**Presented:**
27th Annual Labor Law Institute

August 25-26, 2017
San Antonio, TX

# From Parties to Presidents: Dealing with Compromised Decision-Makers

**Jason S. Boulette**

Author contact information:
Jason S. Boulette
Boulette Golden & Marin L.L.P.
Austin, TX 78746

jason@boulettegolden.com
512-732-8901

# TABLE OF CONTENTS

## I. INTRODUCTION

Decision-makers and their comments. Employment law has long wrestled with the weight to give to comments made by decision-makers, particularly when those comments are disconnected from any particular employment decision but nevertheless suggest the decision-maker may harbor an unlawful animus toward a particular group or activity. Tests examining the timing, nature, and context of the comment have emerged, evolved, and in some instances fallen away. At the same time, the law's understanding of what it means to discriminate or retaliate "because of" something has changed over time, raising abstract philosophical questions about causation and how a plaintiff might go about proving it, with or without resort to remarks made by the person who took the adverse employment action at issue.

Against this (seemingly unrelated) legal backdrop, Donald J. Trump ran for President of the United States and on January 20, 2017, was sworn in as the 45th President of the United States. In the first 100 days of his Presidency, President Trump signed 32 executive orders.[1] Of President Trump's initial 32 executive orders, five dealt directly with immigration:

- EO13767 "Border Security and Immigration Enforcement Improvements" (01/25/2017)
- EO13768 "Enhancing Public Safety in the Interior of the United States" (01/25/2017)
- EO13769 "Protecting the Nation from Foreign Terrorist Entry Into the US" (01/27/2017)
- EO13780 "Protecting the Nation from Foreign Terrorist Entry Into the US" (03/06/2017)
- EO13788 "Buy American and Hire American" (04/18/2017)

This paper focuses on two of these orders—EO13769 and EO13780—which have been embroiled in litigation from the moment of their signing through the date of this paper. While the legal theories vary, the thrust of the argument against the two orders is that they are impermissibly motivated by religious considerations in violation of the Establishment Clause, the Equal Protection Clause, and the statutory terms of the Immigration and Nationality Act, as evidenced by comments by citizen Trump, candidate Trump, President-Elect Trump, President Trump, and his top advisors.

Setting aside the question of whether a court should examine the motives of the President in exercising his lawful authority, the comments themselves have been uniformly viewed by the courts as providing at least some evidence of President Trump's motivation in signing the two executive orders banning travel from seven and then six Muslim-majority countries. While not exhaustive, the following represent those comments deemed significant enough to be included in the Fourth Circuit decision upholding the order enjoining enforcement of the second travel ban:

- 12/07/2015 – Trump publishes a "Statement on Preventing Muslim Immigration" on his campaign website, which proposed "a total and complete shutdown of Muslims entering

[1] http://www.presidency.ucsb.edu/executive_orders.php?year=2017 (last visited May 11, 2017). Looking strictly at raw numbers, President Trump has signed more executive orders in the first 100 days than any other U.S. President, other than Franklin D. Roosevelt, who holds the record with 99. https://fivethirtyeight.com/features/a-presidents-first-100-days-really-do-matter/ (last visited May 11, 2017). President Truman, formerly second-place, is now in third place, with 25 executive orders in his first 100 days.

the United States until our country's representatives can figure out what is going on." That same day, Trump tweets, "Just put out a very important policy statement on the extraordinary influx of hatred & danger coming into our country. We must be vigilant!" That night, Trump reads from the published statement at a campaign rally in Mount Pleasant, South Carolina, commenting, "I have friends that are Muslims. They are great people—but they know we have a problem."

- 03/09/2016 – Trump gives an interview to CNN in which he states, "I think Islam hates us," and opined that "we can't allow people coming into the country who have this hatred." Likewise, Katrina Pierson, a Trump spokeswoman, tells CNN, "We've allowed this propaganda to spread all through the country that [Islam] is a religion of peace."

- 03/22/2016 – Trump gives an interview to Fox Business television, in which he again urges a ban on Muslim immigration and explains "[W]e're having problems with the Muslims, and we're having problems with Muslims coming into the country." During the same interview, Trump offers, "[Y]ou have to deal with the mosques whether you like it or not."

- 07/17/2016 – Candidate Trump is asked about a tweet stating, "Calls to ban Muslims from entering the U.S. are offensive and unconstitutional," and responds, "So you call it territories. OK? We're gonna do territories." J.A. 798.

- 07/24/2016 – Candidate Trump gives an interview to NBC's Meet the Press and when asked if he has pulled back on his "Muslim ban," Candidate Trump provides a more nuanced response, having likely received feedback regarding the potential dangers associated with focusing on "Muslims" when discussing his proposed travel ban, "We must immediately suspend immigration from any nation that has been compromised by terrorism until such time as proven vetting mechanisms have been put in place." Attempting to stay on message, but muddying the water in the process, Trump continues, "I actually don't think it's a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim. Remember this. And I'm okay with that, because I'm talking territory instead of Muslim." Trump then offers, "Our Constitution is great.... Now, we have a religious, you know, everybody wants to be protected. And that's great. And that's the wonderful part of our Constitution. I view it differently."

- 12/19/2016 – Commenting on the terrorist attack in Germany, President-Elect Trump describes the victims as people who were "prepared to celebrate the Christmas holiday" and the attackers as "ISIS and other Islamic terrorists [who] continually slaughter Christians in their communities and places of worship as part of their global jihad."

- 12/21/2016 – When asked if recent violence in Europe had affected his plans to bar Muslims from immigrating to the United States, President-Elect Trump responds, "You know my plans. All along, I've been proven to be right. 100% correct. What's happening is disgraceful."

- 01/27/2017 – President Trump gives an interview to the Christian Broadcasting News, in which he explains that Executive Order 13769 (his first travel ban, which he signed the day of the interview) gives preference to Christian refugees: "They've been horribly treated. Do you know if you were a Christian in Syria it was impossible, at least very tough to get into the United States? If you were a Muslim you could come in, but if you were a Christian, it was almost impossible. ..." Moreover, just prior to signing EO 13769, President Trump says, "This is the 'Protection of the Nation from Foreign Terrorist Entry into the United States.' We all know what that means."

- 01/28/2017 – Rudolph Giuliani is asked by Fox News, "How did the President decide the seven countries [targeted by the travel ban]?" Giuliani responds, "I'll tell you the whole history of it. So when [the President] first announced it, he said 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'" Giuliani goes on to explain that he assembled a group of "expert lawyers" that "focused on, instead of religion, danger—the areas of the world that create danger for us.... It's based on places where there [is] substantial evidence that people are sending terrorists into our country."

- 02/16/2017 – After the Ninth Circuit Court Appeals declines to stay a lower court order barring enforcement of Executive Order 13769, President Trump holds a news conference in which he explains he intends to issue a new order and reminds those listening, "I got elected on defense of our country. I keep my campaign promises, and our citizens will be very happy when they see the result."

- 02/22/2017 – Stephen Miller, Senior Policy Advisor to President Trump, tells Fox News, "Nothing was wrong with the first executive order. One of the big differences that you're going to see in the [new] executive order is that it's going to be responsive to the judicial ruling, which didn't exist previously. … And so these are mostly minor technical differences. Fundamentally, you're still going to have the same basic policy outcome for the country, but you're going to be responsive to very technical issues that were brought up by the court, and those will be addressed. But in terms of protecting the country, those basic policies are still going to be in effect." In similar fashion, President Trump describes his second executive order on the topic as "a watered down version of the first order."

- 03/06/2017 – During the press conference announcing President Trump's revised travel ban, Executive Order 13780, Secretary of State Rex Tillerson states, "This executive order is a vital measure for strengthening our national security." Later that same day, Attorney General Jefferson Sessions and Secretary of Homeland Security John Kelly submit a letter to President Trump recommending a temporary pause on entry of nationals from the Designated Countries.

- 03/07/2017 – Secretary Kelly gives CNN an interview, in which he says there are probably "13 or 14 countries" with "questionable vetting procedures," not all of which are Muslim countries or in the Middle East. Notably, however, the revised travel ban only

targeted six countries (Iraq was removed from the list), all of which are Muslim-majority countries.[2]

This paper will explore the history and current state of Executive Orders 13769 and 13780, commonly referred to as the "travel bans." This paper will then pivot to a discussion of Supreme Court and Fifth Circuit case law related to decision-making and intent in the employment law setting as a means of understanding the parallels between President Trump and his travel bans and everyday decision-makers who get hung up by their own statements and commentary.

## II. I HAVE A PEN …

### A. No Travel For Any Of You: EO 13769 a.k.a. Travel Ban I

President Trump signed Executive Order 13769 on January 27, 2017.[3] Citing the terrorist attacks of September 11, 2001, the EO asserts that "numerous foreign-born individuals have been convicted or implicated in terrorism-related crimes" since that time and further that "the United States must ensure that those admitted to this country do not bear hostile attitudes toward it and its founding principles."[4] The EO further asserts, "Deteriorating conditions in certain countries due to war, strife, disaster, and civil unrest increase the likelihood that terrorists will use any means possible to enter the United States. The United States must be vigilant during the visa-issuance process to ensure that those approved for admission do not intend to harm Americans and that they have no ties to terrorism."[5]

To accomplish its stated purpose, EO 13769 made a series of changes, all of which took effect immediately. First, section 3(a) of the EO directed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to conduct an immediate review to determine the information needed from any country to adjudicate any visa, admission, or other benefit under the Immigration and Nationality Act ("INA") to determine the individual seeking the benefit is who the individual claims to be and is not a security or public-safety threat.[6] Section 3(b) then directed the Secretary of Homeland Security, in consultation with the Secretary of State and the Director of National Intelligence, to provide President Trump within 30 days a report on the results of this review, including the Secretary of Homeland Security's determination of the information needed for adjudications and a list of countries that do not provide adequate information.[7]

So as to "temporarily reduce" the "investigative burdens" on the relevant agencies conducting the review described above, and so as to ensure the "proper review and maximum utilization of available resources for the screening of foreign nationals" and "ensure that adequate standards are established to prevent infiltration by foreign terrorists or criminals," section 3(c) of the Executive Order made one of its most controversial directives:

---

[2] *International Refugee Assistance Project v. Trump*, -- F.3d --, 2017 WL 2273306, *3-*5 (4th Cir. 2017) (*en banc*).
[3] 82 Fed. Reg. 8,977.
[4] *Id*. at § 1.
[5] *Id.*
[6] *Id.* at § 3(a).
[7] 82 Fed. Reg. 8,977-78, at § 3(b).

> [P]ursuant to section 212(f) of the INA, 8 U.S.C. 1182(f), I hereby proclaim that the immigrant and nonimmigrant entry into the United States of aliens from countries referred to in section 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the United States, and I hereby suspend entry into the United States, as immigrants and nonimmigrants, of such persons for 90 days from the date of this order (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas). [8]

This provision implemented President Trump's so-called travel ban. Notably, it leveraged an existing list of countries, nationals of which are not eligible for participation in any visa waiver program the United States might establish. [9] This list, which is found in the INA, explicitly includes Iraq and Syria as well as other countries that might be designated by the Secretary of State or the Secretary of Homeland Security under other specified statutes. [10] As of the effective date of EO 13769, the affected countries were: Iran, Iraq, Lybia, Somalia, Sudan, Syria, and Yemen.

Section 3(c)'s reference to "immigrants" and use of the term "entry"—rather than "admission"—to describe what it was suspending suggested it might actually bar "entry" of legal permanent residents who happened to be from one of the identified countries.[11] At the same time, Section 3(g) of the Executive Order gave the Secretaries of State and Homeland Security the authority to issue visas or other immigration benefits to nationals of countries for which visas and benefits were otherwise blocked by the order on a case-by-case basis, and when "in the national interest," leading some to speculate the Secretaries might use their authority to allow legal permanent residents into the country, even if the order otherwise purported to block their entry. Ultimately, the confusion over the application of the order to legal permanent residents resulted in airlines overseas allowing legal permanent residents to board their flights to the United States (because it was not clear they were covered by the order) even as they turned back non-immigrant visa holders from the affected countries (because they were clearly covered by the order). Within hours, however, it became clear that Customs and Border Protection ("CBP") was applying the ban to legal permanent residents from the affected countries, including those who were airborne

[8] 82 Fed. Reg. 8,977-78, at § 3(c).
[9] *See* 8 U.S.C. § 1187(a)(12).
[10] 82 Fed. Reg. 8,977-78, at § 3(c).
[11] Briefly, an "immigrant" intends to reside in the United States indefinitely, whereas a "non-immigrant" is coming to the United States on a temporary basis, typically for a specific purpose. *See* 8 U.S.C. § 1101(15). Generally speaking, a legal permanent resident is allowed to intend to reside in the United States indefinitely (i.e., have an immigrant intent), whereas most non-immigrants are not allowed to have such an intent (although a few "dual-intent" non-immigrants, such as H1B visa holders, are permitted to have an immigrant intent). Moreover, by statute, a legal permanent resident is not considered to be seeking "admission" to the United States, subject to certain narrow exceptions. 8 U.S.C. § 1101(13). As a result, the reference to "immigrants" and use of the term "entry" (which is generally understood to include a physical crossing of the United States border) rather than "admission" suggested the order would apply to legal permanent residents.

when the Executive Order was issued or had been allowed to board flights to the United States after the Executive Order was issued.[12]

Although Section 3(c)'s travel ban was only for an initial period of 90 days, Section 4 of the Executive Order provided that, within 60 days of the Secretary of Homeland Security's report detailing the information needed for adjudications and the list of countries that do not provide that information (*i.e.*, within 90 days of the date of the Executive Order), the Secretary of State would direct those countries to begin providing the requested information.[13] Moreover, within the next 60 days, the Secretary of Homeland Security, in consultation with the Secretary of State, would then submit a list of countries recommended for inclusion on a Presidential proclamation prohibiting the entry of foreign nationals (excluding those foreign nationals traveling on diplomatic visas, North Atlantic Treaty Organization visas, C-2 visas for travel to the United Nations, and G-1, G-2, G-3, and G-4 visas) from countries that did not provide the requested information. [14] This provision created considerable uncertainty as to what future impact the order might have with respect to countries who were identified as being unwilling or unable to comply with whatever information demands the United States might make pursuant to the order.

Section 4(a) of EO 13769 directed the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, and the Director of the Federal Bureau of Investigation to implement a program to identify individuals seeking to enter the United States on a fraudulent basis with the intent to cause harm, or who are at risk of causing harm subsequent to their admission. Similar to the directive to review standard visa processing and issuance, this portion of the Executive Order was not controversial.

The Executive Order then turned its attention to refugees and set forth its second, controversial set of directives. Specifically, Section 5(a) of the Executive Order suspended the United States Refugee Admissions Program in its entirety for 120 days.[15] Upon resumption of the refugee program, Section 5(b) of the Executive Order directed the Secretary of State to prioritize refugee claims based on religious persecution where a refugee's religion is the minority religion in the country of his or her nationality.[16] Independent of these two directions, Section 5(c) of the Executive Order suspended indefinitely the entry of all Syrian refugees.[17] Section 5(d) further capped all refugee admissions for 2017 at 50,000.[18]

Just as Section 3(g) had done with respect to entry by nationals of the seven targeted countries, Section 5(e) allowed the Secretaries of State and Homeland Security to make case-by-case exceptions to the various refugee bans "when in the national interest." [19] Unlike Section 3(g), however, Section 5(e) went on to provide that situations in the national interest include "when

---

[12] www.reuters.com/article/us-usa-trump-immigration-greencard-idUSKBN15C0KX (last visited May 11, 2017); www.nydailynews.com/news/politics/trump-order-blocks-green-card-visa-holders-airports-article-1.2957910 (last visited May 11, 2017).
[13] 82 Fed. Reg. 8,978, at § 3(d).
[14] *Id.* at § 3(e).
[15] 82 Fed. Reg. 8,979, at § 5a.
[16] *Id.* at § 5(b).
[17] *Id.* at § 5(c).
[18] *Id.* at § 5(d).
[19] *Id.* at § 5(e).

the person is a religious minority in his country of nationality facing religious persecution."[20] The Executive Order requires the Secretaries of State and Homeland Security and the Director of National Intelligence to evaluate the United States' visa, admission, and refugee programs during the periods in which entry is suspended.[21]

Independent of the Executive Order, on January 27, 2017, Edward J. Ramotowski, Deputy Assistant Secretary, Bureau of Consular Affairs, issued a directive to U.S. consulates around the world, instructing them to immediately revoke all valid non-immigrant and immigrant (green card) visas of nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[22] In other words, in a one-page missive, the Department of State cancelled *all* U.S. visas, including U.S. immigrant visas (*a.k.a.*, "green cards" held by legal permanent residents) of every national of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen on the planet.

The impact of the Executive Order was immediate and widespread. There was confusion as to enforcement and application, protests erupted across the country, and chaos reigned in U.S. airports. Within hours of the Executive Order being released, the American Civil Liberties filed suits and various states filed suits in federal district courts throughout the U.S. seeking to block implementation of the order.

On January 28, 2017, U.S. Federal District Court Judge Ann M. Donnelly found two Iraqis, one of whom had served the U.S. military for five years in Iraq as an interpreter, had proven "the removal of the petitioner and others similarly situated violates their rights to Due Process and Equal Protection guaranteed by the United States Constitution." [23] Accordingly, the court issued a temporary restraining order against President Trump, the Department of Homeland Security ("DHS"), Customers and Border Protection ("CBP"), and others ordering they were

> ENJOINED AND RESTRAINED from, in any manner or by any means, removing individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of valid immigrant and non-immigrant visas, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia, and Yemen legally authorized to enter the United States.[24]

The next day, U.S. Federal District Court Judge Allison D. Burroughs and U.S. Magistrate Judge Judith G. Dein likewise found that two legal permanent residents detained at Logan Airport had shown "a strong likelihood of success in establishing that the detention and/or removal of the petitioners and others similarly situated would violate their rights to Due Process and Equal Protection guaranteed by the United States Constitution." [25] Accordingly, the court issued a temporary restraining order against President Trump, DHS, CBP, and others holding they

[20] *Id.* at § 5(e).
[21] 82 Fed. Reg. 8,979, at § 5
[22] *Tootkaboni et al. v. Trump, et al.*, 1:17-cv-10154-NMG (D. Mass. 2017), document 23-1 Filed 01/31/17.
[23] *Darweehs et al. v. Trump et al.*, 1:17-cv-480-AMD (E.D.N.Y. 2017), issued 01/28/2017.
[24] *Id*.
[25] *Tootkaboni et al. v. Trump et al.*, 1:17-cv-10154-NMG (D. Mass. 2017), issued 01/29/2017.

> shall not, by any manner or means, detain or remove individuals with refugee applications approved by U.S. Citizenship and Immigration Services as part of the U.S. Refugee Admissions Program, holders of valid immigrant and non-immigrant visas, lawful permanent residents, and other individuals from Iraq, Syria, Iran, Sudan, Libya, Somalia and Yemen who, absent the Executive Order, would be legally authorized to enter the United States.[26]

On January 29, 2017, DHS fired back by stating, in apparent defiance of both orders, that it would "continue to enforce all of President Trump's Executive Orders in a manner that ensures the safety and security of the American people" and that "President Trump's Executive Orders remain in place—prohibited travel will remain prohibited, and the U.S. government retains its right to revoke visas at any time if required for national security or public safety."[27] At the same day, DHS separately stated that legal permanent resident status would be considered a "dispositive factor" in considering whether an individual was entitled to a waiver pursuant to Section 3(g) of the order, such that the order would not as a practical matter apply to legal permanent residents going further.[28]

On January 30, 2017, the State of Washington became the first state to join the fray, filing suit against President Trump, DHS, and the United States of America (among others) seeking to enjoin enforcement of Sections 3(c), 5(a)-(c), and 5(e) of the Executive Order.[29] Washington alleged that the Executive Order unconstitutionally and illegally stranded its residents abroad, split their families, restricted their travel, and damaged the State's economy and public universities in violation of the First and Fifth Amendments, the INA, the Foreign Affairs Reform and Restructuring Act, the Religious Freedom Restoration Act, and the Administrative Procedure Act.[30] Washington also alleged that the Executive Order was not truly meant to protect against terror attacks by foreign nationals but rather was intended to enact a "Muslim ban," as the President had stated during his presidential campaign that he would do.[31]

On February 2, 2017, apparently concerned by the new legal challenge by a state, White House Counsel Don McGahn issued guidance "clarifying" that the ban did not apply to legal permanent residents at all, such that they did not even need the blanket waiver DHS had granted them days before but were instead entirely exempted from it.[32]

On February 3, 2017, notwithstanding the administration's attempts to backpedal, U.S. Federal District Court Judge James L. Robart found the State of Washington and the State of Minnesota, which had joined the suit, had established they were likely to prevail on their claims, that their economies and citizens were facing an imminent threat of irreparable and ongoing injury, and that enforcement of the order should be temporarily enjoined pending a temporary injunction

---

[26] *Id*.

[27] www.dhs.gov/news/2017/01/29/department-homeland-security-response-recent-litigation (last visited May 11, 2017).

[28] www.dhs.gov/news/2017/01/29/statement-secretary-john-kelly-entry-lawful-permanent-residents-united-states (last visited May 11, 2017).

[29] *State of Washington et al. v. Trump et al.*, C17-0141-JLR (W.D. Wash. 2017).

[30] *Id.*

[31] *Id.*

[32] https://www.buzzfeed.com/chrisgeidner/heres-the-white-house-memo-used-to-clarify-that-green-card-h (last visited May 11, 2017).

hearing.[33] Accordingly, the court restrained President Trump and the other defendants from enforcing Sections 3(c), 5(a), 5(b), 5(c), and 5(e), to the extent Section 5(e) purported to prioritize refugee claims of certain religions.[34]

On February 4, 2017, after issuing a number of choice tweets, the Administration appealed Judge Robart's ruling to the Ninth Circuit Court of appeals, seeking an immediate stay of the order.[35] The Ninth Circuit denied the request for an immediate stay but set an expedited briefing and hearing schedule for a hearing on an emergency stay.[36] In the hearing that quickly followed, the government principally argued that the Judicial Branch simply did not have the authority to review or otherwise question President Trump's Executive Orders:

> The Government does not merely argue that courts owe substantial deference to the immigration and national security policy determinations of the political branches—an uncontroversial principle that is well-grounded in our jurisprudence. Instead, the Government has taken the position that the President's decisions about immigration policy, particularly when motivated by national security concerns, are unreviewable, even if those actions potentially contravene constitutional rights and protections. The Government indeed asserts that it violates separation of powers for the judiciary to entertain a constitutional challenge to executive actions such as this one.[37]

The Ninth Circuit noted that there was *no* legal precedence for the administration's claim, which appeared on its face to run counter to the fundamental structure of our constitutional democracy:

> Although our jurisprudence has long counseled deference to the political branches on matters of immigration and national security, neither the Supreme Court nor our court has ever held that courts lack the authority to review executive action in those arenas for compliance with the Constitution. To the contrary, the Supreme Court has repeatedly and explicitly rejected the notion that the political branches have unreviewable authority over immigration or are not subject to the Constitution when policymaking in that context. Our court has likewise made clear that "[a]lthough alienage classifications are closely connected to matters of foreign policy and national security," courts "can and do review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake."[38]

Turning to the merits, the Ninth Circuit found the government had not shown it was likely to succeed on appeal with respect to "at least" the States' Due Process arguments.[39] The Ninth Circuit also noted "the serious nature of the allegations the States have raised with respect to their religious

---

[33] *State of Washington et al. v. Trump et al.*, C17-0141-JLR (W.D. Wash. 2017), issued 02/03/2017.
[34] *Id.*
[35] *State of Washington et al. v. Trump*, No. 17-35105, 2017 WL 469608 (9th Cir. Feb. 4, 2017).
[36] *Id.*
[37] *State of Washington et al. v. Trump et al.*, No. 17-35105, D.C. No. 2:17-cv-00141, at pp. 13-14 (9th Cir. Feb. 9. 2017) (citations omitted).
[38] *Id*. at pp. 14-15 (citations omitted).
[39] *Id*. at p. 19.

discrimination claims." [40] Furthermore, the Ninth Circuit found the government had not demonstrated it would suffer irreparable harm absent a stay of the temporary restraining order. As the Ninth Circuit explained,

> Although we agree that "the Government's interest in combating terrorism is an urgent objective of the highest order," Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010), the Government has done little more than reiterate that fact. Despite the district court's and our own repeated invitations to explain the urgent need for the Executive Order to be placed immediately into effect, the Government submitted no evidence to rebut the States' argument that the district court's order merely returned the nation temporarily to the position it has occupied for many previous years.[41]

Accordingly, on February 9, 2017, the Ninth Circuit denied the administration's request for a stay of Judge Robart's temporary restraining order, meaning President Trump's travel ban was effectively dead pending a full temporary injunction hearing before Judge Robart to take place at a later date.

### B. No Travel For Many of You: EO 13780 a.k.a. Travel Ban II

On March 6, 2017, President Trump signed a revised travel ban, Executive Order 13780, which was a highly modified version of his prior travel ban.[42] The Executive Order opened by setting forth the history of EO 13769, including the litigation it spawned.[43] EO 13780 then explicitly revoked EO 13769, in the apparent hopes of closing the chapter on the events that had led to it being enjoined.[44]

The new Executive Order set forth a sharply narrowed version of the prior travel ban. As a threshold matter, while the other six countries previously targeted remained targeted, nationals of Iraq were completely exempted from the new Executive Order's directives related to visas and admission, noting "the close cooperative relationship between the United States and the democratically elected Iraqi government, the strong United States diplomatic presence in Iraq, the significant presence of United States forces in Iraq, and Iraq's commitment to combat ISIS justify different treatment for Iraq."[45]

Moreover, unlike the prior Executive Order, EO 13780 gave advance notice and by its terms would not become effective for twenty days.[46] In addition, once effective, it applied to a much smaller subset of individuals. Whereas EO 13769 had immediately banned entry by *any* national of one of the targeted countries, EO 13780 only banned entry of a national of one of the (now) six targeted countries who: (i) was outside the United States on the effective date of the order; (ii) did not have a valid visa at 5:00 p.m., eastern standard time on January 27, 2017; and (iii) did not have a valid visa on the effective date of this order (March 26, 2017).[47] Combined with the

---

[40] *Id*.
[41] *Id*. at p. 26.
[42] 82 Fed. Reg. 13209.
[43] *Id*. at § 1(a)-(c).
[44] 82 Fed. Reg. 13212, at § 1(i).
[45] *Id*. at § 1(g).
[46] *Id*. at § 2(a).
[47] 82 Fed. Reg. 13213, at § 3(a).

delayed effective date of this order, this meant individuals outside the U.S. had an opportunity to return to the U.S. (or secure a visa to return to the U.S.) and thereby exempt themselves from the order.

In addition, the new Executive Order explicitly exempted:

(i) any lawful permanent resident of the United States;

(ii) any foreign national who is admitted to or paroled into the United States on or after the effective date of this order;

(iii) any foreign national who has a document other than a visa, valid on the effective date of this order or issued on any date thereafter, that permits him or her to travel to the United States and seek entry or admission, such as an advance parole document;

(iv) any dual national of a country designated under section 2 of this order when the individual is traveling on a passport issued by a non-designated country;

(v) any foreign national traveling on a diplomatic or diplomatic-type visa, North Atlantic Treaty Organization visa, C-2 visa for travel to the United Nations, or G-1, G-2, G-3, or G-4 visa; or

(vi) any foreign national who has been granted asylum; any refugee who has already been admitted to the United States; or any individual who has been granted withholding of removal, advance parole, or protection under the Convention Against Torture.[48]

Like the prior Executive Order, the new Executive Order also allowed for case-by-case exceptions and this time included a list of situations in which a waiver would be "appropriate":

(i) the foreign national has previously been admitted to the United States for a continuous period of work, study, or other long-term activity, is outside the United States on the effective date of this order, seeks to reenter the United States to resume that activity, and the denial of reentry during the suspension period would impair that activity;

(ii) the foreign national has previously established significant contacts with the United States but is outside the United States on the effective date of this order for work, study, or other lawful activity;

(iii) the foreign national seeks to enter the United States for significant business or professional obligations and the denial of entry during the suspension period would impair those obligations;

(iv) the foreign national seeks to enter the United States to visit or reside with a close family member (e.g., a spouse, child, or parent) who is a United States citizen, lawful

[48] 82 Fed. Reg. 13213-14, at § 3(b).

permanent resident, or alien lawfully admitted on a valid nonimmigrant visa, and the denial of entry during the suspension period would cause undue hardship;

(v) the foreign national is an infant, a young child or adoptee, an individual needing urgent medical care, or someone whose entry is otherwise justified by the special circumstances of the case;

(vi) the foreign national has been employed by, or on behalf of, the United States Government (or is an eligible dependent of such an employee) and the employee can document that he or she has provided faithful and valuable service to the United States Government;

(vii) the foreign national is traveling for purposes related to an international organization designated under the International Organizations Immunities Act (IOIA), 22 U.S.C. 288 et seq., traveling for purposes of conducting meetings or business with the United States Government, or traveling to conduct business on behalf of an international organization not designated under the IOIA;

(viii) the foreign national is a landed Canadian immigrant who applies for a visa at a location within Canada; or

(ix) the foreign national is traveling as a United States Government-sponsored exchange visitor.[49]

The new Executive Order also softened the potential consequences of countries ultimately identified as not providing the information the United States determined was necessary to process visa and admission applications. Whereas the prior order contemplated a list of non-compliant countries for inclusion in a list banning entry of nationals from those countries "until compliance occurs," the new Executive Order provided that the President's list would "prohibit the entry of appropriate categories of foreign nationals of countries that have not provided the information requested until they do so or until the Secretary of Homeland Security certifies that the country has an adequate plan to do so, or has adequately shared information through other means."[50]

With respect to refugees, the new Executive Order did not ban refugees from Syria, as its predecessor had. It did, however, reinstate the ban on all refugee processing for 120 days.[51] Likewise, the new Executive Order reinstated the 50,000 cap on refugee admissions for 2017.[52] Like the prior order, the new order also allowed for case-by-case exceptions, but it no longer included a provision for prioritizing refugee applications by individuals whose religion was in the minority.[53]

[49] 82 Fed. Reg. 13214-15, at § 3(c).
[50] 82 Fed. Reg. 13213, at § 1(e).
[51] 82 Fed. Reg. 13215, at § 6(a).
[52] 82 Fed. Reg. 13216, at § 6(b).
[53] *Id.* at § 6(c).

The new order also implemented various other provisions related to visa issuance, including a reinstatement of the requirement of in-person interviews for individuals of all nationalities. [54]

The new Executive Order was plainly designed to deal with many of the challenges that had faced the implementation of the prior executive order, and reaction to the order was in fact far less intense (if for no other reason than the advance notice provided). Nevertheless, it was quickly met in court, this time with Hawaii taking the lead in seeking to block its implementation.

On March 7, 2017, the day after EO 13780 was signed, Hawaii filed suit against President Trump and others, arguing the new executive order violated the Establishment Clause, the Equal Protection Clause, the Due Process Clause, and the INA because it continued to target individuals on the basis of religion and nationality.[55] For its part, the administration argued the Executive Order was facially neutral as to religion and could not possibly be religiously motivated because "the six countries represent only a small fraction of the world's 50 Muslim-majority nations, and are home to less than 9% of the global Muslim population . . . [T]he suspension covers every national of those countries, including millions of non-Muslim individuals[.]"[56] As the U.S. Federal District Court Judge Derrick K. Watson noted, "The illogic of the Government's contentions is palpable. The notion that one can demonstrate animus toward any group of people only by targeting all of them at once is fundamentally flawed."[57]

The court likewise rejected the administration's argument that the court could not consider President Trump's (numerous) statements regarding his desire to institute a "Muslim ban" and instead could only review the text of the order itself. After noting the Ninth Circuit had specifically rejected this argument when it refused to issue a stay of the temporary restraining order barring the prior executive order, the court went on to note the incredibly unique factual history behind the revised executive order:

> The Government appropriately cautions that, in determining purpose, courts should not look into the "veiled psyche" and "secret motives" of government decisionmakers and may not undertake a "judicial psychoanalysis of a drafter's heart of hearts." The Government need not fear. The remarkable facts at issue here require no such impermissible inquiry. For instance, there is nothing "*veiled*" about this press release: "Donald J. Trump is calling for a total and complete shutdown of Muslims entering the United States.[]" Nor is there anything "*secret*" about the Executive's motive specific to the issuance of the Executive Order:
>
> > Rudolph Giuliani explained on television how the Executive Order came to be. He said: "When [Mr. Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.'"

[54] *Id.* at § 9(a).
[55] *State of Hawai'i v. Trump et al.*, No. 17-00050-DKW-KSC, (D. Hawaii 2017).
[56] *State of Hawai'i v. Trump et al.*, No. 17-00050-DKW-KSC, (D. Hawaii 2017), Order issued 03/15/2017 at p. 30.
[57] *Id*.

> On February 21, 2017, commenting on the then-upcoming revision to the Executive Order, the President's Senior Adviser, Stephen Miller, stated, "Fundamentally, [despite "technical" revisions meant to address the Ninth Circuit's concerns in Washington,] you're still going to have the same basic policy outcome [as the first]."[58]

The court then dismantled the state rationale for the order, security, by examining a number of internal inconsistencies related to the application of the order to certain individuals (e.g., an Iranian who immigrated to Switzerland and lived there his entire life) but not others (e.g., a Swiss national who immigrated to Iran and lived there his entire life), ultimately labeling it a "pre-text" for the order's apparent purpose, religious discrimination.[59]

Accordingly, on March 15, 2017, after conducting a hearing and considering the argument of the parties, the court enjoined enforcement of Sections 2 and 6, the entry and refugee provisions respectively, pending a full temporary injunction hearing.[60] The court was quick to note that it was not holding this administration could *never* issue an appropriate executive order on the handling of entry by foreign nationals and refugee processing:

> Here, it is not the case that the Administration's past conduct must forever taint any effort by it to address the security concerns of the nation. Based upon the current record available, however, the Court cannot find the actions taken during the interval between revoked Executive Order No. 13,769 and the new Executive Order to be "genuine changes in constitutionally significant conditions." The Court recognizes that "purpose needs to be taken seriously under the Establishment Clause and needs to be understood in light of context; an implausible claim that governmental purpose has changed should not carry the day in a court of law any more than in a head with common sense." Yet, context may change during the course of litigation, and the Court is prepared to respond accordingly.[61]

That same day, U.S. Federal District Court Judge Theodore Chuang in Maryland issued a nationwide temporary restraining order barring enforcement.[62] First, the government acknowledged that anyone who was subject to the new executive order would be denied an immigrant visa at a consulate outside the United States.[63] Given this acknowledgement, the court found the EO amounted to a bar on the issuance of immigrant visas on the basis of nationality, in violation of the INA, which explicitly provides, "No person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of his race, sex, nationality, place of birth, or place of residence[.]"[64]

---

[58] *Id*. at pp. 34-35.
[59] *Id*. at pp. 36-38.
[60] *Id*. at pp. 43.
[61] *Id*. at 38-39 (citations omitted).
[62] *International Refugee Assistance Project (IRAP) v. Trump*, 8:17-cv-00361-TDC (2017), Order issued 03/15/2017.
[63] *Id*. at p. 21.
[64] *Id*. (citing 8 U.S.C. § 1152(a)(1)(A)).

The court further found that the plaintiffs were likely to prevail on their claim that the second Executive Order violates the Establishment Clause, based largely on the statements of President Trump and the internally flawed mechanics of the Executive Order with respect to application. Like the court in *Hawai'i v. Trump*, the court found it was not confined to the facial text of the order but could instead consider the statements of President Trump:

> These statements, which include explicit, direct statements of President Trump's animus towards Muslims and intention to impose a ban on Muslims entering the United States, present a convincing case that the First Executive Order was issued to accomplish, as nearly as possible, President Trump's promised Muslim ban. In particular, the direct statements by President Trump and Mayor Giuliani's account of his conversations with President Trump reveal that the plan had been to bar the entry of nationals of predominantly Muslim countries deemed to constitute dangerous territory in order to approximate a Muslim ban without calling it one precisely the form of the travel ban in the First Executive Order. Such explicit statements of a religious purpose are "readily discoverable fact[s]" that allow the Court to identify the purpose of this government action without resort to "judicial psychoanalysis." They constitute clear statements of religious purpose comparable to those relied upon in *Glassroth v. Moore*, where the court found that a Ten Commandments display at a state courthouse was erected for a religious purpose in part based on the chief justice stating at the dedication ceremony that "in order to establish justice, we must invoke 'the favor and guidance of Almighty God.'"[65]

Accordingly, the court enjoined President Trump and the other defendants from enforcing Section 2(c), the revised travel ban, but not the refugee suspension or any other provision of the order.[66]

Unlike its decision to scrap the first travel ban, the administration elected to defend its second travel ban and continues to litigate in both the Hawaii and Maryland cases. On May 25, 2017, the Fourth Circuit Court of Appeals upheld the Hawaii district court order enjoining enforcement of the second travel ban, holding the Judicial Branch is able to review the President's exercise of immigration-related powers and consider the President's commentary related to the exercise of that power, that the plaintiffs opposing the second travel ban had made a "substantial and affirmative showing" that the President's stated national security rationale was proffered in bad faith, and that the travel ban, its history, and the comments of the President and his advisors were sufficient proof of illegal religious animus to warrant a temporary restraint on enforcement.[67] As the Fourth Circuit explained,

> [F]inally, the Government argues that even if we could consider unofficial acts and statements, we should not rely on campaign statements. Those statements predate President Trump's constitutionally significant "transition from private life to the Nation's highest public office," and as such, they are less probative than

[65] *Id*. at p. 29-30 (citations omitted).
[66] *Id*. at pp. 40-41.
[67] International Refugee Assistance Project, -- F.3d. --, 2017 WL 2273306 at *24.

official statements, the Government contends. We recognize that in many cases, campaign statements may not reveal all that much about a government actor's purpose. But we decline to impose a bright-line rule against considering campaign statements, because as with any evidence, we must make an individualized determination as to a statement's relevancy and probative value in light of all the circumstances. The campaign statements here are probative of purpose because they are closely related in time, attributable to the primary decisionmaker, and specific and easily connected to the challenged action.

Just as the reasonable observer's "world is not made brand new every morning," nor are we able to awake without the vivid memory of these statements. We cannot shut our eyes to such evidence when it stares us in the face, for "there's none so blind as they that won't see." If and when future courts are confronted with campaign or other statements proffered as evidence of governmental purpose, those courts must similarly determine, on a case-by-case basis, whether such statements are probative evidence of governmental purpose. Our holding today neither limits nor expands their review.

The Government argues that reviewing campaign statements here would encourage scrutiny of all religious statements ever made by elected officials, even remarks from before they assumed office. But our review creates no such sweeping implications, because as the Supreme Court has counseled, our purpose analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Just as a reasonable observer would not understand general statements of religious conviction to inform later government action, nor would we look to such statements as evidence of purpose. A person's particular religious beliefs, her college essay on religious freedom, a speech she gave on the Free Exercise Clause—rarely, if ever, will such evidence reveal anything about that person's actions once in office. For a past statement to be relevant to the government's purpose, there must be a substantial, specific connection between it and the challenged government action. And here, in this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and EO-2, the "watered down" version of that plan that "get[s] just about everything," and "in some ways, more."

For similar reasons, we reject the Government's argument that our review of these campaign statements will "inevitably 'chill political debate during campaigns.'" Not all—not even most—political debate will have any relevance to a challenged government action. Indeed, this case is unique not because we are considering campaign statements, but because we have such directly relevant and probative statements of government purpose at all. To the extent that our review chills

> campaign promises to condemn and exclude entire religious groups, we think that a welcome restraint.[68]
>
> *****
>
> The Government has repeatedly asked this Court to ignore evidence, circumscribe our own review, and blindly defer to executive action, all in the name of the Constitution's separation of powers. We decline to do so, not only because it is the particular province of the judicial branch to say what the law is, but also because we would do a disservice to our constitutional structure were we to let its mere invocation silence the call for meaningful judicial review. The deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.
>
> EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it. In light of this, we find that the reasonable observer would likely conclude that EO-2's primary purpose is to exclude persons from the United States on the basis of their religious beliefs. We therefore find that EO-2 likely fails Lemon 's purpose prong in violation of the Establishment Clause. Accordingly, we hold that the district court did not err in concluding that Plaintiffs are likely to succeed on the merits of their Establishment Clause claim.[69]

On June 26, 2017, the United States Supreme Court upheld the all of the lower court injunctions with respect to individuals "similarly situated" to those who brought suit, "that is people or entities in the United States who have relationships with foreign nationals abroad, and how rights might be affected if those foreign nationals were excluded."[70] At the same time, the Court stayed enforcement of the injunctions with respect to foreign nationals who were not "similarly situated." Without disturbing the lower courts' findings that the various plaintiffs had demonstrated a likelihood of success, the Court focused on the different balancing of the equities with respect to foreign nationals:

> The courts below took account of the equities in fashioning interim relief, focusing specifically on the concrete burdens that would fall on Doe, Dr. Elshikh, and Hawaii if § 2(c) were enforced. They reasoned that § 2(c) would "directly affec[t]" Doe and Dr. Elshikh by delaying entry of their family members to the United States. The Ninth Circuit concluded that § 2(c) would harm the State by preventing students from the designated nations who had been admitted to the University of Hawaii from entering this country. These hardships, the courts reasoned, were sufficiently weighty and immediate to outweigh the Government's interest in enforcing § 2(c). Having adopted this view of the equities, the courts approved injunctions that covered not just respondents, but parties similarly situated to them—that is, people or entities in the United States who have

[68] International Refugee Assistance Project, -- F.3d. --, 2017 WL 2273306 at *22.
[69] International Refugee Assistance Project, -- F.3d. --, 2017 WL 2273306 at *24.
[70] *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017).

> relationships with foreign nationals abroad, and whose rights might be affected if those foreign nationals were excluded.
>
> But the injunctions reach much further than that: They also bar enforcement of § 2(c) against foreign nationals abroad who have no connection to the United States at all. The equities relied on by the lower courts do not balance the same way in that context. Denying entry to such a foreign national does not burden any American party by reason of that party's relationship with the foreign national. And the courts below did not conclude that exclusion in such circumstances would impose any legally relevant hardship on the foreign national himself. So whatever burdens may result from enforcement of § 2(c) against a foreign national who lacks any connection to this country, they are, at a minimum, a good deal less concrete than the hardships identified by the courts below.
>
> At the same time, the Government's interest in enforcing § 2(c), and the Executive's authority to do so, are undoubtedly at their peak when there is no tie between the foreign national and the United States. Indeed, EO–2 itself distinguishes between foreign nationals who have some connection to this country, and foreign nationals who do not, by establishing a case-by-case waiver system primarily for the benefit of individuals in the former category. To prevent the Government from pursuing that objective by enforcing § 2(c) against foreign nationals unconnected to the United States would appreciably injure its interests, without alleviating obvious hardship to anyone else.[71]

## III. IF IT SAYS IT'S A DUCK

As noted above, employment law has forced courts to grapple with what decision-maker comments do and do not prove with respect to intent and the causal connection (if any) between that intent and an adverse employment action experienced by the employee. At the same time, the evolution of causation standards in employment law cases has led to particularly nuanced approaches to the evidentiary value of decision-maker comments, particularly at the summary judgment stage.

### A. Taking The Bad With The Good

In 1989, the United States Supreme Court addressed causation in employment cases at length in the watershed case of *Price Waterhouse v. Hopkins*.[72]

Ann Hopkins was a senior manager in Price Waterhouse's Office of Government Services in Washington, D.C., and in 1982 her managers proposed her for partnership.[73] At the time, Price Waterhouse's process for determining whether to admit a candidate to partnership included inviting all partners to submit comments about each candidate up for consideration.[74] The firm's Admissions Committee then reviewed these comments, interviewed the partners who made

[71] Id. at 2087-88.
[72] *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989).
[73] *Id*. at 1780-81.
[74] *Id*. at 1781.

them, and made a recommendation to the firm's Policy Board regarding the candidate.[75] The Policy Board would then decide whether to submit the candidate's name for a full vote on partnership, reject the candidate outright, or place the candidate's application on hold.[76] Notably, there were no fixed guidelines controlling the recommendation of the Admissions Committee or the final decision of the Policy Board, and there was no limit on the number of partners the firm could admit in any given year.[77]

The comments submitted with respect to Hopkins praised her for her intellect, productivity, ability to deal with clients, and ability to obtain results. At the same time, some partners pointed out that her aggressiveness could translate into abrasiveness, particularly when it came to dealing with staff, an issue on which Hopkins had been counseled during her employment.[78] While many of these comments were sex-neutral, some suggested a number of the partners had an issue with Hopkins' demeanor *because she was a woman*. For example, one partner said Hopkins "overcompensated for being a woman," while another said Hopkins should take "a course at charm school." Similarly, while several partners criticized Hopkins's use of profanity, one partner explained that these partners were bothered "because it's a lady using foul language." Indeed, even the comments of some of Hopkins's supporters were laced with sexual bias, including one supporter who said Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." To cap it all off, one of the partners on the Policy Board explained that Hopkins needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her chances.[79]

The Policy Board ultimately decided to put Hopkins's application on hold. After the partners in her office then declined to nominate Hopkins for partnership again, she sued Price Waterhouse under Title VII for sex discrimination. The case was tried to Judge Gesell (bench trials folks), who found Price Waterhouse had legitimately emphasized interpersonal skills in its admission process and had *not* fabricated its concerns about Hopkins. Judge Gesell further found that Price Waterhouse had *not* given decisive consideration to Hopkins's interpersonal issues *solely* because she was a woman.[80]

At the same time, Judge Gesell found that *some* of the partners' remarks about Hopkins stemmed from an "impermissibly cabined view of the proper behavior of women" and noted that Price Waterhouse had done nothing to disavow or avoid relying on *those* partners' comments. Accordingly, Judge Gesell held that Price Waterhouse had unlawfully discriminated against Hopkins "because of" sex by giving credence to comments that were based on sex stereotyping. Judge Gesell further found that Price Waterhouse failed to prove by "clear and convincing" evidence that it would have placed Hopkins's candidacy on hold absent consideration of the discriminatory comments.[81] The Court of Appeals affirmed Judge Gesell.[82]

---

[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*. at 1782.
[79] *Id*.
[80] *Id*. at 1783.
[81] *Id*.

Seeing an opportunity to clarify Title VII's seemingly simple prohibition on discrimination "because of" sex, the Supreme Court granted certiorari. In a fractured plurality opinion, with Justice Kennedy and Scalia dissenting, the Supreme Court noted that "because of" does not mean "*solely* because of" and rejected Price Waterhouse's argument that Title VII requires "but for" causation. Instead, the Court held Title VII prohibits decisions based on a "mixture" of legitimate and illegitimate considerations:

> But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way. The present, active tense of the operative verbs of § 703(a)(1) ("to fail or refuse"), in contrast, turns our attention to the actual moment of the event in question, the adverse employment decision. The critical inquiry, the one commanded by the words of § 703(a)(1), is whether gender was a factor in the employment decision *at the moment it was made*. Moreover, since we know that the words "because of" do not mean "*solely* because of," we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.[83]

The plurality then turned to the criticism of the dissent, who argued this construction of Title VII's causation requirement was too lax:

> To attribute this meaning to the words "because of" does not, as the dissent asserts, divest them of causal significance. A simple example illustrates the point. Suppose two physical forces act upon and move an object, and suppose that either force acting alone would have moved the object. As the dissent would have it, neither physical force was a "cause" of the motion unless we can show that but for one or both of them, the object would not have moved; apparently both forces were simply "in the air" unless we can identify at least one of them as a but-for cause of the object's movement. Events that are causally overdetermined, in other words, may not have any "cause" at all. This cannot be so.
>
> We need not leave our common sense at the doorstep when we interpret a statute. It is difficult for us to imagine that, in the simple words "because of," Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision she challenges. We conclude, instead, that Congress meant to obligate her to prove

[82] *Id*. The Court of Appeals disagreed with Judge Gesell in terms of what would happen if Price Waterhouse met its burden in this regard. Whereas Judge Gesell opined it would have allowed Price Waterhouse to avoid equitable relief, the Court of Appeals stated Price Waterhouse would have avoided liability entirely.
[83] *Id*. at 1785 (emphasis in original).

> that the employer relied upon sex-based considerations in coming to its decision.[84]

Next, the plurality attempted to reconcile its construction with its prior holding in *Burdine*, in which held the burden of persuasion does not shift to the employer to show that its stated legitimate reason for the employment decision was its "true reason," even if a plaintiff has made out a *prima facie* case of discrimination.[85] According to the plurality, *Burdine* was simply inapplicable to mixed motive cases: "Where a decision was the product of a mixture of legitimate and illegitimate motives, … it simply makes no sense to ask whether the legitimate reason was *the* 'true reason' for the decision—which is the question asked by *Burdine*."[86]

Turning to the record evidence before it, the plurality affirmed the lower court finding that Hopkins had met her burden of proving Price Waterhouse had impermissibly considered her sex when it delayed her partnership application:

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part. In any event, the stereotyping in this case did not simply consist of stray remarks. On the contrary, Hopkins proved that Price Waterhouse invited partners to submit comments; that some of the comments stemmed from sex stereotypes; that an important part of the Policy Board's decision on Hopkins was an assessment of the submitted comments; and that Price Waterhouse in no way disclaimed reliance on the sex-linked evaluations. This is not, as Price Waterhouse suggests, "discrimination in the air"; rather, it is, as Hopkins puts it, "discrimination brought to ground and visited upon" an employee.[87]

The plurality then turned to whether Price Waterhouse had met its burden, explicitly mindful of the fact that Title VII was intended to preserve the employer's right freedom to consider anything it choose that was not specifically made illegal.[88] At the same time, the Court cautioned, "proving 'that the same decision would have been justified ... is not the same as proving that the same decision would have been made.'"[89] Moreover, an employer must do more than show that it was motivated *in part* by a legitimate reason and must instead prove that its legitimate reason would have led it to make the same decision on its own.[90] The Court further held that an employer that makes this showing may escape liability under Title VII entirely, on causation grounds.[91] Finally, the Court held, an employer is not required to make its showing by "clear and convincing" evidence but instead may prevail by making the showing under a

---

[84] *Id*. at 1785-86.
[85] *Id*. at 1788-89, *citing Texas Dept. of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1095-96 (1981).
[86] *Id*. at 1789.
[87] *Id*. at 1791.
[88] *Id*. at 1786.
[89] *Id*.at 1791 (citations omitted).
[90] *Id*. at 1791-92.
[91] *Id*. at 1795.

traditional preponderance of the evidence standard.[92] Given the courts below had held only that Price Waterhouse had not met its burden under a "clear and convincing" standard, the Court remanded the case for a determination of whether it had met is burden under a preponderance of the evidence standard.[93]

Justice O'Connor wrote separately from the plurality, concurring in its judgment but seeing a need to spell out a somewhat different view of causation under Title VII. Like the plurality, Justice O'Connor rejected the dissent's view that Title VII required a plaintiff to prove "but-for" discrimination.[94] At the same time, Justice O'Connor felt Title VII required more than a simple preponderance of the evidence showing that discrimination was "a" factor in bringing about the adverse employment action at issue and instead felt a plaintiff should show it was a "substantial" factor in bringing about the adverse action.[95]

Like the dissent, Justice O'Connor also agreed the plurality's opinion marked a significant departure from both *McDonnell Douglas* and *Burdine* by shifting the burden of persuasion from the plaintiff to the defendant to prove it would have taken the same action without regard to the impressible motivation, although unlike the dissent she believed the departure was warranted.[96] First, Justice O'Connor noted that *McDonnell Douglas* was designed to deal with cases where the evidence of discrimination was circumstantial, not direct.[97] Second, she was concerned that requiring the plaintiff to prove that one (illegal) reason was the employer's true reason was demanding the impossible and that the policy underlying Title VII was better served by shifting the burden of persuasion to the employer, once the plaintiff showed the illegal motivation was a "substantial factor" in the decision:

> [T]here is mounting evidence in the decisions of the lower courts that respondent here is not alone in her inability to pinpoint discrimination as the precise cause of her injury, despite having shown that it played a significant role in the decisional process. Many of these courts, which deal with the evidentiary issues in Title VII cases on a regular basis, have concluded that placing the risk of nonpersuasion on the defendant in a situation where uncertainty as to causation has been created by its consideration of an illegitimate criterion makes sense as a rule of evidence and furthers the substantive command of Title VII. Particularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, requiring the plaintiff to prove that any one factor was the definitive cause of the decisionmakers' action may be tantamount to declaring Title VII inapplicable to such decisions.[98]

Turning back to the question of the showing needed to shift the burden to the employer to prove its "true" reason, Justice O'Connor gave specific attention to the probative value of comments:

---

[92] *Id*.
[93] *Id*.
[94] *Id*. at 1797.
[95] *Id*. at 1798.
[96] *Id*. at 1801.
[97] *Id*.
[98] *Id*. at 1802-03 (citations omitted).

> [S]tray remarks in the workplace, while perhaps probative of sexual harassment, cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard. … Race and gender always "play a role" in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion. For example, in the context of this case, a mere reference to "a lady candidate" might show that gender "played a role" in the decision, but by no means could support a rational factfinder's inference that the decision was made "because of" sex. What is required is what Ann Hopkins showed here: direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.[99]

Justice O'Connor's reference to "direct evidence" proved fateful and became the cornerstone of the next wave of fights over the showing needed to invoke the mixed-motive framework constructed by the fractured plurality opinion in *Price Waterhouse*. Moreover, while Price Waterhouse was ultimately overruled in part by statute, its analysis of causation and the impact of discriminatory comments by decision-maker commentary remains instructive, as do the plurality's observations regarding corrective measures an employer might consider when dealing with a compromised decision-maker, such as disavowing any input by or reliance on that decision-maker.

### B. Circumstantial Evidence Is Still Evidence

Two years after *Price Waterhouse*, Congress passed the Civil Rights Act of 1991. Among other things, the 1991 Act codified in part and overruled in part Price Waterhouse by amending how causation is handled for Title VII discrimination claims. Under the 1991 Act, "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[100] At the same time, a plaintiff is limited to declaratory relief, certain injunctive relief, and attorney's fees for a mixed-motive violations, if the employer proves it would have taken the same action in the absence of the impermissible motivating factor.[101]

In the wake of the 1991 Act, federal courts split over whether a plaintiff had to prove by direct evidence that an impermissible consideration was a "motivating factor," with a number of courts requiring such direct evidence based on Justice O'Connor's concurrence in *Price Waterhouse*.[102] In 2003, the Supreme Court decided to attempt to resolve the issue by taking up the case of *Desert Palace v. Costa*.

---

[99] *Id*. at 1804-05 (citations omitted).
[100] 42 U.S.C. § 2000e-2(m).
[101] 42 U.S.C. § 2000e-5(g)(2)(B).
[102] *Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2151-52 (2003) (collecting cases).

In *Desert Palace*, Catherine Costa worked as a warehouse worker and heavy equipment operator for Desert Palace d/b/a Caesar's Palace Hotel & Casino of Las Vegas, Nevada, and was the only woman in her position and Teamsters bargaining unit.[103] Costa had a number of run-ins with her managers and co-workers, which resulted in an escalating series of disciplinary actions, ranging from informal warnings to outright suspension.[104] On the heels of those disciplinary actions, Costa got into a physical altercation with Herbert Gerber, a fellow Teamster, in a warehouse elevator. Desert Palace gave Gerber, who had a clean record, a five day suspension and fired Costa, given her past history of problems.[105]

In response, Costa sued Desert Palace under Title VII, claiming she was singled out for "stalking" by her supervisor, received harsher discipline than men for similar conduct, was treated less favorably than men with respect to overtime, had her disciplinary record "stack[ed]," and had to endure sex-based slurs, which were both used and tolerated by her superiors. After receiving instructions on both mixed motive and the associated affirmative defense, a Las Vegas jury found in favor of Costa and awarded backpay, compensatory damages, and punitive damages.[106] On appeal, a three-member panel of the Ninth Circuit Court of Appeals reversed, finding Costa was required to present direct evidence of discrimination to make use of the new Title VII mixed-motive causation standard, and rendered judgment in favor of Desert Palace, finding Costa's evidence was not sufficient to show she had been terminated "because" she was a woman.[107] En banc, the Ninth Circuit reinstated the verdict, holding the 1991 Act abrogated Price Waterhouse (and thus Justice O'Connor's concurrence) and its plain language imposed no heightened evidentiary standard for invoking the mixed-motive method of demonstrating an unlawful employment practice.[108]

On review, the Supreme Court unanimously held the 1991 Act imposes no special evidentiary burden for invoking the mixed-motive method of proving a Title VII discrimination violation. In the course of its relatively brief opinion, the Court explained that "direct" evidence was not inherently superior to "circumstantial" evidence of discrimination:

> Title VII's silence with respect to the type of evidence required in mixed-motive cases also suggests that we should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases." That rule requires a plaintiff to prove his case "by a preponderance of the evidence," using "direct or circumstantial evidence," We have often acknowledged the utility of circumstantial evidence in discrimination cases. For instance, in *Reeves v. Sanderson Plumbing Products, Inc.*, we recognized that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of *circumstantial evidence* that is probative of intentional discrimination." The reason for treating circumstantial and direct evidence alike is

[103] *Id*. at 2152.
[104] *Id*.
[105] *Id*.
[106] *Id*. at 2153.
[107] *Id*.
[108] *Id*.

> both clear and deep rooted: "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence."[109]

It was thus proper, the Court held, for the district court to give the jury a mixed-motive instruction, because Costa had presented sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that her sex was a motivating factor for her termination.

Notably, Justice O'Connor wrote a very brief concurrence in which she reaffirmed her belief that her concurrence in Price Waterhouse correctly stated the law prior to the 1991 Act and represented the proper balance of causation requirements and evidentiary burdens in the absence of the 1991 Act's plain creation of a new evidentiary framework for Title VII discrimination claims.

As discussed below, the reasoning set forth in Justice O'Connor's *Price Waterhouse* concurrence and reaffirmed in her *Desert Palace* concurrence would assert itself again as courts began to acknowledge the limits of the 1991 Act.

### C. "Because of" By Any Other Name Might Mean Something Else Entirely

Six years after *Desert Palace*, the Supreme Court waded into the issue of causation again, this time in the context of the Age Discrimination in Employment Act.

In *Gross v. FBL Financial Services, Inc.*, the Supreme Court took up the case of Jack Gross. Gross started working for FBL in 1971 and by 2001 had risen to the position of claims administration director.[110] In 2003, when he was 54, Gross was moved into a different position and several of his prior responsibilities were transferred to a newly created position which was then filled by Lisa Kneeskern, who had been supervised by Gross and was in her early forties.[111] Although Gross and Kneeskern were paid the same, Gross sued FBL claiming the transfer of his duties to Kneeskern amounted to a demotion and violated the ADEA.[112] At trial, the court gave the jury a mixed-motive instruction based on *Price Waterhouse*.[113] On appeal, the Eighth Circuit reversed the trial court, holding that Justice O'Connor's opinion was the controlling opinion in Price Waterhouse and required the plaintiff provide direct evidence of discrimination to gain access to the mixed-motive method of discrimination.[114] (Remember, the 1991 Act only amended the discrimination prohibition found in Title VII; it did not touch the ADEA.)

On review, the Supreme Court noted that Congress had not seen fit to add a mixed-motive provision to the ADEA when it added one to Title VII, a fact the Court deemed significant.[115] In the absence of a statutory provision explicitly injecting mixed-motive into the ADEA, the Court began with the plain language of the ADEA itself, which prohibits discrimination "because of" age, to determine whether the ADEA permitted for mixed-motive proof. Unlike the plurality in

---

[109] *Id*. at 2154.
[110] *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2346 (2009).
[111] *Id*. at 2346-47.
[112] *Id*. at 2347.
[113] *Id*.
[114] *Id*. at 2348.
[115] *Id*. at 2349.

*Price Waterhouse*, the majority in *Gross* had no difficulty concluding that "because of" means "but for":

> The words "because of" mean "by reason of: on account of." Thus, the ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the "but-for" cause of the employer's adverse decision.
>
> It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. And nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases. Where the statutory text is "silent on the allocation of the burden of persuasion," we "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." We have no warrant to depart from the general rule in this setting.[116]

Lest there be any doubt, the Court then explicitly held that *Price Waterhouse* did not control this issue and noted that it was not clear the Court would approach the issue in *Price Waterhouse* the same way again, if it were given an opportunity to do so.[117] As the Court explained, "Whatever the deficiencies of *Price Waterhouse* in retrospect, it has become evident in the years since that case was decided that its burden-shifting framework is difficult to apply. … [E]ven if *Price Waterhouse* was doctrinally sound, the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims."[118]

### D. Seriously, We Mean It; Congress Only Amended One Part Of The Law And Otherwise "Because of" Means What It Means

Four short years after *Gross*, the Supreme Court took up the question of causation yet again, this time in the context of Title VII retaliation claims.

In *University of Texas Southwestern Medical Center v. Nassar*, Dr. Naiel Nassar was a University faculty member and a staff physician at Parkland Memorial Hospital, a local hospital that had agreed to offer vacant staff physician positions to University faculty members.[119] Nassar believed his supervisor at University, Dr. Beth Levine, was biased against him because of his religion and Middle Eastern heritage and complained to Dr. Fitz, Levine's University supervisor about same.[120] Among other things, Nassar claimed Levine scrutinized his billings and made comments like, "Middle Easterners are lazy."[121] Despite Levine helping Nassar receive a promotion, Nassar continued to believe she was biased against him and approached Parklad

[116] *Id*. at 2350-51 (citations omitted).
[117] *Id*. at 2351-52.
[118] *Id*. at 2352.
[119] *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2519-20 (2013).
[120] *Id*. at 2520.
[121] *Id*. at 2523.

Memorial about staying on as a staff physician even if he resigned from his faculty position with the University.[122] After Parkland indicated that would be possible, Nassar resigned from the University and sent a letter to Fitz and others citing Levine as the reason for his departure and claiming she had a "religious, racial and cultural bias against Arabs and Muslims."[123]

Upon reading the letter, Fitz was upset and said Levine had been "publicly humiliated" and that it was "very important that she be publicly exonerated."[124] At about the same time, Parkland Memorial extended an offer to Nassar consistent with its prior discussions with him. When Fitz learned of the offer, he contacted Parkland Memorial and objected, pointing out it was inconsistent with Parkland Memorial's agreement to offer vacant staff physician positions to University faculty members.[125] In response, Parkland Memorial withdrew the offer, prompting Nassar to sue the University for discrimination and retaliation under Title VII.

Nassar claimed Fitz's alleged discriminatory treatment of him constituted a constructive discharge and that Levine's interference with his employment with the hospital constituted retaliation.[126] A jury found for Nassar on both claims, awarding him over $400,000 in backpay and $3,000,000 in punitive damages.[127] On appeal, the Fifth Circuit reversed the verdict on constructive discharge, finding Nassar had not presented sufficient evidence to support it, but affirmed the retaliation finding.[128] Notably, the Fifth Circuit held a retaliation plaintiff could prevail on a mixed-motive theory under Title VII and was not required to show his or her protected activity was the "but for" cause of the adverse employment action at issue.[129] The Supreme Court then took the matter up for review.

After summarizing the evolution of causation from *Price Waterhouse* to the 1991 Act to *Gross*, the Court turned to the language of the 1991 Act.[130] The Court noted the 1991 Act's mixed-motive provision only references the five protected characteristics and makes no reference of retaliation.[131] The Court further noted the provision was inserted in the section of Title VII dealing with discrimination, not the section dealing with retaliation.[132] Finally, the Court distinguished cases in which a prohibition on retaliation was inferred from a broad prohibition on discrimination and then interpreted to have the same causation standard.[133] As the Court explained, Title VII was not a broad prohibition on discrimination but rather a carefully tailored ban on specific types of discrimination and contained a free-standing prohibition on retaliation.[134] As the Court summarized,

---

[122] *Id*.
[123] *Id*. at 2524.
[124] *Id*.
[125] *Id*.
[126] *Id*. at 2520.
[127] *Id*. at 2524.
[128] *Id*.
[129] *Id*.
[130] *Id*. at 2528.
[131] *Id*. (citing 42 U.S.C. § 2000e—2(m)).
[132] *Id*. at 2529.
[133] *Id*.
[134] Id. at 2529-31.

> In sum, Title VII defines the term "unlawful employment practice" as discrimination on the basis of any of seven prohibited criteria: race, color, religion, sex, national origin, opposition to employment discrimination, and submitting or supporting a complaint about employment discrimination. The text of § 2000e–2(m) mentions just the first five of these factors, the status-based ones; and it omits the final two, which deal with retaliation. When it added § 2000e–2(m) to Title VII in 1991, Congress inserted it within the section of the statute that deals only with those same five criteria, not the section that deals with retaliation claims or one of the sections that apply to all claims of unlawful employment practices. And while the Court has inferred a congressional intent to prohibit retaliation when confronted with broadly worded antidiscrimination statutes, Title VII's detailed structure makes that inference inappropriate here. Based on these textual and structural indications, the Court now concludes as follows: Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in § 2000e–2(m). This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.[135]

Finally, the Court rejected Nassar's alternate argument that the Court should apply the *Price Waterhouse* standard to Title VII claims, if it was not going to apply the statutory mixed-motive standard. The Court noted there was no reason to think Price Waterhouse's reasoning survived the detailed treatment Congress gave the issue when it passed the 1991 Act. Moreover, even if it did, Gross's majority opinion construction of "because of" was more persuasive than Price Waterhouse's fractured plurality opinion and would control.[136] Ultimately, the Court held Title VII's prohibition on retaliation "because of" protected activity requires a showing of "but for" causation, just as the ADEA's prohibition on discrimination "because of" age requires a showing of "but for" causation.

### E. The Fifth Circuit Rides Again, And Again, And Again

As the Supreme Court wrestled with the precise impact of comments and contours of causation in discrimination cases, lower courts attempted to apply the periodic guidance they were receiving from on high.

#### 1. *It Started With Logic*

In 1996, the Fifth Circuit affirmed the trial court's decision to grant summary judgment to CSC Logic on the age discrimination claims of Donald Brown and Robert Davis, both of whom were separated in connection with a workforce reduction.[137] Although the district court had assumed Brown and Davis had made out prima facie cases of discrimination, the Fifth Circuit noted Brown and Davis could not show younger workers were retained in "similar" positions following the RIF and thus concluded they needed to produce evidence that they were "otherwise discharged because of … age."[138] After concluding Brown and Davis had failed to show younger

[135] *Id*. at 2532-33.
[136] *Id*. at 2534.
[137] Brown v. CSC Logic, Inc., 82 F. 3d 651, 652 (5th Cir. 1996).
[138] *Id*. at 655.

workers were treated better, the Fifth Circuit turned to the ageist comments Brown and Davis offered as evidence. With respect to Brown, the Fifth Circuit held the comments failed to carry his prima facie burden:

> Finally, we look at age-related remarks allegedly made to Brown by CEO Kimzey. Such remarks may serve as sufficient evidence of age discrimination if the offered comments are: 1) age related; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue. Comments that are "vague and remote in time" are insufficient to establish discrimination. In contrast, specific comments made over a lengthy period of time are sufficient.
>
> In this case, Brown offers only three allegedly discriminatory statements made by Kimzey to Brown. First, Kimzey noted that the staff was "getting long in the tooth." Second, in 1992, Kimzey told Brown that he needed "hiring lessons; that you can hire a pretty one and teach them the job, but you can't hire an ugly one and make them pretty." Finally, Kimzey repeatedly told Brown that appellant Davis was old.
>
> These comments do not show age discrimination towards Brown. None of these comments are directed to Brown, and the first two comments arguably do not even reflect age discrimination. Furthermore at least one of the remarks was made in 1992, sixteen months before Brown was actually terminated. Taken as a whole, the alleged age-related remarks made to Brown are too vague, indirect, and remote in time to support a finding of a discriminatory discharge. Because Brown has failed to present evidence sufficient to support a *prima facie* case, his case must be dismissed.

With respect to Davis, on the other hand, the Fifth Circuit held the comments he offered as evidence met his prima facie burden:

> [W]e again look for proof of discriminatory discharge in the age-related comments allegedly made by Kimzey to Davis. Davis alleges that Kimzey made at least four types of age-related remarks to him. First, at the time of Davis's remarriage in 1991, Kimzey stated, "you don't need to be remarrying a young woman again; you can't even get it up." Second, on several occasions, Kimzey called Davis an "old goat." Third, at a managers' meeting, when Davis was unable to remember a number, Kimzey stated, "you just can't remember, you're getting too old." And finally, in connection with a work assignment, Kimzey allegedly asked Davis if "senility was setting in."
>
> Unlike the comments made to Brown, all of these comments were directed at Davis, and were all clearly age-related. Further, all but the first comment were made near the time of Kimzey's termination. Finally, at least two of the comments imply that Kimzey believed Davis's age was affecting his job performance. In

> short, these alleged remarks are sufficiently troublesome to satisfy Davis's burden of proving a *prima facie* case.[139]

Given that Davis made out a prima facie case, the Fifth Circuit turned its attention to pre-text. The Fifth Circuit was unimpressed by Davis's proffered evidence supposedly drawing into question CSC Logic's reasons for selecting him for reduction, explaining it "merely questions the prudence of CSC Logic's methods of cost cutting."[140] After noting the same decision-maker that hired Davis at age 54 had selected him for separation at age 56, the Fifth Circuit held Davis had failed to establish pretext with respect to CSC Logic's cost-cutting rationale for ending his employment, resulting in summary judgment being upheld.[141]

Notably, the Fifth Circuit did not consider the ageist comments in deciding pretext. Rather, the Fifth Circuit analyzed those comments only with respect to determining whether Davis had made out hi *prima facie* case.

2. *One Standard To Rule Them All*

Following CSC Logic, the Fifth Circuit repeatedly analyzed allegedly discriminatory comments under CSC Logic's four-part "stray remark" standard, including when such comments were asserted as evidence of pretext:

- *Rubinstein v. Administrators of Tulane Educational Fund* – Statements by members of a committee that made allegedly discriminatory pay decision referring to plaintiff as a "Russian Yankee," describing Jews as "thrifty," and asserting that anyone could make tenure if the "Russian Jew" could were best analyzed under the stray remark doctrine, where the plaintiff had failed to show pretext as to each of the defendant's reasons;[142]

- *Auguster v. Vermillion Parish School Bd.* – In the absence of other competent evidence of pretext, statements by decision-maker that "he had bad luck with black men" and that the school had "problems with other black coaches" and "he would do his best to get rid of" the plaintiff if there was another problem were best analyzed under the stray remark doctrine;[143]

- *Wallace v. Methodist Hosp. System* – Where plaintiff failed to rebut each of the employer's asserted reasons, alleged comments analyzed as "stray remarks" to determine if they could uphold a jury verdict where the plaintiff failed to rebut *both* of the employer's stated reasons for termination, including comments by the plaintiff's immediate supervisor (who did not make the decision to terminate to plaintiff) indicating she was unsure "how to classify [plaintiff] because she was gone three months before and she would be gone three months again" and that the plaintiff had been fired because "she's been pregnant three times in three years"

[139] *Id*. at 656.
[140] *Id*. at 657.
[141] *Id*. at 658.
[142] *Rubinstein v. Administrators of Tulane Educational Fund*, 218 F.3d 392, 400 (5th Cir. 2000).
[143] *Auguster v. Vermillion Parish School Bd.*, 249 F.3d 400, 404-405 (5th Cir. 2001).

and comments by the head nurse decision-maker indicating the plaintiff was "stupid" and needed to "choose between nursing and family."[144]

- *Patel v. Midland Memorial Hosp. and Medical Center* – Statements by fellow physician describing plaintiff as a "sand nigger," "a god damn Indian quack," and "very dangerous" analyzed under the "stray remark" doctrine where there was no other evidence of pretext.[145]

Notably, these cases all involved situations where no other meaningful evidence of pretext was offered, such that the discriminatory comments were in effect being asked to carry the full burden of showing the employer's stated reason was a pretext for discrimination.

3. *You Need More Than A Feeling: The Direct Evidence Standard*

In 2010, the Fifth Circuit returned to the question of decision-maker commentary in *Jackson v. Cal-Western Packaging Corp.*, another age discrimination case.[146] Wayne Jackson was employed by Cal–Western Packaging Corporation. In May 2007, Karen Hopper sent an email to her supervisor, James Rosetti, claiming that Jackson had made her "uncomfortable."[147] According to Hopper, Jackson had asked to see her breasts, said her boyfriend must like "big boobs," tried to touch her every time he saw her, and once cornered her before asking her to lift up her blouse.[148] Hopper also said that Jackson made inappropriate comments in front of female employees on a number of occasions. Rosetti relayed Hopper's complaint to the company's Chief Operating Officer, Jimmy Phelps, who launched an internal investigation and interviewed several employees who corroborated Hopper's allegations.[149] Phelps then hired Victoria Phipps, an attorney, to conduct an investigation. Phipps interviewed male and female coworkers alike, who confirmed the Hopper's allegations. Notably, when Phipps interviewed Jackson, Jackson said he was "vindictive" and would "legally" retaliate against those making allegations against him.[150] Following the investigation, Cal-Western terminated Jackson, who was 69, and replaced him with a 42-year-old employee.

Jackson sued Cal-Western, claiming it terminated him because of his age. Jackson's principal piece of "evidence" was his claim that Phelps (the COO) told Donnie Sheets, one of Jackson's coworkers, a couple of times that Sheets would be in charge once that "old gray-haired fart retired," meaning Jackson.[151] Cal-Western moved for summary judgment. The district court held Jackson had made a *prima facie* case of discrimination but had failed to create a fact issue on whether Cal-Western's stated reason was a pretext for age discrimination.[152] Accordingly, the court granted Cal-Western's motion. Jackson appealed.

---

[144] *Wallace v. Methodist Hosp. System*, 271 F.3d 212, 222-23 (5th Cir. 2001.
[145] *Patel v. Midland Memorial Hosp. and Medical Center,* 298 F.3d 333, 344 (5th Cir. 2002).
[146] *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374 (5th Cir. 2010).
[147] *Id*. at 376.
[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] *Id*. at 376, 380.
[152] *Id*.

On appeal, Jackson argued Phipps comment constituted "direct evidence" of age discrimination. The Fifth Circuit rejected this argument, noting the comment was not proximate in time to the decision and was not related to the decision.[153] Using somewhat loose language, the Fifth Circuit explained again the standard for using commentary "standing alone" to prove discrimination:

> We have explained that comments are evidence of discrimination only if they are "1) related to the protected class of persons of which the plaintiff is a member; 2) proximate in time to the complained-of adverse employment decision; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue." Comments that do not meet these criteria are considered "stray remarks," and standing alone, are insufficient to defeat summary judgment.
>
> While Phelps's alleged comment meets the first and third criteria, Jackson has provided no evidence that the comment was proximate in time to his firing or related to the employment decision at issue. Jackson maintains that Sheets told him of Phelps's comment on a visit to Memphis in the summer of 2006, but it is unclear when Phelps actually made the comment. Still, even assuming that the comment was made soon before Sheets reported it to Jackson, it was made almost a year before Jackson's June 2007 termination. The comment appears wholly unrelated to Jackson's termination, and Jackson has not presented any evidence to show otherwise.[154]

Having rejected Phelps's alleged comment as "direct" evidence of discrimination, the Fifth Circuit further held it was insufficient for purposes of showing a genuine issue of material fact with respect to pretext:

> This comment alone, or in combination with Jackson's uncorroborated denial of any sexual harassment, is insufficient to establish a genuine issue of material fact as to pretext. There is substantial evidence that Jackson was fired for violation of Cal–Western's sexual harassment policy, and Jackson's only contravention of that evidence comes from his own assertions. Without more, we simply cannot conclude that there is a triable issue of fact as to whether Cal–Western discriminated against Jackson based on age.

4. *Did We Mention There Are Actually Two Standards?*

In 2012, however, the Fifth Circuit issued its opinion in *Reed v. Neopost USA, Inc.* and made it clear there are (for at least some panels) actually *two* standards for judging the value of a decision-makers comments: one that applies to comments asserted as direct evidence capable of supporting a finding of discrimination outright and another for determining whether a comment might support a prima facie case of discrimination or finding of pretext capable of defeating summary judgement.[155]

---

[153] *Id*. at 377.
[154] *Id*. at 380 (footnotes and citations omitted).
[155] *Reed v. Neopost USA, Inc.*, 701 F.3d 434 (5th Cir. 2012).

In *Reed*, Ronald Reed worked for Neopost for roughly five years, cold-calling companies and recording information regarding their postage equipment into a survey. Shortly before his termination, one of Reed's coworkers accused him of submitting falsified surveys. Neopost investigated, substantiated the complaint, and terminated Reed's employment.[156] Reed was 60 years old at the time of termination. Notably, Neopost also investigated five other employees for alleged fraud with respect to reports at the same time, ultimately terminating two (one 44 and one under 40), warning three others (aged 52, 42, and 37), and replacing the three employees it terminated (which included Reed) with four new hires aged 52, 51, 41, and 25.[157]

Reed sued Neopost under the ADEA and Texas Commission on Human Rights Act ("TCHRA") claiming Neopost terminated him because of his age. As his evidence, Reed claimed his coworkers called him names like "old man," "old fart," "pops," and "grandpa" at various times, although he struggled to identify who made which comment and when they made it. In any event, it was undisputed that the coworkers making the comments had no decision-making authority with respect to his termination.[158] Neopost moved for summary judgment, which the district court granted, finding Reed had failed to present evidence indicating Neopost's stated reason was pretext for age discrimination.

On appeal, Reed argued the district court had applied the ADEA's "but for" test to his TCHRA claim, which by statute allowed for mixed-motive causation.[159] Although the Fifth Circuit concluded the district court had actually applied a mixed-motive standard to Reed's TCHRA claim, it further found Reed had failed to present evidence that would create a fact issue under either standard.[160] The Fifth Circuit also explained that there were two different standards for judging workplace comments as potential evidence of animus and that the comments offered by Reed failed under both of them:

> We note that Reed relied, in part, on allegedly discriminatory comments by his coworkers in asserting his age-discrimination claim. In evaluating federal discrimination claims, this court has distinguished between workplace comments presented as direct evidence of discrimination and those presented as additional (*i.e.*, circumstantial) evidence in the course of a *McDonnell Douglas* analysis. Where a plaintiff offers remarks as direct evidence, we apply a four-part test to determine whether they are sufficient to overcome summary judgment. Where a plaintiff offers remarks as circumstantial evidence alongside other alleged discriminatory conduct, however, we apply a more flexible two-part test. In that circumstance, a plaintiff need only show (1) discriminatory animus (2) on the part of a person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.
>
> Here, the district court found that Reed based his claim on circumstantial evidence alone. Reed does not challenge that finding or the application of the *McDonnell Douglas* framework to his age-discrimination claim. Thus, the proper

[156] *Id*. at 438.
[157] *Id*. at 438, fn. 1.
[158] *Id*.
[159] *Id*. at 440.
[160] *Id*.

> inquiry regarding the alleged remarks is the two-part test articulated in *Russell*. The district court applied the *CSC Logic* test, however, emphasizing that the comments were "stray remarks," unrelated to Reed's termination and made by individuals who were not responsible for Reed's termination. Although the court should have applied *Russell*, we agree with its ultimate conclusion: the remarks are insufficient to create a fact issue. They are sporadic, in large part untethered to specific speakers or times, and attributed to harassers who had no responsibility for, or influence over, Reed's termination. Thus, they fail under both *CSC Logic* and *Russell*. Summary judgment was therefore appropriate.[161]

What the Fifth Circuit seem to ignore was the fact that *Reed* involved a jury verdict where there was independent evidence that the employer's proffered reason was not its true reason.[162] In that posture, the *Reed* court held comments that evidence animus and are made by the effective decision-maker can serve to support a jury verdict when combined with evidence of pretext, given the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products*.[163]

5. *It Would Be Nice If You Had More Than Just Comments*

In 2013, the Fifth Circuit issued its opinion in *Ion v. Chevron USA, Inc.*, and found an email written by a management official near the time of termination was sufficient to establish retaliatory animus under either a mixed-motive or but-for causation framework where there was other evidence suggesting possible pretext and retaliatory animus.[164]

In *Ion*, Todd Ion worked for Chevron as a chemist, under the management of Steve Ogborn, chief chemist, Vince Dressler, lead chemist, and Rich Kerns, laboratory supervisor.[165] According to Ion, in or about February 2009 he told Dressler he was thinking about taking leave as a result of his recent divorce and told Ogborn he had been granted six months of custody of his five-year-old son who was having difficulty sleeping, eating, and adjusting and that he was taking extended lunch breaks to be with him.[166]

On March 11, 2009, Ogborn and Dressler met with Ion to discuss his attendance. According to Ogborn, security-gate records showed Ion was taking extended lunch breaks. According to Ion, Ogborn accused him of "stealing from the company" and a "very serious violation of Chevron's policies."[167] Although Ion acknowledge that he took more than 30 minutes for lunch, Ion claimed everyone took extra time for lunch and that he had told Dressler he was going to see his son at daycare during lunch and Dressler never objected.[168] On March 12, 2009, Ion brought in copies of the sign-in sheet for his son's daycare and showed them to Ogborn. According to

---

[161] *Id*. at 441-42.
[162] *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 228-29 (5th Cir. 2000).
[163] *Id.* at 229 (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000)).
[164] *Ion v. Chevron USA, Inc.*, 731 F.3d 379 (5th Cir. 2013).
[165] *Id*. at 382.
[166] *Id*. at 383.
[167] *Id*. at 384.
[168] *Id*.

Ogborn, the sign-in sheet lined up with Ion's extended lunch breaks on some days but not on many others.[169]

On March 16, 2009, Dressler and Ogborn met with Ion, presented him with "Performance Agreement and Attendance Improvement Plan" ("PIP/AIP"), and explained they were suspending him for five days as a result of performance deficiencies and his extended lunch breaks.[170] According to the PIP/AIP, the performance issues were discussed with Ion in December 2008 and again in January 2009; while Ion acknowledged the performance issues were discussed in December 2008, he denied they were discussed in January 2009.[171]

On March 19, 2009, Ion contacted Chevron's EAP and learned he might be eligible for FMLA leave. On March 23, 2009, the day Ion was supposed to return from his five-day suspension, Ion called Ogborn and told him he would be out sick and under the care of the EAP counselor. Ogborn told Ion to notify the nurse and made a note to his file indicating Ion had called in sick and had thus failed to attend a meeting to discuss his PIP/AIP. That afternoon, Dr. Ronald Berman faxed an FMLA certification form to Chevron, indicating Ion had an FMLA serious health condition, was suffering from "too much stress—can't focus on his job—single parent," and would require ongoing treatment for an indefinite period of time.[172]

On March 24, 2009, Ion called Ogborn again to inform him he would be out sick again and was working on short-term disability "paperwork." Ogborn then called his HR Business Partner, Johnette Watson, who recommended sending the clinic an email asking them to keep Ogborn informed of Ion's status and anticipated return to work date, which he did.[173] Ogborn copied Chris Melcher, the refinery's General Manager, on his e-mail to the clinic. Melcher responded as follows:

> It looks like Mr. Ion is playing games with us after his suspension. I assume the "paperwork for short-term disability" comment means that he is looking for a doctor to give him some FMLA-qualified time off. What are our options moving forward?[174]

That same day, Chevron nurse Angela Fortney sent Ion an email informing him that his FMLA paperwork had been mailed to him but that he needed to come to the clinic to complete a GO-153, which was titled "Authorization for Release of Medical and Other Information." The next day, Ion went to the clinic and explained the EAP counselor told him he would not have to sign a release as part of the FMLA process. According to Ion, the nurse at the clinic said she could not give him any information but insisted that he had to sign the form.[175] After two other nurses likewise refused to explain the need for the form, Ion (by his own account) became "extremely frustrated because [the nurses] were asking him to sign a form that they weren't explaining."[176]

---

[169] *Id*.
[170] *Id*. at 383.
[171] *Id*.
[172] *Id*. at 385.
[173] *Id*. at 386.
[174] *Id*.
[175] *Id*.
[176] *Id*.

At this point, Ion called Watson to ask about the form. Watson referred Ion to various policies, none of which explained the need for the form.[177] Accordingly, Ion went back to the clinic and asked to see Fortney, who he had been told was not available. According to Ion, he saw Fortney and when approached her, she "exploded" and demanded that Ion leave the clinic in a "loud voice."[178] Ion then left, and the nurses notified Ogborn of what had happened. Ogborn then made the following note to his file:

> Ion refused to sign the GO–153 form stating that the EAP Rep ... said that he didn't need to sign the form. Ion asked the Clinic personnel many HR questions regarding policies and pay of which they didn't know the answers to and repeatedly referred him to HR. ... He was asked to leave but tried to circumvent leaving by getting another clinic employee ... to take him to Taylor's office even after he was told that Taylor wasn't in today.[179]

The clinic employees also told Ogborn that Ion had made them feel uncomfortable, describing his demeanor as "passive/aggressive harassment," "disgruntled," and "angry." Ogborn then contacted Revere Christophe,[180] a security officer, who conducted a "threat assessment" of Ion based on the clinic incident. Christophe determined Ion was "belligerent and abusive toward the nursing staff." And, given his behavior, banned Ion from entering Chevron's property.[181]

That same day, James Peel, one of Ion's co-workers, told Ogborn via email that Ion had come back from a meeting with Ogborn and Dressler about his lunch hour on or about March 12, 2009, in an "angered state of mind."[182] According to Peel, Ion "mentioned faking a nervous breakdown related to his divorce so he could take a leave of absence with FMLA and EAP benefits" and "boasted about how he could get paid for being at home."[183] During his subsequent deposition, Peel explained he had not told Ogborn or Dressler of the conversation initially, because he was afraid Ion would get fired. He changed his mind, however, because he had "a philosophical problem with doing somebody else's work when I know they're sitting at home sipping beers watching Oprah or The View or whatever."[184]

After reading Peel's email, Ogborn forwarded it to Melcher and Watson with the following note:

> It is clear to me that [Ion] is doing exactly what he told Peel he was going to do. … I think strong action should be taken since Ion has premeditatedly planned to fake an "illness" and bilk Chevron. We don't need this type of criminal behavior in Chevron.[185]

According to Watson, Melcher was the first one to mention terminating Ion in the discussion that followed. Moreover, it was Melcher who contacted Watson later that week and informed her that

---

[177] *Id*.
[178] *Id*.
[179] *Id*. at 387 (internal brackets omitted).
[180] Seriously. There is no "r" at the end of his last name.
[181] *Id*. at 387.
[182] *Id*.
[183] *Id*.
[184] *Id*.
[185] *Id*. at 387-88.

they had in fact decided to terminate Ion.[186] In a letter dated April 2, 2009, and signed by Ogborn, Chevron then terminated Ion's employment. The letter cited his poor performance, absence without leave, falsification of time records, PIP/AIP, and comments to Peel. The letter also mentioned that Ion had taken Chevron property home with him when he was suspended and noted that he had not returned to work since his suspension. The letter closed by stating, "Based on your overall performance, the seriousness of the policy violations and your behavior following the March 16th discussion, Chevron management has decided to end your employment effective immediately."[187] Strangely, the letter made no mention of the March 25, 2009, incident at the clinic.

On Marcy 29, 2011, just shy of two years later, Ion sued Chevron for alleged FMLA retaliation and interference. Chevron moved for summary judgment, which the district court granted. Ion then appealed summary judgment as to his retaliation claim, but not as to his interference claim. On appeal, the Fifth Circuit noted that the parties and district court had assumed the mixed-motive framework applied to Ion's claims and had not briefed whether the Supreme Court's decisions in *Gross* and *Nassar* meant a but-for standard applied instead.[188] The Fifth Circuit emphasized it was not deciding which framework applied, because it felt there was a fact issue under either standard.

First, the Fifth Circuit affirmed the district court's finding that Ion had made out his *prima facie* case and that Chevron had articulated a legitimate non-discriminatory reason. Accordingly, the court focused its attention on whether Ion had presented evidence creating a triable issue of fact on whether Chevron's nondiscriminatory reasons, although true, were only "some" of its reasons and that another reason was retaliation.[189]

On this question, the Fifth Circuit agreed with the district court that the reference to the fact that Ion had not returned to work since his suspension in the termination letter could be interpreted by a jury to indicate his FMLA leave was a factor in Chevron's decision to terminate his employment.[190] The Fifth Circuit also pointed to Melcher's March 24, 2009 email as some evidence of retaliatory animus, even though the district court had not relied on it.

The Fifth Circuit then turned to whether Chevron had demonstrated it would have taken the same action absent any discriminatory animus as a matter of law (given it was summary judgment), thereby establishing an "affirmative defense" to Ion's claim.[191] For a variety of reasons, the Fifth Circuit decided Chevron had not met its burden, and it pointed to Melcher's email as the basis for distinguishing Ion's case from the holding in *Jackson*:

> *Jackson* is distinguishable from the instant case. Unlike the plaintiff in *Jackson*, Ion does not rely solely on his own statements denying Chevron's allegations. Ion has presented significantly more evidence that Chevron was motivated by discriminatory reasons—and not merely reliance on other employees' reports of

[186] *Id*. at 388.
[187] *Id*.
[188] *Id*. at 389-90.
[189] *Id*. at 391.
[190] *Id*.
[191] Id. at 392.

> Ion's misbehavior—than the plaintiff in *Jackson*. Here, Ion has offered an e-mail written by General Manager Melcher, in which Melcher references Ion's attempt to exercise his FMLA rights and asks Ion's supervisor, Ogborn, for "options." The temporal proximity between when the e-mail was sent, when Peel came forward with Ion's alleged statements, when Ion was asked to come to the clinic to sign a medical records release, and when Ion was terminated is noteworthy and raises serious questions about Chevron's motives for terminating Ion.

While *Ion* does not say it outright, its reasoning is ultimately consistent with the Fifth Circuit's tradition of varying its standards for assessing decision-maker commentary based on the weight the commentary is being asked to carry. When the plaintiff has little to no other evidence of pretext, the standard can be exacting. On the other hand, when the plaintiff has evidence of pretext, such as a termination letter that explicitly references the plaintiff's FMLA leave and does not reference other supposedly key events leading up to the plaintiff's termination, the standard appears to be less exacting. While not cast in the same strict "direct evidence" v. "circumstantial evidence" terms used by *Reed*, it nevertheless follows the same overall pattern of thinking.

6. *But Seriously, There Really Are Two Standards*

In 2015, the Fifth Circuit issued its opinion in *Goudeau v. Nat'l Oilwell Varco, L.P.* and reaffirmed Reed's explicit holding that there are two standards for judging the value of a decision-maker's comments: one for direct evidence and one for circumstantial evidence.[192]

In *Goudeau v. National Oilwell Varco, L.P.*, Maurice Goudeau worked for ReedHycalog as a mechanic, millwright, and eventually a maintenance supervisor. In 2008, ReedHycalog was acquired by National Oilwell Varco (NOV). Following the acquisition, Goudeau was initially managed by Tim Taylor, but in September 2010, Mike Perkins became Goudeau's supervisor.[193]

According to Goudeau, Perkins told him "there sure are a lot of old farts around here" one day when they stepped out for a smoke and then asked about the ages of two other, older employees under his supervision, Joe Jett and Bill Fisher. According to Goudeau, Perkins then told him he planned to fire both Jett and Fisher. Shortly thereafter, Goudeau complained to HR about Perkins's "old farts" comment and his stated plan to fire Jett and Fisher. According to Goudeau, after his complaint, Perkins stopped socializing with him, reduced his authority, and "really turned the heat up on [him]."[194]

Goudeau also claimed Perkins continued to make ageist remarks, despite his complaint, repeatedly asking if the smoking area was "where the old people meet," remarking that Goudeau wore "old man clothes," and calling Goudeau an "old fart."[195] According to Goudeau, Perkins made all of the comments between August or September 2010, when Perkins became his supervisor, and January 2011, when Perkins gave Goudeau his a write-up for ignoring a direct

[192] *Ion v. Chevron USA, Inc.*, 731 F.3d 379 (5th Cir. 2013).
[193] *Goudeau v. National Oilwell Varco, L.P.*,793 F.3d 470 (5th Cir. 2015).
[194] *Id*. at 472-73.
[195] *Id*. at 473.

request to complete a task, his first warning in his entire 18-year career.[196] Goudeau promptly complained to HR, claiming the write-up was retaliation for his earlier complaint against Perkins. When Perkins then gave Goudeau a subpar performance review in March 2011, Goudeau again complained to HR that Perkins was retaliating.[197]

In July 2011, Perkins documented three more write-ups for Goudeau, one for failing to get certain machines repaired, another for failing to conduct a monthly inspection of fire extinguishers, and a "Final Warning" for failing to start an assigned project on time.[198] Notably, all three warnings were signed by Perkins on July 15, 2011, even though the underlying events occurred on different dates, and none had Goudeau's signature, even though there was a blank for it.[199]

On August 11, 2011, Perkins met with Goudeau and told him was being fired for poor performance and insubordination. Perkins gave Goudeau the three warnings from July 2011, as well as a warning from the day before that was not signed by even Perkins and related to Goudeau's failure to complete a task on August 9, 2011. According to Goudeau, this was the first time he had seen any of the warnings.[200]

Goudeau sued NOV under the ADEA and the Texas Commission on Human Rights Act ("TCHRA"), claiming age discrimination. NOV moved for summary judgement, which the district court granted and Goudeau appealed. On review, the Fifth Circuit focused its attention on whether Goudeau had met the fourth element of his prima facie case by pointing to evidence that he was "otherwise discharged because of his age" and whether he had created a fact issue on whether NOV's stated reason was a pretext for discrimination.

Turning first to the prima facie case, the Fifth Circuit noted that Perkins had not been replaced and that Perkins's remarks could not meet the test for "direct evidence." They could, however, satisfy the test for circumstantial evidence and thus provided the evidence needed for the fourth prong of Goudeau's prima facie case:

> Goudeau contends that the ageist comments satisfy the fourth prima facie element—that he was "otherwise discharged because of his age." NOV counters that the remarks Goudeau attributes to Perkins are insufficient under the four-part "stray remarks" test articulated in *Brown v. CSC Logic, Inc.* This issue requires us to again emphasize the two different contexts in which we evaluate so-called "stray remarks" evincing discrimination.
>
> The *CSC Logic* test that NOV invokes requires that any ageist remark be proximate in time to the terminations, made by an individual with authority over the employment decision, and related to the challenged decision. That more demanding test applies, however, only when the remarks are being used as direct evidence of discrimination. Such a case is analyzed outside the more common

[196] *Id*.
[197] *Id*.
[198] *Id*.
[199] *Id*.
[200] *Id*.

> *McDonnell Douglas* framework, as the comments are being relied on to prove the entire case of discrimination. We thus allow such comments to defeat summary judgment—that is to serve as sufficient evidence that by itself would allow a jury to find discriminatory motive—only if they are not stray, but instead are tied to the adverse employment action at issue both in terms of when and by whom they were made.
>
> In a circumstantial case like this one, in which the discriminatory remarks are just one ingredient in the overall evidentiary mix, we consider the remarks under a "more flexible" standard. 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 person that is either primarily responsible for the challenged employment action or by a person with influence or leverage over the relevant decisionmaker.'"[201]

The Fifth Circuit further found that NOV met its burden by identifying two nondiscriminatory reasons for the termination—poor performance and insubordination—such that Goudeau's claim came down to the issue of pretext, which was the stage at which the district court had found Goudeau's evidence to be wanting.[202] The Fifth Circuit, however, concluded the doubts Goudeau raised about the legitimacy of the written warnings, combined with Perkins's comments and termination of subsequent termination of Fisher (one of the other older employees under his supervision), was sufficient to raise a triable issue of fact as to NOV's true motivation for firing Goudeau.[203] The Fifth Circuit specifically faulted the district court for not considering Perkins's comments when analyzing the question of pretext, noting such comments can simultaneously service the prima facie case and serve as evidence of pretext.[204]

In an attempt to drive home the value of Perkins's comments, the Fifth Circuit then offered its take on a closing argument Goudeau's lawyer could make at trial, implying that the fact that a jury might be moved by these facts meant they must be evidence (thereby begging the question at hand and ignoring the reason for the rules of evidence):

> Mr. Goudeau's new boss repeatedly made negative comments about old people. He said Goudeau wore "old man clothes," called him an "old fart," and said a smoking area was "where the old people meet." The supervisor also made a comment that "there sure are a lot of old farts around here" during a conversation in which he asked Goudeau about the ages of two other employees. After hearing their ages, he said he was going to fire them. The boss followed through on that statement and ultimately fired two of the three "old farts," including Mr. Goudeau. He couldn't fire the third only because he left the company for another reason.
>
> NOV says that it fired Goudeau because of his poor performance. Those complaints about Goudeau only started with this new boss after 18 years of a solid

[201] *Id*. at 475-76 (*citing Reed v. Neopost USA, Inc.*, 701 F.3d 434, 441 (5th Cir. 2012)) (additional citations omitted).
[202] *Id*. at 476.
[203] *Id*. at 477.
[204] *Id*.

> work record with the company. The final four warnings involved duties that were not Goudeau's responsibility. And those written warnings sure are suspicious because Goudeau never received them prior to being fired—what's the point of that kind of warning—and three of them were signed by his supervisor on the same date even though the infractions supposedly happened on different days.[205]

Noting that NOV would no doubt offer a "compelling" response and that a jury might well disbelieve Goudeau's testimony, the Fifth Circuit reminded NOV that the summary judgment standard required it to credit Goudeau's testimony over NOV's explanation and find all reasonable inferences in his favor. Against that standard, the Fifth Circuit held Goudeau had identified evidence sufficient to allow a finding that age discrimination was the "but for" cause of his termination in violation of the ADEA, which necessarily met the lesser "motivating factor" standard under the TCHRA.[206]

### F. Did You Say, "Meow"?

According to the United States Supreme Court, the term "cat's paw" comes from one of Aesop's fables, in which a monkey uses flattery to persuade a cat to remove roasting chestnuts from the fire. The cat burns its paw in the process, and the monkey makes off with the chestnuts.[207] Whatever its origin, the cat's paw theory complicates matters by allowing a plaintiff to attempt to hold an employer liable on the basis of discriminatory or retaliatory animus harbored by an employee (typically a supervisor) who influenced, but did not make, the employment decision at issue.[208]

In *Staub v. Proctor Hospital*, Vincent Staub was a member of the United States Army Reserve and during the period of his employment was a technician with Proctor Hospital. Staub's membership in the Reserve required him to miss work for training one weekend per month and for two to three full weeks during the summer.[209] The evidence showed that Janice Mulally, Staub's supervisor, would schedule Staub for additional shifts without notice so he would "pay back the department for everyone else having to bend over backwards to cover his schedule for the Reserves."[210] Mulally also asked one of Staub's co-workers, Leslie Sweborg, to help her "get rid of him," and told Sweborg that Staub's "military duty had been a strain on the department."[211] Likewise, Michael Korenchuk, Mulally's supervisor, described Staub's military obligations as "a bunch of smoking and joking and a waste of taxpayers' money" and was aware Mulally was "out to get" Staub.[212]

In January 2004, Mulally gave Staub a "Corrective Action" for violating a supposed rule requiring him to remain in his work area when he was not working with a patient.[213] According

---

[205] *Id*. at 478.
[206] *Id*.
[207] *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190 fn. 1 (2011).
[208] *Id*. at 1189.
[209] *Id*.
[210] *Id*. (internal brackets and quotations removed).
[211] *Id*. (internal brackets and quotations removed).
[212] *Id*. (internal brackets and quotations removed).
[213] *Id*.

to Staub, there was no such rule, and even if there was he did not violate it.[214] A few months later, one of Staub's co-workers, Angie Day, complained to Linda Buck, Proctor's Vice President of Human Resources, and Garrett McGowan, Proctor's Chief Operating Officer, about Staub's frequent unavailability and abruptness. McGowan told Korenchuk and Buck to develop a plan to address Staub's "availability problems." [215] However, three weeks later, before Korenchuk and Buck had developed a plan, Korenchuk told Buck that Staub had left his desk without informing a supervisor, in violation of the January warning. Relying on Korenchuk's accusation, Buck reviewed Staub's personnel file and decided to terminate him for ignoring the directive he was given in January 2004.[216]

Staub sued under the Uniformed Services Employment and Reemployment Rights Act (USERRA), claiming that Mulally and Korenchuk were hostile to his military status and influenced Buck's decision to terminate his employment.[217] A jury found Staub's military status was a motivating factor in Proctor's decision to terminate his employment and awarded $57,640 in damages.[218] On appeal, the Seventh Circuit Court of Appeals reversed, explaining that Seventh Circuit precedent required the employee harboring the unlawful animus to exercise "'singular influence" over the actual decision-maker such that the decision to terminate was the product of "blind reliance."[219]

Displaying a remarkably academic understanding of the workplace, the Supreme Court on review approached the issue before it using basic tort principles causation. As a threshold matter, the Court held that unless Mulally and Korenchuk intended to cause Staub's termination, their animus could not result in liability for Proctor, because they had not terminated Staub and the person who did (Buck) had no animus.[220] As the Court explained, "When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision; but it seems to us a considerable stretch to call it 'a motivating factor.'"[221]

At the same time, the Court was unwilling to require that the employee with the animus be the "*de facto*" decision-maker, at least where the employee harboring the animus was him or herself an agent of the employer (a supervisor):

> So long as the agent intends, for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable under USERRA. And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct

[214] *Id*.
[215] *Id*.
[216] *Id*.
[217] *Id*. at 1190.
[218] *Id*.
[219] *Id*.
[220] *Id*. at 1191.
[221] Id. at 1192.

> alleged," and excludes only those "link[s] that are too remote, purely contingent, or indirect." We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent." The decisionmaker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. Nor can the ultimate decisionmaker's judgment be deemed a superseding cause of the harm. A cause can be thought "superseding" only if it is a "cause of independent origin that was not foreseeable."[222]

Moreover, the Supreme Court was unwilling to adopt a bright-line rule under which an independent investigation by the employer would automatically preclude liability in all instances, at least where the employee harboring the animus was him or herself a supervisor:

> Proctor suggests that even if the decisionmaker's mere exercise of independent judgment does not suffice to negate the effect of the prior discrimination, at least the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus ought to do so. We decline to adopt such a hard-and-fast rule. As we have already acknowledged, the requirement that the biased supervisor's action be a causal factor of the ultimate employment action incorporates the traditional tort-law concept of proximate cause. Thus, if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.
>
> Justice ALITO claims that our failure to adopt a rule immunizing an employer who performs an independent investigation reflects a "stray[ing] from the statutory text." We do not understand this accusation. Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a "motivating factor in the employer's action," precisely as the text requires.[223]

In short, if a supervisory agent, with discriminatory animus, undertakes an act for the purpose of causing a foreseeable adverse employment action (proximate cause) and that act in fact causes the foreseeable adverse employment action, then the employer may be liable. As a result, an

[222] *Id*.
[223] *Id*. at 1193.

employer must concern itself not only with the comments of the ultimate decision-maker but also with the comments of any other agent involved in the decision-making process (even if that agent did not have decisive influence over the ultimate decision-maker).[224]

## IV. CONCLUSION

This paper is overdue, and if you're still reading I congratulate you, but it's time to bring this to an end. Here's the punchline: what a decision-maker says matters, to one degree or another. If you come to a case with decision-maker commentary suggesting animus, gear up and dig into the law to find the most current thinking on the standards for consideration and causation and then brief your heart out; this stuff changes. If, however, you are faced with a decision-maker who has been compromised by his or her own comments before anyone has sued (*i.e.*, if there's still time to fix it), disavow the comments and, if necessary, remove the decision-maker from the equation and re-approach the issue without the decision-maker's input. You may just save yourself some heartache down the line and will certainly have more confidence in the decision.

***This paper is definitely not legal advice. Hire a lawyer, preferably a good one.***

[224] Notably, the Fifth Circuit has held the cat's paw theory set forth in *Staub* applies in cases requiring "but for" causation (rather than motivating factor), although the strength of the connection between the actions of the agent harboring the illegal animus and the ultimate adverse employment action must be stronger. *Zamora v. City of Houston*, 798 F.3d 326, 331-33 (5th Cir. 2015) (Title VII retaliation claim). Specifically, the Fifth Circuit suggests Staub required only that the agent's action be a proximate cause of the adverse action (but not cause-in-fact) in motivating factor cases, before concluding the agent's action be the "but for" cause of the adverse action in "but-for" cases. *Id*.