What Is the Stray Remarks Doctrine? An Explanation and a Defense

David M. Litman

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What Is the Stray Remarks Doctrine? An Explanation and a Defense

“Every person in this room has endured a slight. Every person. Somebody has said something that has hurt their feelings or did something to them—left them out.”

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* Justice Clarence Thomas, Supreme Court of the United States, Speech at Palm Beach Atlantic University (Feb. 11, 2014) (partial transcript available at Chris Moody, Clarence Thomas: Society Is Overly Sensitive About Race, YAHOO! NEWS (Feb. 11, 2014, 2:41 PM), http://news.yahoo.com/clarence-thomas-on-race-194104252.html). Justice Thomas’s well-timed words provide a great starting point for an analysis of when those “slights” are just slights and when they can become evidence of illegal employment discrimination.
INTRODUCTION

In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*,¹ which dealt with gender stereotyping and mixed-motive analyses in employment discrimination law. Soon afterward, Congress amended Title VII² to eliminate a key holding in the opinion dealing with evidentiary burdens in mixed-motive analyses.³ While the *Price Waterhouse* opinion had but a brief rule on that end, two sentences found in Justice O’Connor’s concurrence have taken a life of their own:

Thus, *stray remarks* in the workplace, while perhaps probative of sexual harassment, cannot justifiably require 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.⁴

These words have resulted in what has been called the “Stray Remarks Doctrine.” What this doctrine is, precisely, has been unclear for quite some time, but it has come into play repeatedly when courts have considered the admissibility or sufficiency of evidence of discriminatory remarks in employment discrimination suits, particularly in disparate treatment cases. In *Price Waterhouse*, the discussion of stray remarks was in the context of a broader discussion of direct evidence and mixed-motive analyses.⁵ Since then, the doctrine has expanded in terms of the context it appears in, as well as the factors that are considered under the doctrine.⁶ While virtually every court takes into consideration the factors alluded to by Justice O’Connor, namely whether a decision maker was the speaker and

1. 490 U.S. 228 (1989).
4. *Price Waterhouse*, 490 U.S. at 277 (O’Connor, J., concurring in judgment) (emphasis added) (internal citation omitted).
5. Justice O’Connor, in the same paragraph as the sentences quoted above, succinctly summarized her point by stating that a plaintiff must show “direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision” in a mixed-motive case. *Id.*
whether the remark was related to the decision, courts also look at factors such as temporal proximity and the content of the remark. When the factors align under varying circumstances, courts have disregarded evidence of such discriminatory remarks, whether on a motion for summary judgment, a motion in limine, or in any other circumstance dealing with the sufficiency and admissibility of evidence.

The growth of the Stray Remarks Doctrine in prevalence and scope has not come without great confusion and its fair share of

7. See, e.g., McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals, 140 F.3d 288, 301 (1st Cir. 1998) (“[E]ven if the remarks are relevant for the pretext inquiry, their probativeness is circumscribed . . . if they were not related to the employment decision in question or were made by nondecisionmakers.”); Del Franco v. N.Y.C. Off-Track Betting Corp., 429 F. Supp. 2d 529, 536 (E.D.N.Y. 2006) (quoting Justice O’Connor’s concurrence in Price Waterhouse regarding stray remarks); Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992) (quoting Justice O’Connor from her concurrence in Price Waterhouse regarding stray remarks); EEOC v. Clay Printing Co., 955 F.2d 936, 941 (4th Cir. 1992) (describing remarks as not directly related to a decision maker or the decision and thus not sufficiently probative of discrimination); Reed v. Neopost USA, Inc., 701 F.3d 434, 441 (5th Cir. 2012) (noting that a test that requires comments be made by a decision maker and be related to the decision still applies where the proponent seeks to use the remark as direct evidence); Tooson v. Roadway Express, Inc., 47 F. App’x 370, 375 (6th Cir. 2002) (in order for stray remarks to be considered, they must be made by a decision maker); Fuka v. Thomson Consumer Elecs., 82 F.3d 1397, 1403 (7th Cir. 1996) (“[P]laintiff must show that the remarks ‘were related to the employment decision in question.’”); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1315–16 (8th Cir. 1996) (noting that comments by non-decision-makers and those unrelated to the decisional process may be properly disregarded); Mondero v. Salt River Project, 400 F.3d 1207, 1213 (9th Cir. 2005) (agreeing with the lower court that comments not related to the decision nor communicated to the decision maker are insufficient to raise a genuine issue of material fact); Minshall v. McGraw Hill Broad. Co., 323 F.3d 1273, 1287 (10th Cir. 2003) (noting that comments not made by a decision maker are not material); Standifer v. Sonic-Williams Motors, L.L.C., 401 F. Supp. 2d 1205, 1215–16 (N.D. Ala. 2005) (quoting Justice O’Connor’s concurrence in Price Waterhouse and describing stray remarks as those not made by decision makers or unrelated to the decision).

8. See, e.g., McMillan, 140 F.3d at 301 (stating that the probativeness of a remark is circumscribed if made temporally remote from the decision); Pivirootto v. Innovative Sys., Inc., 191 F.3d 344, 359 (3d Cir. 1999) (stating that a remark made temporally remote from the decision is insufficient); Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400, 405 (5th Cir. 2001) (reaffirming that a remark must be proximate in time to the decision). But see Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 762 (7th Cir. 2001) (suggesting that comments which are made around the time of the decision and are in reference to the decision might not be stray at all).
criticism from academics\(^9\) and even courts.\(^{10}\) Determining which factors matter and to what degree they matter can be a challenge, even within the circuits, as the law develops.\(^{11}\) Further complicating matters, courts have not always been clear regarding why they disregard remarks. Often an opinion will only state that the remark meets the factors to be a stray remark but will not elaborate on why that label allows the court to disregard the remark. Perhaps as a result of this lack of clarity, criticisms have sprung from various corners, alleging that the Stray Remarks Doctrine is inappropriate because a judge is improperly usurping the role of the jury\(^{12}\) or because emerging social science suggests the doctrine may be excluding important evidence of discrimination.\(^{13}\) Certainly courts have not always been correct in their exclusion of evidence.\(^{14}\)


\(^{10}\) \eg, Diaz v. Jiten Hotel Mgmt., Inc., 762 F. Supp. 2d 319, 334 (D. Mass. 2011) (“The expansion of Justice O’Connor’s remarks in her concurring opinion is deeply troubling.”).

\(^{11}\) For example, \textit{Brown v. CSC Logic, Inc.}, 82 F.3d 651, 655 (5th Cir. 1996) created a four-part test that dominated the treatment of discriminatory remarks in the Fifth Circuit. Several years later, \textit{Russell v. McKinney Hospital Venture}, 235 F.3d 219, 226 (5th Cir. 2000) directly challenged the \textit{Brown} test and changed the approach taken to deal with such discriminatory remarks.

\(^{12}\) \eg, Stone, supra note 9, at 178–83 (“Whereas courts presented with stray comments ought to be employing the proper summary judgment standard . . . in actuality they often bypass those mandates, and substitute their personal judgments for those of reasonable factfinders.”).

\(^{13}\) \eg, Ivan E. Bodensteiner, \textit{The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination}, 73 MO. L. REV. 83, 86 (2008) (discussing psychological research related to “implicit bias” and discrimination and arguing that “[d]erogatory comments directed at an individual . . . provide substantial insight into how the speaker assesses people”).

\(^{14}\) \textit{See, e.g.}, Ash v. Tyson Foods, Inc., 546 U.S. 454, 456 (2006) (describing as erroneous the Eleventh Circuit’s opinion requiring modifiers or qualifiers in order to make evidence that an African American was referred to as “boy” necessary to be probative of bias).
The Stray Remarks Doctrine is complicated in its application and yet simple to understand once it is put into context. In Part II, a brief background of the development of employment discrimination law will put into context why the Stray Remarks Doctrine matters and what role it plays in cases involving disparate treatment claims. In Part III, the factors that make up the doctrine will be analyzed, as well as their significance in the development of the doctrine and in proving the ultimate question of disparate treatment cases. In Part IV, the two common sources of criticism of the doctrine, stemming from the social science perspective and from those concerned over the frequent use of summary judgment, will be considered and addressed. Furthermore, Part IV will explain why courts are correctly disregarding remarks in most circumstances. Finally, Part V will explain simply what the doctrine really consists of. This Note argues that despite confusion and criticism, courts are, for the most part, correctly disregarding evidence of discriminatory remarks by applying rules of sufficiency\(^{15}\) and admissibility\(^{16}\) to discriminatory remarks in disparate treatment cases.\(^{17}\)

This Note focuses largely on disparate treatment in Title VII cases. Some Age Discrimination in Employment Act\(^{18}\) cases will also be discussed, and some cases will involve other theories, such as retaliation, harassment, or disparate impact. For purposes of clarity and brevity, some distinctions between a disparate treatment theory under Title VII and other theories under similar legislation will be set aside. Further, although it has been noted that there is a difference between discriminatory “intent” and “motive,” this Note assumes that when “discriminatory intent” is used, “discriminatory motive” is meant.\(^{19}\)

I. Proving Discrimination: A Brief History

In order to understand why the Stray Remarks Doctrine matters, a look through employment discrimination jurisprudence is necessary. Title VII, a part of the Civil Rights Act of 1964, has a purpose “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially

\(^{15}\) See infra Part III.B.1.
\(^{16}\) See infra Part III.B.2.
\(^{17}\) See infra Part IV.
\(^{19}\) This is because “motive” is the language found in the statute.
stratified job environments to the disadvantage of minority citizens." 20 Justice Powell in *McDonnell Douglas Corp. v. Green* 21 expanded upon this, stating that "it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise." 22 To combat such a wide range of discrimination, a number of tools have been developed by Congress and the courts. Perhaps most well-known are those under a "disparate treatment" theory—cases in which the plaintiff seeks to show that the employer acted with discriminatory motive in making a job-related decision. 23 Proving motive is not always necessary; plaintiffs may also show how a facially neutral employment practice is having adverse effects on a protected group and win a suit under Title VII under the "disparate impact" theory. 24 Since discriminatory remarks are used (typically) to show discriminatory intent, the Stray Remarks Doctrine is relevant mostly to the disparate treatment theory. A comparison between the purposes of the two theories, however, is necessary to understand the Stray Remarks Doctrine and so will be explored in Part III.A.1. For purposes of this Note, however, the focus will largely be on disparate treatment. 25

A. The Development of the Burden-Shifting Framework

The modern approach to disparate treatment cases originates, in large part, from *McDonnell Douglas v. Green*, where the Supreme Court laid out the process of proving a disparate treatment case and, in particular, a three-step burden-shifting analysis. The first step is that the plaintiff must establish a prima facie case of discrimination. 26 The elements of a prima facie case vary slightly depending on the adverse employment action alleged but generally include (1) plaintiff is a member of a protected class, (2) plaintiff is qualified for the position, (3) plaintiff suffered an adverse employment action, and (4)  

22. *Id.* at 801.
23. *See*, *e.g.*, Tex. Dep’t of Cnty. Affairs v. Burdine, 450 U.S. 248 (1981) (one of the seminal cases on disparate treatment theory).
25. Harassment and hostile environment cases will also be put on the sideline for purposes of understanding the Stray Remarks Doctrine because the purpose of introducing remarks in those cases is substantially different than a classic disparate treatment case.
circumstances give rise to an inference of discrimination.\textsuperscript{27} The burden at the prima facie stage is not an onerous one and need only be shown by a preponderance of the evidence.\textsuperscript{28} The purpose of this stage is to “eliminate[] the most common nondiscriminatory reasons for the plaintiff’s rejection.”\textsuperscript{29} Further, it creates “an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.”\textsuperscript{30}

Once a plaintiff has established her prima facie case, the “burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.”\textsuperscript{31} In \textit{Texas Department of Community Affairs v. Burdine},\textsuperscript{32} the Supreme Court emphasized that the burden that shifts to a defendant at this stage is only one of production. The burden of persuasion always remains with the plaintiff.\textsuperscript{33} The defendant, however, still must set forth admissible evidence that is sufficient to raise a genuine issue of material fact regarding whether it discriminated against plaintiff.\textsuperscript{34}

The final stage of the \textit{McDonnell Douglas} analysis is that once the defendant has met her burden of production, the plaintiff must establish that the defendant’s proffered legitimate, nondiscriminatory reason is mere pretext for discrimination.\textsuperscript{35} A plaintiff may prove pretext “either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”\textsuperscript{36} The plaintiff’s burden here is one of persuasion, though a finding for

\begin{footnotes}
\item[27] See, \textit{e.g.}, \textit{id.} (listing the elements of a prima facie case for racial discrimination); \textit{Burdine}, 450 U.S. at 253 (“[P]laintiff must prove . . . that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.”); \textit{St. Mary’s Honor Ctr. v. Hicks}, 509 U.S. 502, 506 (1993) (applying the elements listed in \textit{McDonnell Douglas}).
\item[28] \textit{Burdine}, 450 U.S. at 253.
\item[29] \textit{Id.} at 253–54. See also \textit{Int’l Bhd. of Teamsters v. United States}, 431 U.S. 324, 358 n.44 (1977) (noting that the \textit{McDonnell Douglas} elements demand that the discrimination was not because of the “two most common legitimate reasons”).
\item[31] \textit{McDonnell Douglas}, 411 U.S. at 802.
\item[32] 450 U.S. at 254.
\item[33] \textit{Id.} at 253.
\item[34] \textit{Id.} at 254–55.
\item[35] \textit{McDonnell Douglas}, 411 U.S. at 804.
\item[36] \textit{Burdine}, 450 U.S. at 256.
\end{footnotes}
the plaintiff may be made even if the plaintiff has only made a prima facie case and provided some evidence that the employer’s proffered reason was false.37

It still must be emphasized that under Title VII, “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.”38 By adopting such an intentional tort, it must be shown “that the actor intend[ed] the consequences of an act, not simply the act itself.”39 Simply harboring discriminatory thoughts and making an adverse employment action is insufficient.40 In other words, “[u]nless it is proved that an employer intended to disfavor the plaintiff because of his membership in a protected class, a disparate-treatment claim fails.”41

B. Direct Evidence vs. Indirect Evidence of Discrimination

In the development of case law on disparate treatment, a divide has been created between “direct evidence” and “indirect (or circumstantial) evidence.” Understanding this divide helps put the Stray Remarks Doctrine into context. Direct evidence is that evidence

37. Reeves v. Sanderson Plumbing Products., Inc., 530 U.S. 133, 148 (2000). This was the subject of much disagreement among the courts prior to the ruling in Reeves and continues to be a source of much confusion. See Natasha T. Martin, Pretext in Peril, 75 Mo. L. Rev. 313, 396 (2010) (“The Supreme Court clearly repudiated the pretext-plus interpretation of the pretext standard in its unanimous opinion in Reeves. Yet, nearly ten years later, we are still left without a workable definition or framework for the pretext assessment . . . .” (footnote omitted)). It should also be noted that there is a potential loophole in even this statement, as in Justice O’Connor’s opinion, there are situations where no rational fact finder could find for a plaintiff, even when a plaintiff has made a prima facie case and provided evidence the proffered explanation is false. Reeves, 530 U.S. at 148; see also Martin, supra note 37 at 334 (“The Court . . . noted that there may be instances where a prima facie case plus pretextual evidence is insufficient to support a finding of discrimination.”).


based on personal knowledge or observation that does not require any inference, except that it is true, whereas circumstantial evidence requires inferences beyond its truth.\footnote{Black’s Law Dictionary 636 (9th ed. 2009).} The design of the \textit{McDonnell Douglas} analysis was meant to make it easier for plaintiffs to get to court, since direct evidence is hard to come by in employment discrimination cases.\footnote{Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).} It became apparent to courts, though, that the logical corollary to this is that when a plaintiff provides direct evidence of discrimination, the burden-shifting analysis is unnecessary.\footnote{See \textit{id.}; Torgerson v. City of Rochester, 643 F.3d 1031, 1044 (8th Cir. 2011); see generally Allison Berman, Comment, \textit{Proof of Discrimination at Summary Judgment: The Eighth Circuit’s Focus on Categories of Evidence in Torgerson v. City of Rochester}, 53 B.C. L. Rev. Elec. Supp. 1 (2012), http://lawdigitalcommons.bc.edu/bclr/vol53/iss6/2 (“Direct evidence proves discrimination on its face, prompting the court to move on to review any asserted affirmative defenses. But, in the absence of direct evidence, a plaintiff must unpack the employer’s adverse decision to reveal a discriminatory motive.” (footnote omitted)).} The categorization of evidence as either direct or indirect thus does have significance in an analysis of a disparate treatment claim. It is significant for our purposes, as well, since discriminatory remarks can fall into both categories. A remark by a decision maker such as “I fired you because you are [protected class status]” will almost always qualify as direct evidence, rendering the \textit{McDonnell Douglas} analysis unnecessary.\footnote{See, e.g., Mojica v. El Conquistador Resort & Golden Door Spa, 714 F. Supp. 2d 241, 256 (D.P.R. 2010) (finding that, among other remarks, comments by two supervisors that plaintiff “would not be promoted because he was too old” are direct evidence of discrimination).} If you change that comment, however, so that it is made by a non-decision-maker (e.g., a supervisor in another department) or does not directly relate to the employment decision (e.g., “those [protected class status members] are bad at driving” in a job not involving driving), then whether the remark qualifies as direct or indirect becomes more difficult to determine.\footnote{See Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 355–56 (6th Cir. 1998) (deciding that comments by a vice president that “this company is being run by white haired old men waiting to retire, and this has to change’ and that he does ‘not want any employee over 50 years old on his staff’” are sufficient circumstantial evidence).}

There has been substantial confusion in case law regarding what is the purpose of the distinction. The Supreme Court attempted to clarify this in \textit{Trans World Airlines, Inc. v. Thurston},\footnote{469 U.S. 111 (1985).} where the Court stated that “the \textit{McDonnell Douglas} test is inapplicable where
the plaintiff presents direct evidence of discrimination," 48 and in *Furnco Construction Corp. v. Waters* 49 the Court stated that “[t]he method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic.” 50 It thus appears that there is a sharp divide between when there is direct evidence and when there is only circumstantial evidence for what type of analysis is needed. When there is only circumstantial evidence, the *McDonnell Douglas* analysis is not a rigid formula. This interpretation is supported by the fact that some courts have held that the *McDonnell Douglas* analysis is not necessary where a plaintiff provides strong circumstantial evidence of discriminatory motivation. 51

This all leads to the question of what is meant by “direct” and “indirect” evidence. The answer to this question is not fully resolved, even within circuits. 52 Much of this confusion likely stems from the use of Justice O'Connor’s concurrence in *Price Waterhouse* by many courts to suggest that direct evidence must be provided by a plaintiff before mixed-motive instructions are given to juries. 53 This interpretation led to a divide among the circuits regarding what the direct-evidence requirement was for mixed-motive analyses. 54 This divide

48. Id. at 121.


50. Id. at 577.

51. E.g., Torgerson v. City of Rochester, 643 F.3d 1031, 1044 (8th Cir. 2011) (“A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer’s adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial.”).

52. Compare Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (“[D]irect’ refers to the causal strength of the proof, not whether it is ‘circumstantial’ evidence.”), with Bakhtiari v. Lutz, 507 F.3d 1132, 1136 n.3 (8th Cir. 2007) (“[B]oth words [circumstantial and direct] are employed in a purely evidentiary context, and not necessarily in the ‘causal’ sense discussed . . . in *Griffith*.”).

53. Mixed-motive theories are those in which there is evidence to suggest that more than one reason contributed to the decision, and a prohibited factor may have been among them. The treatment and understanding of mixed-motive theories has varied enormously across circuits and through time. Notably, Title VII and the Age Discrimination in Employment Act treat mixed-motive theories quite differently in terms of the plaintiff’s evidentiary burden. Requirements for direct evidence have been found in some circuits and rejected in others. Because of this confusion, this Note avoids discussing the role of such remarks in mixed-motive cases, as the application of the doctrine is similar, if not identical, but may result in misunderstandings of the different evidentiary burdens. 42 U.S.C. § 2000e-2 (2012); 29 U.S.C. §§ 621–634 (2012).

became largely irrelevant with the enactment of the Civil Rights Act of 1991 and its interpretation in Desert Palace, Inc. v. Costa, where it became clear that “the statute does not mention, much less require, that a plaintiff make a heightened showing through direct evidence.” Thus, this Note suggests that the divide over what amounts to “direct evidence” in a mixed-motive analysis is now moot and that the traditional definitions and uses of the terms “direct evidence” and “circumstantial evidence” are the only relevant ones. As defined by Black’s Law Dictionary, “direct evidence” is “[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.” “Circumstantial evidence,” on the other hand, is “[e]vidence based on inference and not on personal knowledge or observation.”

While there is some uncertainty as to some of these elements, we are left with the following framework. In a disparate treatment case, where a plaintiff comes forward with direct evidence, a McDonnell Douglas analysis is unnecessary as the plaintiff does not need the assistance of a burden-shifting scheme in order to make their case.

(2003) (“Unfortunately the Court’s plurality opinion and two concurrences [in Price Waterhouse v. Hopkins] created more problems than they solved. . . . Courts and commentators alike have been unable to agree on the definition of ‘direct evidence.’”); Steven M. Tindall, Note, Do as She Does, Not as She Says: The Shortcomings of Justice O’Connor’s Direct Evidence Requirement in Price Waterhouse v. Hopkins, 17 BERKELEY J. EMP. & LAB. L. 332, 336 (1996) (“Because Justice O’Connor was unclear as to what she meant by direct evidence, however, the federal circuits would approach the question of whether to give a mixed-motives jury instruction (in a jury trial) or to shift the burden of persuasion to Consolidated (in a bench trial) in different ways and reach different conclusions accordingly.”).

57. Id. at 98–99.
58. BLACK’S LAW DICTIONARY 636 (9th ed. 2009). Of course, this definition is not legally binding but serves as a simple example of what is meant by the terms.
59. Id.
60. Cf. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (“[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination. . . . In this case there is direct evidence that the method of transfer available to a disqualified captain depends upon his age.” (citations omitted)). In this context, it is perhaps helpful to be reminded of the Supreme Court’s explanation of why we shift burdens in certain circumstances. “Placing this burden of production [to proffer a legitimate, nondiscriminatory reason] on the defendant . . . serves simultaneously to meet the plaintiff’s prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full
Where a plaintiff comes forward with only circumstantial evidence, the *McDonnell Douglas* analysis *may* come into play but does not need to if the strength of the circumstantial evidence is enough.\(^{61}\)

II. THE STRAY REMARKS DOCTRINE

Since its origins in Justice O’Connor’s concurrence in *Price Waterhouse*, a case about evidentiary requirements in mixed-motive cases that was subsequently superseded by statute,\(^{62}\) the Stray Remarks Doctrine has evolved substantially and in a notably haphazard fashion. Justice O’Connor wrote that “stray remarks in the workplace . . . 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 decision-makers unrelated to the decisional process itself, suffice to satisfy the plaintiff’s burden . . . .”\(^{63}\) What seems like a straightforward proposition has been extended in a number of ways, some of them seemingly contradictory.\(^{64}\) This Part looks at what courts have held can make a statement a stray remark and what the consequence is for a comment deemed a stray remark.

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61. Torgerson v. City of Rochester, 643 F.3d 1031, 1044 (8th Cir. 2011) (“A plaintiff with strong (direct) evidence that illegal discrimination motivated the employer’s adverse action does not need the three-part *McDonnell Douglas* analysis to get to the jury, regardless of whether his strong evidence is circumstantial. But if the plaintiff lacks evidence that clearly points to the presence of an illegal motive, he must avoid summary judgment by creating the requisite inference of unlawful discrimination through the *McDonnell Douglas* analysis, including sufficient evidence of pretext.”).

62. Congress amended Title VII to get rid of *Price Waterhouse’s* holding that an employer is not liable if it can prove it would have reached the same employment decision even if it did not take the prohibited factor into account. Now an employer may still be liable even if there were other motivating factors that would have led to the employment action, so long as a protected status was still a motivating factor. 42 U.S.C. § 2000e-2(m) (2012).


A. What Is a Stray Remark?

In order to understand what a stray remark is, one must examine why such evidence is used in disparate treatment cases. Generally speaking, the purpose is to show that the protected status was a motivating factor in the employment decision. Stray remarks are those comments that, while perhaps discriminatory, do not truly show that discrimination was a motivating factor in the relevant employment decision. With that in mind, courts across jurisdictions have developed a number of factors deemed significant in determining whether comments show discrimination as a motivating factor. These factors vary in the weight attached to them and often on which factors actually matter. While this has resulted in confusing and often seemingly contradictory messages regarding what is a stray remark, the labeling of remarks is “an attempt—perhaps by oversimplified generalization—to explain that the more remote and oblique the remarks are in relation to the employer’s adverse action, the less they prove that the action was motivated by discrimination.”

While this is, generally speaking, what a stray remark is, it is still helpful to review the factors that have been used by courts in analyzing such remarks. The most common factors across jurisdictions can be found in Cooley v. Carmike Cinemas, Inc.:

- Whether the comments were made by a decision maker or by an agent within the scope of his employment; whether they were related to the decision-making process; whether they were more than merely vague, ambiguous, or isolated remarks; and whether they were proximate in time to the act of termination.

Each of these factors deserves some individual attention regarding their prevalence, use, and significance in disparate treatment analyses.

1. Who Made the Remark?

Many courts, following Justice O’Connor’s express acknowledgment of the factor, recognize that when a comment is made by a non-decision-maker, it is a stray remark. For example, the Third Circuit

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65. See Tomassi v. Insignia Fin. Grp., Inc., 478 F.3d 111, 116 (2d Cir. 2007) (“The relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class.”).

66. Id. at 115. See also infra Part IV.

67. 25 F.3d 1325 (6th Cir. 1994).

68. Id. at 1330 (emphasis added).

69. See, e.g., McMillan v Mass. Soc’y for the Prevention of Cruelty to Animals, 140 F.3d 288, 301 (1st Cir. 1998) (stating that probativeness of a remark is circumscribed if not made by a decision maker); Ostrowski
has held that “comments by those individuals outside the decision making chain are stray remarks, which, standing alone, are inadequate to support an inference of discrimination.” This is a rather strong statement, and it shows that a high degree of significance has been attached to this factor, which is perhaps stronger than any other factor. After all, intuitively speaking, a discriminatory remark made by a non-decision-maker would seem to be irrelevant if the question is whether the decision was motivated by discrimination. Some courts have even gone so far as to declare that “stray remarks, even if made by a decisionmaker, do not constitute sufficient evidence [to support] a case of employment discrimination.”

Some courts have not seen it as quite that simple, however. For example, in the First and Sixth Circuits, statements by non-decision-makers are not categorically excludable because “such evidence . . . tend[s] to add ‘color’ to the employer’s decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff.” Further, there is always potential for a “Cat’s Paw

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70. Walden v. Georgia-Pacific Corp., 126 F.3d 506, 521 (3d Cir. 1997); see also Gomez v. Allegheny Health Servs., Inc., 71 F.3d 1079, 1085 (3d Cir. 1995) (“Because Dr. Meister had no supervision over plaintiff . . . [t]he evidence before us more properly falls into the category of stray remarks by non-decision makers, which are inadequate to support an inference of discrimination by the employer.” (citations omitted)).


72. Conway v. Electro Switch Corp., 825 F.2d 593, 597 (1st Cir. 1987); see also Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 356 (6th Cir. 1998) (“[C]omments of a nondecisionmaker are not categorically excludable.”); Walden, 126 F.3d at 521 (“[S]tray remarks by non-decision
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Theory,”73 where there is some evidence that the remark may have somehow impacted or influenced the decision maker in making the employment decision, in which cases courts are reluctant to label a remark as stray.74 The Supreme Court has affirmed the application of a Cat’s Paw Theory where discriminatory remarks are made by a non-decision-maker in Staub v. Proctor Hospital.75 Thus, there could be more scrutiny of this factor and whether the non-decision-maker may have had any influence on the ultimate decision. At least one opinion has discussed the impact of Staub on the Stray Remarks Doctrine, stating that it “suggests that the ‘stray remark’ inquiry should be altered in one minor respect to focus on the nexus between the allegedly discriminatory remarks and the act that the [non-decision-maker] as opposed to the ultimate decision maker performed which allegedly proximately caused the ultimate employment action.”76 Still, a stray remark made by a non-decision-maker and not communicated in some form to the ultimate decision maker is likely insufficient evidence of intentional discrimination.77

2. Relatedness of the Remark to the Decision (Context)

The relatedness of a remark to the ultimate decision, another factor identified by Justice O’Connor in her concurrence, is perhaps the most important and yet most difficult to truly define or understand. It is worth emphasizing that by “relatedness” most courts and this Note mean the nexus between the statement and the actual employment decision. In other words, the context of the statement, as opposed to the connection between the statement and the particular protected status in question, or the content of the remark. It has been

makers may be properly used by litigants as circumstantial evidence of discrimination.”).

73. See Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (“If [the decisionmaker] acted as the conduit of [the nondecisionmaker’s] prejudice—his cat’s paw—the innocence of the [decisionmakers] would not spare the company from liability.”).

74. See, e.g., Rajaravivarma v. Bd. of Trs. for the Conn. State Univ. Sys., 862 F. Supp. 2d 127, 152 (D. Conn. 2012) (“[W]ithin a ‘cat’s paw’ case the allegedly biased supervisor should be considered a decisionmaker for purposes of a ‘stray remark’ analysis.”); Laxton v. Gap Inc., 333 F.3d 572, 583 (5th Cir. 2003) (“The remark must . . . be made by a person primarily responsible for the adverse employment action or by a person with influence or leverage over the formal decisionmaker.”).

75. 131 S. Ct. 1186, 1188 (2011) (applying traditional tort-law concepts of proximate cause to intentional discrimination).

76. Rajaravivarma, 862 F. Supp. 2d at 153.

77. See Mondero v. Salt River Project, 400 F.3d 1207, 1213 (9th Cir. 2005) (“Stray remarks not acted upon or communicated to a decision maker are insufficient to establish pretext.”).
repeatedly held in a number of decisions that a discriminatory remark must be related to the employment decision in question.\textsuperscript{78} In fact, it is probably the most consistent factor among the circuits in terms of its presence. In its application, however, this factor varies significantly across the circuit courts in terms of its consequences, as will be explored in the next section.

One particular area of interest in this factor is that some courts have been willing to admit statements that are not necessarily tied to the decision, but “could be viewed as evidencing a discriminatory attitude.”\textsuperscript{79} Similarly, sometimes courts will consider the frequency of remarks, which could also reflect a discriminatory attitude.\textsuperscript{80} This could be interpreted as courts simply looking at some of the other factors and attaching greater weight to those other factors rather than letting the context factor get in the way. While the Third and Eighth Circuits have held as such, other circuits such as the Fifth,\textsuperscript{81} Seventh,\textsuperscript{82} and Ninth\textsuperscript{83} have been stricter on the relatedness requirement. In reaching a similar conclusion, the Tenth Circuit followed such logic from \textit{Hazen Paper Co. v. Biggins},\textsuperscript{84} in which the Supreme Court emphasized that in a disparate treatment case, the protected trait must actually play a role in the decision-making process.\textsuperscript{85}

\textsuperscript{78} See, \textit{e.g.}, Bahl v. Royal Indem. Co., 115 F.3d 1283, 1293 (7th Cir. 1997) (explaining remarks cannot defeat summary judgment unless they are both proximate in time and are related to the employment decision); Mereish v. Walker, 359 F.3d 330, 337–38 (4th Cir. 2004) (discussing the fact that the comments were not age-related).

\textsuperscript{79} O’Neill v. Sears, Roebuck & Co., 108 F. Supp. 2d 433, 436 (E.D. Pa. 2000); see also Browning v. President Riverboat Casino-Missouri, Inc., 139 F.3d 631, 634–35 (8th Cir. 1998) (holding that a remark, even though not directly related to the decision, was reflective of a discriminatory attitude, and thus was not stray).

\textsuperscript{80} \textit{E.g.}, Domínguez-Curry v. Nevada Transp. Dep’t, 424 F.3d 1027, 1039 (9th Cir. 2005) (holding that evidence of discriminatory remarks was not ambiguous by contrasting with another case in which only one statement was made, whereas here a number of comments were made).

\textsuperscript{81} \textit{E.g.}, Auguster v. Vermillion Parish Sch. Bd., 249 F.3d 400, 405 (5th Cir. 2001).

\textsuperscript{82} \textit{E.g.}, Gorence v. Eagle Food Ctrrs., Inc., 242 F.3d 759 (7th Cir. 2001).

\textsuperscript{83} \textit{E.g.}, Merrick v. Farmers Ins. Grp., 892 F.2d 1434, 1438–39 (9th Cir. 1990); Harris v. Itzhaki, 183 F.3d 1043, 1055 (9th Cir. 1999).

\textsuperscript{84} 507 U.S. 604, 610 (1993).

\textsuperscript{85} Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1140 (10th Cir. 2000) (“A plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company’s termination decision, and therefore ‘that age actually played a role in the defendant’s decisionmaking process.’” (quoting Rea v. Martin Marietta Corp., 29 F.3d 1450, 1455 (10th Cir. 1994))).
3. Is the Comment Vague or Ambiguous? (Content)

A third factor commonly found in the identification of stray remarks is whether the remark is vague or ambiguous—or, in other words, “whether a reasonable juror could view the remark as discriminatory.”86 This factor can often be overlooked, in part, because where a comment might mean one of two different things, the ambiguity should be resolved in favor of the non-movant, which is usually the employee.87

This factor did receive some new attention by the Supreme Court in *Ash v. Tyson Foods, Inc.*,88 where the Court reversed the Eleventh Circuit in a case in which a decision maker referred to two African American employees as “boy” on several occasions. The Court of Appeals for the Eleventh Circuit held that “[w]hile the use of ‘boy’ when modified by a racial classification like ‘black’ or ‘white’ is evidence of discriminatory intent, the use of ‘boy’ alone is not evidence of discrimination.”89 In reversing the Eleventh Circuit, the Supreme Court wrote the following:

> Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage. Insofar as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court’s decision is erroneous.90

These factors identified in *Ash* suggest that the Supreme Court wants the lower courts to look at allegedly discriminatory remarks more carefully to determine if the remarks really are vague or ambiguous. Nothing in the *Ash* opinion, however, suggested that the Stray Remarks Doctrine or the content factor is fundamentally flawed.

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87. Diaz v. Jiten Hotel Mgmt., Inc., 762 F. Supp. 2d 319, 335 (D. Mass. 2011) (“Whether a given remark is ‘ambiguous’—whether it connotes discriminatory animus or it does not—is precisely what a jury should resolve.”). *But see infra* Part III.B.1.
89. *Id.* at 456 (quoting *Ash v. Tyson Foods, Inc.*, 129 F. App’x. 529, 533 (11th Cir. 2005), *rev’d*, 546 U.S. 454 (2006)).
90. *Id.*
4. Is the Remark Temporally Proximate to the Employment Decision?

Virtually all courts will look at whether a remark is temporally proximate to the adverse employment action.\(^{91}\) It is not uncommon to find a case in which a remark is discarded simply because it was made too far in the past.\(^{92}\) Typically, this factor has its greatest influence when other factors exist but are perhaps more convincing when combined with the lack of temporal proximity.\(^{93}\) The length of time considered “proximate” varies and can be best described as a case-by-case analysis. Still, it is interesting to note that despite sharing the same logic as the Same-Actor Inference, the length of time generally required for a remark to be deemed stray is shorter than that allowed for the same-actor inference to be applied, showing an admittedly curious disconnect.\(^{94}\)

5. How Many Factors Must Exist?

A natural question to ask is how many factors are necessary for a stray remark to exist and whether any individual factor is accorded more weight than others. The question, however, is not the correct one to ask. As will be argued below, the Stray Remarks Doctrine is not necessarily a four-factor test to determine the admissibility or sufficiency of a statement as evidence.\(^{95}\) Rather, these factors are common reasons for which courts have decided that a remark is either inadmissible under the Federal Rules of Evidence or insufficient to raise a question of fact. Thus, this Note would suggest that in looking at remarks and determining if they are simply stray remarks, the analysis should not be simply how many factors are satisfied but rather a qualitative look at the individual factors and consideration of them as a whole. Moreover, it would be wise to consider other factors

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92. See, e.g., Shefferly, 94 F. App’x at 281 (holding that a remark of “flirt and drink” made over a year prior to the employment decision was “too far removed in time to be probative of disparate treatment”).

93. See, e.g., Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 545 (3d Cir. 1992) (stating that remarks made by non-decision-makers or unrelated to the decision are rarely given weight, “particularly if they were made temporally remote from the date of decision”).


95. See infra Part IV.
that may be relevant in determining the admissibility or sufficiency of the remarks.

B. What Is the Significance of a Remark Being Labeled as Stray?

Beyond just the factors identified by the different circuit courts, there is significant variation and, consequently, confusion on what the significance is of being labeled a stray remark. Many decisions have held that a remark that meets the factors necessary to be a stray remark may nonetheless be circumstantial evidence of discrimination.\(^96\) In the Fifth Circuit, a stray remark may nonetheless be circumstantial evidence, but only if “the remarks demonstrate (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.”\(^97\) In the Third Circuit, on the other hand, a stray remark may be used as circumstantial evidence, but when certain factors are met, it will rarely be given great evidentiary weight,\(^98\) suggesting that the stray remark factors impact its sufficiency. In one First Circuit opinion, the court stated that “[s]uch factors heighten the remoteness of the remarks, arguably to the point at which they are no more probative than they are prejudicial.”\(^99\) This suggests the factors have consequences for the admissibility of the remark.

What happens when a stray remark is the only evidence, and what happens when there is other evidence? In \(Alvarez v. Royal Atlantic Developers, Inc.\),\(^100\) the Eleventh Circuit held that a “single stray remark ‘Cubans are dumb’ . . . is too weak to raise a genuine fact issue.”\(^101\) That opinion is not alone. Courts are, however, sometimes wary of simply classifying a remark as stray and then

\(^96\) \textit{E.g.}, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5th Cir. 2000) (“The remarks at issue in this case are certainly appropriate additional circumstantial evidence of age discrimination because their content indicates age animus and the speaker . . . was primarily responsible for [the plaintiff]’s termination.”).

\(^97\) Acker v. Deboer, Inc., 429 F. Supp. 2d 828, 847 (N.D. Tex. 2006) (citing Laxton v. Gap Inc., 333 F.3d 572, 583 (5th Cir. 2003); Sandstad v. CB Richard Ellis, 309 F.3d 893, 899 (5th Cir. 2002); \textit{Russell}, 235 F.3d at 225.).

\(^98\) \textit{Ezold}, 983 F.2d at 545 (refusing to give much weight to a remark that was not temporally proximate).

\(^99\) McMillan v. Mass. Soc’y for the Prevention of Cruelty to Animals, 140 F.3d 288, 301 (1st Cir. 1998) (“Such factors heighten the remoteness of the remarks, arguably to the point at which they are no more probative than they are prejudicial.”).

\(^100\) 610 F.3d 1253 (11th Cir. 2010).

\(^101\) \textit{Id.} at 1268 (emphasis added).
disregarding it. When there is additional evidence, courts tend to be more hesitant in dismissing a remark. One opinion put it this way:

Although we agree that stray remarks, standing alone, may not give rise to an inference of discrimination, such remarks are not irrelevant. Rather, such comments are “surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury.”

Similarly, if there are multiple remarks, those remarks may be seen as buttressing one another in supporting an inference of discriminatory animus. This is not universal. In *Greene v. Virgin Islands Water & Power Authority*, the court dismissed evidence of a “collection of stray remarks and unconnected, coincidental circumstances” that did not establish a causal nexus. Nonetheless, it appears that at least in the majority of jurisdictions, a remark that fits the factors identified for becoming stray will, at the very least, have limited probative value in the eyes of the courts. When the remark is the only evidence of discrimination, it will rarely be seen as sufficient to raise an inference of discrimination. Where it is found amidst other evidence of discrimination, however, courts are unlikely to totally discount the remarks.

### III. The Critiques of the Stray Remarks Doctrine

As more and more courts have held stray remarks inadmissible or insufficient, a number of common criticisms of the doctrine have developed in response to those court decisions. One criticism of the Stray Remarks Doctrine is that the doctrine does not comport well with social science and how workplace discrimination actually works. Another common criticism is that judges have been too eager to usurp the role of the jury by making improper determinations regarding questions of fact related to discriminatory remarks. Each of these criticisms make fair points but also fail to truly understand the role of

102. *E.g.*, Tomassi v. Insignia Fin. Grp., Inc., 478 F.3d 111, 115–16 (2d Cir. 2007).


104. Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 356 (6th Cir. 1998) (“[W]hen assessing the relevancy of an allegedly biased remark where the plaintiff presents evidence of multiple discriminatory remarks or other evidence of pretext, we do not view each discriminatory remark in isolation, but are mindful that the remarks buttress one another as well as any other pretextual evidence supporting an inference of discriminatory animus.”).

105. 557 F. App’x 189, 196 (3d Cir. filed 2014).
the Stray Remarks Doctrine in disparate treatment cases. While there are, undeniably, cases in which these criticisms are justified, there are even more cases in which the judges were likely employing correct logic in ruling that a remark is insufficient or inadmissable. As a whole, this Note proposes that the operation of the Stray Remarks Doctrine has been true to sufficiency and admissibility requirements. Simply because courts have not always been clear and, at times, have been confusing or contradictory does not mean that the logic behind the doctrine is incorrect.

A. The Social Science Critique

As argued by one scholar, “the doctrine and its premises fail to comport with even a basic understanding of social science and how people foment, act upon, and reveal discriminatory bias.”106 Many critics have attacked the use of the doctrine on the grounds that excluding allegedly discriminatory remarks because, for example, they are not related to the employment action leaves out evidence showing a discriminatory environment or leaves out evidence of an “implicit bias” among relevant decision makers (or non-decision-makers with influence over the ultimate decision). By not recognizing that implicit biases and “subtle discrimination” affect the same concerns as “old-fashioned” discrimination, it is argued that employment discrimination law is not achieving its own purpose to remove the protected factors from employment considerations.107 Further, some critics argue that “decisionmakers have become quite sophisticated in masking their discriminatory intent,” and thus we need to look beyond traditional forms of evidence of discrimination.108 These concerns are misplaced. The social science critique misunderstands the role of stray remarks and disparate treatment theory and the motive part of the

106. Stone, supra note 9, at 152.

107. See Bodensteiner, supra note 13, at 99 (“Recent psychological research demonstrates that limiting unlawful discrimination to the ‘old-fashioned’ type ignores how discrimination actually works in many situations and leaves much discrimination untouched.”).

108. Id. at 96. The argument that employers have become clever at hiding their discriminatory intent seems to be made by those who also argue that we must combat unconscious discrimination. The former argument seems to be an unfounded assumption designed to suggest employers are inherently bigoted and that we must heavily scrutinize them to catch their bigotry. The latter argument then attempts to bolster the argument that all employers are bigoted even when they are unaware of their own bigotry. These two arguments, individually and collectively, are concerning in the way they flip the American ideal of “innocent until proven guilty” by automatically labeling the employers as discriminatory before any relevant evidence is found. In other words, proponents are saying, “We know you did it; we’ll just figure out how later.”
equation. The judge-focused critique simply applies common issues relating to the admissibility and sufficiency of evidence to the handling of such cases.

1. Disparate Impact Covers Subtle Discrimination and Implicit Biases

Employment discrimination law is not blind to subtle forms of discrimination. As far back as McDonnell Douglas, it was recognized that “Title VII tolerates no racial discrimination, subtle or otherwise.” Courts have gone beyond just paying lip-service to this idea, too. In Griggs v. Duke Power Co., the Supreme Court recognized what has become known as “disparate impact theory,” whereby an employer can still be liable for employment discrimination, even with “good intent or absence of discriminatory intent.” Assuming the validity of the implicit-bias argument, which will be discussed below, the “primary concern of legal scholars is that the law’s requirement of proof of an intentional mental state as a cause of discrimination . . . fails to capture many instances of discrimination caused by automatic stereotyping processes and in-group preferences.” Disparate impact theory provides a mechanism for addressing such “discrimination” if indeed it is there. Where implicit bias would seem to come most into play is where there are subjective hiring processes and “in-group preferences,” and such subjective hiring processes can lead to liability under disparate impact. Thus, there is a tool by which plaintiffs can seek justice because an adverse employment action was the result of a prohibited factor.

Beyond disparate impact, the soundness of using subtle or implicit biases as a source of liability becomes dubious. After all, Title VII and similar legislation is not meant to “prohibit discriminatory attitudes or prejudicial thoughts themselves.” Simply showing that implicit bias exists is insufficient to lead to liability where there is no evidence that the implicit bias actually had a role in the adverse

111. Id. at 432.
113. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 991 (1988) (“[S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.”); see also EEOC v. Joe’s Stone Crab, Inc., 220 F.3d 1263 (11th Cir. 2000) (analyzing under disparate impact theory, but ultimately rejecting, a plaintiff’s allegation that subjective hiring criteria harmed women in the hiring process).
114. Chen, supra note 40, at 919.
employment action. Otherwise, virtually any employment decision could be subject to liability. After all, “most, if not all, of us are implicit bigots most, if not all, of the time.”115 A “conservative” estimate shows that approximately “ninety percent of Americans . . . mentally associate negative concepts with the social group ‘elderly’ . . . [and] [s]eventy-five percent of Whites (and fifty percent of Blacks) show anti-Black bias.”116 Addressing subtle discrimination and implicit biases is thus more appropriate for a disparate impact analysis, unless there is further evidence that the employer acted on a part of their discrimination or bias. It is questionable whether measures of implicit bias really even measure anything useful or relevant to such an analysis, however.

2. Implicit Bias Does Not Show a Discriminatory Motive

As suggested by one scholar, “where the operative discrimination that engenders a finding that something befell a plaintiff ‘because of’ her protected class status may be subconscious or unconscious discrimination, and the utterance of a comment in another context lends credence to the theory that the decision maker’s bias carried over[,]” the comment should be relevant as a link between the adverse action and a discriminatory motivation.117 However, this is not as straightforward as it may appear. Bias that operates beyond conscious awareness cannot evidence discriminatory motive or, more simply, that the actor intended the consequences. Implicit bias has been most commonly measured by the Implicit Associational Test (IAT).118 Studies regarding implicit bias and the IAT suffer from some serious deficiencies, however. For one, “IAT scores remain meaningless until empirical studies link specific ranges of scores to specific acts that objectively (or consensually) represent discrimination.”119 Beyond the meaning of the IAT scores being unclear, the results have shown only a modest correlation at best but have been victim of high failure rates of anywhere between 60 and 90 percent.120 Gregory Mitchell and Philip E. Tetlock perhaps put the problem best, pointing out that “the fact that IAT scores have low positive correlations with behavior expansively defined as discriminatory guarantees that many indivi-

115. Mitchell & Tetlock, supra note 112, at 1024.
117. Stone, supra note 9, at 188.
118. Mitchell & Tetlock, supra note 112, at 1025.
119. Id. at 1032.
120. Id. at 1100–01.
duals labeled prejudiced by the IAT will not exhibit the behavior in question.” Even more concerning is this:

There is strong evidence that psychological processes aside from out-group hostility can artificially inflate and otherwise distort scores on implicit measures such as the IAT. These alternative processes include the power of stimulus familiarity/unfamiliarity to facilitate/impede reaction time, the power of compassion to increase the accessibility of negatively-charged cognitions, the power of widely known but not personally accepted cultural stereotypes to influence the accessibility of associations, the power of objective correlations between group membership and socio-economic outcomes to influence the accessibility of associations, and the power of individual differences in cognitive flexibility to influence reaction time in response to shifting instructions such as those employed with the IAT.

Again, there are questions regarding whether implicit bias actually can be correlated to significant discriminatory actions. Many studies simply connect IAT scores with observed behaviors such as friendliness, comfort level, eye contact, body posture, and other body language indicators. To have any real legal meaning, it must be assumed (or preferably shown) that this extends to more significant discriminatory behavior and that the behavior would not change from “stranger-stranger interactions employed in most social-psychological experiments on discrimination” to the types of interactions that would be found in most employment discrimination situations.

The fact remains that in disparate treatment cases there is still a requirement that a discriminatory motive or intent be behind the employment decision. Yet these “biases are ‘cognitive rather than

121. Id. at 1100.
122. Id. at 1072 (footnote omitted).
125. Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (stating that plaintiff has “the ultimate burden of persuading the court that she has been the victim of intentional discrimination”); Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988) (“[T]he plaintiff is required to prove that the defendant had a discriminatory intent or motive.”). But see Katharine T. Bartlett, Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination, 95 Va. L. Rev. 1893, 1922 (2009) (providing a well-reasoned argument that “intent” in the context of Title VII litigation does not necessarily mean the employer must have a deliberate or conscious discriminatory purpose).
motivational,’ [and] they ‘operate absent intent to favor or disfavor members of a particular social group.’” Regardless of the soundness of the theories and the results that those theories should have on how we address discrimination in the workplace, current law requires plaintiffs to show a discriminatory motive or intent. This means that the relevant actor must “intend the consequences of an act, not simply the act itself.” Simply put, evidence that an actor may have an implicit bias is not probative of whether the actor intended the consequences when implicit bias “operates automatically . . . beyond conscious awareness or intentional control.”

With that said, it is difficult to see how research into implicit bias and similar concepts can be used in the evidentiary process in disparate treatment cases. While stray remarks may be probative of the existence of an implicit bias, an implicit bias is, at best, only slightly probative of a discriminatory employment decision. This very low probative value comes also with serious concerns about false positives and questions about what is actually being measured by things like the IAT. With some doubts regarding the actual meaning of implicit bias and its measurements and the fact that implicit bias does not suggest a discriminatory intent or motive on the part of the actor, the social science critique fails to truly undermine the doctrine and its use by courts. This is not to say that the current state of employment


129. At least one court opinion has referenced implicit bias in its analysis of evidence of discrimination in a disparate treatment case. Kimble v. Wis. Dep’t of Workforce Dev., 690 F. Supp. 2d 765, 775–78 (E.D. Wis. 2010). This discussion, however, was in dicta. Id. (analyzing stereotypes and implicit bias but acknowledging that the “rejection of defendants’ explanation is a sufficient basis for finding liability”).

130. Christopher Cerullo, Everyone’s a Little Bit Racist? Reconciling Implicit Bias and Title VII, 82 Fordham L. Rev. 127, 143 (2013) (“Evaluations of the IAT data demonstrate a low correlation to actual prejudicial behavior. Therefore, many of those who demonstrate an implicit bias . . . may never manifest any discriminatory behaviors.” (footnote omitted)); Mitchell & Tetlock, supra note 112, at 1100 (“[T]he fact that IAT scores have low positive correlations with behavior expansively defined as discriminatory guarantees that many individuals labeled prejudice by the IAT will not exhibit the behavior in question.”).
discrimination law is perfect or even adequate in light of an evolving understanding of how discrimination actually works. Such research may, within time, demand a change to our laws so as to reach the goals of Title VII and similar statutes. Until then, however, the Stray Remarks Doctrine remains proper.

B. The Role of the Judge

Perhaps a more sound criticism of the Stray Remarks Doctrine is that judges may be using the doctrine to improperly exclude or dismiss evidence, particularly at the summary-judgment stage of litigation. Many argue that “[i]t should be up to the jury, as the fact finder, to weigh all of the evidence and decide whether workplace remarks [are] ‘too vague, too distant, or counterbalanced by other evidence to support a claim of discrimination.’”131 Further, critics allege that judges are improperly drawing inferences in favor of defendants, weighing evidence and making credibility determinations of witnesses.132 Undeniably there are cases in which these errors do occur.133 These mistakes are not exclusive to disparate treatment cases involving discriminatory remarks. These criticisms do, however, aid in understanding the basis for the Stray Remarks Doctrine and why it has developed. In analyzing these criticisms, it is important to distinguish between questions of admissibility and questions of sufficiency, a line that has often been blurred both in the application of the doctrine and in its criticism. Upon such an analysis, we find that the doctrine is justified in general by the rules regarding admissibility and sufficiency.

1. Determining Sufficiency

The Stray Remarks Doctrine typically has its greatest effect during motions for summary judgment. Perhaps the most common wording of the doctrine is that when a remark involves the factors addressed above, evidence of the remark is insufficient to defeat summary judgment.134 Courts are frequently ruling in favor of an employer because the evidence of the remark is “too weak to raise a

131. Reinsmith, supra note 6, at 255.


133. See, e.g., Russell v. McKinney Hosp. Venture, 235 F.3d 219, 229–30 (5th Cir. 2000) (reversing the lower court’s decision to dismiss a case in which it gave little weight to evidence that an employee who was the son of the CEO frequently referred to plaintiff as an “old bitch”).

134. See, e.g., Jackson v. Cal-W. Packaging Corp., 602 F.3d 374, 380 (5th Cir. 2010) (“Comments that do not meet these criteria are considered ‘stray remarks,’ and standing alone, are insufficient to defeat summary judgment.” (footnote omitted)).
genuine fact issue.” The dismissal of hundreds of cases on summary judgment has, of course, come with its fair share of criticism:

Many of the opinions decided by different panels within the same circuit appear to conflict with one another. Some panels approach summary judgment cautiously; others do not. Many recent decisions wrongly interpret the trilogy [(Anderson, Celotex, and Matsushita)] to permit courts to draw inferences in defendants’ favor, to weigh evidence, to decide the credibility of witnesses and to require plaintiffs to prove their cases at the summary judgment stage. Many courts compound these errors by examining plaintiffs’ circumstantial evidence in a piecemeal fashion.

Even some courts have been critical of the use of summary judgment where allegedly discriminatory remarks are present, since “[w]hether a given remark is ‘ambiguous’—whether it connotes discriminatory animus or it does not—is precisely what a jury should resolve, considering all of the facts in context. What may be ambiguous to . . . the judge, may not be to the plaintiff or to her peers.” These misapplications of summary judgment, however, are not unique to disparate treatment cases involving stray remarks, and many courts have not committed these mistakes.

In a motion for summary judgment, the question for the judge is whether the admissible evidence on record is sufficient to raise a genuine issue of material fact. This determination is solely a question of law. It is true that judges are not to substitute their own judgment for that of the jury and should avoid making credibility determinations or making inferences in favor of the movant.

135. E.g., Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1268 (11th Cir. 2010) (stating that a remark by a non-decision-maker of “Cubans are dumb” was “too weak to raise a genuine fact issue”).

136. McGinley, supra note 132, at 228–29 (footnotes omitted).


139. Newsome v. Collin Cnty. Cmty. Coll. Dist., 189 F. App’x 353, 355 (5th Cir. 2006); Conkling v. Turner, 18 F.3d 1285, 1300–01 (5th Cir. 1994); In re Letterman Bros. Energy Sec. Litig., 799 F.2d 967, 972 (5th Cir. 1986).

This does not preclude judges from recognizing when a nonmovant has failed to meet their burden of production. A court must grant summary judgment “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Whether in a prima facie or pretext analysis, a plaintiff must show that discrimination motivated an adverse employment action. If the only evidence is a discriminatory remark made by a coworker, and there is no evidence the decision maker heard or was influenced by the remark, then there are certainly genuine issues of which plaintiff has failed to raise any evidence. Certainly a reasonable jury could not conclude that the decision maker was motivated by any discriminatory animus.

Even where a decision maker makes a discriminatory remark, it is easy to understand why summary judgment may nonetheless be appropriate in certain situations. “The critical inquiry, the one commanded by the words of § 703(a)(1), is whether [the prohibited factor] was a factor in the employment decision at the moment it was made.” Arguably, the fact that a discriminatory remark was once made is slightly probative of a discriminatory motive in a later action, although this runs into the character evidence issues discussed below. Comments like these run into problems of whether they raise a genuine issue, however.

Remarks that raise only a weak inference or are only slightly probative tend to be disregarded by courts, quite properly. “If the evidence is merely colorable, or not significantly probative, summary judgment may be granted.” More specifically, “[e]ven in cases where

and the drawing of legitimate inferences from the facts are jury functions”).

141. See 1 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 3:39 (7th ed. 1992).
143. See, e.g., Bonefont-Igaravidez v. Int’l Shipping Corp., 659 F.3d 120, 125 (1st Cir. 2011) (“[P]laintiff presents no evidence that [D]efendant’s decisionmakers made, or were even aware of, such comments at the time the decision to terminate was rendered. Nor is there evidence that [the D]ecisionmaker, in making her decision, relied on information from any [D]efendant employee who may have demonstrably possessed a discriminatory animus.”).
145. Anderson, 477 U.S. at 249–50 (citations omitted); see also Sala v. Gates Constr. Corp., 868 F. Supp. 474, 476 (E.D.N.Y. 1994) (“No genuine issue exists unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”); Matthews v. United States, 756 F. Supp. 511, 512 (D. Kan. 1991) (“An issue of fact is ‘genuine’ if the evidence is
elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.” For example, in *Alvarez v. Royal Atlantic Developers, Inc.*, the Eleventh Circuit described evidence that the president and general counsel of an employer said “Cubans are dumb” as “too weak to raise a genuine fact issue,” even when combined with the plaintiff’s observation that “Cubans ‘seem to get terminated at a very high rate without justification.’” The remark, made by a non-decision-maker and unrelated to the decision, certainly does seem to be inadequate evidence that the decision itself was motivated by race-based animus. Similarly, in *Agoh v. Hyatt Corp.*, the Southern District of Texas held that multiple remarks were insufficient to defeat an employer’s motion for summary judgment in a Title VII and ADEA suit. The plaintiff alleged, among other comments, that two superiors, at different times, commented to him that he should retire so younger employees could be hired. While also dismissing other remarks, the court held that these remarks “hardly constitute[] sufficient evidence on which the jury could reasonably find for the plaintiff; instead [the remarks] seem[] to be a mere scintilla of evidence, not significantly probative of age discrimination.”

Of course, the sufficiency question can come out the other way. In *Minshall v. McGraw Hill Broadcasting Co.*, a news director at a broadcasting station made a number of age-related comments, including calling one employee “‘too fucking old’ for the news format” and saying that “old people should die” in reference to an employee’s father. While acknowledging that isolated and unrelated comments are “insufficient to show discriminatory animus in termination decisions,” the court noted that “a plaintiff can show such animus by ‘demonstrating a nexus between the allegedly discriminatory state-

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147. 610 F.3d 1253 (11th Cir. 2010).
148. *Id.* at 1268 (emphasis added).
150. *Id.*
151. *Id.* at 750 (emphasis added).
152. 323 F.3d 1273 (10th Cir. 2003).
153. *Id.* at 1281.
ments and the defendant’s decision to terminate the plaintiff.” The Tenth Circuit distinguished between these comments, holding that the comment about being too old for the news format did have a nexus to the decision not to renew the plaintiff’s contract, while the comment “old people should die,” in reference to the employee’s father, was a stray comment that had no connection to the decision not to renew the contract. The comments with a nexus were thus sufficient to raise a genuine issue of material fact, but the First Circuit has stated that a “lack of a direct connection between the words and the employment action significantly weakens their probative value.”

The sufficiency of stray remarks as evidence has been and likely will continue to be the main impact of the Stray Remarks Doctrine. While there are certainly instances in which courts are misapplying summary-judgment standards, they do retain the ability to grant summary judgment even where a discriminatory remark was made if that remark does not raise a genuine issue of material fact. Where a remark holds only limited probative value, insufficient for a reasonable jury to find for the plaintiff, or where there is a lack of a nexus between the remarks and the employment action, courts may properly grant summary judgment. In order to avoid furthering the confusion and contradiction found in case law on the matter, courts should be sure to clearly elaborate why the evidence of a remark is insufficient. Additionally, courts should be sure to avoid analyzing different pieces of evidence individually in determining sufficiency, as they may buttress one another to make what may have been an unreasonable inference a more plausible inference. As stated in Reeves v. Sanders Plumbing Prods., Inc., whether judgment as a matter of law is appropriate depends on “the strength of the plaintiff’s prima facie case, the probative value of the proof that the employer’s explanation is false, and any other evidence that supports the employer’s case and that properly may be considered.”

154. Id. (quoting Rea v. Martin Marietta Corp., 29 F.3d 1450, 1457 (10th Cir. 1994)).
155. Id. at 1282.
159. Id. at 148–50.
2. Determining Admissibility

Courts are also often confronted with the question of whether certain evidence, such as an allegedly discriminatory remark, is admissible. While the application of the Stray Remarks Doctrine has its greatest impact in the summary-judgment phase, stray remarks also have made their mark in motions in limine. Questions of admissibility go beyond motions in limine and trials, of course, as “[t]he principles governing admissibility of evidence do not change on a motion for summary judgment.” Judges must consider the admissibility of evidence submitted in opposition to (or support of) a motion for summary judgment. Where a stray remark is inadmissible under the Federal Rules of Evidence, that remark should not be considered.

a. Questions of Relevancy

Remarks may be inadmissible for any number of reasons. They may be irrelevant and thus not admissible under Federal Rule of Evidence 402. It is certainly difficult to argue that a discriminatory remark does not have a tendency to make a discriminatory motive more probable than without evidence of the remark. It must be kept in mind, however, that “[t]he relevance of discrimination-related remarks does not depend on their offensiveness, but rather on their tendency to show that the decision-maker was motivated by assumptions or attitudes relating to the protected class.” Further, as at least two decisions have noted, there is a point at which a prior act becomes so temporally remote that it cannot, as a matter of law, be relevant to the question of whether there was a discriminatory


161. Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997); see also Beyene v. Coleman Sec. Servs., Inc., 854 F.2d 1179, 1181 (9th Cir. 1988) (“It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment.”); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175–76 (5th Cir. 1990) (“[T]he admissibility of evidence on a motion for summary judgment is subject to the same rules that govern the admissibility of evidence at trial.”).


163. FED. R. EVID. 402 (“Irrelevant evidence is not admissible.”).

164. FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

motive.\textsuperscript{166} While this may mean some discriminatory remarks are not relevant, it is unlikely that Rule 402 is a common reason for ruling remarks inadmissible.

\textbf{b. Balancing Probative Value with the Rule 403 Concerns}

More commonly courts look to Rule 403\textsuperscript{167} to exclude evidence of discriminatory remarks. Rule 403 states that “\[t\]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”\textsuperscript{168} Courts frequently cast discriminatory remarks in terms of their probativeness, characterizing remarks that fit the factors discussed above as having their probative value circumscribed,\textsuperscript{169} or having significantly weakened probative value.\textsuperscript{170} At least three circuits have specifically looked at the balance between probativeness and prejudice in relation to stray remarks.\textsuperscript{171} Naturally, these descriptions have not been universally approved, with some courts expressing their concern over courts that view the Stray Remarks Doctrine “not \[as\] a rule for analyzing the sufficiency of the evidence, but rather a rule to determine its very admissibility at trial under Federal Rule of Evidence 403.”\textsuperscript{172} While such a concern might be overstated since courts should be looking at the admissibility of all evidence, there is the underlying concern that Rule 403 is “a standard


\textsuperscript{167.} \textit{Fed. R. Evid.} 403.

\textsuperscript{168.} \textit{Id}.

\textsuperscript{169.} \textit{E.g.}, Bonefont-Igaravidez v. Int’l Shipping Corp., 659 F.3d 120, 125 (1st Cir. 2011) (citing to \textit{McMillan v. Massachusetts Society for the Prevention of Cruelty to Animals}, 140 F.3d 288, 301 (1st Cir. 1998) in arguing that remarks made temporally remote, not made by a decision maker, or unrelated to the decision have their probativeness “circumscribed”).

\textsuperscript{170.} \textit{E.g.}, Ortiz-Rivera v. Astra Zeneca LP, 363 F. App’x 45, 47 (1st Cir. 2010) (describing some stray remarks as “not significantly probative of pretext”).

\textsuperscript{171.} See, \textit{e.g.}, Henry v. Wyeth Pharm., Inc., 616 F.3d 134, 149-51 (2d Cir. 2010); Morgan v. N.Y. Life Ins. Co., 559 F.3d 425, 432-33 (6th Cir. 2009); Joseph v. Publix Super Mkts., Inc., 151 F. App’x 760, 769 (11th Cir. 2005).

rather than a rule—and a standard that tilts in favor of admissibility.”

As has been discussed in the preceding section, many comments may lack significant probative value. To be inadmissible, the remark must first be analyzed for any probative value. Then that probative value, if any, must be weighed against any danger of unfair prejudice, confusion of the issues, or misleading the jury. Some courts have found that the risk of unfair prejudice does exist in some circumstances. In *Henry v. Wyeth Pharmaceuticals, Inc.*, the Second Circuit determined that the lower court could have been within the range of permissible decisions in excluding testimony pertaining to a coworker’s “tar baby” remark. The court concluded that the remark “had some, but not great, probative value” and that the remark “might have sufficiently offended members of the jury that they would feel inclined to rule against defendants, merely to punish [the employer] for continuing to employ [the coworker who uttered the remark].” Other courts have come to similar conclusions. In *Mendelsohn v. Sprint/United Management Co.*, the court held that even if some derogatory remarks had probative value, “the limited probative value was ‘substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” Similarly, in *Knox v. First National Bank of Chicago*, the Northern District of Illinois held that alleged race-based comments could not be used in testimony after noting that “Seventh Circuit authority suggests that the analysis is simply whether the probative value of the comment outweighs any possible unfair prejudice that the statement may cause.”

In *Quinby v. WestLB AG*, an employer sought to preclude evidence of various e-mails and instant messages among her coworkers and clients containing potentially discriminatory jokes and comments. The suit was for disparate treatment and retaliation, thus

174. 616 F.3d 134 (2d Cir. 2010).
175. Id. at 150.
176. Id.
178. Id. at 1219 (quoting Fed. R. Evid. 403).
180. Id. at 574. Notably, the court seemed to misstate Rule 403, in that the unfair prejudice must *substantially* outweigh the probative value.
complicating the analysis somewhat. Nonetheless, under Rule 403, the court found that those comments in the messages that directly concerned the plaintiff and her performance and those concerning the ability of women to perform their job duties were not excludable. At the same time, under Rules 401 and 403, the court excluded remarks, even those crude ones, that “do not relate to the ability of women to perform their job duties;” remarks relating to “boy’s club” social plans among her coworkers; remarks “reflecting negative but non-gendered comments about women in the office; and . . . items containing inappropriate comments about race or sexual orientation.” Although the court does not elaborate much, it seems to focus on the content and context factors found in the doctrine and excludes those distasteful comments that are not related to both the decision and prohibited factor because of the “dangers of unfair prejudice and confusion of the issues.”

In Hill v. Southeastern Pennsylvania Transportation Authority, the Eastern District of Pennsylvania excluded some comments because of unfair prejudice, while refraining from excluding others. The court did not exclude comments by a former coworker who may have had influence over the decision makers. This was despite the court’s noting that “an earlier discriminatory act might be remote enough that its probative value is substantially outweighed by the danger that it will cause unfair prejudice, meriting exclusion under Federal Rule of Evidence 403.” The court turned around, however, and excluded under Rule 403 evidence that the relevant actor referred to another employee from the same protected class in a derogatory manner because the remark was made over a decade prior to the action, and thus the probative value was substantially outweighed by the danger that it would cause unfair prejudice.

182. Id. at *2.
183. Id.
184. Id.
185. After all, “bigotry, per se, is not actionable. It is actionable only if it results in injury to a plaintiff; there must be a real link between the bigotry and an adverse employment action.” Gorence v. Eagle Food Ctrs., Inc., 242 F.3d 759, 762 (7th Cir. 2001).
188. Id. at *3.
Discriminatory remarks have been regarded as holding little probative value while containing enough of a risk of unfair prejudice in different contexts and for different reasons. Although such exclusions are generally discouraged at the pretrial stage to allow time for the potential relevance of the evidence to take shape, exclusion of evidence under Rule 403 is certainly permissible and provides a further explanation regarding why some stray remarks, although discriminatory, are nonetheless not proper evidence.

c. Preventing Impermissible Character Evidence

Another way in which a stray remark may be considered inadmissible is if it constitutes impermissible character evidence. “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”189 This ban also applies to past bad acts.190 There is certainly an argument that evidence of past discriminatory remarks unrelated to the decision are impermissible propensity arguments that (1) decision maker made a bigoted statement; thus (2) decision maker is a bigot; thus (3) decision maker acted in conformity with that bigotry. Of course, Rule 404(b)(2) permits evidence of another act to prove motive or intent,191 but it is difficult to imagine a scenario in which this does not require an initial inference that the unrelated discriminatory remark means the speaker is a bigot, thus making an impermissible propensity argument.192 Nonetheless, there have been few attempts to use Rule 404 to exclude evidence of discriminatory remarks, and most of them have been unsuccessful. To the Author’s knowledge, no courts have, however, truly analyzed the propensity-based inference that seems to exist where a decision maker makes a remark that is unrelated to the decision. Instead, comments found to be inadmissible tend to be found so because of Rule 403, not 402 or 404.

IV. SO WHAT REALLY IS THE STRAY REMARKS DOCTRINE?

As has been shown, the Stray Remarks Doctrine is not a simple rule, if it can be called a rule at all. A range of factors are taken into consideration by courts, but the factors’ significance is not viewed with much consistency across different courts. The question of whether they are describing such remarks as insufficient to raise a genuine issue of material fact or finding them to be inadmissible under the

192. See United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013).
Federal Rules of Evidence is also a source of uncertainty. The lack of uniformity in the way stray remarks are handled leads to the question of whether the Stray Remarks Doctrine really is a doctrine at all.

In *Hunt v. City of Markham, Illinois*, Judge Posner discussed cases dealing with the effect of stray remarks. In doing so, Judge Posner stated the following:

> All that these cases hold—all that they could hold and still make any sense—is that the fact that someone who is not involved in the employment decision of which the plaintiff complains expressed discriminatory feelings is not evidence that the decision had a discriminatory motivation. That is simple common sense.194

Rather than serving as a rule or even a standard, the Stray Remarks Doctrine is but a name for the common characteristics that a multitude of courts have found tend to reduce the value of evidence of discriminatory remarks. Even this description is too simplistic, however.

Beyond being a bad idea, making certain types of evidence categorically inadmissible or insufficient would likely run afool of the Federal Rules of Evidence and Supreme Court precedent on motions for summary judgment. This appears to be what some courts nonetheless do—possibly a result of much of the significant jurisprudence on the subject of disparate treatment evolving prior to either the adoption of the Federal Rules of Evidence or the series of rulings on summary judgment. *McDonnell Douglas* was decided two years before the adoption of the Federal Rules of Evidence. The “trilogy” of summary judgment cases,195 decided in 1986, came after important rulings such as *McDonnell Douglas*,196 *Burdine*,197 *Furnco Construction*,198 and *Griggs*.199 Regardless, it is becoming increasingly clear that the existence of certain factors does not make stray remarks categorically excludable. Courts are beginning to recognize that “oversimplified generalization[s]” have been made in relation to stray remarks.200

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193. 219 F.3d 649 (7th Cir. 2000).
194. Id. at 652.
This marks a shift, and a quite proper one, in the analysis of discriminatory remarks. Instead of simply looking for the existence of the factors, courts are beginning to look more carefully at the remark itself and the surrounding circumstances. Courts are recognizing that two remarks, which may share common characteristics, may nonetheless hold widely different probative values because of the existence of other factors or considerations. Courts are moving away from simply categorizing remarks as stray or not and then disregarding them if they are deemed stray. At the very least, courts are refocusing on why remarks that involve certain factors should be disregarded, because they fail to show that the decision itself was motivated by discrimination. Instead, they are focusing on the overall value of remarks. While they are not always explicit about it, courts are viewing these remarks in terms of their probative value, prejudice, and sufficiency. Thus, the Stray Remarks Doctrine is not the rule or even the doctrine it has been made out to be. In increasingly obvious fashion, it is just the application of already existing rules of evidence and procedure to a certain form of evidence often found in employment discrimination settings.

From this perspective, the treatment of stray remarks becomes increasingly clear. The continuing confusion over mixed-motive analyses and direct-evidence requirements becomes much less problematic. The questions are, quite simply, whether, and to what degree, the remarks being analyzed are relevant to and probative of employment discrimination. In a motion for summary judgment, if those remarks are relevant and probative, is the probative value so

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201. See, e.g., id. at 116 (noting that such an approach is incorrect).

202. See, e.g., Harris v. Itzhaki, 183 F.3d 1043, 1055 (9th Cir. 1999) (characterizing stray remarks as those unrelated to the decisional process); Threadgill v. Spellings, 377 F. Supp. 2d 158, 164 (D.C. 2005) (characterizing stray remarks as those made in isolated situations out of context of the decision); Del Franco v. N.Y.C. Off-Track Betting Corp., 429 F. Supp. 2d 529, 536 (E.D.N.Y. 2006) (requiring a nexus between remarks and the decision); Mereish v. Walker, 359 F.3d 330 (4th Cir. 2004) (stating that remarks must be related to the decision in order to be relevant).


204. E.g., Joseph v. Publix Super Mkts., Inc., 151 F. App’x 760, 769 (11th Cir. 2005) (finding error in the lower court’s admission of evidence of racial slurs because it was “highly prejudicial”).

205. E.g., Jackson v. Cal-W. Packaging Corp., 602 F.3d 374, 380–81 (5th Cir. 2010) (finding that a remark that was made nearly a year earlier and that came with no evidence that the remark was related to the employment action is insufficient to raise a genuine issue of material fact).
minimal that no reasonable jury could find for the plaintiff? In any other setting, as well as in a motion for summary judgment, is the probative value outweighed by concerns for unfair prejudice or confusing the issues? Are there any other admissibility concerns, such as the evidence requiring an impermissible character trait inference? The factors discussed in Part III.A are not dispositive considerations. They are, rather, a nonexhaustive list of factors, which, if present, should elicit concern from a judge regarding whether such evidence is sufficient or admissible. Whether a judge is considering one of those factors or any other potential factor, they must remain cognizant that the ultimate question is whether the decision was made with a discriminatory motive.

With this clarity, the criticism and concerns over the Stray Remarks Doctrine become less of a problem. Criticism from a social science perspective misses the distinction between disparate treatment and disparate impact and fails to adequately show how measures of implicit bias or anything similar can evidence discriminatory motive in the relevant decision. Concerns that employment discrimination law is not reaching significant forms of discrimination is not a criticism of the propriety of the handling of stray remarks by courts; rather, it is an argument critical of the nature of laws such as Title VII themselves. Negative commentary on the way judges have handled stray remarks under rules of evidence and procedure relates to mistakes not unique to stray remarks. Instead, these rules illustrate exactly why such remarks are often disregarded.

Moving forward, it would be wise for courts to take notice of these criticisms so that, at the very least, understanding of the application of the rules will come with greater clarity and thus reduced concern over whether such remarks are being disregarded by courts for improper reasons. A more careful analysis of the probative values, the presence and interplay of other evidence, the potential for unfair prejudice or improper character trait inferences should also lead to a better understanding of what disparate treatment law really is meant to combat: decisions made with a discriminatory motive. This is all “simple common sense.”

David M. Litman†

206. Hunt v. City of Markham, Ill., 219 F.3d 649, 652 (7th Cir. 2000).

† J.D. Candidate, 2015, Case Western Reserve University School of Law. The Author would like to express his utmost gratitude to the Hon. Christopher A. Boyko, his staff, and his judicial clerks Patricia Rogo and Paul Sikorski. He also thanks Dr. Kenneth Grieb, for providing an excellent foundational experience from which to understand these issues in litigation, and his friend and former colleague Susan Asselin for her technical and moral support throughout the writing process.