OUTGROWING ITS USEFULNESS: SEVENTH CIRCUIT LIMITS THE APPLICATION OF THE COMMON ACTOR INERENCE IN TITLE VII DISCRIMINATION CASES

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INTRODUCTION

Can a person harbor discriminatory views toward protected minority groups, yet still hire a member of that minority group as an employee? That is the question at the heart of the common actor inference in Title VII employment discrimination jurisprudence. The common actor inference holds if the same supervisor hires an employee from a protected minority group, and then fires that employee a short period of time later, there is a strong inference that discrimination did not factor in the employment decision. Because the burden for proving Title VII discrimination on the basis of race, color, religion, sex, or national origin lies with the plaintiff, the common actor inference is a tool employer-defendants can use to defeat Title VII discrimination claims. However, in the Seventh Circuit’s recent decision in McKinney v. Sheriff of Whitley County, the court not only critiqued the district court’s reliance on the common actor inference,


1 Perez v. Thornton’s, Inc., 731 F.3d 699, 710 (7th Cir. 2013).
but also questioned the utility of the inference in Title VII
discrimination cases. This comment will argue that the Seventh
Circuit was correct in rejecting the defendant’s use of the common
actor inference in McKinney, and that other circuit courts should
follow the Seventh Circuit’s lead in limiting the common actor
inference to an evidentiary issue that can only be argued to the
ultimate trier of fact at the trial stage of litigation.

The common actor inference is not codified in Title VII nor
any other federal civil rights statute. The first mention of a common
actor inference was in the Fourth Circuit decision Proud v. Stone,
which stated, “in cases where the hirer and the firer are the same
individual and the termination of employment occurs within a
relatively short time span following the hiring, a strong inference
exists that discrimination was not a determining factor for the adverse
action taken by the employer.” In Proud, the Fourth Circuit endorsed
the use of the common actor inference at the pleading stage, and
upheld the district court’s decision to dismiss the plaintiff’s complaint
alleging age discrimination.

The common actor inference has been adopted across all U.S.
Circuit Courts, but its application is not uniform. Some circuits,
including the First, Second, Third, Ninth, and Tenth, have adopted the
Fourth Circuit’s use of the common actor inference and apply it to
discrimination claims at the pleading and summary judgment stage.
Other circuits have limited the scope of the common inference to cases

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4 Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).
5 Id. at 797-98.
6 See LeBlanc v. Great American Ins. Co., 6 F.3d 836, 847 (1st Cir. 1993); Cordell v. Verizon Commc’n, Inc., 331 F.App’x. 56, 58 (2d Cir. 2009); Waldron v. SL Industries Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio v. Sygma Network Inc., 458 F.3d 1177, 1183 (10th Cir. 2006).
where there are genuine issues of material fact. The Seventh Circuit has adopted the most narrow application of the common actor inference, holding that the inference should only be considered by the ultimate trier of fact and should not be applied in motions to dismiss or motions for summary judgment. The Eleventh Circuit has taken a similar approach to the Seventh Circuit.

Section I of this comment will discuss the background that preceded the passage of Title VII, employees’ protections under Title VII, and how a plaintiff brings a Title VII discrimination suit. Section II will discuss the background of McKinney v. Office of Sheriff of Whitley County, and how the Seventh Circuit reached its decision to limit the application of the common actor inference. Section III will explain why the Seventh Circuit made the right decision and will argue that other circuits should adopt the Seventh Circuit’s approach.

I. TITLE VII HISTORY AND DEVELOPMENT

A. Title VII Protects Members of Protected Classes from Employment Discrimination

Federal protections against employment discrimination, known as the Title VII protections, emerge from the Civil Rights Act of 1964. The Civil Rights Act was landmark legislation that emerged after a long, often bloody struggle to achieve equal rights for minorities in the

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7 See, e.g., Brown v. CSC Logic Inc., 82 F.3d 651, 658 (5th Cir. 1996); Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003); Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 835 (8th Cir. 2000) (abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)).


9 Williams v. Vitro Serv. Corp., 144 F.3d 1438, 1443 (11th Cir. 1998).

United States. The 1963 Civil Rights March in Birmingham, Alabama, and the horrifically violent response that accompanied it, is often credited with finally spurring Congress to act to protect certain employees from discrimination based on race, color, sex, religion, or national origin. Despite fierce debate in Congress, the Act was politically popular enough to pass by well over 100 votes in the House of Representatives and with over two-thirds of the members in the U.S. Senate, enough to defeat a filibuster.

Title VII of the Civil Rights Act specifically prohibits “employers,” as defined by the Act, “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” The Act also states an employer cannot “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”

Title VII protects employees before and during their relationship with the employer. Before the employment relationship officially exists, employers may not advertise for a position by indicating

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12 *Id.* at 21-22.
13 *Id.* at 22.
14 With some exception, Title VII defines an employer as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b) (2012).
16 *Id.*
prefer to hire employers of a certain class, or that the employer will not hire a member of a protected class. 18 Second, employers cannot refuse to hire employees for a job because of their status as a member of a protected class. 19 Third, employers may not institute employment tests or training programs that are designed to discriminate against a protected class of employees or potential employees. 20 Title VII therefore provides remedies to any person who faces employment discrimination before the employer-employee relationship begins. 21

Title VII also protects employees once their official relationship with an employer begins. An employer is prohibited from firing an employee solely because of their race, color, religion, sex, or national origin. 22 Employers cannot refuse to assign an employee to certain duties solely because of their membership in a protected class. 23 Employers cannot unfairly segregate or classify their employees at work because of the employee’s membership in a protected class. 24 Employers also cannot promote or refuse to promote an employee based on their, race, color, sex, religion, or national origin. 25

Title VII protects employees who oppose unlawful employment practices or file a complaint against their employer for discriminatory practices. 26 This includes protections that allow employees to participate in investigations of their employer for discriminatory employment practices. 27 Title VII prohibits an employer from retaliating “against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful

18 42 U.S.C § 2000e-3(b) (“class” as used in this sentence means race, color, sex, religion, or national origin).
19 Greene, supra note 17, at 95.
23 Id.
24 Greene, supra note 17, at 94
26 Greene, supra note 17, at 95.
27 Id.
employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

Title VII goes beyond merely providing employees with protection from employment discrimination. It also provides employees with enforcement provisions and remedies for any discrimination they may face. Title VII created the Equal Employment Opportunity Commission (EEOC) which has the power to investigate, study, intervene, and assist employees who believe they have been victims of prohibited discrimination by their employer or potential employer. The EEOC is designed to work with state and local employment enforcement agencies to ensure all claims are investigated thoroughly. The EEOC serves as an enforcement, investigatory, and regulatory body.

Title VII also specifically allows the Attorney General to bring an action against employers for discriminatory employment practices in United States District Courts. Notably, Title VII also contains a fee-shifting provision that awards a prevailing plaintiff attorney fees if he or she can prove employment discrimination under § 2000e-2(m). Awards of attorney fees are not the norm in U.S. civil cases, and

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30 42 U.S.C. § 2000e-5 (“[i]n the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials.”)
31 Id.
33 42 U.S.C. 2000-e-5(k) (“[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.”); 42 U.S.C. § 2000e-2(m).
special fee provisions in legislation are a sign that Congress wished to encourage private lawyers to bring a certain type of litigation.  

B. Bringing a Title VII Claim as a Plaintiff

Based on the preceding section, it would be easy to conclude that Title VII’s employment protections make it easy for a plaintiff to prevail on an employment discrimination claim. Title VII defines forbidden acts employers may not engage in, creates an investigative and enforcement agency to examine Title VII claims, and provides incentives to pursue Title VII actions. However, Title VII’s broad provisions and years of judicial interpretation have made it very difficult for a plaintiff to prevail on a Title VII claim.

Title VII was never intended to protect an employee from being discharged or passed over for any reason other than prohibited discrimination. Title VII does not protect an employee from being discharged for poor performance, inappropriate work activity, poor judgment, or disputes with management. Title VII’s protections are thus limited only to cases where the plaintiffs can prove they suffered an adverse employment action because of their race, religion, color, sex, or national origin. A Title VII discrimination case over unlawful termination is thus decided on the limited scope of whether “the evidence would permit a reasonable factfinder to conclude that the plaintiff’s race [religion, color, sex or national origin] . . . caused the discharge.”

A plaintiff may prove race discrimination by either direct or indirect proof, relying on direct or circumstantial evidence. Because direct proof of discrimination is usually present in only the most blatant cases, most Title VII cases require indirect proof of

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35 Hill v. St. Louis University, 123 F.3d 1114, 1120 (8th Cir. 1997).

36 Ortiz v. Werner Enter. Inc., 834 F.3d 760, 765 (7th Cir. 2016).

37 Coleman v. Donahue, 667 F.3d 835, 845 (7th Cir. 2012).
discrimination.\textsuperscript{38} In order to “sharpen the inquiry into the elusive factual question of intentional discrimination” the United States Supreme Court and the Seventh Circuit have developed a distinct framework demonstrating what a plaintiff needs to prove to prevail on a Title VII discrimination claim.\textsuperscript{39} The United States Supreme Court established a framework, for plaintiffs who are bringing indirect proof of discrimination, in \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{40}

\textbf{C. The McDonnell Douglas Framework}

In \textit{McDonnell Douglas}, the plaintiff, an African-American man, was laid off as part of general workforce reduction by the McDonnell Douglas Corporation.\textsuperscript{41} The plaintiff and other workers protested these firings as racially motivated and staged protests at the McDonnell Douglas job site.\textsuperscript{42} After the protests ended, plaintiff noticed McDonnell Douglas was advertising for open positions, including the position the plaintiff used to hold.\textsuperscript{43} McDonnell Douglas declined to rehire the plaintiff, citing his participation in the protest activities, and the plaintiff filed a complaint with the EEOC.\textsuperscript{44} The EEOC found some cause that McDonnell Douglas had violated Title VII by refusing to rehire the plaintiff, and the plaintiff then brought an action in the district court.\textsuperscript{45} The district court dismissed the plaintiff’s claims, stating that McDonnell Douglas’s “refusal to rehire respondent was based solely on his participation in the illegal demonstrations and not on his legitimate civil rights activities” or his race or color.\textsuperscript{46}

\begin{enumerate}
\item \textit{Id.}\textsuperscript{38}
\item Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n. 8 (1981).
\item McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).
\item \textit{Id.} at 794.
\item \textit{Id.} at 795.
\item \textit{Id.} at 796.
\item \textit{Id.}
\item \textit{Id.} at 797.
\item \textit{Id.}
\end{enumerate}
Plaintiff appealed the district court’s decision to the Eight Circuit Court of Appeals. 47 The Eight Circuit upheld some of the district court’s decision, but reversed the district court’s decision to dismiss the plaintiff’s complaint for discriminatory hiring practices against McDonnell Douglas. 48 In explaining its decision to remand, the Eight Circuit attempted to create a framework for examining Title VII employment discrimination claims. 49 The Eight Circuit stated that when the district court considered the evidence offered by the plaintiff and McDonnell Douglas, the district court relied on subjective criteria which carried little weight in rebutting charges of discrimination. 50 The court explained that the plaintiff should be given the opportunity to demonstrate that McDonnell Douglas’s reasons for refusing to rehire him were mere pretext for discriminatory purposes. 51 The Supreme Court granted certiorari to better clarify the Eight Circuit’s standards for evaluating a plaintiff’s Title VII employment discrimination claim. 52

The Supreme Court created a four-element test for a plaintiff to establish a prima facie case of Title VII prohibited discrimination. The Supreme Court held that for a plaintiff to establish a prima facie case of racial discrimination in his hiring, the plaintiff must demonstrate: 1) he is a member of a racial minority; 2) he applied and was qualified for a position for which the employer was seeking applicants; 3) despite his qualifications for the position, he was rejected; and 4) after his rejection, the position remained open and the employer continued to seek applications from persons of plaintiff’s qualifications. 53 The

47 Id.
48 Id. at 798.
49 Id.
50 Id.
51 Id.
52 Id.
53 Id. at 802. The McDonnell-Douglas framework is now used for any Title VII claim where discrimination is alleged, including race, religion, color, sex, or national origin. See Tristin K. Green, Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII, 87 CALIF. L. R. 983, 985 (1999).
Supreme Court agreed with the Eight Circuit that the plaintiff did demonstrate a prima facie case of race discrimination.\textsuperscript{54}

After the plaintiff demonstrates a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for not hiring the plaintiff.\textsuperscript{55} The Supreme Court stated it is not necessary for an employer to delineate every legitimate reason why an employer chose to fire or not hire an employee, but makes clear that any legitimate, nondiscriminatory reason for the employment decision relieves the employer from this burden.\textsuperscript{56} The inquiry does not end if the employer demonstrates a legitimate, nondiscriminatory reason for the hiring decision. The burden then shifts back to the plaintiff to demonstrate through evidence that the employer’s stated legitimate, nondiscriminatory reason for its hiring decision is mere “pretext” to hide or overshadow a discriminatory reason.\textsuperscript{57} The Supreme Court then remanded the case to the district court with the instructions that the plaintiff’s case should be evaluated with the tests stated in this decision, in what came to be known as the \textit{McDonnell Douglas} burden-shifting framework.\textsuperscript{58}

\textit{McDonnell Douglas} is an example of the Supreme Court creating a test that the district courts and circuit courts can follow when interpreting and applying legislation from Congress. It also demonstrated the burdens a plaintiff carries in proving a Title VII discrimination case. The plaintiff not only carries the initial burden of proving a prima facie case, the plaintiff must also have sufficient evidence to prove that any legitimate, nondiscriminatory reason the employer offers for its decision is mere pretext for a discriminatory purpose.

\textsuperscript{54} \textit{McDonnell Douglas}, 411 U.S. at 802.
\textsuperscript{55} \textit{Id.} at 802-803.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.} at 807.
\textsuperscript{58} \textit{Id.}
D. Introduction of Common Actor Inference as an additional hurdle to a Title VII claim

The common actor inference is a judicially-created inference that weighs against the plaintiff in a Title VII case. The common actor inference developed after the Supreme Court established the McDonnell Douglas framework and is a way to help the judge or jury better apply the framework in a case. It is important to understand at what point in a Title VII case the common actor inference is considered, as it varies from circuit to circuit, and the inference can have a more substantial impact on a Title VII case based on when it is considered.

The first appearance of the common actor inference was in the Fourth Circuit Court of Appeals.59 The Fourth Circuit articulated the test, which is “in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.”60 The Fourth Circuit analyzed the common actor inference in the context of the McDonnell Douglas framework, and stated “[t]he relevance of the fact that the employee was hired and fired by the same person within a relatively short time span comes at the third stage of the analysis,” when the plaintiff must demonstrate that the employer’s stated reason for the employment action is mere pretext for a discriminatory purpose.61 The court explained that if the same employer hired and fired the employee in a relatively short time span, this then “creates a strong inference that the employer’s stated reason for acting against the employee is not pretextual.”62

U.S. Courts of Appeals vary on what stage of litigation is appropriate to consider the common actor inference. There are

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59 Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991).
60 Id.
61 Id. at 798.
62 Id.
typically three ways a Title VII race discrimination case can reach a final judgment: 1) an order dismissing the complaint; 2) summary judgment before the case reaches the ultimate trier of fact; or 3) a final judgment rendered after trial to a judge or jury. In Proud v. Stone, the Fourth Circuit considered evidence of the common actor inference when considering a motion to dismiss the plaintiff’s Title VII complaint. Because a motion to dismiss is based solely on the pleadings, the Fourth Circuit established that the common actor inference can apply before the litigation moves to the fact-finding stage. A majority of the other circuit courts have followed the Fourth Circuit’s precedent and allow courts to consider the common actor inference when evaluating a plaintiff’s claim in a motion to dismiss or in a summary judgment motion. Other circuits have limited the application of the common actor inference to only when discrimination has been alleged and there are genuine issues of material fact. However, in McKinney v. Office of Sheriff of Whitley County, the Seventh Circuit limited the application of the common actor inference to the narrowest of circumstances, and stated its concern that the common actor inference may be “outgrow[ing] its usefulness” in Title VII jurisprudence.

64 Stone, 945 F.2d at 798.
65 See Cordell v. Verizon Commc’n, Inc., 331 F.App’x. 56, 58 (2d Cir. 2009); Waldron v. SL Industries Inc., 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan v. Am. Seafoods Co. LLC., 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio v. Sygma Network Inc., 458 F.3d 1090, 1096-97 (9th Cir. 2005).
66 See, e.g., Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564, 573 (6th Cir. 2003); Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 835 (8th Cir. 2000) (abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011)).
67 McKinney v. Office of Sheriff of Whitley Cnty, 866 F.3d 803, 815 (7th Cir. 2017).
II. McKINNEY V. OFFICE OF SHERIFF OF WHITLEY COUNTY

A. Factual Background and District Court Decision

Sheriff Mark Hodges of Whitley County, Indiana, hired Terrance McKinney as a full-time merit officer on August 5, 2013. McKinney was the first-ever black officer in Whitley County. The merit officer position carries a one-year “probationary period” where the officer can be fired at the sole discretion of the Sheriff, without input from the county merit review board. The purpose of the probationary period is to allow a sheriff to determine if a new officer is capable of performing his or her duties before he or she benefits from state law that requires “good cause” for termination, as well as the law’s procedural protections.

Because McKinney would have been the first black officer in Whitley County history, Sheriff Hodges and McKinney discussed McKinney’s race during the interview. McKinney stated that he did not expect that he would experience racial discrimination at the Sheriff’s Office. However, throughout his employment, McKinney was able to point to specific instances when he was subjected to racist or discriminatory words and actions by his fellow officers. McKinney related that one officer used the “n-word” in front of him, that officers joked about ordering their coffee “like him,” and that certain officers would not train him or even speak to him. Sheriff Hodges recommended that McKinney watch the movie 42, which depicts Jackie Robinson’s battle to break the color barrier in baseball, and told him the movie would “help him out.”

68 Id. at 805.
69 Id.
70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
On May 15, 2014, Sheriff Hodges fired McKinney, invoking the power he had as Sheriff under the “probationary period.”\textsuperscript{76} Sheriff Hodges’ termination letter listed three reasons for firing McKinney: 1) submitting false work hours while attending the Indiana Law Enforcement Academy; 2) violating standard operating procedure for filing complete monthly reports; and 3) violating standard operating procedure for fueling county vehicles.\textsuperscript{77} The Whitley County Board of Commissioners added more reasons for McKinney’s firing in a termination letter sent four days after McKinney’s firing, including damaging a county vehicle, failing to complete a transport, and failing to follow verbal instructions.\textsuperscript{78}

After McKinney was terminated, he brought suit against the Office of the Sheriff of Whitley County and Deputy Sheriff Tony Helfrich in the District Court, alleging several theories, including race discrimination in violation of Title VII.\textsuperscript{79} In the course of the defense, counsel for the Sheriff’s office offered even more reasons for McKinney’s firing, including texting while driving, crashing a county vehicle, and being late while transporting a juvenile to court.\textsuperscript{80} After pleadings were filed and discovery was completed, the Sheriff’s office moved for summary judgment, arguing that under the \textit{McDonnell Douglas} framework, McKinney had failed to allege a prima facie case of discrimination in order to successfully meet the burden-shifting requirement.\textsuperscript{81} The defense relied on an affidavit from Sheriff Hodges, which stated the reasons why McKinney was fired, and did not include any mention of McKinney’s race.\textsuperscript{82}

The district court ultimately ruled for the defense and granted summary judgment for the Sheriff’s Office.\textsuperscript{83} The court ruled that

\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id. at 806.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
McKinney failed to present any direct evidence of discrimination. The court also stated McKinney could not point to any direct evidence that would constitute a genuine issue of material fact. The court further determined that McKinney failed to meet the Sheriff’s legitimate employment expectations, based largely upon the Sheriff’s affidavit. The court also based its decision upon the “strong presumption against finding discrimination when the same person hires and fires a plaintiff-employee.” The district court stated “[i]f Sheriff Hodges wanted to discriminate against McKinney based on his race, he could have refused to hire him in the first place.”

B. 7th Circuit Decision in McKinney v. Office of Sheriff of Whitley County

McKinney appealed the district court’s decision to the Seventh Circuit Court of Appeals. A panel consisting of Judges Bauer, Posner, and Hamilton unanimously reversed the district court’s decision. After a review of the factual and procedural background of the case, the Seventh Circuit began its analysis by examining McKinney’s presentation of evidence and the Sheriff’s stated reasons for firing McKinney. The Seventh Circuit utilized the elements of prima facie case of race discrimination and the McDonnell Douglas framework in analyzing the district court’s decision.

First, the court examined whether McKinney had met the elements for a prima facie case of race discrimination, whether: 1) he is a member of a racial minority; 2) his job performance met the employer’s legitimate expectations; 3) he suffered an adverse

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84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id. at 815.
90 Id. at 808.
91 Id. at 807.
employment action; and 4) another similarly situated individual who was not in the protected class was treated more favorably than him.\footnote{92}{Id}

The court noted that it was undisputed that McKinney is a member of a protected class and that he suffered an adverse employment action.\footnote{93}{Id} at 807-08.

The court stated that for McKinney to prevail under the McDonnell Douglas framework, he must present sufficient evidence to show that his performance met the Sheriff’s legitimate employment expectations and that other similarly situated employees who are not in the protected class were treated more favorably.\footnote{94}{Id} at 808.

The court evaluated the weight of the evidence presented by both sides, noting that the Sheriff’s Office offered plausible rationales for why McKinney did not meet the Sheriff’s legitimate employment expectations.\footnote{95}{Id} at 814.

However, the Seventh Circuit ruled that the district court did not give sufficient weight to McKinney’s evidence.\footnote{96}{Id} at 813.

The Seventh Circuit ruled the district court failed to properly consider McKinney’s legal memorandum, the genuine issues of material fact he raised, and the supporting evidence that he offered to show he met the Sheriff’s legitimate employment expectations. The Seventh Circuit particularly focused on “the sheer number of rationales the defense has offered for firing plaintiff and the quality and volume of the evidence plaintiff has collected to undermine the accuracy and even the honesty of those rationales.”\footnote{97}{Id} at 810.

The court examined the Sheriff’s stated reasons for the firing: 1) falsifying hours; 2) missing his monthly reports; 3) and misusing the gasoline credit card.\footnote{98}{Id} at 810-11.

After a very thorough review of the Sheriff’s evidence and McKinney’s evidence, the court found that McKinney had presented sufficient evidence to at least raise a genuine issue of material fact as to whether the Sheriff’s stated reasons for his
termination were “pretext” for discriminatory actions. The court then pointed out that the Sheriff’s office had offered even more explanations for McKinney’s termination after it became clear that McKinney intended to sue for discriminatory employment practices. The Seventh Circuit examined each of these additional reasons, and also found that the plaintiff had offered sufficient evidence in response to satisfy the *McDonnell Douglas* framework and avoid summary judgment.

The Seventh Circuit reminded the district court that when evaluating McKinney’s evidence under the *McDonnell Douglas* framework on a summary judgment motion, the question is “simply whether McKinney’s evidence would permit a reasonable factfinder to conclude that the plaintiff’s race . . . caused the discharge.” The court concluded that after evaluating McKinney’s testimony, interrogatory answers, internal department documents, and other evidence, McKinney more than satisfied his burden under *McDonnell Douglas*, and that McKinney had presented enough evidence to permit a reasonable factfinder to question whether the Sheriff’s stated reasons for firing were pretext for discriminatory actions. As a result, the Seventh Circuit reversed the district court’s grant of summary judgment to the Sheriff’s Office, and remanded the case for further proceedings.

The Seventh Circuit also took time to criticize the district court for “overestimat[ing] the strength of the ‘common actor’ inference.” The district court cited the common actor inference as further proof of its decision, holding that if the Sherriff had wanted to discriminate against McKinney, the Sherriff would have refused to hire him in the

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99 Id. at 813.
100 Id. at 812.
101 Id. at 814.
102 Id. at 813.
103 Id. at 813-14.
104 Id. at 815.
105 Id. at 814.
first place.\textsuperscript{106} The district court relied on the Seventh Circuit’s explanation of the common actor inference in previous cases such as \textit{EEOC v. Our Lady of Resurrection Medical Center}, which led the district court to believe that the common actor inference applied at the pleading or summary judgment stage of a Title VII case.\textsuperscript{107} In \textit{McKinney}, however, the court seemed to walk back some of its position in \textit{Our Lady of Resurrection}, stating that “this inference is not a conclusive presumption and . . . it should be considered by the ultimate trier of fact rather than on summary judgment or the pleadings.”\textsuperscript{108} The common actor inference may be argued to a jury or judge in a fact-finding endeavor, but it is not a conclusive presumption that applies as a matter of law.\textsuperscript{109} The inference is “just something for the trier of fact to consider.”\textsuperscript{110}

The court further stated “[w]e have tried to impose limits on the common actor inference to ensure it does not outgrow its usefulness.”\textsuperscript{111} While the court acknowledged that it may be helpful to let the jury hear evidence of the common actor inference and weigh the inference in the case before it, the court stated the inference is helpful only “in some limited situations.”\textsuperscript{112} Yet, the court continued that “[t]here are many other occasions, however, where it is unsound to infer the absence of discrimination simply because the same person hired and fired the plaintiff-employee.”\textsuperscript{113}

As an example of such a situation, the court pointed out that an employer may need to quickly fill a position, and as a result hire an individual from a protected class because the supervisor had no other

\begin{footnotes}
\item[106] Id.
\item[107] 77 F.3d 145, 151-52 (7th Cir. 1996).
\item[108] \textit{McKinney}, 866 F.3d at 814.
\item[109] Id.
\item[110] Id (citing Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 747 (7th Cir. 2002)).
\item[111] Id. at 815.
\item[112] Id.
\item[113] Id.
\end{footnotes}
choice.\textsuperscript{114} Once other candidates for that position are available, especially non-minority candidates, the employer could then fire the minority employee for discriminatory reasons and hire a different employee from a non-protected class.\textsuperscript{115} In this circumstance, it would not be appropriate to assume that the employer did not act in a discriminatory manner just because he or she hired and fired an employee from a protected class. Similarly, the court imagined how an employer could hire a woman, but then refuse to give her a promotion or a raise for discriminatory purposes.\textsuperscript{116} The court also pointed out that an employer could hire a woman, but later fire her once she became pregnant, which would certainly qualify as a discriminatory action.\textsuperscript{117}

In the closing paragraph of its analysis, the Seventh Circuit stated that “examples abound” for why the same employer could hire an employee with a nondiscriminatory purpose, but then later fire that same employee with a discriminatory purpose. The court asked the district court to image a scenario where:

The same supervisor could hire a county’s first black police officer, hoping there would be no racial friction in the workplace. But after it became clear that other officers would not fully accept their new black colleague, that same supervisor could fire the black officer because of his race based on a mistaken notion of the “greater good” of the department.\textsuperscript{118}

Without expressly stating this is what happened in the case of Officer McKinney, the Seventh Circuit, at a minimum, demonstrated why the common actor inference should not be considered in a motion for

\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
summary judgment. There are simply too many plausible scenarios for why a supervisor may hire, and then later fire, an employee from a protected class for discriminatory reasons to accord the inference a significant amount of weight at the pleading or summary judgment stage of litigation.

*McKinney* is thus a stark limitation on the common actor inference in the Seventh Circuit. Although the court presented its holding in *McKinney* as a logical extension of its previous Title VII discrimination and common actor jurisprudence, this is the clearest the Seventh Circuit has been about the application of the common actor inference. The court definitively stated that the common actor inference is not a conclusive presumption that applies as a matter of law. Therefore, the inference cannot be considered in a motion to dismiss or a summary judgment motion. The inference is merely a consideration that the ultimate fact-finder, whether a judge or a jury, may weigh when making a decision. The Seventh Circuit thus presented a very narrow definition and use of the common actor inference.

III. **Analyzing the Seventh Circuit’s Decision and Its Impact on the Legitimacy of the Common Actor Inference**

**A. Seventh Circuit exposes logical flaws and uses negative tones when addressing the common actor inference**

The Seventh Circuit’s *McKinney* decision is notable for both the ease with which the Seventh Circuit found logical flaws in the common actor inference and the almost dismissive tone the court used when discussing the inference. After evaluating the approach other U.S. Circuit Courts of Appeals have taken toward the common actor inference, it is clear that the Seventh Circuit took the lead in criticizing the use of the common actor inference in Title VII cases. This becomes

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119 Id. at 814.
120 Id.
abundantly clear upon a close reading of the court’s legal analysis and the language it used when discussing the common actor inference.

The Seventh Circuit could have invalidated the district court’s ruling in McKinney based solely the plaintiff’s evidence, without addressing the district court’s reliance on the common actor inference. McKinney appealed the district court’s grant of summary judgment; all the Seventh Circuit needed to find to reverse the district court’s decision was find a genuine issue of material fact that would require final adjudication by a judge or jury.\footnote{Fed. R. Civ. P. 56.} The court went through the facts presented to the district court in long and painstaking detail, and it found many issues of material fact that would be sufficient to reverse the grant of summary judgment.\footnote{McKinney, 866 F.3d at 807-13.} However, the Seventh Circuit went beyond just invalidating the circuit court’s decision based on genuine issues of material fact; it devoted an entire section to exposing the logical flaws in the common actor inference.\footnote{Id. at 814-15.}

The Seventh Circuit stated that “examples abound” of scenarios where it would be unsound to infer that the same supervisor hiring and firing an employee in a short time period did not have a discriminatory purpose for doing so.\footnote{Id. at 815.} Although the court stated that examples abound, it listed only four examples: 1) a supervisor hires an employee from a protected class out of necessity, then later fires that employee when members of a nonprotected class are available; 2) a supervisor who hires a woman, but refuses to promote her because of her gender; 3) a supervisor who hires a woman, but later fires her when she becomes pregnant; and 4) when a supervisor hires the county’s first black police officer and then fires him because of racial friction in the department.\footnote{Id.} These are all very clear and easy-to-follow examples of how the common actor inference can be unsound, and unfairly slanted toward the supervisor who fires an employee from a protected class.
However, as the Seventh Circuit suggested, these three examples are far from the only ones that expose flaws in the common actor inference. Imagine a supervisor who feels compelled to hire an employee from a protected class out of a company-wide push to increase diversity, only to later fire that employee for discriminatory reasons. Or, consider an all-male law firm who hires female partner to attract new female clients, only to later fire the female partner because she does not “fit-in” with the boy’s club culture. One can also think of a scenario where a supervisor hires a Muslim man or woman, but then later fires him or her after a domestic terrorist attack because the supervisor does not want to associate with people of that religion. These are just a few of a multitude of “examples,” as the Seventh Circuit said, that demonstrate the inherent flaws of the common actor inference, and cast doubt on its usefulness or probative value in Title VII discrimination cases.

It is also important to note the tone the court uses in discussing the common actor inference in McKinney. The Seventh Circuit opened its discussion of the common actor inference by stating “the district court seems to have overestimated the strength of the common actor inference” in reaching its decision. In its very first sentence on the common actor inference, the Seventh Circuit signaled that the common actor inference is not an especially strong one because it has been “overestimated” by the district court. The Seventh Circuit then explained its interpretation of the common actor inference and took the time to clearly explain to the district court how it improperly applied the Seventh Circuit’s analysis. The Seventh Circuit stated that the district court may have gone astray by relying on older Seventh Circuit cases such as EEOC v. Our Lady of Resurrection Medical Center, a 1996 case in which the Seventh Circuit implied the common actor inference could be used in summary judgment motions. However, in McKinney, the Seventh Circuit pointed out that its decisions since Our

126 Id. at 814.
127 Id.
128 Id.
129 Id.
Lady of Resurrection have “clarified that this inference is not a conclusive presumption and that it should be considered by the ultimate trier of fact rather than on summary judgment or the pleadings.”

The court then stated that it has tried to “impose limits on the common actor inference to ensure it does not outgrow its usefulness.” It referred to inference as “just something for the trier of fact to consider.” It stated that the inference may be helpful “in some limited situations.” The court then provided four clear examples of when the inference is illogical. The combination of the court’s tone and the narrow application it assigned to the common actor inference cannot help but leave the reader with the impression the court does not look upon the inference with great favor. In the Seventh Circuit’s own words, the inference is in danger of “outgrowing its usefulness,” “just” something to be considered, and is only in helpful in “limited circumstances.” These are not words or phrases that convey a positive connotation.

B. Circuit Courts should limit the application of the common actor inference to an evidentiary inference at the trial stage

Despite the Seventh Circuit’s critique of the common actor inference and its logical flaws, the court did not completely scrap the use of the common actor inference in the Seventh Circuit. Rather, the Seventh Circuit clearly stated limits on the inference and proscribes when the inference can be considered. The Seventh Circuit framed the common actor inference as an evidentiary issue, and it

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130 Id.
131 Id. at 815.
132 Id. at 814.
133 Id. at 815.
134 Id.
135 Id. ("["t]he inference may be helpful in some limited situations, which is why we allow the jury to hear such evidence and weigh it for what it is worth" (internal quotations omitted)).
stated the inference can only considered by the ultimate trier of fact at
the trial stage of litigation.\textsuperscript{136}

There are definite practical implications of the Seventh Court’s
decision in \textit{McKinney} as it pertains to the common actor inference. A
defendant may not assert the common actor inference as an affirmative
defense; it can only be argued at trial as probative evidence. Therefore,
when a plaintiff brings a Title VII complaint against a defendant-
employer, even if the relationship between the plaintiff and supervisor
would implicate the common actor inference, the defendant cannot use
the inference to defeat a complaint in a motion to dismiss or in a
summary judgment motion in the Seventh Circuit.

The court’s decision removed one hurdle a plaintiff must
overcome to successfully plead Title VII discrimination in the Seventh
Circuit. A hypothetical Title VII plaintiff in the Seventh Circuit must
first plead a prima facie case of discrimination: that he or she is a
member of a protected class; that he or she was qualified for the
position; and that he or she suffered an adverse employment action.\textsuperscript{137}

If the plaintiff can successfully plead a prima facie case, then pursuant
to \textit{McDonnell Douglas}, the burden shifts to the defendant to articulate
legitimate, nondiscriminatory reason for the employment action.\textsuperscript{138}
At this stage in the litigation, there would be no reason for the defendant
to assert a common actor inference (even if they could) because
discriminatory acts by the defendant are not considered at this stage.\textsuperscript{139}
If the defendant articulates a legitimate, nondiscriminatory reason for
the employment action, the burden shifts back to the plaintiff to
demonstrate through evidence that the employer’s reasons were
“pretext” for a discriminatory purpose.\textsuperscript{140} It is at this stage that the
plaintiff begins presenting his or her evidence of the employer’s
discriminatory actions.

\textsuperscript{136} \textit{Id.} at 814.
\textsuperscript{137} \textit{See} McDonnell-Douglas v. Green, 411 U.S. 792, 802 (1973).
\textsuperscript{138} \textit{Id.} at 802-03.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 807.
Once the plaintiff has offered evidence of the defendant’s discriminatory acts, other circuit courts will allow the defendant to introduce the common actor inference to weigh against the plaintiff’s evidence.\textsuperscript{141} In \textit{Proud v. Stone}, the Fourth Circuit stated the fact that the same supervisor hired and fired an employee “creates a strong inference that the employer's stated reason for acting against the employee is not pretextual.”\textsuperscript{142} The Fourth Circuit recognized the strong impact this inference has on a plaintiff’s case, and stated “[t]he plaintiff still has the opportunity to present countervailing evidence of pretext, but in most cases involving this situation, such evidence will not be forthcoming. In short, employers who knowingly hire workers within a protected group seldom will be credible targets for charges of pretextual firing.”\textsuperscript{143}

The Fourth Circuit’s approach is very favorable to defendants, and assists defendant-employers in defeating Title VII discrimination claims before those claims ever reach an ultimate trier of fact. This scenario occurred in the Indiana district court’s decision, where McKinney’s complaint was defeated at the summary judgment stage based in part on the Sheriff invoking the common actor inference.\textsuperscript{144} However, as the Seventh Circuit demonstrated in its opinion, there are simply too many flaws in the common actor inference to accord it so much power at the pleadings or summary judgment stage.\textsuperscript{145}

The Seventh Circuit’s awareness of how the common actor inference can result in illogical conclusions or too strong of an advantage for employers led the court to limit the use of the inference

\textsuperscript{141} See \textit{Proud v. Stone}, 945 F.2d 796, 798 (4th Cir. 1991); LeBlanc \textit{v. Great American Ins. Co.}, 6 F.3d 836, 847 (1st Cir. 1993); Cordell \textit{v. Verizon Commc’n, Inc.}, 331 F.App’x. 56, 58 (2d Cir. 2009); Waldron \textit{v. SL Industries Inc.}, 56 F.3d 491, 496 n.6 (3d Cir. 1995); Coghlan \textit{v. Am. Seafoods Co. LLC.}, 413 F.3d 1090, 1096-97 (9th Cir. 2005); Antonio \textit{v. Sygma Network Inc.}, 458 F.3d 1177, 1183 (10th Cir. 2006).
\textsuperscript{142} \textit{Proud}, 945 F.2d at 798.
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} McKinney \textit{v. Sheriff of Whitley County}, 866 F.3d 803, 805 (7th Cir. 2017).
\textsuperscript{145} \textit{Id.} at 815.
to only the trial stage of litigation.\textsuperscript{146} The court stated that “the common actor inference is a reasonable inference that may be argued to the jury, but it is not a conclusive presumption that applies as a matter of law.”\textsuperscript{147} The court continued that the defendant may argue the inference to the jury, who may then “weigh it for what it is worth.”\textsuperscript{148} The court acknowledged the flaws of the inference when it is applied as a matter of law at the pleadings or summary judgment stages, stating “[i]t is misleading to suggest (as some cases do) that the inference creates a ‘presumption’ of nondiscrimination, as that would imply that the employee must meet it or lose his case.”\textsuperscript{149} Thus in the Seventh Circuit, any employer who wishes to use the common actor inference as a way to overcome a Title VII discrimination claim may only do so when arguing to the ultimate trier of fact.\textsuperscript{150}

\textbf{CONCLUSION}

The Seventh Circuit presented the most logical use of the common actor inference, if it is to be used at all. As this comment has demonstrated, Congress created Title VII to protect certain American workers from discriminatory employment actions. The subsequent judicial interpretations of Title VII created the very rigorous \textit{McDonnell Douglas} framework that specifies exactly what a plaintiff must allege, and eventually prove, in order to succeed on a claim. The text of Title VII and the \textit{McDonnell Douglas} framework already provide defendants with a number of protections against frivolous claims. Plaintiffs must plead a prima facie case of discrimination before defendants even need to respond to charges of discrimination. Defendants then have an opportunity to articulate legitimate, nondiscriminatory reasons for their employment action. Plaintiffs then

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{146}] \textit{id.} at 814.
\item[\textsuperscript{147}] \textit{id.}
\item[\textsuperscript{148}] \textit{id.} at 815.
\item[\textsuperscript{149}] \textit{id.} at 814 (quoting Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 747 (7th Cir. 2002)).
\item[\textsuperscript{150}] \textit{id.} at 815.
\end{enumerate}
\end{footnotesize}
must produce actual evidence of discrimination to show that the defendant’s reasons are merely pretextual. These steps help ensure that only serious and credible Title VII claims can even advance to the summary judgment or trial stage.

The inclusion of the common actor inference in pleadings and summary judgment is an example of how a powerful yet ultimately flawed judicially-created inference places a significant burden on Title VII plaintiffs. The Fourth Circuit, and those other circuits who have followed the Fourth Circuit’s lead, have acknowledged that the common actor inference is a nearly fatal blow to a plaintiff’s claim. A plaintiff who has met the prima facie elements of Title VII discrimination and demonstrated discrimination through evidence should be able to advance to a trial without having to overcome a defendant-friendly inference that the Seventh Circuit so easily critiqued.

While the common actor inference can be logical when applied to the right scenario, it contains too many easily-identifiable flaws that tip the scales towards a defendant. Therefore, the inference should not be considered before reaching the ultimate trier of fact. At the trial stage, the ultimate trier of fact will have the chance to survey all of the evidence presented, including the common actor inference, and will be able to weigh the evidence as the he or she sees fit. Applying the common actor inference before the trial robs the plaintiff of the chance to argue all of its evidence, and ultimately can lead to judgment for the defendant for less than solid reasons.

U.S. Circuit Courts should follow the Seventh Circuit’s lead and limit the application of the common actor inference only to the trial stage. McKinney’s guidance on the common actor inference will achieve Congress’ goal of protecting Americans from discrimination based on their race, sex, religion, color, or national origin, while also protecting defendants from frivolous claims by plaintiffs. The framework for a Title VII claim is well-established and fair, and protects both plaintiffs and defendants equally with a rigid burden-shifting test. The common actor inference disrupts this framework by shifting the scales too far toward the defendant, and as a result it
should be limited in accordance with the Seventh Circuit’s decision in *McKinney*.