nature.[23] Affirming, the appellate court also found that the use of the word "boy" was not evidence of discrimination.[24] The Supreme Court

16. Price v. Marathon Cheese Corp., 119 F.3d 330, 337 (5th Cir. 1997) (finding that the trial court granted judgment as a matter of law even in light of the "young blood" remark because "[t]he district court held that there was simply no probative evidence that age was a determinative factor in the decision to terminate Price").

17. Engstrand v. Pioneer Hi-Bred Int'l, Inc., 946 F. Supp. 1390, 1399 (S.D. Iowa 1996), *aff'd*, 112 F.3d 513 (8th Cir. 1997).

18. Harrison v. Formosa Plastics Corp. Tex., 776 F. Supp. 2d 433, 442 (S.D. Tex. 2011).

19. *See* FED. R. CIV. P. 56(a).

20. *See, e.g.*, Holmes v. Marriott Corp., 831 F. Supp. 691, 704 (S.D. Iowa 1993) ("There appears to be no unified test for determining whether certain statements fall within the stray remarks doctrine.").

21. Ash v. Tyson Foods, Inc., 546 U.S. 454, 455–56 (2006).

22. Ash v. Tyson Foods, Inc., 2004 WL 5138005, at *1, *6 (N.D. Ala. 2004), *aff'd in part, rev'd in part*, 129 F. App'x 529 (11th Cir. 2005), *vacated*, 546 U.S. 454 (2006).

23. *Id.*

24. Ash v. Tyson Foods, Inc., 129 F. App'x 529, 533 (11th Cir. 2005), *vacated*, 546 U.S. 454 (2006).

reversed the appellate court's decision regarding the use of the word "boy," noting that the meaning of the term depended on the context in which it was used.[25]

The Supreme Court also rejected the application of the stray remarks doctrine in *Reeves v. Sanderson Plumbing Products, Inc.*[26] In that case, Roger Reeves alleged that his employer fired him because of his age.[27] At the time he was fired, Mr. Reeves had worked for Sanderson Plumbing for 40 years and was 57 years old.[28] To support his discrimination claim, Mr. Reeves presented evidence at trial that a supervisor who was involved in his termination told Mr. Reeves several months before his dismissal that he was so old that he "must have come over on the Mayflower" and that he was "too damn old to do the job."[29]

Not only did the jury find in Mr. Reeves's favor, it also found that the employer's conduct was willful. Reviewing the jury's decision, the appellate court disregarded the age-related comments as stray remarks and rejected the verdict. It noted, "Despite the potentially damning nature of [the] age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination."[30] The Supreme Court corrected the appellate court's mistake and found that the jury's verdict should stand.[31] The Supreme Court reasoned that when a supervisor makes comments that someone is so old that they must have sailed on the Mayflower, and that a worker is too old to do his job, the jury is entitled to infer that age played a role in the worker's termination.[32] Despite both of these Supreme Court cases, the lower courts still continue to use the stray remarks doctrine to exclude evidence in employment discrimination cases.

B. The Same Actor and Same Protected Class Inferences

The courts have also created two additional inferences that favor employers and disfavor workers: the same protected class inference and the same actor inference. Judges often rely on these inferences when granting summary judgment in favor of the defendant. The inferences are not mandatory and are not contained within the statutory language of the federal discrimination statutes. The same protected class inference presumes that a person who is in the same protected class as the worker would not

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25. *Ash*, 546 U.S. at 456.
26. 530 U.S. 133, 137 (2000).
27. *Id.*
28. *Id.*
29. Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 691 (5th Cir. 1999), *rev'd*, 530 U.S. 133 (2000).
30. *Id.* at 693.
31. *Reeves*, 530 U.S. at 151.
32. *Id.*

discriminate against the worker based on their shared protected trait. For example, this inference might assume that a person older than 40 years old will not discriminate against other workers over the age of 40.[33]

Similarly, the same actor inference allows a court to assume that if a supervisor made a positive decision in favor of a worker, the same supervisor's later negative action against that same worker cannot be discriminatory.[34] For example, if a supervisor hired an older worker and then a few years later fires the worker, the court will assume that the supervisor did not take age into account when firing the worker. As one court reasoned, "From the standpoint of the putative discriminator, [i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job."[35]

Some courts will apply the same actor inference where there is a short period of time between the positive decision and the subsequent negative decision.[36] However, at least one court has applied the doctrine when seven years elapsed between the positive and negative decision.[37] Courts in every federal circuit have relied on the same actor inference.[38]

Like the stray remarks doctrine, there are numerous Supreme Court holdings that appear to invalidate both the same protected class and the same decisionmaker doctrines. In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court considered whether a plaintiff could present a claim for same-sex sexual harassment.[39] The Court allowed such claims, holding that men and women can discriminate against their own sex. The Court specifically noted: "If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[40] Likewise, in

33. Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (citing Proud v. Stone, 945 F.2d 796, 796 (4th Cir. 1991)). There is a long line of cases applying the same protected class inference. *See, e.g.*, Elrod v. Sears, Roebuck and Co., 939 F.2d 1466, 1471 (11th Cir. 1991); Cartee v. Wilbur Smith Assocs., Inc., 2010 WL 5059643, at *5 (D.S.C. 2010); Demesme v. Montgomery Cnty. Gov't, 63 F. Supp. 2d 678, 683 (D. Md. 1999); Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1128 (4th Cir. 1995). However, courts also reject the same protected class inference. Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 361 (7th Cir. 2001).

34. *See Brown*, 82 F.3d at 658.

35. *Id. See also* DeJarnette v. Corning Inc., 133 F.3d 293, 298 (4th Cir. 1998) (finding that employer's knowledge of plaintiff's pregnancy when she was hired created an inference that the reason for her termination was not pretextual).

36. Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1135 (2008) (discussing cases).

37. Proud v. Stone, 945 F.2d 796, 796–97 (4th Cir. 1991); Martin, *supra* note 36, at 1135. *But see* Carlton v. Mystic Transp., Inc., 202 F.3d 129, 132 (2d Cir. 2000) (criticizing use of the doctrine when there is a long intervening period between the positive decision and the negative one).

38. Martin, *supra* note 36, at 1128.

39. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 76 (1998).

40. *Id.* at 79.

Reeves v. Sanderson Plumbing Products, Inc., the Supreme Court recognized that the lower court improperly granted judgment in favor of the employer in an age discrimination case.[41] That case involved decisionmakers who were age 40 or older and thus belonged to the same protected class as the plaintiff. However, the Court did not find this fact to be dispositive or even probative of the underlying legal question.

Although less strong, Supreme Court precedent also casts doubt on the same decisionmaker doctrine. For example, in *Meritor Savings Bank, FSB v. Vinson*, a vice president of a bank hired the plaintiff.[42] In the plaintiff's sexual harassment case, in which she alleged that the bank vice president sexually harassed her, the Supreme Court did not draw any inference in favor of the employer based on the fact that the bank vice president both hired her and was involved in the decision to terminate her.[43]

C. *The Honest Belief Rule*

The "honest belief" rule is another disbelief doctrine, at least in some cases. Under the honest belief doctrine, some courts will not hold an employer liable for negative actions against on employee based on incorrect information if the employer honestly believed the information to be true at the time it made the employment decision.[44] For example, if an employer fires a worker for three unexcused absences, the employer will not be held liable for discrimination if it later turns out that the worker did not have three unexcused absences. Even though the employer was wrong, courts reason, the basis for the termination was not the worker's protected trait.[45]

Like the stray remarks doctrine, the underlying intuition of the honest belief rule is correct in a limited subset of cases. If the employer truly made its decision under a faulty set of facts and there is no other evidence suggesting discrimination, then it would be appropriate for a judge to find in favor of the employer. Again, courts need not rely on a special employment discrimination doctrine to reach this outcome. In such a case, the worker has simply failed to present any evidence that a protected trait played a negative role in an employment outcome. Like the stray remarks doctrine, though, courts often use the honest belief rule in cases where the facts are not straightforward.

Unfortunately, some judges apply the honest belief doctrine in cases where the worker has evidence showing that when the decision was made,

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41. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153–54 (2000).

42. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 59 (1986).

43. Vinson v. Taylor, 1980 WL 100, at *8 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded*, 477 U.S. 57 (1986).

44. Loyd v. St. Joseph Mercy Oakland, 766 F.3d 580, 590 (6th Cir. 2014).

45. *Id.* at 590–91.

the employer did *not* actually believe the reason it later asserted in court.[46] Courts have also allowed employers to claim that they honestly believed they fired an employee for violating company policy even when they do not regularly enforce the policy or when there is evidence that the policy does not even exist.[47] One worker's case was dismissed on summary judgment notwithstanding a federal appellate judge calling the employer's factual investigation "so poor and one-sided as to be 'unworthy of credence.'"[48] Courts have applied the honest belief doctrine to dismiss cases when there was evidence that the supervisor who complained about an employee's performance also made racist remarks,[49] and where others involved in the decision may have known about the supervisor's bias.[50]

Judges have also supported a supervisor's reasons for acting, even if the supervisor is not able to explain why he made a decision.[51] As one court noted in criticizing the "honest belief" rule, the rule allows employers to "provide an honest reason for firing the employee, even if that reason had no factual support."[52] One court has gone so far as to dismiss a case under the honest belief rule even when the employer *changed* reasons for its actions.[53]

Many honest belief cases seem to contradict Supreme Court precedent.[54] In *McDonnell Douglas Corp. v. Green*, the Supreme Court held that a worker may prove discrimination by showing that the reason provided by the employer for its decision is not true, and rather was a pretext for discrimination.[55] The Court explained this in detail in *Reeves* when it noted:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional

46. *See* Hamilton v. Boise Cascade Express, 280 F. App'x 729, 733 (10th Cir. 2008) (plaintiff presented evidence that employer may have believed time card discrepancies were mistakes, and not fraudulent).

47. *See, e.g.*, Hale v. Mercy Health Partners, 2015 WL 1637896, at *10 (6th Cir. 2015) (White, J., concurring in part and dissenting in part) (disagreeing with the majority's use grant of summary judgment where the employer did not adhere strictly to its timekeeping policies but claimed it terminated plaintiff due to timekeeping violations); Wilson v. Cleveland Clinic Found., 579 F. App'x 392, 408 (6th Cir. 2014) (Cole, C.J., dissenting in part) (criticizing use of honest belief doctrine where employer had not disciplined nursing assistant for participating in the same act that allegedly caused plaintiff's termination).

48. Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 290 (6th Cir. 2012) (Tarnow, J., dissenting) (discussing honest belief doctrine in context of the Family and Medical Leave Act, which is similar analysis to that used in discrimination cases). *See also* Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 677 (7th Cir. 1997) (describing employer investigation as "careless").

49. *See* Clack v. Rock-Tenn Co., 304 F. App'x 399, 403 n.2 (6th Cir. 2008).

50. *See id.* at 405.

51. *See* Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999).

52. Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998).

53. Bhama v. Mercy Memorial Hosp. Corp., 416 F. App'x 542, 557 (6th Cir. 2011) (White, J., dissenting) (arguing the majority should not have dismissed the plaintiff's claims in light of evidence that the defendant had changed its justification for not promoting the plaintiff).

54. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (noting that the factfinder's disbelief of the employer's reason is sufficient to establish discrimination).

55. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

> discrimination, and it may be quite persuasive. ("[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[56]

In discrimination cases, a jury may find in favor of the plaintiff if it finds that the employer lied about the reason for its action.[57] The lie is a proper basis from which the jury may infer discrimination. In many honest belief cases, the employer gives one reason for its decision, and the worker has evidence that the reason is not true. Nonetheless, some courts choose to believe that the employer had an honest belief, rather than finding that the employer's reason might be a pretext for discrimination. Although some judges find the rule problematic and others refuse to use it,[58] the honest belief doctrine is still widely applied.

D. Super-Personnel Department

In summary judgment orders and other similar contexts, federal judges will often repeat the mantra that they do not sit as super-personnel departments.[59] There is no problem with this idea in itself. The federal discrimination statutes are not a fairness code. They do not require employers to be nice or to treat employees well. Rather, the statutes prohibit certain conduct because of a protected trait. The super-personnel department concept is not so much a coherent doctrine, but rather a reason that judges often supply to exclude or diminish evidence that might also show discrimination by the employer.

Courts improperly use the super-personnel department justification to undergird their dismissal decisions in a wide-range of contexts. At times, judges use this idea to limit a worker's ability to challenge whether the employer is proffering an accurate reason for its employment decision. Recall

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56. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993); Wright v. West, 505 U.S. 277, 296 (1992)).

57. *McDonnell Douglas*, 411 U.S. at 804.

58. *See, e.g.*, Dailey v. Accubuilt, Inc., 944 F. Supp. 2d 571, 580 (N.D. Ohio 2013) (expressing concern over the frequency of summary judgment grants based on the honest belief doctrine); Obike v. Applied EPI, Inc., 2004 WL 741657, at *5 (D. Minn. 2004) (discussing reluctance of some courts to use doctrine).

59. Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1115–16 (2004).

that in *McDonnell Douglas*, the Supreme Court held that a worker can establish discrimination at trial by showing that the employer lied about its reason for acting.[60]

In an employment discrimination case, an employer might provide multiple reasons to counter allegations of discriminatory action. However, a judge might dismiss a case if a worker shows that some, but not all, of the employer's reasons are false.[61] If the employer lies about one of the reasons, this might be pretext for discrimination, yet a judge might use the super-personnel department doctrine to dismiss these cases.[62] Using this same idea, the judge might hold that there is no inference of discrimination even when an employer does not follow its posted job criteria in making hiring or promotion decisions.[63] The judge may not view her job as requiring employers to follow their own posted job criteria. However, a judge that follows this line of reasoning ignores that the failure to follow posted criteria could mean that the decisionmaker was changing the job criteria to favor workers of a different race or sex, especially when there is other evidence of bias.

Some courts refuse to allow a worker to prove that she was the most qualified person for the position. For a long time, some courts would not allow a worker to use evidence of her qualifications as evidence of discrimination unless the worker presented evidence that "the disparity in qualifications is 'so apparent as virtually to jump off the page and slap you in the face.'"[64] In *Ash v. Tyson Foods, Inc.*, however, the Supreme Court rejected this standard, finding that "the visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise."[65] The Court noted that a worker can show discrimination by presenting evidence that the employer chose a less qualified candidate.[66]

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60. *McDonnell Douglas*, 411 U.S. at 804–05.

61. DeJarnette v. Corning Inc., 133 F.3d 293, 299 (4th Cir. 1998) (dismissing case where plaintiff disproved one of employer's proffered nondiscriminatory reasons for termination by proving that her packing and inspecting performance was average, but did not disprove other proffered reasons of poor attitude, lack of enthusiasm, and poor use of slack time).

62. Wolf v. Buss (Am.) Inc., 77 F.3d 914, 918 (7th Cir. 1996) (affirming grant of summary judgment for employer despite plaintiff demonstrating a genuine issue of material fact on four of employer's six proffered reasons for plaintiff's dismissal because these four reasons were not sufficiently "intertwined" as to create doubt as to final two reasons).

63. *See, e.g.*, Ash v. Tyson Foods, Inc., 2004 WL 5138005, at *1, *6 (N.D. Ala. 2004), *aff'd in part, rev'd in part*, 129 F. App'x 529 (11th Cir. 2005), *vacated*, 546 U.S. 454 (2006).

64. *See* Bryant v. Dougherty Cnty. Sch. Sys., 2009 WL 3161678, at *13 (M.D. Ga. 2009) (quoting Cofield v. Goldkist, Inc., 267 F.3d 1264, 1268 (11th Cir. 2001)), *aff'd*, 382 F. App'x 914 (11th Cir. 2010).

65. Ash v. Tyson Foods, Inc., 546 U.S. 454, 457 (2006).

66. *Id.* at 458. Despite the *Ash* decision, lower courts continue to reject evidence that a worker was better qualified. While courts should not use the "slap you in the face" standard that the Supreme Court rejected, some courts seem to continue to use a similarly high standard for viewing a worker's evidence. *Compare id.* at 457 *with Bryant*, 2009 WL 3161678, at *13. Recently, a court stated that evidence that a worker was better qualified than the chosen applicant constitutes evidence of discrimination only if the

Nonetheless, after *Ash*, some courts still make it very difficult for a worker to prove her case through evidence that she was more qualified for the position than other applicants.[67]

Courts also use the super-personnel department justification to dismiss cases when the employer accuses the employee of engaging in bad conduct and the employee has evidence to the contrary. When the worker presents evidence, through his own testimony or the testimony of co-workers, that the alleged bad conduct did not occur, judges have asserted that the evidence is not relevant.[68] Courts have also used the super-personnel department rationale in holding that an employer's failure to follow its own policies was not evidence of discrimination.[69] As with many of the disbelief doctrines, however, courts do not apply the super-personnel department doctrine uniformly. For example, some courts allow evidence of a company's failure to follow its own policies to count as evidence of discrimination.[70]

II.
THE FEDERAL RULES OF CIVIL PROCEDURE

The Federal Rules of Civil Procedure provide the rules that govern litigation in federal court. They also express fundamental ideas about how the judicial process is supposed to operate, two of which are important to this discussion: Rule 56, which governs summary judgment, and Rule 50, which governs judgment as a matter of law. Further, on appeal, once a jury rules in favor of a party, there are important rules that limit appellate judges' abilities to second-guess the jury on factual questions. Together, these rules provide powerful limits on federal judges. This section discusses how those rules

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differences between candidates "are so favorable to the plaintiff that there can be no dispute among reasonable persons of impartial judgment that the plaintiff was clearly better qualified for the position at issue." Carlson v. CSX Transp., Inc., 2015 WL 400633, at *6 (S.D. Ind. Jan. 28, 2015) (quoting Mlynczak v. Bodman, 442 F.3d 1050, 1059–60 (7th Cir. 2006)).

67. *See, e.g.*, *Bryant*, 2009 WL 3161678, at *13; *Carlson*, 2015 WL 400633, at *6; *Mlynczak*, 442 F.3d at 1059–60.

68. *See, e.g.*, DeJarnette v. Corning, 133 F.3d 293, 299 (4th Cir. 1998); Ramos v. Molina Healthcare, Inc., 963 F. Supp. 2d 511, 523 (E.D. Va. 2013), *aff'd*, 603 F. App'x. 173 (4th Cir. 2015) (evidence from plaintiff and coworker calling into question claim that plaintiff was belligerent during a meeting was not tethered to other evidence of age discrimination); Jones v. Polk Ctr., 2009 WL 700686, at *6 (W.D. Pa. 2009).

69. *See, e.g.*, *Ramos*, 963 F. Supp. 2d at 526. *See also* Ash v. Tyson Foods, Inc., 2004 WL 5138005, at *1, *6 (N.D. Ala. 2004), *aff'd in part, rev'd in part*, 129 F. App'x 529 (11th Cir. 2005), *vacated*, 546 U.S. 454 (2006) (noting that failure to follow written qualifications for job was not evidence of race discrimination).

70. *See, e.g.*, Morrison v. Booth, 763 F.2d 1366, 1374 (11th Cir.1985) ("Departures from normal procedures may be suggestive of discrimination."); Ransdell v. Russ Berrie & Co., Chicago, Inc., 1991 WL 101658, at *2 (N.D. Ill. 1991) ("[W]here a company has established certain procedures for dealing with performance problems but does not follow them . . . this deviation may support an inference of pretext.").

limit a judge's ability to use the disbelief doctrines in individual circumstances.

The American legal system has a set of fundamental ideals about the appropriate role of its institutional actors. When a jury is properly requested for a claim triable by jury, the jury is the factfinder, not the judge. Under the federal rule governing summary judgment, Rule 56, a claim may be dismissed only if there is "no genuine dispute as to any material fact" and the employer is entitled to judgment as a matter of law.[71] Rule 50, on the other hand, governs when it is appropriate for a court to grant judgment as a matter of law in a jury trial.[72] That rule provides that a judge may grant judgment as a matter of law if there is "no legally sufficient evidentiary basis" for a reasonable jury to find for the party on a particular issue.[73]

Under both of these rules, the judge is not supposed to determine the credibility of witnesses. In ruling on motions for summary judgment or motions under Rule 50, the judge is supposed to read all evidence in the light most favorable to the non-moving party.[74] The judge is not allowed to weigh the quality of the evidence of the moving party against the weight of the evidence of the non-moving party.[75] Instead, after looking at the evidence as a whole, the judge is required to "disregard all evidence favorable to the moving party that the jury is not required to believe."[76] The judge is then supposed to assume that the facts presented by the non-moving party are true and to draw all reasonable inferences in favor of the non-moving party.[77]

Similar inferences operate at the appellate level after a jury verdict to ensure that the appellate courts properly defer to the jury. As one court noted, the appellate court must "give deference to all credibility determinations and reasonable inferences of the jury, and may not weigh the credibility of witnesses or otherwise consider the weight of the evidence."[78]

The limits placed on a judge's ability to second-guess a jury have a constitutional and a statutory dimension. The Seventh Amendment of the Constitution limits how a judge can change the outcome reached by a jury. Moreover, the federal discrimination statutes explicitly provide workers with a right to jury trial.[79] Likewise, the procedural rules that govern federal judges

71. FED. R. CIV. P. 56(a).
72. FED. R. CIV. P. 50.
73. FED. R. CIV. P. 50(a).
74. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 135 (2000).
75. *See* Lytle v. Household Mfg., Inc., 494 U.S. 545, 554 (1990).
76. *See Reeves*, 530 U.S. at 135.
77. *See id.*
78. Crawford v. Tribeca Lending Corp., 815 F.3d 121, 128 (2d Cir. 2016).
79. 42 U.S.C. § 1981a(c) (2012).

restrict a judge's ability to replace a jury's verdict with her own opinion of the case.[80]

There is an additional reason to be concerned about improper factfinding at summary judgment and on appeal. When trial judges rule on summary judgment motions or when appellate judges are considering an appeal, they typically never see or hear the parties' witnesses. Instead, judges make their decisions based on the record and the written material provided by each party to support its case.

Despite these rules, the disbelief doctrines impermissibly allow a court to believe the employer, not the worker. For example, when a court invokes the same decisionmaker doctrine, it is claiming that because a decisionmaker once took a positive action in favor of the worker, the same decisionmaker could not have taken a protected trait into account when later making a negative decision. Likewise, when a court invokes the same protected class doctrine, the idea is that an individual would not discriminate against a group of people with whom he or she shares one or more protected traits.

In many cases, it is not clear why these inferences are logical. If a supervisor hires a woman for one job and then fails to promote her, bias could have played a role in the promotion decision. The glass ceiling metaphor suggests that some people think women are qualified for some lower-level jobs, but not jobs with higher levels of responsibility. In another example, a supervisor might have hired a woman who appeared to fit within certain sex stereotypes during an interview, but then later discover that the worker acts differently than the supervisor expected. For instance, a supervisor who believes that women should be deferential may be initially pleased with a female employee who was deferential during the interview, but disappointed when she was not as deferential in the day-to-day job. The supervisor could also be responding to pressures from others. For example, the supervisor might not have thought about a person's protected class when hiring, but then receives pressure from others about the new hire's race, sex, age, or other trait. This internal pressure might cause the supervisor to later make a negative decision related to the new hire.

In the same protected class context, there are many reasons that a supervisor might discriminate against a worker in the same class. The supervisor might have the same biases, but believe that they do not apply to the supervisor. For example, a 55-year old supervisor might not think of himself as old, but views other 60 year-olds as old. Likewise, a supervisor may share the same trait as a worker, but there may be differences within the trait itself. For example, a supervisor who is Catholic may discriminate against other Catholics who hold more or less orthodox beliefs than the supervisor.

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80. FED. R. CIV. P. 50(a)–(b), 56(a).

The stray remarks doctrine exhibits similar problems. If a supervisor makes a comment six months before firing a worker that she is "too old to do the job," it is not clear why the passage of six months erases the probative value of the comment to show bias.

Whenever a judge invokes the same actor inference or the same protected class inference in the following contexts, the judge is ignoring the fundamental rules of litigation: (1) when ruling in favor of the employer on a motion for summary judgment, (2) when ruling in the employer's favor on a motion for judgment as a matter of law, (3) when deciding in the employer's favor and contrary to the jury verdict to grant a renewed judgment as a matter of law; and (4) when an appellate court nullifies a jury verdict in the employee's favor. In many cases where judges invoke the stray remarks doctrine and the super-personnel department justification, they are likewise making credibility determinations and deciding whom to believe.

Harvard Law senior lecturer and then United States District Court Judge Nancy Gertner indicated: "Whether a given remark is 'ambiguous'—whether it connotes discriminatory animus or it does not—is precisely what a jury should resolve, considering all of the facts in context. What may be ambiguous to me, the judge, may not be to the plaintiff or to her peers."[81] Judge Gertner also noted the reasons that derogatory terms are potentially powerful evidence of discrimination:

> Introduced into evidence, ageist slurs, such as "old bag," "old shoe," or "old pumpkin" may lead a reasonable juror to conclude that the speaker harbors some animus towards a group of people, for example. And they might lead a reasonable juror to further conclude that when that speaker is making a decision concerning the employment of a member of the class about which he holds a bias, he might actually be influenced by that bias. And finally, apart from the speaker's animus, the statements that employers and employees make in the workplace create an environment that may be hostile in itself or an environment in which discriminatory employment decisions are made and tolerated.[82]

Despite this recognition, many judges continue to dismiss discriminatory epithets as "stray remarks."

There are other reasons to be concerned about the stray remarks doctrine. When judges use this doctrine, there is usually more evidence than just one comment. Nonetheless, some judges isolate comments from the broader context of the rest of the evidence in the case.[83]

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81. Diaz v. Jiten Hotel Mgmt., Inc., 762 F. Supp. 2d 319, 335 (D. Mass. 2011).

82. *Id.* at 337.

83. *See, e.g.*, Ash v. Tyson Foods, Inc., 129 F. App'x 529, 531 (11th Cir. 2005), *vacated and remanded*, 546 U.S. 454 (2006). *See also* Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577 (2001) (additional examples of the slicing and dicing phenomenon).

Importantly, the assumptions underlying the same actor and stray remarks doctrines actually conflict. When judges use the same actor inference, they are assuming that once a supervisor decides to hire someone with a protected trait, that same person will not act in a discriminatory manner when making other decisions about that person. In other words, the supervisor's propensity not to discriminate will not change over time.

Yet, the stray remarks doctrine makes the opposite inference about discrimination. If the supervisor discriminated in the past, he very well may not discriminate in the future.[84] In *Perez v. Thorntons, Inc.*, the United States Court of Appeals for the Seventh Circuit recognized the tension between the doctrines:

> This case actually highlights an interesting linkage, or perhaps a disconnect, between the cases using the "common actor" inference and cases dealing with "stray remarks." The common actor inference says it is reasonable to assume that if a person was unbiased at Time A (when he decided to hire the plaintiff), he was also unbiased at Time B (when he fired the plaintiff). Again, that is not a conclusive presumption, but we treat it as a reasonable inference. Some "stray remarks" cases, though, seem to conclude that if a person was racist or sexist at Time A (time of the remark), it is *not* reasonable to infer that the person was still racist or sexist at Time B (when he made or influenced the decision to fire the plaintiff).[85]

Likewise, there is a similar tension between the stray remarks doctrine and the breadth of information that courts will allow employers to submit in support of their claim that they did not discriminate. Courts often make judgment calls about when a potentially biased comment is too stale to show discrimination. If a supervisor makes a discriminatory statement two years prior to a negative action, for example, many courts will hold that this statement is too far removed from the action to evince bias.[86] Yet, there is no similar limit on the time period over which an employer can assert the employee engaged in bad behavior, even if there is a time gap between the poor performance and a later negative action.[87]

And there is outright unfairness in the way that courts often invoke the super-personnel department justification. Courts often allow employers to support their non-discriminatory reason for acting by presenting the evidence of co-workers, human resources personnel, and non-direct supervisors. For example, if a worker has poor performance, the employer might submit the

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84. Stone, *supra* note 3, at 183–84.

85. Perez v. Thorntons, Inc., 731 F.3d 699, 710 (7th Cir. 2013) (emphasis in original) (citations omitted).

86. *See, e.g.*, Colom Gonzalez v. Black & Decker, PR, LLC., 193 F. Supp. 2d 419, 422 (D.P.R. 2002).

87. Paquin v. Fed. Nat. Mortg. Ass'n, 119 F.3d 23 (D.C. Cir. 1999) (noting company could use evaluations from several years); Cellucci v. RBS Citizens, N.A., 987 F. Supp. 2d 578, 592 (E.D. Pa. 2013) (noting the employee had poor performance for years).

testimony of co-workers supporting the supervisor's belief that the worker performed poorly. However, when workers try to present evidence from co-workers or others that their performance was good, the courts often exclude this evidence, citing the idea that the courts do not sit as super-personnel departments.[88] This lack of analytical consistency regarding bias shows that the disbelief doctrines are inherently structured to favor employers and disfavor workers.

III.
STRUCTURAL CONCERNS

The disbelief doctrines raise three structural concerns. First, their use in individual cases raises serious conflicts with the Federal Rules of Civil Procedure. Second, it is unclear what authority the federal courts are invoking to create the doctrines. Finally, the disbelief doctrines add to an already confusing court-created jurisprudence. When judges use these doctrines at procedural junctures, such as summary judgment, the analysis they undertake is so different than how a jury would approach the case, that it is increasingly difficult for judges to determine what a reasonable jury would decide.

If a federal judge invokes the same decisionmaker or the same protected class inference to rule in favor of the employer at summary judgment, either during trial or post-trial motions, or on appeal to nullify a jury verdict, it is likely that the judge has violated the procedural rules that govern these steps in the litigation process. These inferences tell the court to believe the employer and not the worker, which thus facially violates Rules 50 and 56, as well as rules that govern cases on appeal after a jury verdict. For example, Rule 56 requires the court to draw all inferences in favor of the non-moving party. In an employment discrimination case, this is typically the employee, not the employer. On appeal after a jury verdict in favor of a plaintiff, the appellate court is supposed to construe the facts in favor of the plaintiff. In many cases, the stray remarks doctrine, the honest belief doctrine, and rulings made on the basis that courts do not sit as super-personnel departments suffer from the same problems. I am advocating that each time a court invokes one of these doctrines, when the judge is not sitting as the factfinder, the judge should also separately examine whether her use of the doctrine comports with the Federal Rules of Civil Procedure.

The fact that judges in individual cases fail to follow the limits imposed by the Federal Rules of Civil Procedure is troublesome, but common. A larger issue is whether the federal judiciary even possesses the power to create these doctrines in the first place.

88. *See, e.g.*, Montes v. Cicero Pub. Sch. Dist. No. 99, 141 F. Supp. 3d 885, 898 (N.D. Ill. 2015); Weller v. Titanium Metals Corp., 361 F. Supp. 2d 712, 722 (S.D. Ohio 2005).

Imagine that a federal judge created a rule in discrimination cases. The rule provides as follows: "Whenever the employer presents evidence, always believe it." Imagine that this is a court-created rule and that the judge applies it whenever she is ruling on a summary judgment motion or a trial or post-trial motion. It is easy to see how it would be inappropriate for a judge to create this rule because it directly contradicts Rules 56 and 50 and their supporting doctrines. The rule also lacks any relation to the underlying statute and cannot be justified under principles of statutory construction. In a sense, the Federal Rules of Civil Procedure serve as a limit on judges' ability to create some substantive law.

Yet, the disbelief doctrines often perform the same work as the hypothetical rule I outlined above. Given the inherent tension between these court-created disbelief doctrines and the basic rules that govern litigation, it becomes necessary for the courts to explain from what source they derive their power to create substantive rules that inherently contradict fundamental notions about the proper role of the judge and the jury.

There is no arguable basis in the federal discrimination statutes' text, purposes, or history to support either the same decisionmaker or same protected class inferences. Indeed, as discussed above, both of these inferences appear to contradict existing Supreme Court precedent. In justifying these doctrines, therefore, courts cannot rely on any claim about statutory interpretation. Although some of the other doctrines may be valid in a limited form, they cannot be justified in many instances. For example, using the honest belief doctrine in a case where the employer claims the worker violated a workplace rule is inappropriate where there is evidence that the rule did not exist at the time, where it was not enforced in the past, or where there is evidence that the employer had reason to doubt the employee violated the rule. In each of these scenarios, there is evidence that the employer's reason for acting is not the true reason for its decision.

The best argument in favor of these inferences is that the courts are empowered to create rules necessary to administer statutes. However, such an argument does not hold for very long. None of the doctrines discussed in this article are necessary to carrying out the functions of the federal discrimination statutes, and many of them contradict the core purpose of these statutes, which is to provide workers with a remedy when they face differential treatment at work because of a protected trait. Additionally, the federal discrimination statutes explicitly instruct the courts when the employer should have a defense to liability. For example, Title VII allows an employer to discriminate based on certain protected classes if the class is a bona fide occupational qualification.[89] Thus, the statutes already balance the

89. 42 U.S.C. § 2000e-2(e)(1) (2012).

interests of employers and workers. Adding additional rules that favor employers throws off the balance already written into the statutory regime.

Even if courts could justify the disbelief doctrines as rules of administration, it is unclear what power the courts have to create such rules when they contradict the Federal Rules of Civil Procedure. For example, imagine that a court decided that to properly administer a statute, it needed to create a rule abolishing summary judgment in that subset of cases. Such a rule would be improper because it contradicts the pre-existing rule found in the Federal Rules of Civil Procedure. The disbelief doctrines present the same issue. When courts use the disbelief doctrines to believe or favor one party, they contradict and undermine the existing Federal Rules of Civil Procedure and for this reason are invalid.

The disbelief doctrines contribute to a larger problem with employment discrimination jurisprudence: how far removed judge-made analysis is from the analysis a jury would use if it were asked to decide the case. When a judge is considering a summary judgment motion, the judge is supposed to consider what a reasonable jury might decide given the disputed facts. However, the complex, court-created doctrines that judges use to evaluate discrimination cases frame cases in ways that are far different from how a jury would frame them.

Imagine a case in which Billy, a 50-year-old, fires Tommy, who is 60 years old. Billy fires Tommy two years after he hired him. Tommy asserts that on two occasions, when Tommy first started, Billy stated that older women were "useless and just there to get paid." The employer asserts that the reason Billy fired Tommy is that he violated a work rule relating to using the Internet while on the job. No one has ever been fired for this before, but Billy has also never caught anyone using the Internet at work before. Billy believes that Tommy ordered a pair of shoes from Zappos during work hours. However, Tommy claims that he switched his lunch hour that day and ordered the shoes during lunch.

For a jury, this case likely revolves around credibility and motive. Does the jury believe that Tommy violated a work rule? Does the jury believe that Billy fired Tommy because he violated the rule, or was Billy simply trying to get rid of Tommy because of his age? Do Billy's earlier comments about older women show a bias against older workers generally? The essential inquiries in this case are contested, fact specific, and involve credibility determinations. This is exactly the kind of case that a court should allow a jury to decide.

If the employer requests summary judgment in its favor, the judge will not approach the case in the same way. Over the years, the courts have created layers upon layers of legal analysis that judges use to evaluate cases at summary judgment. The disbelief doctrines are one part of this complex infrastructure.

A judge approaching this case would most likely funnel it through the *McDonnell-Douglas* test. In 1973, the Supreme Court decided the case of *McDonnell Douglas Corp. v. Green.*[90] In that case, the Court first enunciated the three-part burden-shifting framework that is now called the *McDonnell Douglas* test. The Court held that a plaintiff proceeding on a disparate treatment claim based on circumstantial evidence could prove his case through a multi-part framework. The plaintiff is required to establish a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[91]

After the plaintiff establishes a prima facie case, a rebuttable presumption of discrimination arises.[92] The Supreme Court cautioned, however, that the facts required to establish a prima facie case will necessarily vary, depending on the factual scenario of the underlying case.[93]

After a plaintiff makes a prima facie showing, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the allegedly discriminatory decision or action, thereby rebutting the presumption.[94] The plaintiff is then provided the opportunity to show that the employer's stated reason for the employment action was, in fact, pretext and that the plaintiff's protected trait was the real reason for the decision.[95]

In *Texas Department of Community Affairs v. Burdine*, the Court indicated that "the burden of establishing a prima facie case of disparate treatment is not onerous."[96] According to the Court, the prima facie case serves the function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection." [97] For example, in a failure to hire case, the prima facie case should show that the employee possessed the minimum, objective requirements for the job and that the employer was indeed hiring. The Court further explained that if the plaintiff makes a prima facie case, the defendant is required to articulate a legitimate, non-discriminatory reason for its actions to rebut the presumption of discrimination.[98] The defendant's burden, however, is one of production only.[99] After the defendant has

90. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
91. *Id.* at 802.
92. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311–12 (1996).
93. *McDonnell Douglas*, 411 U.S. at 802.
94. *Id.*
95. *Id.* at 804.
96. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).
97. *Id.* at 254.
98. *Id.*
99. *Id.* at 255–56.

articulated a legitimate, non-discriminatory reason, the plaintiff has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision.[100] The Court indicated that the plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[101] The Court held, however, that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[102]

In our age discrimination hypothetical, the summary judgment inquiry will likely focus on whether Tommy can establish the prima facie case, which in many modern iterations would require him to show that similarly situated employees were treated differently. The court also will focus on whether there is evidence that the employer's asserted reason is pretext.

The disbelief doctrines may also be a part of the judge's inquiry. The judge may determine that Billy and Tommy are in the same protected class. The judge may use the same decisionmaker inference, believing that Billy hired Tommy just two years earlier and thus is unlikely to fire him because of his age. The judge may also decide that the employer had an honest belief that Tommy violated the work rule when Billy fired him.

Scholars have already noted the potential problems when judges place themselves in the shoes of a reasonable jury.[103] Federal judges are appointed by the President of the United States and have elite backgrounds and credentials. Almost 75 percent of judges are men[104] and approximately 80 percent of them are white.[105] Juries, on the other hand, include people from more diverse economic and cultural backgrounds. Thus, it is already difficult for a judge to place himself or herself in the shoes of the reasonable jury.

What has received little attention, however, is how court-created jurisprudence within the field of discrimination law also puts federal judges in a completely different analytical frame of reference than the jury. The jurisprudence makes it more difficult for a federal judge to determine what a

100. *Id.*

101. *Id.* at 256.

102. *Id.* at 253.

103. Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759, 771–72 (2009); Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 795 (2002). *See also* Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 671, 681–82 (2012–2013).

104. *Women in the Federal Judiciary: Still a Long Way to Go*, NATIONAL WOMEN'S LAW CENTER 2, n.2 (Feb. 2016), https://nwlc.org/wp-content/uploads/2016/07/JudgesCourtsWomeninFedJud10.13.2016.pdf.

105. Russell Wheeler, *The Changing Face of the Federal Judiciary*, GOVERNANCE STUDIES AT BROOKINGS 1 (Aug. 2009), www.brookings.edu/~/media/research/files/papers/2009/8/federal-judiciary-wheeler/08_federal_judiciary_wheeler.pdf.

reasonable jury might decide because the analytical structures that courts use are so different from the way juries approach the same cases. Juries often are not instructed to use the analytical frameworks used by judges, but rather receive a broad instruction to determine whether a negative action occurred because of a protected trait.[106] Judges often refuse to instruct juries on the disbelief doctrines because they give improper weight to the defendant's view of the facts.[107] Yet, judges continue to use these analytical frameworks themselves to decide whether summary judgment is appropriate. Thus, judges and juries may reach different answers because they are asking different questions.

CONCLUSION

Disbelief doctrines are an important feature of discrimination jurisprudence. Individually, these doctrines are problematic because many of them are factually unsupported and they violate basic tenets around the allocation of responsibility between judges and juries.

It is unclear whether the federal courts had the power to create the disbelief doctrines in the first place. None of the doctrines is found within the text of the federal discrimination statutes. The same decisionmaker and same protected class doctrines cannot arguably be drawn from any reasonable interpretation of the statutes. Many of the instances in which the courts invoke the stray remarks doctrine, the honest belief rule, and the super-personnel department concept are equally problematic. Finally, many of these doctrines contradict Supreme Court precedent. They are in direct tension with the basic rules that govern the proper roles of judges and juries, and yet the courts have never explained under what authority they created them.

Importantly, the disbelief doctrines add another layer to an already complicated employment discrimination jurisprudence. These complex doctrines are most often used by judges when deciding motions, such as a motion for summary judgment. Most alarmingly, the court-created doctrines used by judges are getting further and further removed from how a jury would approach a discrimination case. As a consequence, when judges consider how a reasonable jury would view the evidence, the existing jurisprudence—which includes the disbelief doctrines—might lead those judges down analytical paths that diverge from those chosen by a jury.

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106. *See, e.g.*, Beard v. AAA of Michigan, 593 F. App'x 447, 453 (6th Cir. 2014) (noting it is typically improper to instruct a jury using *McDonnell Douglas*); Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1333 (11th Cir. 1999) (declining to find error in trial court's decision not to instruct jury on *McDonnell Douglas* framework). *See also* Eleventh Circuit Pattern Jury Instruction 4.5.

107. *See, e.g.*, McDole v. City of Saginaw, 471 F. App'x 464, 476 (6th Cir. 2012) (noting no error when district court did not give honest belief jury instruction); Jones v. Nat'l Am. Univ., 608 F.3d 1039, 1048 (8th Cir. 2010) (finding it would be duplicative to provide an honest belief instruction).