It’s Unlawful Age Discrimination—Not the “Natural Order” of The Workplace!

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“Ageism is the last acceptable prejudice in America.”—Bill Maher†

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I. INTRODUCTION

The Age Discrimination in Employment Act (ADEA) \(^2\) “reflects a societal condemnation of invidious bias in employment decisions.” \(^3\) The ADEA, along with Title VII of the Civil Rights Act of 1964, \(^4\) is “part of an ongoing congressional effort to eradicate discrimination in the workplace, . . . [and] a wider statutory scheme to protect employees in the workplace nationwide.” Yet, fifty years after the ADEA took effect, \(^5\) age

\(^{5}\) The ADEA first applied to private employers with 25 or more employees in June 1968. See Pub. L. No. 90-202, § 15, 81 Stat. 607 (codified as amended at 29 U.S.C. §630(b) (2012)). The 1974 amendments to the ADEA lowered the threshold number of employees for coverage of a private employer
discrimination is still common and seems to be simply accepted by society, employers and judges.

Why is that? One overarching reason is that age discrimination is often viewed differently from other types of discrimination, which allows it to persist and be tolerated in today’s workplaces. This reason is based on several assumptions. First, too many people assume, if not believe, that age affects ability and still make decisions based on that assumption. Second, decisionmakers, meaning employers and judges, seem to be stuck in the 1960s in their views about older workers, discrimination, and the “natural order” of the workplace to move out the old to make room for the young. Third, some say that because we all age, age discrimination doesn’t present the same “us against them” dichotomy present in other forms of discrimination that pits protected groups against others. Some say age discrimination is “different” in that it doesn’t have a history of prejudice or intolerance like the histories of discrimination based on race or national


8. The term “older workers” refers to those covered by the ADEA, specifically those age 40 and older. 29 U.S.C. §631(a) (2012).


Collectively, these assumptions lead to judicial skepticism that age discrimination even happens or is harmful. Each of these assumptions has serious flaws that will be examined in this article. More specifically, these flawed and outdated assumptions about age discrimination infect three judge-made rules that effectively undermine the ADEA’s goal to protect workers from age biased decisions in the workplace. While applied generally to discrimination claims, these rules are used expansively to routinely dismiss ADEA claims. First, the same-actor rule, which originated in a 1991 ADEA case, creates an inference of no discrimination if an employee was hired and fired by the same person within a relatively short time span. Second, the same-group rule raises an inference of no discrimination when the actor taking the adverse action is a member of the same protected class as the employee. Third, the stray remarks doctrine operates to discount or dismiss evidence in the form of discriminatory comments.

These three judge-made doctrines are contradicted by decades of social science research and are contrary to the court’s obligation to draw inferences favoring the non-moving party under Federal Rule of Procedure Rule 56. This article proposes that it is time to update our assumptions about aging, work, and discrimination to reflect a contemporary understanding of today’s workers, workplaces, and biases. It recommends arguments for worker advocates and counsel in ADEA cases to show how these judge-made doctrines rely on outdated and flawed views of aging, work, and discrimination, undermining their validity. It also recommends analogizing age discrimination to traditional notions about gender roles and sexist stereotypes to help judges and employers recognize unlawful age discrimination in the workplace.


12. Victoria A. Lipnic, U.S. Equal Employment Opportunity Commission, The State of Older Workers and Age Discrimination in the US 50 Years After the Age Discrimination in Employment Act 28 (2018) (internal citations removed) (“While most older workers say they have seen or experienced age discrimination, only 3 percent report having made a formal complaint to someone in the workplace or to a government agency.”).


15. See Slattery v. Swiss Reins. Am. Corp., 248 F.3d 87, 94 (2d Cir. 2001) (affirming summary judgment based in part on evidence that plaintiff’s supervisors were also members of the protected class).

II. STUCK IN A 1960S FRAMEWORK THAT VIEWS AGE DISCRIMINATION AS DIFFERENT AND ACCEPTABLE

Skepticism of age discrimination relies on the following assumptions: (1) that age actually impacts ability, making age discrimination rational; (2) that the “natural order” of the workplace requires moving older workers out to make room for younger workers; and (3) that Congress’s decision not to include age in Title VII meant that age discrimination was different and acceptable.

The first assumption is contradicted by decades of research and experience that age does not predict performance on the job. The second assumption relies on antiquated views of hierarchical career and workplace structures that do not fit most of today’s workers or workplaces. Finally, the third assumption is flawed because Congress’s enactment of a separate law to prohibit age discrimination in the workplace was intended to ensure robust enforcement, not to relegate the ADEA to second-class status.

A. Outdated Views of Age and Aging

The views that age as a protected class is different from other protected classes and that age discrimination is different from other related discrimination are premised in part on two findings of the 1965 Wirtz Report. Congress commissioned the report as part of the 1964 Civil Rights Act to study the nature and extent of age discrimination in lieu of including a prohibition against age discrimination in the 1964 Act.

17. See WIRTZ REPORT, supra note 11, at 1089–90.

18. “The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.” Pub. L. No. 88-352, 78 Stat. 265 (codified as amended at 42 U.S.C. § 2000e-14 (2012)).

19. A prohibition on age discrimination was in a 1962 bill that was a precursor to Title VII, H.R. 10144, which prohibited “arbitrary employment discrimination because of race, religion, color, national origin, ancestry or age.” H.R. 101144, 87th Cong. (1962); 108 CONG. REC. 2629, 2707 (1962). However, both houses of Congress ultimately rejected amendments to include age as part of Title VII. See 110 CONG. REC. 2596–99 (1964) (House); 110 CONG. REC. 9911–13 (1964) (Senate). ADEA historians have suggested that the inclusion of age as a prohibition in Title VII was a strategic move to defeat passage, similar to the lore surrounding the addition of sex as a class protected by Title VII. See DANIEL P. O’Meara, PROTECTING THE GROWING NUMBERS OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 11 (1989) (noting the inclusion of age in the Civil Rights Act was “a largely disingenuous effort”); DISPARATE IMPACT ANALYSIS AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT, 64 MINN. L. REV. 1038, 1053 (1984); see generally Alfred W. Blumrosen, Interpreting the ADEA: Intent or Impact, in AGE DISCRIMINATION IN EMPLOYMENT ACT: A COMPLIANCE AND LITIGATION MANUAL FOR LAWYERS AND PERSONNEL PRACTITIONERS 68, 106–15 (1982) (explaining the ADEA has the same language as Title VII and should be used to prohibit “only those actions based on an intent to discriminate because of age”).
provided the foundation for Congress’s consideration of a federal law to prohibit age discrimination, namely the ADEA. First, the Wirtz Report stated that at some age in some jobs, age likely affected ability, whereas ability is unrelated to one’s race, national origin, or sex. Second, the Wirtz Report found that discrimination based on age was different because it did not derive from historical origins or feelings of dislike and intolerance that originated from outside of the workplace.

In the 1960s, it was commonly assumed that age impacted physical capability. Indeed, employers cited the effect of age on physical ability as the most prominent single reason for the then-pervasive age limits on jobs. Yet most employers also admitted that they had no factual support for a correlation between the selected age limit and physical capability to justify such age limits on jobs. These age-related bans generally occurred in jobs that were not physically demanding and without any consideration of an individual older worker’s abilities.

Based on these findings in the Wirtz Report, Congress designed the ADEA to prohibit employers from making age-related assumptions about an individual’s capabilities in any employment decision. The ADEA requires an assessment of individual abilities and qualifications for a job without regard to age. The first regulations implementing the ADEA in 1968 explicitly rejected the use of age-related assumptions about physical ability. Congress permitted employers to justify the use of age as a qualification for

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20. “The Nation has faced the fact – rejecting inherited prejudice or contrary conviction – that people’s ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth.” WIRTZ REPORT, supra note 11, at 1. In contrast, the Wirtz Report found that age discrimination occurred based on assumptions that age related to ability to do a job both “when there is in fact no basis for these assumptions” and “when there is in fact a relationship between his age and his ability to perform the job.” Id. at 2 (emphasis in original).

21. Id. at 5.

22. A 1965 study of over 500 employers included in the Wirtz Report revealed that arbitrary age limits for hiring and firing were pervasive. Three out of 5 employers surveyed used age limits in hiring. Workers age 45 and older were barred from a quarter of all jobs, those 55 and older were barred from half of all jobs, and most jobs were barred to workers age 65 and older. WIRTZ REPORT, supra note 11, at 6.

23. Employers reported no factual basis for age limits in 70 percent of the cases studied. Many other employers hired and retained older workers for the same jobs at the same ages for which these employers barred them. WIRTZ REPORT, supra note 11, at 8.

24. Id.


26. The threshold purpose of the ADEA is to “promote employment of older persons based on their ability rather than age.” 29 U.S.C. § 621(b).

27. The Department of Labor regulations construed the ADEA to prohibit practices that assumed “every employee over a certain age in a particular job usually becomes physically unable to perform the duties of that job.” 29 C.F.R. § 860.103(f)(1)(iii) (1970).
a job only when the employer could establish that age was a bona fide occupational qualification.28

The legislative histories of the ADEA and its amendments are replete with examples of the common view that age impacted ability29 and Congress’s efforts to put forth facts and research to refute unfounded assumptions about age and ability.30 Yet, for the first twenty years of the ADEA, Congress effectively perpetuated the belief that age affected ability by setting an age cap on the ADEA’s protections that permitted employers to deny jobs to the oldest workers and to force workers to retire based solely on age.31 When Congress finally gathered the political will to protect all workers age forty and older in the 1986 amendments to the ADEA,32 it cited both scientific33 and public support34 for the fact that job performance is not correlated with age.35

Decades of research document that age does not predict ability or performance.36 It is way past time to put this outdated notion to rest just as

28. The ADEA and Title VII apply the same standard for demonstrating a bona fide occupational qualification. See W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 416–17 (1985) (holding that an employer must show that no person of the class is qualified or otherwise show that it is impossible or highly impractical to assess the fitness of employees in the protected class on an individual basis).

29. “[T]here is simply a widespread irrational belief that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.” 113 CONG. REC. 31253, 31254 (1967) (remarks of Sen. Javits).


31. “The Act’s current age limitation unfairly assumes that age alone provides an accurate measure of an individual’s ability to perform work.” Id.


33. A 1985 study by psychologists David Waldman and Bruce Avolio, cited in both the Senate and House Reports, “found that contrary to popular belief, older workers can be just as productive as their younger counterparts” and found little support for the notion that ability to perform a job declined with age. Working Americans: Equality at Any Age, Hearing Before the Special Comm. on Aging, 99th Cong. 2d Sess. (1986); S. Hrg. 99-826, 107–08 (1986).


35. Throughout the legislative history of the ADEA, one empirical fact is repeatedly emphasized: the process of psychological and physiological degeneration caused by aging varies with each individual. “The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age.” [note omitted] As a result, many older American workers perform at levels equal or superior to their younger colleagues. W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 409 (1985).

36. Id. See also Amending the Age Discrimination in Employment Act Amendments of 1977, S. REP. 95-493, 95th Cong. 1st Sess. 2–4 (1977) (“Scientific research now indicates that chronological age alone is a poor indicator of ability to perform a job.”); Schaie, The Longitudinal Study: A 21-year Exploration of Psychometric Intelligence in Adulthood, in LONGITUDINAL STUDIES OF ADULT PSYCHOLOGICAL DEVELOPMENT, 33 (K. W. Schaie, ed. 1983) (studies show no decline in average intelligence at until age 80); McEvoy & Cascio, Cumulative Evidence of the Relationship between Employee Age and Job Performance, 74 J. OF APPL. PSYCH. 11 (1989) (finding age bears no relationship
we have put aside the notion that gender determines ability. The effects of aging on both cognitive and physical abilities vary widely from person to person and among those of the exact same age, which makes age a useless predictor of ability. Older people can and do out-perform younger people due to their skills, not their ages. Differences in physical ability are dependent on genetics, lifestyle, fitness, and health status, rather than age.

If the facts are clear and the law requires that each individual be judged based on ability, why are the stereotypes about older workers still so common and accepted? In part, decisionmakers are stuck in a 1960s view of the workplace and how discrimination operates.

B. Outdated Views of the Natural Order of the Workplace

When the ADEA was enacted in the 1960s, it was common for a worker to have spent his entire work life at one company, working his way up a hierarchical corporate ladder until retirement. In this bygone era, the natural order of the workplace was viewed as older workers managing younger ones, and younger workers ultimately replacing older workers when they retired or were forced out.

Many of today’s workers and workplaces simply don’t align with these outdated views. The average tenure at one company of today’s older workers...
is only ten years and is less than three years for younger workers.\textsuperscript{42} Workplaces have flatter hierarchies and workplace relationships are becoming less standardized.\textsuperscript{43} Yet we continue to see courts relying on antiquated views of a natural order in the workplace to discount evidence of age discrimination when older workers are pushed out and replaced by younger workers.

For example, in two cases, Fourth Circuit Judge J. Harvie Wilkinson III held that an employer’s comments were not evidence of age discrimination but merely a reflection of a natural order of generational replacement.\textsuperscript{44} In \textit{Birkbeck v. Marvel Lighting},\textsuperscript{45} he found that the statement “there comes a time when we have to make way for younger people” was a “truism” and merely a “fact of life.”\textsuperscript{46} In \textit{Waters v. Logistics Management Institute},\textsuperscript{47} Judge Wilkinson characterized the remark that “[p]eople with gray hair are probably not the future” made by the company CEO at a town hall six months prior to a reorganization in which a fifty-two-year old was terminated as “an innocuous remark reflecting the uncontroverted fact that the future of many companies rests upon bringing in a stream of younger workers.”\textsuperscript{48}

Other courts have also used this view that the natural order of generational replacement excuses consideration of age in employment decisions to dismiss ADEA claims. For example, in \textit{Sharp v. Aker Plant Services, Inc.},\textsuperscript{49} a district court deemed a supervisor’s statement that a younger employee was being retained because he would be able to work for the defendant longer was “nondiscriminatory succession planning.”\textsuperscript{50} After he was selected for layoff, the fifty-two-year-old employee had the following exchange with his supervisor:

\begin{itemize}
  \item \textbf{EMPLOYEE TENURE IN 2018, BUREAU OF LAB. STAT., U.S. DEP’T OF LAB., USDL 18-1500 at 1, https://www.bls.gov/news.release/pdf/tenure.pdf (“The median tenure of workers ages 55 to 64 (10.1 years) was more than three times that of workers ages 25 to 34 (2.8 years”).}
  \item \textit{The court held that the statement made by the plaintiffs’ supervisor two years prior to their termination was too remote in time to be relevant and also not probative because it was just one statement. Birkbeck, 30 F.3d at 510, 512.}
  \item \textit{2018 U.S. App. LEXIS 3122, *11 (4th Cir. 2018).}
  \item \textit{726 F.3d 789 (6th Cir. 2013).}
  \item \textit{Sharp v. Acker Plant Servs., Inc., 726 F.3d 789, 794 (6th Cir. 2013).}
\end{itemize}
Supervisor: “[Y]ou want somebody that will give you, you know, ten or so years after the last—the other person leaves.”
Employee: “I’ve got another [fifteen] years to go before I retire.”
Supervisor: “[W]e want someone younger.”

Even with such an explicit statement admitting that the employee’s older age was a reason for the employer’s termination decision, the district court did not consider this to be strong circumstantial evidence of age discrimination and granted summary judgment to the employer. On appeal, the Sixth Circuit reversed, finding that the comment constituted direct evidence of age discrimination in violation of Kentucky’s age discrimination law, which follows ADEA case law.

Similarly, in *Kirkland v. New York City Transit Authority*, the district court granted summary judgment to the employer, finding the plaintiff’s evidence of age discrimination insufficient. The plaintiff’s unit director, who was not her direct supervisor, made the following comment to her when he selected her for termination in a reduction-in-force (RIF):

Director: “Can you retire?”
Employee: [After she composed herself from the shock of his question, she replied] “With a penalty, I am not of the age to retire, and I don’t want to retire.”
Supervisor: “People who are eligible to retire should retire and make room for the younger generation.”

The Second Circuit reversed in *Martinez v. New York City Transit Authority*, viewing the same words as “an open declaration of bias” that “reflected a highly discriminatory attitude” expressed “at the time of the RIF and referred directly to the particular employee’s tenure . . . in negative terms.”

Other comments by company leaders urging the ouster of older workers have been viewed by district courts as irrelevant in ADEA cases. For example, a vice-president’s statements that the company “is run by white-haired old men waiting to retire,’ and ‘[t]his must change’” and that those who lost their jobs would be replaced by “young college graduates at less money” were deemed “too abstract, in addition to being irrelevant and prejudicial” by the district court in *Scott v. Goodyear Tire & Rubber Co.*
sharp contrast, the Sixth Circuit viewed these comments by a leader of the company as inculpatory evidence of age discrimination.\textsuperscript{58}

Outdated views of aging permeate negative stereotypes about older workers. For example, some continue to assume that younger workers are a better investment than older workers because younger workers will stay with a company longer than older workers, who are likely to retire in their fifties or sixties.\textsuperscript{59} As the Seventh Circuit explained in \textit{Filar v. Board of Education}, it is the very essence of age discrimination for employers to move older workers out of the workforce and replace them with younger workers based on such assumptions: “employers might think that younger workers can do the same work as older workers at a lower price, whether measured in time or money. Giving effect to these assumptions by swapping the older with the younger worker would be an act of age discrimination.”\textsuperscript{60}

This stereotype denies older workers equal opportunity when it’s applied to older workers seeking a job, a promotion, or training. Not only is it illogical to assume that someone applying for a job is likely to leave it within a short time to retire, but the assumption that younger workers will stay longer is also simply contrary to the average work patterns of Millennials,\textsuperscript{61} who typically hop from one job to another in fewer than three years.\textsuperscript{62}

The assumption that most workers in their fifties or sixties will soon retire is another flaw of this stereotype. Today, more than two-thirds of Baby Boomers\textsuperscript{63} and eighty-five percent of GenXers\textsuperscript{64} expect to work until age seventy.\textsuperscript{65}

\textsuperscript{58} Id.

\textsuperscript{59} “In the past, companies believed younger workers were a better investment because they held the promise of staying with the company throughout their careers, and often for 20 or 30 years. It is no longer the case. . . . Millennials are leaving their employers, on average, after 3 years.” \textit{The ADEA 50 – More Relevant Than Ever, Meeting of the U.S. Equal Employment Opportunity Commission} (June 14, 2017) (written Testimony of John Challenger, CEO, Challenger, Gray & Christmas, Inc.), https://www.eeoc.gov/eeoc/meetings/6-14-17/challenger.cfm.

\textsuperscript{60} \textit{Filar v. Bd. of Educ.}, 526 F.3d 1054, 1065 n.4 (7th Cir. 2008).


\textsuperscript{62} In one survey, ninety-one percent of Millennials reported that they expect to stay in a job for less than three years, and reported having an average of nine jobs between ages eighteen and thirty-two. \textit{Multiple Generations @ Work Survey}, FUTURE WORKPLACE LLC, http://futureworkplace.com/wp-content/uploads/MultipleGenAtWork_infographic.pdf (last visited Dec. 8, 2018).

\textsuperscript{63} The Baby Boom generation, those born from 1946 to 1964, was the largest generation ever in US history, reaching 78.8 million in 1999. Fry, \textit{supra} note 61.

\textsuperscript{64} GenXers are sandwiched between the Boomer and Millennial generations as those born from 1965 to 1980. \textit{Id.}

\textsuperscript{65} 78 percent of Baby Boomers say they expect to continue working until age seventy. \textit{Future Workplace LLC}, \textit{supra} note 62. 67 percent of workers fifty and over say they plan to work past age sixty-five or do not plan to retire. \textit{Transamerica Center for Retirement Studies, The Current State of Retirement: Pre-Retiree Expectations and Retiree Realities} 8 (2015),
This view of the natural order of generational replacement is also premised on an outdated hierarchical structure of career progression in the workplace. It still sees an older worker as a “company man” who spent his career working his way up at one company. But today’s older worker is just as likely to be a woman as well as a man. And today’s older workers typically have had many jobs over their careers with lateral movement and even changed careers.

This view of the natural order sees generational replacement as a zero-sum equation—in essence that older workers have to move out of the work force to make room for younger workers based on a finite number of jobs, known as the lump-of-labor theory. However, research refutes this notion, as there is simply no evidence that the employment of older workers reduces employment opportunities or the pay of younger workers. Even during the Great Recession of 2008, research found “no evidence that Boomer employment negatively affected the labor force activity of the young.”

While at least some circuit courts are correcting district courts’ reliance on outdated assumptions about a natural order of generational replacement justifying terminations of older workers, the persistence of this assumption undermines the very purposes of the ADEA. If the justification of a natural order was suggested in a sex discrimination case, it would be resoundingly rejected. But one could argue that the traditional sex-segregated jobs and paternalistic laws that limited the type of work women could engage in were the natural order of labor and the economy at a different time in our history.


70. Id. at 2.

71. For example, in Bradwell v. Illinois, 83 U.S. 130, 141 (1872), the Supreme Court sanctioned the denial of a law license to a woman based on its view that “the natural and proper timidity and delicacy which belongs to the female sex evidently unfit[s] it for many of the occupations of civil life.” In Goesaert v. Cleary, 355 U.S. 464 (1948), the Supreme Court upheld a Michigan law that prohibited women from...
Title VII helped change that natural order by prohibiting employment decisions that resulted from sexist stereotyping\textsuperscript{72} and opened up opportunities for women in all occupations\textsuperscript{73} and all kinds of work conditions.\textsuperscript{74} Shouldn’t the ADEA have done the same by now to change what is still viewed as the natural order for older workers?

\textit{C. Outdated View of Discrimination}

Also underlying courts’ skeptical view of age discrimination is the view that age discrimination is different because its origins and motivations fundamentally differ from the origins and motivations of other forms of discrimination. While it is true that age discrimination does not have a history of prejudice and hatred, Congress made the historical origins of the discrimination irrelevant when it used the same words to prohibit age discrimination as it used to prohibit discrimination based on race or sex.\textsuperscript{75} It is also an antiquated view of discrimination. Today, discrimination typically derives from stereotyping, revealing more similarities than differences in the motivations driving age discrimination and other forms of discrimination.\textsuperscript{76}

\textsuperscript{72} The Supreme Court has recognized that “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” because Title VII “strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707, n.13 (1978).

\textsuperscript{73} Job ads in the 1960s were segregated by sex and many office cultures were rife with sexual stereotyping. For example, women who wanted to be writers or editors at Newsweek were relegated to dead-end researcher positions. They filed the first sex discrimination class action under Title VII of the Civil Rights Act of 1964 for discriminatory hiring and promotions. LYNN POVICH, THE GOOD GIRLS REVOLT: HOW THE WOMEN OF NEWSWEEK SUED THEIR BOSSES AND CHANGED THE WORKPLACE 85 (2012).

\textsuperscript{74} In United Automobile Workers v. Johnson Controls, Inc., the Supreme Court recognized that Title VII effectively outlawed protective legislation and employer policies that denied women employment opportunities. 499 U.S. 187, 211 (1991). The employer’s policy had precluded women of childbearing age, except those who could document infertility, from jobs subject to lead exposure. Id. The Court held “[i]t is no more appropriate for the courts than it is for individual employers to decide whether a woman’s reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make.” Id.

\textsuperscript{75} “Except for substitution of the word ‘age’ for the words ‘race, color, religion, sex, or national origin,’ the language of that provision in the ADEA is identical to that found in §703(a)(2) of the Civil Rights Act of 1964 (Title VII) . . . [W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both.” Smith v. City of Jackson, 544 U.S. 228, 233 (2005).

\textsuperscript{76} See Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment, 94 CALIF. L. REV. 997, 1004 (2006) (social science research shows that discriminatory attitudes and behavior still exist today, and a large percentage of bias, prejudice, and discriminatory behavior is due to unconscious factors).
Traces of the view that age is different based on its historical origins come from the 1965 Wirtz Report. It characterized discrimination based on age as grounded in assumptions about ability.\textsuperscript{77} In contrast, it characterized discrimination based on race, national origin, and religion as deriving from “dislike and intolerance.”\textsuperscript{78} Supreme Court cases relying on this assumption in the Wirtz Report have perpetuated this flawed narrative.\textsuperscript{79}

Flowing from this view of discrimination as grounded in dislike and hostility is an understanding of discrimination as a “we vs. them” relationship that pits classes against one another based on protected status. Some judges have discounted evidence of age discrimination by suggesting that age discrimination does not involve this same kind of “we vs. them” adversarial relationship. For example, in \textit{Birkbeck v. Marvel Lighting Corp.},\textsuperscript{80} the court reasoned that “statements about age may well not carry the same animus as those about race or gender. Unlike race or gender differences, age does not create a true we/them situation—barring unfortunate events, everyone will enter the protected age group at some point in their lives.”\textsuperscript{81}

More recently, in the 2018 oral argument in \textit{Waters v. Logistics Management Institute},\textsuperscript{82} Judge Wilkinson employed similar reasoning to question the plaintiff’s evidence of age discrimination:

\begin{quote}
No, age is different because we are all going to get old . . . but when you’re talking about gender or race or ethnicity those are immutable characteristics as the Supreme Court has said. But it’s a little bit different because all of us are going to be older or elderly one day. So, you know, it’s odd in this way because you’re positing we are discriminating against our future selves which is an odd kind of thing.\textsuperscript{83}
\end{quote}

Rarely do we see such candor from decisionmakers that explains why age discrimination is discounted and deemed acceptable. Judge Wilkinson’s candor reflects a common but significantly flawed and outdated view of age discrimination and how bias operates. This can be challenged with the following arguments.

First, Congress made no distinction between age and race or sex discrimination when it designed the prohibitions of the ADEA to be identical to those of Title VII.\textsuperscript{84} The plain language of the ADEA should instruct the

\textsuperscript{77} \textit{WIRTZ REPORT}, supra note 11, at 5.
\textsuperscript{78} \textit{Id.}
\textsuperscript{80} 30 F.3d 507 (4th Cir. 1999).
\textsuperscript{81} Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511–12 (4th Cir. 1999).
\textsuperscript{84} “[T]he prohibitions of the ADEA were derived \textit{in haec verba} from Title VII.” \textit{Lorillard, Inc. v. Pons}, 434 U.S. 575, 584 (1978); \textit{see also} Smith v. City of Jackson, 544 U.S. 228, 233 (2005).
courts to apply the same legal standards used in Title VII cases. The ADEA embodies Congress’s decision that there is no time at which one worker must make way for another because of age.\textsuperscript{85}

Second, aging does in fact create a “we/them” dichotomy, contrary to Judge Wilkinson’s view. It is actually “common and natural” for older supervisors to engage in a phenomenon known as “not me” whereby they exempt themselves from the negative aspects of aging and ageist stereotyping, as the Seventh Circuit recognized in \textit{Kadas v. MCI Systemhouse Corp.}\textsuperscript{86} Rejecting the employer’s argument that it was unlikely that the fifty-six-year-old supervisor engaged in age discrimination in terminating a fifty-four-year-old, the court acknowledged a “we vs. them” dichotomy in explaining why ageist motive was likely even when the supervisor was an older worker:

For it is altogether common and natural for older people, first, to exempt themselves from what they believe to be the characteristic decline of energy and ability with age; second, to want to surround themselves with younger people; third to want to protect their own jobs by making sure the workforce is not too old, which might, if “ageist” prejudice is rampant, lead to RIFs of which they themselves might be the victims; and fourth, to be oblivious to the prejudices they hold, especially perhaps prejudices against the group to which they belong.\textsuperscript{87}

Third, the prohibitions of Title VII and the ADEA do not vary depending on whether the protected characteristics are immutable. However, it should be noted that age is actually immutable as a characteristic that is not subject to choice or change.\textsuperscript{88} Once you reach a certain age, there is no going back.

Fourth, stereotypical assumptions about the competencies of a protected group are inherent in discriminatory motives,\textsuperscript{89} even when a history of malice and intolerance also drove prejudices.\textsuperscript{90} Discrimination often involves negative stereotypes about the abilities of workers based on their membership in a protected group. For example, only fifty-nine percent of Southern White Americans believed that “Negroes are as intelligent as white people” in a 1956 study.\textsuperscript{91}

\begin{thebibliography}{99}
\bibitem{85} The ADEA initially permitted mandatory retirement ages at 65 and older by limiting the ADEA’s coverage to those age 40 to 64. (“The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.” Pub. L. No. 90-202, § 12 (1967)). In the 1986 amendments to the ADEA, Congress abolished mandatory retirement for most workers reasoning “[i]t is a question of whether we as a society are willing to deny older Americans their basic rights to remain as productive members of society that is insured to every other person. The overwhelming majority of Americans, regardless of age, have decided that the answer to that question must be ‘no’. Mandatory retirement based on age must be eliminated.” \textit{Age Discrimination in Employment Amendments of 1986, supra note 32; H.R. REP. NO. 99-756, at 7–8 (1986).}
\bibitem{86} 255 F.3d 359, 361 (7th Cir. 2001).
\bibitem{87} \textit{Id.}
\bibitem{88} \textit{See} Howard C. Eglit, \textit{Age in American Society and in the American Workplace, in Age Discrimination I, 1-1 to 1-12 (1994).}
\bibitem{89} For example, only fifty-nine percent of Southern White Americans believed that “Negroes are as intelligent as white people” in a 1956 study. \textit{Bruno Bettelheim & Morris Janowitz, Social Change and Prejudice: Including Dynamics of Prejudice I (1964).}
\bibitem{90} \textit{Id.}
\end{thebibliography}
It may have been politically expedient in the 1965 Wirtz Report to omit views held at that time about inferior ability based on race or ethnicity, but this omission in the Wirtz Report undermines a fundamental premise of its conclusion that age discrimination was different from other forms of discrimination.

Another fundamental flaw in the Wirtz Report’s conclusion that age discrimination is different is its failure to compare age discrimination to sex discrimination. Sex discrimination, like age discrimination, often results from stereotypes about women’s abilities and is based on assumptions about the appropriate roles of women in the workplace and society. In the 1960s, it was commonly believed that gender determined one’s abilities, interests, and qualifications—just like age.

The history of sex discrimination in this country has been grounded in paternalistic and protectionist laws, policies, and practices that viewed women as inferior. If the origins of age discrimination premised on a lack of ability made it “different,” as the Wirtz Report concluded, then the similar origins of sex discrimination would logically make it “different” as well. But arguing that such a difference means sex discrimination should be more acceptable than race discrimination seems preposterous today because Congress used the same words to prohibit sex discrimination that it used to prohibit discrimination because of race, national origin, and religion.

91. Id.

92. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1990); L.A. Dept. of Water and Power v. Manhart, 435 U.S. 702, 708 (1978) (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”). In Los Angeles Dept. of Water and Power v. Manhart, the Supreme Court held that Title VII prohibited a requirement that women make greater pension contributions than men, even though it was based on the accurate assumption that women generally live longer. Manhart, 435 U.S. at 708. The Court noted that “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,” even those that were true for the class. Id. at 708 n.13. “[E]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.” Id. at 708.

93. Women were relegated to “women’s” jobs, viewed as the “weaker” sex, and not deemed fit for certain jobs. A 1969 Harvard Law Review article notes that “experience teaches that biological differences between the sexes are often related to performance.” Developments in the Law – Equal Protection, 82 HARV. L. REV. 1159, 1174 n.61 (1969). Sex-segregated jobs were common in the 1960s and only slightly declined after the passage of Title VII. See Andrea H. Beller, Trends in Occupational Segregation by Sex and Race, 1960-1981, in SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES 11, 11 (Barbara F. Reskin ed. 1984).

94. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973) (describing statutes “laden with gross, stereotyped distinctions between the sexes”).

95. Wirtz Report, supra note 11, at 5.

96. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits sex discrimination in the same prohibition of race discrimination: “It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual
This leads to the next assumption used to argue that age discrimination is different and acceptable: Congress didn’t include age in Title VII but rather placed it in a separate and weaker law because age is different.

**D. Congress Designed the ADEA to Ensure Robust Enforcement and Protections Mirroring Title VII.**

Those arguing that the ADEA is different from Title VII infer too much from the congressional decision to make the ADEA a separate statute from Title VII with the Department of Labor (DOL) as the initial enforcement agency. The legislative history of the ADEA does not support any inference that these congressional choices meant that the protections against age discrimination were meant to be weak or that the ADEA was to be narrowly enforced. To the contrary, Congress’s goal was to ensure that age discrimination was prohibited with the same force and effect as Title VII’s prohibitions and that enforcement of the ADEA was vigorous.

**1. Congress Chose the DOL to Enforce the ADEA to Provide Robust Enforcement**

The argument that the ADEA was intended to be weaker than Title VII because Congress chose the Department of Labor (DOL) rather than the U.S. Equal Employment Opportunity Commission (EEOC) to enforce the law is easily dismissed by the ADEA’s legislative history. Congress placed the ADEA under the authority of the DOL rather than the EEOC because Congress believed enforcement by the DOL would be more efficient and rigorous than what the overburdened EEOC could provide given the DOL’s extensive experience enforcing wage and hour laws. In 1967, Congress was concerned that the EEOC was under-resourced to handle enforcement of the ADEA, given the “lengthy EEOC charge process[] backlogs” and “the possibility that age discrimination enforcement would be neglected in favor of other forms of discrimination.”

The DOL had enforcement authority for the ADEA for just over ten years. In 1978, the Carter Administration recognized that the ADEA, as a civil rights statute with the same prohibitions as Title VII, should be enforced...
by the EEOC along with Title VII and transferred enforcement authority for the ADEA to EEOC.\footnote{Reorganization Plan No. 1, of 1978, 43 Fed. Reg. 19,807, § 2 (Feb. 23, 1978); Exec. Order No. 12,144, 44 Fed. Reg. 37193 (June 22, 1979).} One would suppose that any inference about Congress’s decision not to give ADEA enforcement authority to the EEOC in 1967 would have been laid to rest when such authority was transferred to the EEOC. Moreover, since the EEOC has enforced the ADEA along with Title VII for most of the ADEA’s history, the notion that the statute’s origin at the DOL fixed in perpetuity an assumption that age discrimination is different is simply implausible.

2. The ADEA’s Prohibitions are In Haec Verba to Title VII’s Prohibitions

As the Supreme Court has made crystal clear, it is the text of the statute that determines its interpretation, not the principle concerns of legislators at the time the law was enacted.\footnote{See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).} In the ADEA, Congress used the exact same words to prohibit employers from using age in making employment decisions as it used in Title VII of the Civil Rights Act of 1964 to prohibit discrimination based on race, color, religion, sex, or national origin.\footnote{“[T]he prohibitions of the ADEA were derived in haec verba from Title VII.” Lorillard, Inc. v. Pons, 434 U.S. 575, 584 (1978). The Court cited to both prohibitions in Title VII § 703(a)(1) and (2), 42 U.S.C. § 2000e-2(a)(1), (2), in comparing the almost identical language in the ADEA’s prohibitions §§ 4(a)(1)-(2), 29 U.S.C. §§ 623(a)(1)-(2). Id. at 584 n.12. See also Smith v. City of Jackson, 544 U.S. 228, 233–34 (2005) (citing to Lorillard, 434 U.S. at 584).} Given the explicit language of the ADEA’s prohibitions, there is no basis to infer that age discrimination should be deemed more acceptable due to its placement in a separate statute. Indeed, Congress’s decision to model the ADEA on Title VII’s prohibitions is indicative of Congress’s view that the ADEA shares the same purposes and should have the same application, force, and effect as Title VII.\footnote{See Lorillard, 434 U.S. at 584; Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).}

For about the first three decades of the ADEA, the Supreme Court repeatedly recognized that the ADEA’s prohibitions were taken verbatim from Title VII and emphasized the similar and shared goals of the two statutes. In two decisions in the late 1970s, \textit{Lorillard, Inc. v. Pons}\footnote{434 U.S. 575 (1978).} and \textit{Oscar Mayer & Co. v. Evans},\footnote{441 U.S. 750, 756 (1979) (ADEA and Title VII share common purpose).} the Supreme Court acknowledged that there “are important similarities between the two statutes, to be sure, in their aims: the elimination of discrimination from the workplace—and in their substantive prohibitions.”\footnote{Lorillard, 434 U.S. at 584; Oscar Mayer, 441 U.S. at 756 (ADEA and Title VII share common purpose).} In two 1985 decisions interpreting the ADEA’s
bona fide occupational qualification (BFOQ) provision,\textsuperscript{106} which is essentially identical to Title VII’s BFOQ provision,\textsuperscript{107} the Supreme Court held that interpretations of Title VII are to be applied with “equal force” to the ADEA’s substantive provisions.\textsuperscript{108} In the 1990s, the Supreme Court conveyed its view of the import of the ADEA as part of the national effort to eradicate workplace discrimination:

The ADEA, enacted in 1967 as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflects a societal condemnation of invidious bias in employment decisions. The ADEA is but part of a wider statutory scheme to protect employees in the workplace nationwide.\textsuperscript{109}

But more recent ADEA Supreme Court cases over the past decade and a half have disregarded longstanding precedent of the shared purposes and prohibitions of the ADEA and Title VII, relying instead on the finding of the 1965 Wirtz Report that age discrimination was different to interpret the ADEA differently from Title VII.\textsuperscript{110}

In \textit{General Dynamics Land Systems, Inc. v. Cline}, the Supreme Court held that the term “age” in the ADEA should be construed to mean “older age” based on “social history,” with the Wirtz Report playing a significant role in the construct of “social history.”\textsuperscript{111} While the Court’s conclusion may not seem significant, its analysis of the term “age” diverged dramatically from Title VII precedent that had previously interpreted the term “race” in Title VII based on its plain and common meaning to prohibit discrimination against any race.\textsuperscript{112} In \textit{General Dynamics}, the Court declined to give the term “age” the plain and common meaning of “chronological age.”\textsuperscript{113}

\begin{itemize}
  \item \textsuperscript{106} The BFOQ affirmative defense permits employers to explicitly use age to limit employment opportunities only if the employer could demonstrate that age was a bona fide occupational qualification reasonably necessary to the operation of the business. 29 U.S.C. § 623(f)(1) (2012).
  \item \textsuperscript{107} Title VII’s BFOQ affirmative defense permits employers to explicitly use sex, national origin, or religion as a basis for employment or admittance to training programs but only if the employer can demonstrate that the protected status is a bona fide occupational qualification reasonably necessary to the operation of the business. 42 U.S.C. § 2000e-2(e)(1). Title VII does not allow for race or color to be used or justified as a BFOQ. \textit{See id.}
  \item \textsuperscript{108} \textit{See Trans World Airlines, Inc. v. Thurston}, 469 U.S. 111, 121 (1985) (“This interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA ‘were derived in haec verba from Title VII.’”) (quoting Lorillard, 434 U.S. at 584); \textit{W. Air Lines, Inc. v. Criswell}, 472 U.S. 400, 414 n.19 (1985) (recognizing the parallel language and treatment of the BFOQ exception in the ADEA and Title VII to apply Title VII caselaw in an ADEA case).
  \item \textsuperscript{111} \textit{General Dynamics}, 540 U.S. at 596–600.
  \item \textsuperscript{113} \textit{General Dynamics}, 540 U.S. at 603–04 (Thomas, J., dissenting).
\end{itemize}
In *Kentucky Retirement Systems v. EEOC*, the Supreme Court again disregarded well-settled ADEA and Title VII precedent that a policy or plan that defines eligibility based on a protected class is facially discriminatory and requires no additional proof to establish it as unlawful. The Court held that even though a disability plan determined eligibility based on age, ADEA plaintiffs would have to produce additional evidence that age actually motivated a reduction or denial of benefits. Rather than relying on the statutory text and established precedent, the Court based its decision on “background circumstances” about its notion of age bias and stereotypes and viewed benefits eligibility as a “special case” that narrowed the reach of the ADEA and imposed different standards of proof on victims of age discrimination.

One harm of these cases is the Court’s view that the reach of the ADEA is limited by its legislative history rather than defined by the express terms of the statute. Another harm is that courts interpret these cases as imposing different and greater burdens on victims of age discrimination to establish unlawful discrimination than are imposed on victims of race or sex discrimination under Title VII. Cumulatively, the cases reflect a view that age discrimination is different and that the ADEA is weaker than Title VII. This view also permeates three judge-made rules and courts’ application of them in ADEA cases: same actor, same group, and stray remarks, which are examined in more detail in Part III.

### III. Judge-Made Rules Inferring No Discrimination Premised on Outdated and Flawed Assumptions About Older Workers and


117. *Id.* at 143.

118. *Id.* at 148.

119. The Court’s analysis in *General Dynamics v. Cline*, 540 U.S. 581 (2004), also conflicts with its analysis in *Oncale v. Sundowner Offshore Services, Inc.*, which reasoned that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale v. Sundowner, Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

HOW BIAS OPERATES

Three judge-made doctrines—same-actor inference, same-group inference, and stray remarks—while applicable to all discrimination cases, are expansively applied in age discrimination cases to discount evidence of age discrimination and dismiss ADEA cases. These doctrines are fundamentally flawed as inconsistent with how discrimination operates and are particularly outdated in light of today’s understanding of bias in the workplace. They effectively subvert an objective inquiry into whether discrimination occurred by giving undue weight to certain facts while failing to give sufficient weight to more relevant evidence. In other words, they do more harm than good in ensuring a fair adjudication of employment discrimination cases.

A. Evidence that the Same Actor Made a Positive and Negative Decision Should Have No Presumptive Value

The Fourth Circuit created the same-actor doctrine in a 1991 ADEA case, Proud v. Stone, to raise an inference of no discrimination if an employee was hired and fired by the same person within a relatively short time span. In Proud, the same decisionmaker hired and fired the older worker within six months. The Fourth Circuit held that these facts created an inference against discrimination sufficient to dismiss the older worker’s case on summary judgment, reasoning “[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.”

The same-actor inference against discrimination has been applied broadly to contexts well beyond its original context with outer boundaries described as “nebulous.” It has been applied to employment contexts


122. Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991) ("[I]n cases where the hirer and firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.").

123. Id.

124. Id.

125. Quintanilla & Kaiser, supra note 121, at 24–25 ("The Fourth Circuit premised the doctrine on an erroneous psychological account of prejudice, one that obscures how stereotyped groups experience bias in American workplaces.").
outside of hiring and firing to cases involving different decisionmakers and
to decisions made by the same supervisor but separated by many years. 126 In
several circuits, it has evolved into essentially an irrebuttable presumption
that compels a finding of no discrimination unless the plaintiff essentially
produces direct evidence to overcome this powerful presumption. 127

The doctrine is flawed for the following reasons. First, the same-actor
inference relies on an outdated and refuted understanding of how bias
operates. 128 Second, it fails to recognize the fluidity of organizational
relationships, conditions, and events. Finally, it is contrary to the
court’s obligation under Rule 56 of the Federal Rules of Civil Procedure to
only draw inferences in favor of the nonmoving party. The fact that the same
person made an adverse decision within a short period of time after a decision
should only be considered as one piece of evidence for the ultimate trier of
fact and not used as an expansive device to dismiss discrimination cases at
the summary judgment stage. 129

1. The Same-Actor Inference Against Discrimination is Contrary to Social
Science Principles of Bias and Organizational Behavior and to Rule 56 of
the Federal Rules of Civil Procedure

The same-actor inference is grounded in assumptions about the nature
of bias that are inconsistent with social psychology, human motivation, and
organizational behavior. 130 This judicially created inference is premised on a

127. Quintanilla & Kaiser, supra note 121, at 36 (“These federal courts consider the same-actor
inference very compelling and at times equate the strong inference to a virtually irrebuttable presumption
of nondiscrimination, having explained that the claimant must come forward with ‘an extraordinarily
strong showing of discrimination’ to overcome the ‘strong inference’ of nondiscrimination.”). See, e.g.,
discrimination case describing the same-actor inference as “a powerful inference”); Crudder v. Peoria
Unified Sch. Dist. No. 11, 468 F. App’x 781, 782 (9th Cir. 2012) (evidence that employer failed to follow
policy which could establish pretext “would still fail to show that the district’s investigation was pretext
for racial discrimination, especially in a case raising the same-actor inference.”); Coghlan v. Am.
Seafoods Co., 413 F.3d 1090, 1097 (9th Cir. 2005) (requiring an “extraordinarily strong showing of
discrimination” to overcome same-actor inference).
129. See McKinney v. Office of the Sheriff of Whitley Cty., 866 F.3d 803, 814 (7th Cir. 2017)
(reversing summary judgment, holding “this inference is not a conclusive presumption and [] should be
considered by the ultimate trier of fact rather than on summary judgment or the pleadings”).
130. See generally Linda Hamilton Krieger & Susan T. Fiske, Behavioral Realism in Employment
Discrimination Law: Implicit Bias and Disparate Treatment, 94 CALIF. L. REV. 997 (2006); see also
Natasha T. Martin, Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the
Contemporary Workplace, 40 CONN. L. REV. 1117, 1118 (2008) (the implicit behavioral theories
underpinning the same-actor doctrine have been discredited by decades of psychological science on
aversive racism, implicit bias, and moral licensing); Andrea L. Miller, The Use (and Misuse) of the Same-
Actor Inference in Family Responsibilities Discrimination Litigation: Lessons from Social Psychology on
on the faulty assumption that individuals’ stereotypes and prejudices are consistently expressed in a
conscious, discrete manner against all individuals from a protected class.”) and “[t]he same-actor inference
“common-sense” theory that an actor does not hire a candidate from a different group that the actor has a bias against so as to avoid interactions with “out” group members. It assumes that bias only operates overtly between “in” and “out” groups. It presumes that an actor inclined to discriminate will do so consistently at every opportunity, that bias and beliefs are inherent and unchanging, that relationships and people do not change over time, and that business conditions remain static.

These premises of the same-actor inference are woefully outdated and do not comport with how discrimination typically operates or how decisions are made in the workplace of the twenty-first century. Today, many discriminatory decisions result from implicit bias and stereotyping rather than from overt “in” and “out” group decisions. With more than fifty years of federal civil rights laws governing employment decisions, decisionmakers are trained and held accountable for not allowing their biases to infect their decisions. Procedures are put in place to cabin subjective and unfettered discretion where discriminatory stereotypes can taint decisions.

Biases and beliefs can change over time, just as relationships and business conditions can change. Age is a relative concept, and people’s attitudes about age can change over time. As the Tenth Circuit noted in Paup v. Gear Products, Inc., “Age is unusual in that it is a protected class in which an employee becomes more susceptible to unlawful discrimination over time. Simply because an employer harbors no age animus toward forty-five-year-old employees does not necessarily mean it feels the same about fifty-eight-year-old employees.” An employer’s assumptions about an older employee hired at age sixty-two can easily change by the time she is sixty-nine and terminated.

The same-actor inference is also based on a static work environment, which is at odds with the contemporary workplace. Business conditions is rooted in fundamental misunderstandings on the part of judges and fact-finders that directly contradict social psychological evidence.”; Quintanilla & Kaiser, supra note 121, at 5.

131. See Miller, supra note 130, at 1056.
132. Id.
133. See Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 361–62 (7th Cir. 2001).
134. See Quintanilla & Kaiser, supra note 121, at 4 (“[T]he field of social psychology has amassed vast scientific knowledge on how stereotypes, prejudice, and discrimination manifest and operate in the modern day.”).
135. See id.
136. See, e.g., CHAIR. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at v (2016) (summarizing that employers often train and develop policies to prevent discrimination and harassment in the workplace).
137. Paup v. Gear Prod., Inc., 327 F. App’x 100, 110 (10th Cir. 2009) (not for publication).
139. See Martin, supra note 130, at 1117 (“[S]ame-actor inference is anchored in an outdated narrative of the American workplace and an inaccurate view of human motivation.”).
can change dramatically in short periods of time, particularly with mergers, acquisitions, and reorganizations. Such changes in business conditions can change how an employer views older workers and the reason why an employer hires and fires individuals at different times.

Finally, the same-actor inference requires the court to draw an inference in favor of the moving party at the summary judgment stage, which is contrary to the court’s obligation to draw inferences in favor of the nonmoving party under Rule 56 of the Federal Rules of Civil Procedure and is reversible error. Finding no discrimination from the fact that the same person hired and fired the plaintiff means the court weighed the evidence presented and found this fact to be dispositive. Essentially, the court finds for the defendant based on this one discrete fact rather than recognizing any factual disputes. The Supreme Court has repeatedly emphasized that on summary judgment, courts may not weigh the evidence and may not resolve disputed issues in favor of the nonmoving party. But that is precisely what courts do by finding conclusively no discriminatory motive could have existed based solely on the fact that the same actor who made the adverse decision had previously made a positive decision about the plaintiff.

2. Conflicting Circuit Court Standards for the Same-Actor Inference

As outlined below, courts apply widely varying conclusions as to the import of same-actor evidence, with inconsistent standards even within the same circuit. At one end of the spectrum, some circuits hold same-actor
evidence to conclusively presume the absence of discrimination. Courts taking a middle-ground approach view it as a permissive inference depending on the circumstances. At the other end, other courts view it merely as one piece of evidence to be considered within a holistic assessment of all the evidence. Thus, the following discussion attempts to discern the current prevailing views within the circuits.

The Second, Fifth, Eighth, Ninth, and Tenth Circuits have joined the Fourth Circuit in holding that the same-actor inference permits summary judgment for the employer, unless the plaintiff presents extraordinary evidence to overcome the inference or presumption of no discrimination. For example, evidence of ageist comments that could typically preclude summary judgment was deemed insufficient to overcome the strength of the same-actor inference in Fitzgerald v. Action, Inc. Even in cases where there are genuine issues of material fact in dispute, which

146. See, e.g., Fitzgerald v. Action, Inc., 521 F.3d 867, 876–77 (8th Cir. 2008) (holding that evidence of ageist comments were insufficient to overcome the same-actor presumption); Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997) (“[S]ome factors strongly suggest that invidious discrimination was unlikely. For example, when the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire.”); see also Quintanilla & Kaiser, supra note 121, at 36 (“The Second, Fourth, Fifth, Eighth, and Ninth Circuits, for example, hold that the same-actor doctrine enacts a ‘strong inference’ that the defendant did not engage in discrimination.” (Citations omitted)).

147. See, e.g., Wexler v. White’s Fine Furniture, 317 F.3d 564, 573 (6th Cir. 2003) (en banc); see also Quintanilla & Kaiser, supra note 121, at 37 (describing positions of the Third and Sixth Circuits as not a mandatory presumption, but an inference dependent on the circumstances).

148. See, e.g., McKinney, 866 F.3d at 814; see also Quintanilla & Kaiser, supra note 121, at 38 (noting that the Seventh and Eleventh Circuits have essentially rejected a presumptive inference of no discrimination based on same-actor evidence).

149. See Graves v. Deutsche Bank Sec., Inc., 548 F. App’x 654 (2d Cir. 2013) (affirming summary judgment for employer based in part on the fact that the same supervisor who fired the plaintiff had hired him four years earlier).

150. See White v. Omega Protein Corp., 226 F. App’x 360, 362 (5th Cir. 2007) (not for publication) (applying same actor inference where same decision-maker hired plaintiff at age fifty and fired him at age fifty-five). Panels of the Fifth Circuit appear to view the inference as “permissive.” See Lawson v. Graphic Packaging Int’l Inc., 549 F. App’x 253, 258–59 (5th Cir. 2013) (affirming jury verdict for employer and district court’s jury instruction on same-actor inference that “[o]ne may conclude that there is no age discrimination involved’ if its conditions are met”) (citing Russell v. McKinney Hospital Venture, 253 F.3d 219 (5th Cir. 2000)).

151. See Arraleh v. Cty. of Ramsey, 461 F.3d 967, 976 (8th Cir. 2006).

152. See Coghlan v. Am. Seafoods Co., 413 F.3d 1090, 1097 (9th Cir. 2005) (“In cases where the same actor was responsible for both a plaintiff’s hiring and the subsequent adverse employment action, we apply the ‘same-actor inference,’ and require that the plaintiff make an ‘extraordinarily strong showing of discrimination.’”).

153. See Antonio v. Sygma Network, Inc., 458 F.3d 1177, 1183 (10th Cir. 2006) (characterizing same actor evidence as creating a “strong inference” rather than a presumption, that still affords the plaintiff an opportunity to present countervailing evidence of pretext).

154. Fitzgerald v. Action, Inc., 521 F.3d 867, 876 (8th Cir. 2008) (“Under different circumstances, the remarks attributed to Easley might create an inference of discrimination. In this instance, however, they are insufficient to overcome the presumption created by the fact Action hired Fitzgerald at age fifty.”).
would ordinarily preclude summary judgment, courts rely on the same-actor inference to grant summary judgment. 155

Even when courts must give due weight to a jury verdict and surmount a high standard to overturn a jury verdict, 156 courts have held that the presumptive effect of the same-actor doctrine required reversal of a jury verdict. For example, in Grossmann v. Dillard Department Stores, Inc., Mr. Grossman was age forty-eight when hired and fifty-two when he was fired and replaced by a twenty-six-year-old. 157 A jury found in his favor, but the appellate court directed judgment notwithstanding the verdict reasoning: “To uphold the jury’s verdict, we would have to believe that Franzke, himself [fifty-eight], was free of age bias when he hired Grossmann, suddenly turned against older workers four years later, then just as abruptly changed his mind again [when he hired two employees older than fifty]. That is more than reasonable people can swallow.” 158 These are just a few examples of the profound impact of the same-actor doctrine when courts apply it to preclude a finding of discrimination.

In contrast, the Third 159 and Sixth 160 Circuits have rejected the use of a mandatory exculpatory inference in favor of the employer. Opinions in both circuits have recognized the inference as “permissible” and “modest.” 161 However, panels within the Sixth Circuit have conflicted over whether an inference may be drawn at the summary judge stage or only at trial. 162

155. See Schechner v. KPIX-TV, 686 F.3d 1018, 1026 (9th Cir. 2012) (“[E]ven viewing the disputed facts in the light most favorable to Schechner and Lobertini, they do not support a finding of pretext. This is true largely because KPIX is entitled to a favorable ‘same-actor inference.’”).


158. Id. at 459.

159. See Waldron v. SL Indus., Inc., 56 F.3d 491 (3d Cir. 1995). The Third Circuit rejected the establishment of a presumption against discrimination where the same decision-maker was responsible for discharging the plaintiff soon after he hired the plaintiff. The court noted that “this is simply evidence like any other and should not be accorded any presumptive value . . . [I]t was plausible under the evidence presented at summary judgment that [defendant] would hire [plaintiff], use his skills for a few years while a younger person was being ‘groomed’ for his position, then fire [plaintiff] because of his age.” Id. at 496 n.6.


161. Mencarelli v. Alfred Williams Co., 656 F. App’x 80, 87 (6th Cir. 2016) (“[T]he district court expressly acknowledged that the inference is ‘not dispositive’ and determined that the inference ‘is additional evidence’ that AWC’s reason for Mencarelli’s termination is not pretextual.”).

162. Compare Gaglioti v. Levin Grp., Inc., 508 F. App’x 476, 483 (6th Cir. 2012) (holding that same-actor inference is not applicable on summary judgment and “cannot be an independent reason to grant summary judgment where there are other disputes of material fact”), with Mencarelli, 656 F. App’x at 87 (district court properly applied same actor inference at the summary judgment stage as one factor, albeit not a dispositive one).
The practical effect of even a permissive inference in contrast to a conclusive one is significant. Under a permissive standard, courts may not use the same-actor inference to grant summary judgment when there are material issues of fact in dispute. Under a permissive standard, the same-actor inference cannot trump a jury verdict. For example, in *Hudson v. Insteel Industries, Inc.*, the Sixth Circuit refused to overturn a jury verdict finding unlawful age discrimination, ruling that the jury was properly instructed that the same-actor inference was not mandatory. The Sixth Circuit gave due respect to the jury’s deliberations in reasoning that “we do not know whether the jury made the inference, but then found it trumped by the weight of Hudson’s evidence on the question of pretext.”

The Seventh and Eleventh Circuits have essentially rejected the same-actor inference as having presumptive value and held that it is for the jury to decide the significance of same-actor evidence. Their reasoning flows from Supreme Court precedent, notably *Reeves v. Sanderson Plumbing Products, Inc.*, that a court “must disregard all evidence favorable to the moving party that the jury is not required to believe.” In other words, “placing too strong a reliance on an inference of nondiscrimination may go too far at the summary judgment stage.” Moreover, it is for the jury, not the judge, to draw inferences from the facts presented. The same-actor facts are simply evidence, without any presumptive value, to be considered along with all other evidence by the trier of fact.

The Seventh Circuit’s decision in *Filar v. Board of Education* explains why two assumptions inherent in the same-actor inference—that aversion...
bias is ever-present and consistently acted upon—are flawed, particularly in age discrimination cases:

[T]he fact that a worker was within the protected class when hired might not be as telling in some cases: An employer may assume an over-forty employee is productive when hired but not years later. It may be reasonable to assume that Dr. Garvey did not have an “aversion to older people” because he hired Filar when she was sixty-two. But it’s just as reasonable to assume that Dr. Garvey viewed Filar as productive at sixty-two but not at sixty-nine. Second, placing too strong a reliance on an inference of nondiscrimination may go too far at the summary judgment stage. In Filar’s case, this inference would be in favor of the party moving for summary judgment.174

The Seventh Circuit’s decision in McKinney v. Office of the Sheriff of Whitley County,175 a race discrimination case, expressed frustration about the expansive use of the same-actor inference (also known as the common actor inference) and the need for it to be cabined:

We have tried to impose limits on the common actor inference to ensure it does not outgrow its usefulness. The inference may be helpful in some limited situations, which is why “we allow the jury to hear such evidence and weigh it for what it is worth.” (citation omitted). There are many other occasions, however, where it is unsound to infer the absence of discrimination simply because the same person both hired and fired the plaintiff-employee. Examples abound. The same supervisor may need to fill a position quickly, then later when the exigency subsides, fire the employee due to unlawful bias. The same supervisor could both hire a woman and then refuse to promote her for discriminatory reasons. The same supervisor could both hire a woman and later fire her because she became pregnant (citations omitted). The list could go on, but only one more example is needed. The same supervisor could hire a county’s first black police officer, hoping there would be no racial friction in the workplace. But after it became clear that other officers would not fully accept their new black colleague, that same supervisor could fire the black officer because of his race based on a mistaken notion of the “greater good” of the department.176

The Seventh Circuit’s examples in McKinney recognize that a wide variety of reasons may exist as to why courts should not assume a lack of bias in employment decisions made by the same actor.177

In addition, giving undue weight to same-actor evidence would conflict with established summary judgment standards in employment discrimination cases. The Eleventh Circuit premised its rejection of a strong presumption from same-actor evidence in Williams v. Vitro Servs. Corp.,178 reasoning:

174 Id.
175 McKinney v. Office of the Sheriff, 866 F.3d 803, 814 (7th Cir. 2017).
176 Id.
177 See Jetter v. Knothe Corp., 324 F.3d 73, 76 (2d Cir. 2003) (same-actor rationale has “far less applicability” in case where defendants were forced to hire plaintiff in order to acquire his company).
It is worth restating that, in this circuit, “evidence of pretext, when added to a prima facie case, is sufficient to create a genuine issue of material fact that precludes summary judgment.” [citation omitted] It therefore would be inconsistent with our precedent to require a plaintiff in “same actor” cases not only to show pretext but, in addition, to present further evidence to overcome a special inference created by the “same actor” evidence. Such a rule would be contrary to our previous determinations that a plaintiff need not prove discriminatory intent at the summary judgment stage but, rather, must present evidence from which a jury reasonably could infer that the defendant’s non-discriminatory justification for its employment decision is pretextual.\textsuperscript{179}

When courts rely on an automatic inference against discrimination, they neglect their duty to objectively consider all the evidence before them and to let a jury decide whenever there are genuine issues of material fact in dispute. Treating same-actor facts as merely evidence without any presumptive value, rather than a strong inference, not only comports with evidentiary and procedural standards, but will also ensure more objective treatment of discrimination cases.

3. Expansive Application of the Same-Actor Inference

The same-actor inference originally applied to hiring and firing decisions made by the same actor within a relatively short period of time. It has expanded to apply to a variety of employment decisions where the same actor hired the plaintiffs but then denied them promotions,\textsuperscript{180} demoted them,\textsuperscript{181} or failed to reinstate them.\textsuperscript{182} It has been applied to initial decisions other than hiring, such as a decision to renew an employment contract followed by the same decisionmaker selecting the plaintiff for lay off.\textsuperscript{183} Employers have argued that the same-actor inference should apply to support summary judgment even in cases where different actors made the alleged discriminatory decision\textsuperscript{184} or there is a factual dispute as to whether the same actor was involved.\textsuperscript{185}

\textsuperscript{179} Id. at 1443 n.4.

\textsuperscript{180} See Philbrick v. Holder, 583 F. App’x 478, 488 (6th Cir. 2014) (same-actor inference applied to gender discrimination claim of failure to promote).

\textsuperscript{181} See Varno v. Canfield, 664 F. App’x 63, 65 (2d Cir. 2016) (applying same-actor inference to demotion decision).

\textsuperscript{182} See Kobaisy v. Univ. of Miss., 624 F. App’x 195, 199 (5th Cir. 2015) (applying same-actor inference to national origin claim for failure to reinstate).

\textsuperscript{183} See Schechner v. KPIX-TV, 686 F.3d 1018, 1027 (9th Cir. 2012) (applied inference where decisionmaker signed plaintiffs to new contracts “not long before” they decided to lay them off).

\textsuperscript{184} See Diaz v. Eagle Produce Ltd., 521 F.3d 1201, 1210 (9th Cir. 2008) (rejecting the application of the same-actor inference when a different supervisor fired the plaintiffs than the one who hired them years before).

\textsuperscript{185} See Russell v. McKinney Hosp. Venture, 235 F.3d 219, 228, n. 16 (5th Cir. 2000) (refusing to apply same-actor inference where fact of who hired the plaintiff was in dispute and for the jury to decide).
Courts have expanded the same-actor inference to cases where the time lapse between decisions was two or three years\(^{186}\) rather than the “relatively short period of time” described in *Proud v. Stone* of six months.\(^ {187}\) Employers have argued, with mixed results,\(^ {188}\) that the same-actor inference should apply even when the gap in time between the employment decisions spans more than a few years.\(^ {189}\) Moreover, courts have applied the same-actor inference without any mention of the gap in time between the decisions.\(^ {190}\)

Expanding the same-actor presumption without any time constraint would effectively insulate hundreds if not thousands of employment decisions from liability. If same-actor evidence is to have any probative value, a short time frame (for example, three or four months) would be a necessary criterion and consistent with the Supreme Court’s reasoning in retaliation cases that short gaps can show causality between protected activity and an adverse action, but a longer gap (for example, twenty months) would not.\(^ {191}\)

The logic of applying an inference about the motive for an action when years separate it from a previous action is at odds with the logic of rejecting such an inference about the motive for an action when the same time span separates it from discriminatory comments made by the same actor. The

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But see Fitzgerald v. Action, Inc., 521 F.3d 867, 872 (8th Cir. 2008) (applying same-actor inference without identifying who hired the plaintiff).

186. See, e.g., Ritter v. Hill 'N Dale Farm, Inc., 231 F.3d 1039, 1044 (7th Cir. 2000) (two years); Schnabel v. Abramson, 232 F.3d 83, 91 (2d Cir. 2000) (applying same-actor inference where three years spanned hiring and firing decisions).


188. Compare Potter v. Synerlink Corp., 562 F. App’x 665, 676 n.10 (10th Cir. 2014) (holding same-actor inference only applies to decisions made within a “relatively short time span” and declining to apply it to a hiring and firing separated by three and a half years) with Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (affirming summary judgment in a RIF case when the plaintiff was hired at age fifty-four and fired four years later by the same decisionmaker).

189. See Carlton v. Mystic Transp., Inc., 202 F.3d 129, 138 (2d Cir. 2000) (only a weak inference given passage of seven years between events); Brown, 82 F.3d at 658 (applying same-actor inference with four years separating hiring and firing decisions to affirm summary judgment); Buhmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995) (applying same-actor inference where six years passed, reasoning “to say that time weakens the same actor inference is not to say that time destroys it. In discrimination cases where the employee’s class does not change, it remains possible that an employer who has nothing against women *per se* when it hires a certain female will have nothing against women *per se* when it fires that female, regardless of the number of years that pass. Thus, a short period of time is not an essential element of the same actor inference, at least in cases where the plaintiff’s class does not change.”).

190. See, e.g., Varno v. Canfield, 664 F. App’x 63, 65 (2d Cir. 2016) (applying same-actor inference without mention of the time span between hiring and demotion); Kobaisy v. Univ. of Miss., 624 F. App’x 195, 199 (5th Cir. 2015) (applying same-actor inference without mention of time in between hire and failure to reinstate the plaintiff).

Seventh Circuit noted this discordance in the different temporal requirements of the same-actor and stray remarks doctrines in *Perez v. Thorntons, Inc.*

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). . . 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).

It makes little sense to infer the absence of discrimination just because the same actor hired someone when a variety of reasons could have motivated the actor at that time, particularly when there isn’t any other evidence explaining the motive for the hire.

In contrast, when the same actor makes a discriminatory comment months or years before he performs an alleged discriminatory action, his words reflect a biased state of mind. Yet, as will be discussed infra, courts say it is not reasonable to draw an inference of discrimination from these discriminatory comments made several months before an adverse action because they are deemed too remote from the employment decision. If the same-actor inference permits courts to draw an inference for a present situation based on a past decision that occurred years ago, wouldn’t it be logically consistent for courts to permit an inference based on words spoken by the decisionmaker years ago about the plaintiff and her age? And shouldn’t the gap in time for the inference to even arise be consistent for both situations?

While this approach would bring consistency to the courts’ application of the stray remarks and same-actor doctrines, both doctrines are so flawed that they need considerable refinement to bring consistency and objectivity to their application in discrimination cases. The expansive application of both the stray remarks doctrine and the same-actor inference unmoored to their origin threatens to exempt a multitude of employment decisions from the protections of our civil rights laws.

**B. Same-Group Inference of No Discrimination Is Contrary to Supreme**
Court Precedent

In addition to the same-actor inference, courts have created an inference of no discrimination when the actor taking the adverse action is a member of the same protected class as the employee, which is known as the same-group inference.\textsuperscript{195} This inference assumes that one does not harbor negative stereotypes or discriminatory animus toward another in one’s own group. This inference is used in age cases when the decisionmaker is older than the plaintiff\textsuperscript{196} or even close in age to the plaintiff.\textsuperscript{197}

The Supreme Court has explicitly rejected the premise that one does not discriminate against members of one’s group in race and gender cases.\textsuperscript{198} The same reasoning should apply in age cases, arguably with greater force, as there are marked differences and wide variety in members of the forty-year-old-plus workforce. Several courts have rejected employer arguments to expand the same-actor inference to instances based solely on the supervisor’s membership in the protected age group.\textsuperscript{199}

The assumption that all those age forty and older view each other as sharing common characteristics of a protected group such that they would never distinguish oneself against another older worker is simply contrary to well-established findings of perceptions about age and aging. Self-perceptions of one’s own age and ability and even what age is considered old vary considerably by age, gender, and income.\textsuperscript{200}

\textsuperscript{195} See Slattery v. Swiss Reinsurance Am. Corp., 248 F.3d 87, 94 (2d Cir. 2001) (affirming summary judgment based in part on evidence that plaintiff’s supervisors were also members of the protected class).

\textsuperscript{196} See Graves v. Deutsche Bank Sec., Inc., 548 F. App’x 654, 656 (2d Cir. 2013) (inferring no discrimination where the supervisor who had hired plaintiff was almost a decade older than the plaintiff).

\textsuperscript{197} See, e.g., Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996) (affirming summary judgment in a reduction-in-force case when the plaintiff was hired at age fifty-four by a fifty-six-year-old and fired by the same person four years later).

\textsuperscript{198} Castaneda v. Partida, 430 U.S. 482, 499 (1977) (“Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”); see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (recognizing sex discrimination committed by supervisor of same sex as employee).

\textsuperscript{199} See Wesler v. White’s Fine Furniture, Inc., 317 F.3d 564, 574 (6th Cir. 2003) (en banc) (reasoning that Supreme Court’s rejection of same-group inference for race and sex discrimination should also apply to age discrimination); Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 361 (7th Cir. 2001) (“relative ages of the terminating and terminated employee are relatively unimportant”); Danzer v. Norden Sys., Inc., 151 F.3d 50, 55 (2d Cir. 1998) (“The proposition that people in a protected category cannot discriminate against their fellow class members is patently untenable.”).

\textsuperscript{200} A nationwide survey of adults age 50 and older found that “[o]n average, adults 50 and older think a person becomes old at 71.5 years,” but perceptions vary based on one’s own age, gender, and income. JENNIFER BENZ ET AL., THE ASSOCIATED PRESS & NORC CENTER FOR PUBLIC AFFAIRS RESEARCH, WORKING LONGER: OLDER AMERICANS’ ATTITUDES ON WORK AND RETIREMENT 12 (2013). Americans who have reached or are nearing the traditional retirement age “generally do not think of themselves as ‘old,’” with six in ten reporting they feel younger than their chronological age. Id.
Plaintiffs’ counsel should challenge assertions of the same-actor and same-group inferences given the flaws in these doctrines. They have become convenient judicial tools to quickly dispose of discrimination cases, as eighty percent of cases in which the same-actor inference is relied upon are dismissed at summary judgment.

C. “Stray Remarks” Often Relevant Evidence of Age Discrimination

Judges’ skeptical view of age discrimination is most prevalent in their assessment of whether age-related comments are evidence of age discrimination or irrelevant “stray remarks.” What used to be merely an assessment of relevance has become a “series of loosely-bound doctrines and casual labels that different courts assign to proffered evidence of discrimination that they plan to discount or ignore.” The stray remarks doctrine has grown exponentially and is seriously flawed, contrary to Supreme Court case law, evidentiary standards of relevance, and Rule 56 of the Federal Rules of Civil Procedure.

1. Supreme Court Standard for Assessing Relevance of a Discriminatory Comment

The Supreme Court has not approved of the stray remarks doctrine, and the lower courts’ unfettered and inconsistent application of the doctrine has been characterized as “messy” at best. Notably, the lower courts have not adopted the two-factor analysis for examining the relevance of a comment as circumstantial evidence of discrimination, set forth by the Supreme Court in

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201. Plaintiff’s counsel should “move in limine to exclude same-actor evidence so that jurors could not make improper inferences of non-discrimination from the fact that, for example, the same individual promoted and then fired the plaintiff.” See Miller, supra note 130, at 1083. Absent exclusion, plaintiff should argue that the evidence is merely one piece of evidence to be considered among the entirety of the evidence presented.

202. See Quintanilla & Kaiser, supra note 121, at 66.

203. In Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 512 (4th Cir. 1994), the Fourth Circuit opined that “statements about age may well not carry the same animus as those about race or gender. Unlike race or gender differences, age does not create a true we/they situation—barring unfortunate events, everyone will enter the protected age group at some point in their lives.”

204. The concept of “stray remarks” in employment discrimination cases evolved from Justice O’Connor’s concurrence in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a sex discrimination case.

205. Stone, supra note 16, at 159.

206. Id.

207. Reed v. Neopost USA, Inc., 701 F.3d 434, 441 n.5 (5th Cir. 2012) (acknowledging the circuit’s messy application of the stray remarks doctrine and complication of matters for lower courts).

208. Reeves argued that the case involved clear direct evidence based on his supervisor’s ageist statement as an admission of age bias by a decision-maker. But the Fifth Circuit not only rejected the statement as direct evidence or an admission, it held the statement was a “stray remark”: Despite the potentially damning nature of Chestnut’s age-related comments, it is clear that these comments were not made in the direct context of Reeves’s termination. In addition, Chestnut was just one of three individuals who recommended to Ms. Sanderson that Reeves be

In Reeves, the plaintiff presented evidence that several months before he was fired, his supervisor told him that he was so old that he “must have come over on the Mayflower.” Two months before firing Reeves, the same supervisor told Reeves that he was “too damn old to do the job” when Reeves was having difficulty starting a machine. Plaintiff argued that the statements constituted direct evidence of age discrimination. The Fifth Circuit discounted these statements as not relevant evidence of discrimination because they “were not made in the direct context of Reeves’ termination.”

The Supreme Court treated the case as one involving circumstantial evidence and explicitly rejected the Fifth Circuit’s requirement that comments related to bias were irrelevant unless they were made in the direct context of the adverse action. The Court identified two critical factors for determining whether remarks are relevant evidence of age discrimination: (1) if their content indicates age bias, and (2) if the speaker of the remarks was “primarily responsible” for the adverse action. The Court did not even question that the supervisor’s statements, made months before the adverse action, were relevant to show Reeves’ termination was discriminatory.

Despite the guidance provided by the Supreme Court in Reeves, lower courts routinely dismiss or devalue comments as “stray remarks” in employment discrimination cases if the remarks meet the criteria set forth by the Supreme Court but were: (1) not made in the context of the adverse action, (2) not made close in time to the adverse action, or (3) a one-time occurrence rather than a pattern.

There are two problems with courts discounting the import of biased comments if any of these additional factors are not satisfied. First, this
approach conflicts with the factors for circumstantial evidence cases set forth by the Supreme Court in *Reeves*. Second, it fails to recognize that these additional factors only apply in cases where the comments are asserted as direct evidence that establish unlawful discrimination. These problems are significant, since most discrimination cases are proven through circumstantial evidence, given the rarity of direct evidence.

Courts’ reliance on these three factors to dismiss relevant circumstantial evidence cannot be squared with the factors applied in *Reeves*. *Reeves* clearly rejected the Fifth Circuit’s requirement of “context”—meaning the comment had to have a nexus to the adverse action. And while not directly commenting on the relevance of the timing of the comments, *Reeves* applied a lenient approach to the gap in time between the comment and the adverse action factors. Even though the statements were remote in time from the adverse action and not related to the decision-making process, *Reeves* held that the ageist statements were evidence of age-based animus.

The Supreme Court has recognized temporally remote statements as probative evidence of bias in other cases as well. Notably, in *Staub v. Proctor Hospital*, the Court found that discriminatory statements made by those in a position to influence the decisionmaker were relevant to evaluating whether the decision was discriminatory, despite the statements made being significantly remote in time from the adverse action, with one statement made six years prior to the plaintiff’s termination.

In *Goudeau v. National Oilwell Varco, L.P.*, the Fifth Circuit held that the *Reeves* two-factor test applies in the determination of whether a comment is circumstantial evidence of discrimination.

To be relevant evidence considered as part of a broader circumstantial case, the comments must show: “(1) discriminatory animus (2) on the part of a

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218. Direct evidence establishes discriminatory motive and action without inference or presumption. See *Scheick v. Tecumseh Public Schs.*, 766 F.3d 523, 531 (6th Cir. 2014) (finding that two statements by the decisionmaker “about wanting ‘someone younger’ . . . do not require an inference to conclude that age was the but-for cause of the decision not to renew Scheick’s contract”).
219. Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003) (“Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”) (quoting Rogers v. Mo. Pac. R.R. Co., 352 U.S. 500, 508 n.17 (1957)).
220. *Reeves*, 530 U.S. at 152.
221. *Id.* at 151.
222. See *Wisconsin v. Mitchell*, 508 U.S. 476, 489–90 (1993) (citing *Price Waterhouse’s* plurality as favoring the admissibility of such statements to prove intent or motive despite First Amendment concerns).
224. *Id.* Justice Alito’s concurrence in *Staub* also cites to the record evidence of the statements made years before the termination decision by the biased employee as evidence of his intent to “get rid” of *Staub*. *Id.* at 426 (Alito, J., concurring).
225. 793 F.3d 470, 476 (5th Cir. 2015).
person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.”

The Tenth and D.C. Circuits have adopted this framework and cautioned lower courts not to categorically disregard such comments as stray and immaterial based on timing or context but to consider them as evidence probative of a supervisor’s discriminatory attitude.

In Goudeau, the Fifth Circuit also acknowledged the error of lower courts imposing these three additional criteria in circumstantial evidence cases to discount biased comments. The court emphasized that the additional criteria apply “only when the remarks are being used as direct evidence of discrimination . . . as the comments are being relied on to prove the entire case of discrimination.” Since direct evidence by itself allows the jury to find discriminatory motive, it makes sense that these additional factors “do not apply when the ageist statement is presented as circumstantial evidence.”

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227. Id.
228. The Tenth Circuit claims to have repudiated the “direct context” factor used by the Fifth Circuit and rejected by the Supreme Court in Reeves. See Guyton v. Ottawa Truck Div., 15 F. App’x 571, 581 (10th Cir. 2001) (citing Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 139 (2000)) (noting that “[a]fter Reeves, we are mindful that these comments need not be made ‘in the direct context’ of the employee’s termination”). And the court has recognized that the nexus requirement between the comments and the adverse action applies only in direct evidence cases, not in circumstantial evidence cases. See McCowan v. All Star Maint., Inc., 273 F.3d 917, 926 (10th Cir. 2001) (the “nexus, essential in establishing the comments constitute direct evidence of discrimination, is not the test in proving discrimination with circumstantial evidence.”), although the circuit has not been consistent. See, e.g., Plotke v. White, 405 F.3d 1092, 1107 (10th Cir. 2005) (requiring “a nexus between the allegedly discriminatory statements and the employer’s decision”).
230. Id. at 670 (“Instead of reviewing each racially charged remark individually and finding it insufficient, we consider it alongside any additional statements.”).
231. Goudeau, 793 F.3d at 475.
232. Id.
However, decisions in the Second, Third, Sixth, and Seventh Circuits236 have neither clearly adopted the Reeves two-factor analysis for evaluating comments as circumstantial evidence, nor distinguished standards for assessing comments as either direct or circumstantial evidence. Consistent with established evidentiary and procedural standards discussed below, circuits could easily rectify these two problems by adopting the Reeves two-factor analysis for consideration of comments as circumstantial evidence.

2. Explaining How and Why a Comment is Evidence of Age Bias

The meaning and import of an ageist comment cannot be assumed to be obvious to skeptical judges or juries. Thus, it is incumbent upon counsel representing older workers in age discrimination cases to present evidence explaining the age-related meaning and import of a statement237 to satisfy the first factor in the Reeves standard.

First, plaintiff’s counsel should use the Supreme Court’s approach in Ash v. Tyson Foods, Inc.238 to explain how certain comments reflect age bias by the

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233. In Henry v. Wyeth Pharmaceuticals, 616 F.3d 134, 149 (2d Cir. 2010), the Second Circuit identified four non-dispositive factors in deciding what weight to accord isolated remarks suggestive of discriminatory bias in a circumstantial evidence case: (1) who made the remark (i.e., a decision-maker, a supervisor, or a low-level co-worker), (2) when the remark was made in relation to the employment decision at issue, (3) the content of the remark (i.e., whether a reasonable juror could view the remark as discriminatory), and (4) the context in which the remark was made (i.e., whether it was related to the decision-making process).

234. In addition to the Reeves factors concerning the clarity of the content of the statement and who made the statement, the Third Circuit requires a temporal connection between the statement and the challenged employment action for comments to be considered relevant evidence. See Hodczak v. Latrobe Specialty Steel Co., 451 F. App’x 238, 241 (3d Cir. 2011) (not for publication).

235. The Sixth Circuit recognizes that statements should not be categorically excluded and includes the temporal connection factor in assessing relevance. See Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 356 (6th Cir. 1998) (“courts must carefully evaluate factors affecting the statement’s probative value, such as ‘the declarant’s position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action.’”) (quoting Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 133 (3d Cir. 1997)).

236. The Seventh Circuit applies the following factors in assessing whether a comment reflects an inference of discrimination: that the comments must be “(1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action.” Teruggi v. CIT Grp./Capital Fin., Inc., 709 F.3d 654, 661 (7th Cir. 2013) (dismissing comments unrelated to the adverse action made by decisionmaker 18 months prior to terminating the plaintiff as stray remarks).


238. Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006). In Ash, the Supreme Court elaborated on the first element of Reeves by providing general criteria for assessing whether a comment, term, or phrase reflects bias. The Court considered five factors relevant to determine the meaning of a disputed remark: (1) context, (2) inflection, (3) tone of voice, (4) local custom, and (5) historical usage. The white manager in Ash had on several occasions called the plaintiff, a middle-aged African American man, “boy.” The Eleventh Circuit held that the
employer. The older employee who is the subject of the comment can testify to the first four Ash factors: (1) context, (2) inflection, (3) tone, and (4) local custom. She can explain what the comment meant to her, and how the inflection and tone of the speaker affected its meaning. Other employees could also testify about their understanding of how the comments related to age and had a negative meaning. Testimony about the first three Ash factors is particularly important because no court could properly evaluate such evidence at summary judgment—meaning it is for the jury’s consideration.

Second, plaintiff’s counsel should also explain how purportedly “neutral” comments relate to negative views about the plaintiff’s age. The court’s analysis in Baker v. Becton, Dickinson and Co. noted how certain statements that the district court viewed as “neutral” actually reflected biased attitudes when paired with stereotyping and were probative evidence of age discrimination. The fifty-eight-year-old plaintiff reported to a supervisor in his thirties, who commented that the plaintiff was “too old and lack[ed] energy and eagerness,” that he was “not the kind of sales rep that [Becton] want[s] to build its future on,” that he was “too old and too slow,” and that the supervisor said he “did not want anyone over [forty] in sales.” As the court explained, “[W]hile of course a person may lack energy and eagerness regardless of age, [the supervisor]’s comments are clearly made in relation to [plaintiff]’s age. The comments also refer to [the supervisor]’s hopes for his sales team in the future, which he hoped would include no one over forty years old.” The appellate court essentially explained how the statements were tied to the decisionmaker’s age bias and were the motive for his decision to terminate the older plaintiff.

Third, counsel representing older workers in age discrimination cases should emphasize that under the standard set forth by Reeves, neither the timing of the statement nor whether the statement was made about the adverse action are considered factors in determining the relevance of the statement to the employer’s motive. But numerous courts continue to dismiss or devalue age-related comments as “stray remarks” because the remarks were made at a time remote from the challenged employment action or did not relate to the direct context of the adverse action. For example, a comment that “[p]eople with gray hair are probably not the future” made by the company’s CEO six months prior to the fifty-two-year-old plaintiff’s termination in a restructuring was dismissed as too remote in time to be evidence of age

remark was not evidence of racial animus. The Supreme Court reversed, noting that the term standing alone is not always benign, but also need not have the modifier “black” to render the term racist.

239. See id.
241. Id. at 604.
242. Id. at 604–05.
243. Id.
discrimination.\textsuperscript{244} A comment made by a decisionmaker five months prior to terminating the plaintiff that “while young employees are willing to work 100 hours per week, more mature people aren’t willing to do that” was deemed a stray remark because of the gap in time between the comment and the adverse action.\textsuperscript{245} The logic of the courts appears to be that the remoteness of a statement makes it an unlikely reflection of the decisionmaker’s animus because bias and motivations can change over time.\textsuperscript{246}

But this logic is contrary to social science research about bias, stereotyping, and workplace behavior.\textsuperscript{247} Supervisors are trained and generally know not to make discriminatory remarks when taking an adverse action. Consequently, when they make comments reflecting a bias at any time, it’s like a snapshot of what they are actually think. In \textit{Sharp v. Aker Plant Services, Inc.}, the Sixth Circuit reasoned that a comment made by the plaintiff’s supervisor stating that a younger employee was being retained because he would be able to work for the defendant longer “was a window into the mind of an employment decisionmaker.”\textsuperscript{248} In \textit{Kazolias v. IBEW LU 363}, the Second Circuit held that the district court erred in reasoning that a union official’s remarks did not provide sufficient evidence of retaliatory animus “prior to the time” he made those remarks.\textsuperscript{249} Instead, “[a] jury could reasonably infer that [] resentment . . . was not born at the instant he expressed it, but had been brewing ever since they brought their age discrimination charges.”\textsuperscript{250} Thus, courts should consider age-related statements as evidence of discriminatory motive, and the timing and context of the statement should only bear on the relative weight to accord such evidence.

\section*{3.\ Evidentiary Standards for Determining the Relevance of Racist or Sexist Comments Should Apply for Determining the Relevance of Ageist Comments}

Evidentiary standards of relevance should apply to a court’s consideration of the relevance and weight of a comment related to age. The definition of relevant evidence is quite liberal, creating a low threshold for

\begin{itemize}
\item \textsuperscript{244} Waters v. Logistics Mgmt. Inst., 716 F. App’x 194, 198 (4th Cir. 2018) (not for publication).
\item \textsuperscript{245} See Schuster v. Lucent Techs., Inc., 327 F.3d 569, 575–76 (7th Cir. 2003); Hyland v. Am. Int’l Grp., 360 F. App’x 365, 367 (3d Cir. 2010) (deemed a stray remark when made 10 months prior to plaintiff’s termination).
\item \textsuperscript{246} The Seventh Circuit noted a disconnect between the close temporal requirement of the stray remarks doctrine and the lengthy temporal allowance of the same-actor inference in \textit{Perez v. Thorntons, Inc.}, 731 F.3d 699, 710 (7th Cir. 2013). The court reasoned that a discriminatory comment made a year before the plaintiff’s termination should be heard by the jury as part of the evidence of pretext, just as the jury could consider that the same actor hired the plaintiff one year before firing the plaintiff. \textit{Id.}
\item \textsuperscript{247} See, e.g., Stone, supra note 16, at 182–83.
\item \textsuperscript{248} Sharp v. Aker Plant Servs. Grp., 726 F.3d 789, 799 (6th Cir. 2013).
\item \textsuperscript{249} Kazolias v. Int’l Bhd. of Elec. Workers Local Union 363, 806 F.3d 45, 47 (2d Cir. 2015).
\item \textsuperscript{250} \textit{Id.} at 49–50.
\end{itemize}
admissibility under Rule 401 of the Federal Rules of Evidence.\textsuperscript{251} “[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence” is relevant.\textsuperscript{252} “[E]ven if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has the slightest probative worth.”\textsuperscript{253} Evidence is therefore relevant in an ADEA disparate treatment case if it has “any tendency” to make more probable that age had a determinative influence on an employment decision.\textsuperscript{254}

As there is no statutory basis for a different standard, courts should apply the same standards to determine the relevance of ageist comments made in discrimination cases as they apply to comments related to race or sex made in other discrimination cases. The Supreme Court has explicitly rejected heightened proof standards in ADEA cases.\textsuperscript{255} However, courts have applied more stringent standards to find a comment to be relevant evidence of age discrimination in contrast to the standards applied in race or sex discrimination cases.\textsuperscript{256} In Blair v. Henry Filters, Inc.,\textsuperscript{257} the Sixth Circuit acknowledged that it had required more of a nexus between the ageist comments and the adverse action in age cases than it had required in race

\begin{footnotes}
\textsuperscript{251} See Douglass v. Eaton Corp., 956 F.2d 1339, 1344 (6th Cir. 1992).
\textsuperscript{252} Robinson v. Runyon, 149 F.3d 507, 512 (6th Cir. 1998) (quoting Fed. R. Evid. 401).
\textsuperscript{253} DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 475 (6th Cir. 1996) (quoting Douglass, 956 F.2d at 1344); see also United States v. Whittington, 455 F.3d 736, 738–39 (6th Cir. 2006).
\textsuperscript{254} Fed. R. Evid. 401. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (holding age must have motivated the employer’s decision meaning it “played a role . . . and had a determinative influence” on the decision).
\textsuperscript{256} This is not to suggest that there is uniformly better treatment by courts of racist or sexist remarks in employment discrimination cases. There are many examples of courts inappropriately rejecting or discounting comments related to race or sex. See Stone, supra note 16, at 151 (noting proliferation of stray remarks doctrine in Title VII cases). See, e.g., Mayes v. WinCo Holdings, Inc., 846 F.3d 1274, 1279 (9th Cir. 2017) (reversing summary judgment; comments by female general manager that a man “would be better” in the position and she didn’t like that “girl” as crew leader); LaBeach v. Wal-Mart Stores, Inc., No. 5:07–CV–12(HL), 2009 WL 902030, at *4, *7–10 (M.D. Ga. 2009) (dismissing store manager’s comments as “stray” including to “fire all the black people” because “they were n[*]ggers, lazy, and too stupid to do their job”).
\textsuperscript{257} Blair v. Henry Filters, Inc., 505 F.3d 517, 525 (6th Cir. 2007).
\end{footnotes}
discrimination cases. The court noted that the same standards should apply across all discrimination cases.

4. State Courts Have Repudiated the Stray Remarks Doctrine

Several state courts have significantly tempered the use of the stray remarks doctrine so as not to allow it to exclude relevant evidence in discrimination cases brought in state court. For example, in Reid v. Google, Inc., the California Supreme Court recognized that stray remarks may have probative value “in conjunction with other circumstantial evidence.” The court rejected the application of a doctrine that would exclude relevant evidence from consideration at trial. The Washington Supreme Court applied the same reasoning as Reid in Scrivener v. Clark College. The Missouri Supreme Court also rejected the doctrine as making “wholly inadmissible” comments that are “stray comments” or other comments by nondecisionmakers” in Cox v. Kansas City Chiefs Football Club, Inc. The court reasoned that the federal cases applying the stray remarks doctrine “merely say that such comments do not constitute direct evidence . . . and the mere fact that this evidence is circumstantial does not defeat its admission.” These cases recognize that the stray remarks doctrine should not operate to disregard relevant circumstantial evidence on the question of whether discrimination occurred.

5. Any Inferences Drawn from Discriminatory Comments Must be Construed in Favor of the Nonmoving Party

The Supreme Court in Reeves reminded courts of their obligation to draw inferences in favor of the nonmoving party, particularly in weighing the relevance of discriminatory remarks. Reeves cautions against the harsh scrutiny courts have used to dismiss age-related remarks as irrelevant: “The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging ‘the potentially damning nature’ of Chesnutt’s age-related comments, the court discounted them on the ground that they ‘were not made in the direct context of Reeves’s termination.’” Plaintiff’s counsel should also emphasize that the stray remarks jurisprudence is

258. See id. at 525–26.
259. See id.
263. Id.
inconsistent with the deference appellate courts traditionally allow juries and “should be narrowly cabined.” The lower courts’ failure to draw inferences from the discriminatory comments in the case in favor of the plaintiff as required by Federal Rule of Civil Procedure 56 provide a common basis for reversal on appeal. For example, in Brooks v. Davey Tree Expert Co., the Sixth Circuit reversed the grant of summary judgment relying in part on multiple ageist statements made by a decisionmaker to the plaintiff, including, “You’re too old to be doing that kind of stuff anymore,” “old fart,” and “I still think you’re too old.” In another Sixth Circuit case, Bartlett v. Gates, the court held that the ageist comments by a supervisor and selecting official constituted direct evidence, requiring reversal of summary judgment. In France v. Johnson, the Ninth Circuit ruled that the lower court erred in drawing inferences in favor of the moving party, rather than the nonmoving party, to find that the speaker of the discriminatory comments had a limited role in the promotion decision. Drawing inferences in favor of the nonmoving party would lead the factfinder to conclude that he had a “significant and influential” role in the decisionmaking process that denied the plaintiff a promotion. In Tomassi v. Insignia Financial Group, Inc., the Second Circuit vacated the district court’s grant of summary judgment finding that comments about the plaintiff’s age by a decisionmaker, which the district court deemed “stray remarks,” were relevant evidence of ageist motive.

These are but a few examples of appellate courts having to correct lower courts when they fail to draw inferences in favor of the nonmoving party on summary judgment and fail to give due weight to evidence in the form of ageist comments that reflect discriminatory motive. If trial courts accepted and applied the Reeves factors for assessing the relevance of discriminatory comments and adhered to the requirements of Rule 56, many of these cases would have gone to trial rather than an unnecessary appeal.

IV. CONCLUSION

The ADEA was enacted to provide the same civil rights and protections to older workers that Title VII provided to other workers. Yet its promise has been thwarted by persistent beliefs that age and age discrimination are

268. France v. Johnson, 795 F.3d 1170, 1176 (9th Cir. 2015).
269. Id.; see also Mullin v. Temco Mach., Inc., 732 F.3d 772, 778 (7th Cir. 2013) (finding the district court erred in construed comment as supporting defendant’s legitimate reason, rather than drawing an inference in favor of the plaintiff).
different from other protected classes and flawed assumptions about the motivations of discrimination. The judge-made doctrines of same-actor inference, same-group inference, and stray remarks are expansively applied in age discrimination cases to discount relevant evidence and routinely dismiss ADEA cases. These doctrines are fundamentally flawed as contrary to social science research and evidentiary and procedural standards. It is well past time to put these outdated notions and flawed doctrines that have undermined full and equitable enforcement of the ADEA to rest. It is time for freedom from age discrimination under the ADEA to be fully recognized as a civil right on par with the civil rights guaranteed by Title VII.