The Same-Actor Inference: A Look at *Proud v. Stone* and Its Progeny

By C. Scott Schwefel

Since 1991, employers have been able to defend individual disparate treatment suits under Title VII of the Civil Rights Act of 1964[1] and the Age Discrimination in Employment Act[2] by invoking a doctrine known as the same-actor inference.[3] Simply put, the doctrine states that an inference or presumption of nondiscrimination is invoked when the individual terminating the employee is the same person who hired the employee, and the hiring and firing occur within a relatively short time span. The logic behind the doctrine is best summarized by the Fifth Circuit, which explained that "[c]laims that employer animus exists in termination but not in hiring seem irrational. From the standpoint of the putative discriminator, [i]t hardly makes sense to hire workers from a group one dislikes . . . only to fire them once they are on the job."[4]

The same-actor inference originated in *Proud v. Stone*, where the Fourth Circuit held that "in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer."[5]

In *Proud*, an age discrimination case, a 68-year-old plaintiff had been fired six months after having been hired. Proud was hired on the basis of his written application, which included his date of birth. Proud was selected for the position of chief accountant over six younger applicants. Several months later, Proud was terminated and replaced by a 32-year-old employee who was promoted to his position. The same individual that hired Proud made the decision to terminate him, with the stated reason for termination being dissatisfaction with Proud's performance of the his duties.

At trial, the district court granted the defendant-employer's Rule 41(b) motion for dismissal at the close of plaintiff's evidence. The plaintiff's evidence at trial revealed no direct evidence of discrimination and established that the person who fired Proud was the same person who had hired him just a few months earlier. The Fourth Circuit affirmed the dismissal, reasoning that the inference generally makes discrimination cases "amenable to resolution at an early stage," as "employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing."[6]

Although the same-actor inference emerged from an age discrimination case, the inference applies equally to discrimination claims arising under Title VII and the Americans with Disabilities Act.[7]

Generally, and as common sense would suggest, the shorter the time span between the employee's hiring and firing, the stronger is the inference. As put by the Second Circuit,

> Such an inference is strong where the time elapsed between the events of hiring and firing is brief . . . [a]nd, the enthusiasm with which the actor hired the employee years before may have waned with the passage of time because the relationship between an employer and an employee, characterized by reciprocal obligations and duties, is, like them, subject to time's "wrackful siege of battering days."[8]

As there is no bright-line rule as to what constitutes a "relatively short time span," the temporal separation between hiring and firing has varied widely in cases applying the inference, with cases ranging from between eight days and up to four years.[9] However, at least one circuit has left the door open to applying the inference even where there is a longer time span between the hiring and firing. In *Buhrmaster v. Overnite Transportation Co.*, the Sixth Circuit opined that a "short period of time is not an essential element of the same actor inference, at least in cases where the plaintiff's class does not change." The court further noted,

> [T]o say that time weakens the same actor inference is not to say that time destroys it. In discrimination cases where the employee's class does not change, it remains possible that an employer who has nothing against women per se when it hires a certain female will have nothing against women per se when it fires that female, regardless of the number of years that pass.[10]

Although the doctrine originally applied in situations where the same individual had done both the hiring and firing, it has since been extended to apply to multiple decision makers where the hirer and firer was not a single individual acting unilaterally on each occasion.[11] For example, in *Campbell v. Alliance National Inc.*, the plaintiff argued against the application of the doctrine because numerous individuals had participated in the decision to terminate her in addition to the person who had hired her. The court reasoned that "[t]he decision-makers in the hiring and firing need not mirror each other exactly as long as one management-level employee played a substantial role in both decisions."[12] Accordingly, the court held that the same-actor inference applied despite the participation of the nonhiring decision makers.

Similarly, in *DeJarnette v. Corning, Inc.*, a pregnancy discrimination case, the court applied the doctrine where one of the three people who participated in the decision to fire the plaintiff knew that the plaintiff was pregnant at the time she was hired, notwithstanding the fact that the individual did not participate in the hiring decision.[13]

Further extending the doctrine,

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numerous courts have applied the doctrine where the alleged discriminator engaged in some positive action or favorable treatment toward the employee prior to terminating the employee, even where the alleged discriminator did not participate in the hiring decision.[14] For example, in its 1996 decision in *Hartsel v. Keys*, the Sixth Circuit applied the same-actor inference where the decision maker had not initially hired the plaintiff but had promoted her prior to her termination.[15] In that case, a former city employee brought an age and gender discrimination suit against her municipal employer and its mayor when the mayor failed to promote her. Citing a previous promotion and raise, the court observed:

> This circuit has recently endorsed the "same actor inference," which allows an inference of a lack of discriminatory animus where the same person is responsible for both hiring and firing the individual. . . . This rationale seems applicable to Keys's decision to promote Hartsel temporarily but later finding her lacking for the permanent position.[16]

Both the Eleventh and Third circuits expressly reject the same-actor inference as a means of summary disposition.

More recently, in *Coghlan v. American Seafoods Co.*, the Ninth Circuit affirmed summary judgment for the employer in a national-origin discrimination case where the plaintiff was unable to overcome the same-actor inference applied by the district court. On appeal, at issue was whether the trial court, in applying the same-actor inference, had correctly deemed a previous transfer of the plaintiff as favorable treatment. The employee argued on appeal that the lower court's application of the same-actor inference was inappropriate because the transfer was, technically, a step down in rank. The court held that the decision maker, in spite of the demotion in rank of the plaintiff "intentionally chose to appoint [plaintiff] to a new, better-paid, more demanding position. . . . The favorable nature of the reassignment satisfies us that the same-actor inference should arise."[17]

There is a split of authority among the circuit courts as to the weight assigned to the inference, as well as whether the doctrine should be applied at the summary-judgment stage.

The Fourth Circuit, since *Proud*, still affords a strong inference of nondiscrimination, and its courts often apply the doctrine in dismissing claims on summary judgment.[18] Similarly, the Ninth Circuit characterized a plaintiff's burden in overcoming the doctrine as "especially steep" and has noted that it requires an "extraordinarily strong showing of discrimination necessary to defeat the same-actor inference."[19] The Eighth Circuit also affords the inference significant weight. In *Lowe v. J.B. Hunt Transport, Inc.*, the court described the same-actor inference as being "fatal" to the plaintiff's case.[20] In affirming the lower court's directed verdict, the court explained:

> The evidence that plaintiff claims is inconsistent with defendant's proffered justification is thin, but perhaps sufficient, all other things being equal, to defeat a motion for directed verdict. In the present case, however, all other things were not equal. The most important fact here is that plaintiff was a member of the protected age group both at the time of his hiring and at the time of his firing, and that the same people who hired him also fired him. . . . It is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.[21]

Similarly, the Second Circuit indicated that the same-actor inference "strongly suggest[s] that invidious discrimination was unlikely"[22] and that the doctrine is a "highly relevant factor" in deciding summary judgment.[23] Moreover, the Fifth and Tenth circuits also attach strong value to the same-actor inference.[24]

In contrast, the Sixth Circuit "reject[s] the idea that a *mandatory* inference must be applied in favor of a summary-judgment movant whenever the claimant has been hired and fired by the same individual."[25] The court further elaborated:

> [A]lthough the factfinder is permitted to draw this inference, it is by no means a mandatory one, and it may be weakened by other evidence. . . . We therefore specifically hold that where, as in this case, the factfinder decides to draw the same-actor inference, it is insufficient to warrant summary judgment for the defendant if the employee has otherwise raised a genuine issue of material fact.[26]

Both the Eleventh and Third circuits expressly reject the same-actor inference as a means of summary disposition. In *Williams v. Vitro Services Corp.*, the Eleventh Circuit held that it is improper to grant summary judgment on the basis that the hirer and firer are the same actor but that the jury can consider same-actor evidence in determining the issue of pretext.[27] The court noted that "it is the province of the jury rather than the court, however, to determine whether the inference generated by 'same-actor' evidence is strong enough to outweigh a plaintiff's evidence of pretext."[28] The court explained:

> [W]ithin the [employment discrimination] burden-shifting framework . . . this inference is a permissible—not a mandatory—inference that a jury may make in deciding whether intentional discrimination mo-

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> tivated the employer's conduct. [A] prima facie case plus evidence permitting disbelief of the employer's proffered reasons equals the plaintiff's entitlement to have the factfinder decide the ultimate issue of discrimination. [T]he jury must measure the strength of the permissible inference of discrimination that can be drawn from the plaintiff's prima facie case along with the evidence that discredits the employer's proffered explanations for its decision.[29]

In *Waldron v. SL Industries, Inc.*, the Third Circuit similarly held that the same-actor inference "is simply evidence like any other and should not be afforded presumptive value".[30]

Last, courts are split as to whether a party seeking to invoke the doctrine at trial is entitled to a jury instruction on the same-actor inference. In *Buhrmaster*, the Sixth Circuit held that it was not error to give a same-actor instruction allowing the jury to infer a lack of discrimination from the fact that the same individual both hired and fired the employee.[31] Moreover, at least one court has reversed a lower court judgment for failure to instruct the jury as to the doctrine.[32] On the other hand, the Second Circuit held that a trial court need not necessarily provide such an instruction, explaining:

> Although we have recognized the validity of this "same actor" argument . . . we do not believe that defendants were prejudiced by the court's refusal to give an instruction on this issue, particularly inasmuch as over six years had passed between the time plaintiff was hired and the time he was fired. . . . Notably, although the court told defendants that they remained free to make the "same actor" argument to the jury, defendants failed to rely on this allegedly crucial aspect of their case in their closing argument.[33]

Endnotes

1. 42 U.S.C. §§2000e to 2000e-17 (2000).
2. 29 U.S.C. § 621 et seq. (1988).
3. Proud v. Stone, 945 F.2d 796 (4th Cir. 1991).
4. Brown v. CSC Logic, Inc., 82 F.3d 651, 658 (5th Cir.1996) (quoting *Proud*, 945 F.2d at 797 (internal quotation marks omitted)).
5. *Proud*, 945 F.2d. at 797.
6. *Id.* at 798.
7. Buhrmaster v. Overnite Transp. Co., 61 F.3d 461, 464 (6th Cir. 1995) ("This general principle applies regardless of whether the class is age, race, sex, or some other protected classification"); Tyndall v. Nat'l Educ. Ctrs., Inc., of Calif., 31 F.3d 209 (4th Cir. 1994) (ADA); DeJarnette v. Corning, Inc., 133 F.3d 293 (4th Cir. 1998) (Pregnancy Discrimination Act); Amirmokri v. Baltimore Gas and Elec. Co., 60 F.3d 1126 (4th Cir. 1995) (national origin); Raheim v. N.Y. City Bd. of Educ., 2006 WL 2385428 (E.D.N.Y.) (religion); Jiminez v. Mary Washington Coll., 57 F.3d 369 (4th Cir. 1995) (race); Antonio v. Sygma Network, Inc., 458 F.3d 1177 (10th Cir. 2006) (race).
8. Carlton v. Mystic Transp., Inc., 202 F.3d 129, 132 (2d Cir. 2000) (quoting William Shakespeare, Sonnet LXV, in *The Complete Works of William Shakespeare* (W.J. Craig ed., Oxford Univ. Press 1928)).
9. Grady v. Affiliated Cent., Inc., 130 F.3d 553, 561 (2d Cir. 1997) (8 days); Jacques v. Clean-Up Group, Inc., 96 F.3d 506, 509 (1st Cir. 1996) (3 months); *Proud*, 945 F.2d at 798 (6 months); Bradley v. Harcourt Brace & Co., 104 F.3d 267, 269 (9th Cir. 1996) (11 months); Roberts v. Separators, Inc., 172 F.3d 448, 452 (7th Cir. 1999) (1 year); LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993) (2 years); Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173, 174-75 (8th Cir. 1992) (2 years); *Brown*, 82 F.3d at 658 (4 years).
10. *Buhrmaster*, 61 F.3d at 464.
11. *Amirmokri*, 60 F.3d 1126; Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 513 (4th Cir. 1994) (suggesting that a direct relationship between the individual hirer and the plaintiff is not necessary to establish the inference so long as the firing official has hired others in the plaintiff's protected class); *Lowe*, 963 F.2d at 174 (considering evidence that "same people" or "same company officials" hired and fired plaintiff in less than two years "compelling . . . in light of the weakness of the plaintiff's evidence otherwise").
12. Campbell v. Alliance Nat'l Inc., 107 F. Supp. 2d 234, 250 (S.D.N.Y. 2000); *see also* Nieto v. L & H Packing Co., 108 F.3d 621, 623 (5th Cir. 1997) (implicitly rejecting employee's contention disputing the identity of the hirer and firer and accepting employer's argument that corporate decisions are often made by management groups).
13. *DeJarnette*, 133 F.3d 293; *see also Antonio*, 458 F.3d 1177 (applying the inference in a race and national-origin discrimination case, where the hiring and firing decisions were made by a group, even though the group comprised different individuals at the time of the employee's hiring and firing).
14. Hooks v. Lockheed Martin Skunk Works, 14 F. App'x. 769, 2001 WL 706919 (9th Cir. 2006) (unpublished) (in a case involving the denial of a promotion by an individual who had previously promoted the plaintiff, the court held that "[w]hen an individual makes a favorable employment decision and then, within a short period of time, the same actor makes an adverse employment decision, 'a strong inference arises that there was no discriminatory motive'") (internal citations omitted).
15. Hartsel v. Keys, 87 F.3d 795 (6th Cir. 1996).
16. *Id.* at 804 n.9.
17. Coghlan v. American Seafoods Co., 413 F.3d 1090, 1098 (9th Cir. 2005).
18. Montgomery v. Ruxton Health Care, IX, LLC, 2007 WL 1229708 (E.D. Va. Apr. 26, 2007) (unreported).
19. *Coghlan*, 413 F.3d at 1096-97.
20. *Lowe*, 963 F.2d 173 (8th Cir. 1992).
21. *Id.* at 174 (internal citations omitted).
22. *Grady*, 130 F.3d at 560.
23. *Schnabel v. Abramson*, 232 F.3d 83, 91 (2d Cir. 2000).
24. *Brown*, 82 F.3d at 651; *But see* Haun v. Ideal Indus., Inc., 81 F.3d 541, 546 (5th Cir. 1996) ("While evidence of [same actor] circumstances is relevant in determining whether discrimination occurred, we decline to establish a rule that no inference of discrimination could arise under such circumstances"); *Antonio*, 458 F.3d at 1183.
25. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003) (emphasis added).

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26. *Id.* at 573–74 (Citing *Buhrmaster*, 61 F.3d at 464).

27. Williams v. Vitro Servs. Corp., 144 F.3d 1438 (11th Cir. 1998).

28. *Id.* at 1443.

29. *Id.*

30. 56 F.3d 491, 496 n.6 (3d Cir. 1995).

31. 61 F.3d at 463-64.

32. Brown Distrib. Co. of W. Palm Beach v. Marcell, 890 So.2d 1227, 1232 (Fla. 4th DCA 2005) ("Turning next to the proposed jury instruction on the same actor inference, we again find that it accurately states the law and is necessary for the jury to properly resolve the issues of the case").

33. Kim v. Dial Serv. Intern., Inc., 159 F.3d 1347, 1998 WL 514297, *4 (2d. Cir. 1998) (unpublished disposition) (citing *Grady*, 130 F.3d at 560).

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