

HON. MARK W. BENNETT

## Essay:<sup>1</sup> From the “No Spittin’, No Cussin’ and No Summary Judgment”<sup>2</sup> Days of Employment Discrimination Litigation to the “Defendant’s Summary Judgment Affirmed Without Comment” Days: One Judge’s Four-Decade Perspective

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ABOUT THE AUTHOR: Mark W. Bennett is a U.S. District Court Judge in the Northern District of Iowa. One might think that this Iowa district is a sleepy little one. In fact, the Northern District of Iowa has led the ninety-four districts in trials per judge per year more often than any other district over the past decade. See FEDERAL COURT MANAGEMENT STATISTICS SEPT. 2012, IOWA NORTHERN, U.S. COURTS, <http://www.uscourts.gov/viewer.aspx?doc=/uscourts/Statistics/FederalCourtManagementStatistics/2012/district-fcms-profiles-september-2012.pdf&page=56> (last visited Feb. 17, 2013).

1. This is not a law review article, but an essay in both the primary and secondary sense: 1) a short composition presenting the personal views of the author; 2) an attempt or endeavor, especially a tentative one. See *Essay Definition*, THE FREE DICTIONARY, <http://www.thefreedictionary.com/essay> (last visited Feb. 17, 2013). Professors Deborah Eisenberg, Ann McGinley, Suzette Malveaux, Scott Moss, Elizabeth Schneider, Joseph Seiner, and Suja Thomas, some of whom I cite in this essay, greatly added to the richness and depth of this symposium. See Symposium, *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 653 (2012–2013), available at <http://www.nylslawreview.com/trial-by-jury-or-trial-by-motion-summary-judgment-qb-al-and-employment-discrimination/>. Their thoughtful insights have helped me expand my understanding of the interplay between the mushrooming dispositive motion practice industry in employment discrimination litigation and the increasingly rare trial by jury.
2. See Susan T. Wall, “No Spittin’, No Cussin’ and No Summary Judgment”: *Rethinking Motion Practice*, 8 S.C. LAW. 29, 29 (1997) (likening South Carolina judges’ reluctance to embrace summary judgment to a sign hanging in an Alabama courthouse that declared, “No Spittin’, No Cussin’ and No Summary Judgment”). Her article was the inspiration for my title—to describe the days when this sign would have typified judicial sentiment in courthouses around the country.

## FROM “NO SUMMARY JUDGMENT” TO “AFFIRMED WITHOUT COMMENT”

*Nearly seventy-five years after its birth, the time has come to bury summary judgment. The funeral should be swift, dignified, and joyous. The autopsy would reveal that the cause of death was abuse and overuse by my federal judge colleagues. Summary judgment abuse and overuse occurs in all types of cases, but is especially magnified in employment discrimination cases. This problem is exacerbated by the daily ritual of appellate courts affirming summary judgment grants to employers, often without comment, at a rate that far exceeds any other substantive area of federal law. These beliefs are based on my four-decade career in employment discrimination as a trial and appellate lawyer (for both employees and employers), adjunct law professor, author, speaker, federal magistrate judge, and district court judge. Unfortunately, my colleagues have become increasingly unfriendly to plaintiffs' employment discrimination claims. I believe there are six primary reasons for this “unfriendliness” or what many scholars have observed as “hostility”: 1) too many frivolous employment discrimination lawsuits; 2) an overworked federal judiciary; 3) increased sophistication of employers; 4) increasingly subtle discrimination; 5) implicit bias in judicial decisions; and 6) a shift among judges from trial judging to case managing. If I were anointed Grand Poobah<sup>3</sup> of federal civil procedure for a day, my first act would be to eliminate summary judgment—at least for a five- to ten-year experimental period. The time has come to recognize that summary judgment has become too expensive, too time-consuming for the parties and the judiciary, and too likely to unfairly deprive parties—usually plaintiffs—of their constitutional and statutory rights to trial by jury. I am willing to throw out the baby with the bathwater because the culture of unjustly granting summary judgment is far too ingrained in the federal judiciary to reverse course. There is simply no empirical evidence that summary judgment is efficient or fair. Failing elimination of summary judgment, dramatic modifications to Rule 56 of the Federal Rules of Civil Procedure should be made to help eliminate its disparate and unfair impact.*

### I. INTRODUCTION

I bristle at law clerk applicants who, near the end of their cover letter, almost invariably claim they are “uniquely” qualified to be my next law clerk.<sup>4</sup> They are nearly always extremely well qualified, some exceptionally so, but “uniquely?” I don’t think so. Even as a former civil rights and employment discrimination lawyer for seventeen years, who represented both sides; a former federal magistrate judge for nearly three years with a substantial employment discrimination docket, including

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3. The sobriquet “Grand Poobah” comes from the imperious character Poo-Bah, who held, among other titles, that of “Lord-High-Everything-Else,” in Gilbert and Sullivan’s 1885 opera *The Mikado*.

4. I am deeply appreciative of the assistance of my law clerk, Melissa Carrington, for her editing and formatting help on this essay. She did not claim to be “uniquely” qualified in her letter of application, but truly is.

many summary judgment motions, jury trials, and settlement conferences; a federal district court judge in my eighteenth year, having authored hundreds of employment discrimination decisions and tried many to verdict and through post-trial motions,<sup>5</sup> as well as having reviewed appeals of employment discrimination cases while sitting by designation on both the Eighth and Ninth Circuit Courts of Appeals; a coauthor of an employment law treatise for more than twenty years;<sup>6</sup> a law professor teaching employment discrimination litigation for nearly twenty years; and a speaker, often the keynote, at more than two hundred national employment law CLE programs—I make no claim of “uniqueness.” I do, however, believe that my extensive, diverse, and comprehensive background in employment discrimination law, spanning four decades, plenteously informs the observations in this essay.<sup>7</sup>

## II. MY JOURNEY THROUGH THE GOOD OLD DAYS

In junior high school, I decided I would become a civil rights lawyer.<sup>8</sup> I never wavered from that goal. In 1974, when Title VII was only ten years old and still in its infancy, and I was in my second year of law school, I was deeply inspired by my Employment Discrimination professor, Mimi Winslow. Her course opened my eyes and mind to a vast array of theoretical, legal, and practical issues waiting to be explored and resolved. I saw incredible opportunities.

I was all in. After being rejected on my only job application—to the Polk County Legal Aid Society in Des Moines, Iowa—I started my own law firm with two of my best friends in the basement of the Polk County Legal Aid building, which has long since been demolished. The very first case I filed in federal court, an age discrimination case on behalf of Joe Evans, a line hog cutter who had worked for Oscar Mayer for twenty-three years, ended up in the U.S. Supreme Court, where I personally argued it—less than four years after graduating from Drake Law School.<sup>9</sup> My practice became far flung; there were great opportunities and fascinating cases for hardworking, eager lawyers, and I appeared in nearly fifty federal district courts from New York to California. I had the great privilege of representing plaintiffs in individual and class cases and of defending Fortune 500 companies, mom-and-pop employers, and all sorts of entities in between, almost exclusively in federal courts. What I had no way of knowing then, but realize now, is that the late 1970s through the early 1990s—the tenure of my private practice career—were the halcyon days of civil rights and employment discrimination litigation in the federal courts.

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5. I have handled employment discrimination cases in four jurisdictions—the Northern and Southern Districts of Iowa, the District of Arizona, and the District of the Northern Mariana Islands—ruling on summary judgment motions and trying cases to jury verdict.

6. The annual update for the treatise requires me to read several hundred federal district and appellate court summary judgment decisions each year.

7. The opinions expressed in this essay are solely my personal views and opinions and not those of any court, committee, or organization of which I am a member.

8. I wrote a school paper declaring my compelling desire and intent to become a civil rights lawyer.

9. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979).

## FROM “NO SUMMARY JUDGMENT” TO “AFFIRMED WITHOUT COMMENT”

In my four decades in the employment discrimination arena, I have noticed several major paradigm shifts. First, when I practiced, I seldom appeared before a federal district court judge or court of appeals panel that was overtly or covertly unfriendly to the plaintiff’s claims. Nor did I read many reported decisions from trial and appellate courts that were. While my plaintiff clients did not always win, they virtually always received a fair shake.

Second, summary judgment motions were filed far less frequently in those days, and were rarely granted. Back then, I read the advance sheets for every reported employment discrimination case in federal court, and seldom did I read a decision granting summary judgment on facts that troubled me. Many circuits had a clearly stated preference against summary judgment in employment discrimination cases, especially disparate treatment cases, because they almost always turn on delicate factual nuances of intent. For example, my take on the Eighth Circuit incantation went something like this:

The Eighth Circuit Court of Appeals recognized in a number of panel decisions that summary judgment is “disfavored” or should be used “sparingly” in employment discrimination cases. *See* [Torgerson v. City of Rochester, 643 F.3d 1031, 1043 (8th Cir. 2011)] (collecting such cases in an Appendix). The rationales for this “employment discrimination exception” were that “discrimination cases often turn on inferences rather than on direct evidence . . . .,” *E.E.O.C. v. Woodbridge Corp.*, 263 F.3d 812, 814 (8th Cir. 2001) (en banc) (citing *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994); *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999)), and that “intent” is generally a central issue in employment discrimination cases. *See, e.g., Christopher v. Adam’s Mark Hotels*, 137 F.3d 1069, 1071 (8th Cir. 1998) (citing *Gill v. Reorganized Sch. Dist. R-6, Festus, Mo.*, 32 F.3d 376, 378 (8th Cir. 1994)); *see Simpson v. Des Moines Water Works*, 425 F.3d 538, 542 (8th Cir. 2005) (noting summary judgment is disfavored in employment discrimination cases because they are “inherently fact-based.” (quoting *Mayer v. Nextel W. Corp.*, 318 F.3d 803, 806 (8th Cir. 2003))).<sup>10</sup>

As employment discrimination cases worked their way through the Eighth Circuit in the 1990s and beyond, the principles that summary judgment was “disfavored” or should be used “sparingly” were ignored far more often than they were followed by both the district courts and the Eighth Circuit Court of Appeals. The federal reporters are filled with hundreds—if not thousands—of employment discrimination cases where, despite the fact that these principles were the existing law of the circuit, courts swiftly granted summary judgment. Early in my career as a district court judge, I was guilty of this, too.<sup>11</sup> In 2011, the Eighth Circuit Court of Appeals stopped pretending. The de facto abandonment of these principles became de jure in the court’s en banc

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10. *Strom v. Holiday Cos.*, 789 F. Supp. 2d 1060, 1077 (N.D. Iowa 2011).

11. When I began as a district court judge in early September of 1994, I inherited a gigantic backlog of old summary judgment motions. At one point, I had granted eighteen in a row in just two months, earning the nickname “The Terminator” from a longtime employee in the clerk’s office. That nickname died a quick death and is not something I am proud of. In hindsight, I see that, in my haste to have a current docket, I was way too aggressive and overused summary judgment. Unfortunately, not one of those decisions was overturned on appeal.



decision in *Torgerson v. City of Rochester*: “There is no ‘discrimination case exception’ to the application of summary judgment, which is a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial.”<sup>12</sup> The law of summary judgment in employment discrimination cases in the Eighth Circuit now conforms to the practice of summary judgment. The prior fiction, when compared with reality, was laughable—judges would cite the “disfavored” and “sparingly” language repeatedly and then grant the motion.

Motions to dismiss were also filed far less frequently in the late 1970s through the early 1990s—not considered nearly mandatory motions like they are today. While the effect of mushrooming *Twombly*<sup>13</sup> motions to dismiss in employment discrimination cases is beyond the scope of this essay, I note that one of this symposium’s scholars aptly observes that these motions are the new motions for summary judgment.<sup>14</sup> Prior to the pretrial disposition onslaught, cases were frequently tried, and judges seemed eager to try them! No limbs were twisted of eager plaintiff or defense lawyers, seeking a day in court for their clients, by tough-talking magistrate judges with threats varying from the mild, “This case should really settle,” to the questionable and intimidating, “The district court judge is really going to be mad at you and your clients if this case does not settle!”<sup>15</sup> Victories by plaintiffs in the trial courts were neither routinely overturned nor substantially reduced by the courts of appeals.

Collegiality was at its high-water mark. Defense lawyers were, more often than not, highly civil in working through pleading, discovery, and trial problems and issues. This was also true of most plaintiff lawyers. It was even accurate when working opposite “true believers.”<sup>16</sup> Rule 11 motions<sup>17</sup> were nearly unheard of. Opposing counsel in the halcyon days actually spent time talking to each other to help move the case along. This kept costs down because fewer matters needed to be dealt with formally. Many agreements between opposing counsel were consummated

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12. 643 F.3d 1031, 1043 (8th Cir. 2011).

13. I use the term “*Twombly*” to refer to the ubiquitous motions to dismiss based on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See, e.g., *In re Iowa Ready-Mix Concrete Antitrust Litig.*, No. C 10–4038–MWB, 2011 WL 5547159, at \*1 (N.D. Iowa Nov. 9, 2011).

14. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 41 (2010) (“A new time is upon the federal rules after *Iqbal* and *Twombly*. The motion to dismiss is now the new summary judgment motion, in standard and possibly effect. Under both dismissal standards, courts assess the plausibility of a claim, using inferences favoring the plaintiff and inferences favoring the defendant, and under both, courts use their own opinions of the evidence to decide the plausibility question. As a result of the similarity in the standards, the summary judgment motion and the motion to dismiss may have similar effects, including the significant use of the procedures by courts, a related increased role of judges in litigation, and a corresponding increased dismissal of employment discrimination cases.”).

15. I have heard lawyers repeatedly report comments like these at legal conferences around the country over the last two decades.

16. I define “true believers” as lawyers who are so passionate about either plaintiff or defense work that they refuse to represent the other side, have a difficult time seeing merit in the other side’s arguments, and are often self-righteous about their clients’ positions.

17. See FED. R. CIV. P. 11(c)(2).

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with a simple handshake, rarely requiring a confirming letter. Discovery disputes were usually worked out and seldom required court intervention. Your friends in the profession were your opponents, and new opponents often became new friends. If you practiced in a small firm or solo, your opponents were also your mentors—helping to elevate the quality of practicing law. A lawyer’s word was her bond; no need for endless confirming letters or today’s twenty-four-hour e-mails. If your client was fortunate enough to win, the first call you received was a congratulatory one from opposing counsel. If your client lost, you made the call.

When it came to settlement, lawyers in the halcyon days had the experience, skill sets, and willingness to settle without time-consuming and costly outside interventions. Today’s “litigators,” especially the Rambo-style ones, largely lack the negotiation skills even to approach settlement with opposing counsel. Barrages of frivolous motions, unending and needless discovery, and the personal attacks on the parties, make it so much more difficult for lawyers to settle cases on their own. While this state of affairs creates a full employment act for mediators, it is a sad reflection on “litigators” and their lack of negotiation skills, which only adds to the already exorbitant costs of today’s litigation.

The times have obviously changed, but are the employment discrimination bar, the clients they represent, the federal civil justice system, and, more importantly, society, better off? As explained in the remainder of this essay—I don’t think so.

### III. THE TRILOGY AND FEDERAL JUDICIAL RESPONSE

When the U.S. Supreme Court decided the now famous Trilogy over a quarter century ago,<sup>18</sup> who could have predicted that our legal culture would so quickly morph from trial by jury into a “litigation” by summary judgment legal industry? As Judge

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18. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (libel case in which the Court emphasized that “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact[.]” and clarified the meaning of “genuine” and “material”: “[a] dispute about a material fact is ‘genuine,’ . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party[.]” and “the substantive law will identify which facts are material”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (products liability case in which the Court “f[ou]nd no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent’s claim”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (complex price fixing case in which the Court reasoned that “if the factual context renders [the nonmovant’s] claim implausible . . . [the nonmovant] must come forward with more persuasive evidence to support [its] claim than would otherwise be necessary”).

Professor Arthur Miller concisely articulates the significance of the Trilogy cases, as a whole and individually:

On a practical level, the three decisions collectively forge a new, stronger role for the motion. *Matsushita* requires that the moving party’s evidence be sufficient to render the plaintiff’s claim implausible. *Anderson* allows the trial court to enter judgment if the evidence produced by the plaintiff is not sufficient, under the applicable standard of proof, to convince the judge that a reasonable jury could return a verdict in his favor. And *Celotex* has made it easier to shift the burden of adducing support for the nonmovant’s legal position on a Rule 56 motion and effectively obliges the plaintiff to come forward, on the defendant’s motion, with her case before trial. Stated differently,

Patricia M. Wald so eloquently wrote in 1998, “Its flame lit by *Matsushita*, *Anderson*, and *Celotex* in 1986, and fueled by overloaded dockets of the last two decades, summary judgment has spread swiftly through the underbrush of undesirable cases, taking down some healthy trees as it goes.”<sup>19</sup> Note Judge Wald’s use of the word “undesirable”—not an adjective describing a lack of merit or the absence of a material question of fact, but “undesirable”! Judge Wald also rang a clarion call that Federal Rule of Civil Procedure 56,<sup>20</sup> the well-known rule establishing the standards and procedural requirements for summary judgment, had the potential to morph “into a stealth weapon for clearing calendars” and that “there is a real danger of summary judgment being stretched far beyond its originally intended or proper limits.”<sup>21</sup> Judge Wald raised these important concerns about summary judgment after her personal perusal of a sample of her court’s (she was, at the time, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit<sup>22</sup>) summary judgment rulings.<sup>23</sup>

Two years later, in 2000, while sitting by designation on the Eighth Circuit Court of Appeals, I jumped into the summary judgment fray when I wrote a dissent from an all-too-routine per curiam affirmance of summary judgment in an employment discrimination case:

The federal courts’ daily ritual of trial court grants and appellate court affirmances of summary judgment in employment discrimination cases across the land is increasingly troubling to me. I worry that the expanding use of summary judgment, particularly in federal employment discrimination litigation, raises the ominous specter of serious erosion of the “fundamental and sacred” right of trial by jury.<sup>24</sup>

Five years later, I observed,

I think that the trend away from jury trials toward a new focus on expensive discovery and summary judgment has been fueled by the complicity of federal trial and appellate judges. The rise of summary judgment as a means of trial

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Celotex has made it easier to make the motion, and Anderson and Matsushita have increased the chances that it will be granted.

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1041 (2003).

Tellingly, *Anderson*, *Celotex*, and *Matsushita* (in that order) are the three most cited U.S. Supreme Court cases of all time. See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 (2010) (citing Shepard’s data of federal court decisions as of March 17, 2010).

19. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1941 (1998).

20. See FED. R. CIV. P. 56(a) (“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”).

21. Wald, *supra* note 19, at 1898, 1917.

22. *Id.* at 1897.

23. *Id.* at 1917.

24. *Kampouris v. St. Louis Symphony Soc’y*, 210 F.3d 845, 850 (8th Cir. 2000) (Bennett, J., sitting by designation, dissenting) (quoting *Jacob v. City of New York*, 315 U.S. 752, 752 (1942)).

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avoidance has been made easier by the U.S. Supreme Court’s trilogy of decisions in 1986, so that summary judgment is now the Holy Grail of “litigators.” In my view, trial and appellate judges engage in the daily ritual of docket control by uttering too frequently the incantation, “We find no material question of fact.”<sup>25</sup>

While some judicial colleagues are apologists for Rule 56,<sup>26</sup> I am not one of them—and my voice is not alone. Judge Milton Shadur, of the Northern District of Illinois, wrote, “When the close-of-discovery bell rings, the Rule 56 dog salivates. That almost instinctive response seems to be particularly marked in employment discrimination cases, with active encouragement of most courts of appeals . . . .”<sup>27</sup> Judge Shadur concluded, “Counsel (particularly defense counsel) regularly should be urged by judges to consider—and that counsel should do so—the ultimately conservative alternative of trial before they proceed down the summary judgment path.”<sup>28</sup> A year later, Judge Shadur struck again, voicing his concern regarding the aggressive overuse of summary judgment: “From my perspective that trend has gone much too far, to the benefit of no one involved in the justice system . . . .”<sup>29</sup> Similarly, Judge Wald observed that “judges will stretch to make summary judgment apply even in borderline cases which, a decade ago, might have been thought indisputably trial-

25. Mark W. Bennett, *Judges’ Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005).

26. See, e.g., Lee H. Rosenthal, *The Summary Judgment Changes that Weren’t*, 43 LOY. U. CHI. L.J. 471, 495–96 (2012) (“The Rule 56 text has endured because its seemingly indeterminate standard is problematic only if the text is viewed apart from the common-law system in which it operates. The combination of the iconic rule text with the common law that has developed over time, emerging from many different cases, prevents the unguided judicial discretion the critics decry and fear.”). I consider Judge Lee Rosenthal to be a giant among my federal district court colleagues and, in my view, the most knowledgeable federal judge in the country on summary judgment. Her article is brilliant, informative, concise, and extraordinarily well written, and her participation in this symposium was invaluable. I also consider her a friend. However, we are at opposite ends of the spectrum in our assessments of the continuing value of summary judgment—much like in-district colleagues Judge Christopher F. Droney and Chief Judge Alvin W. Thompson were in 2011, as shown by their differing *Chambers Practices*. Compare *Chambers Practices of The Honorable Christopher F. Droney United States District Judge*, U.S. DIST. CT., DIST. OF CONN., [http://www.ctd.uscourts.gov/practiceof\\_cfd.html](http://www.ctd.uscourts.gov/practiceof_cfd.html) (last visited Feb. 21, 2012) (“[Judge Droney] believes that there has been an increase in the number of dispositive motions because of the nature of the cases filed in federal court. In employment cases, for example, many summary judgment motions and motions to dismiss are being filed. He believes that most of these motions have merit and need to be considered by the court.”), with *Chambers Practices of The Honorable Alvin W. Thompson United States District Judge*, U.S. DIST. CT., DIST. OF CONN., [http://www.ctd.uscourts.gov/practiceof\\_awt.html](http://www.ctd.uscourts.gov/practiceof_awt.html) (last visited Feb. 21, 2012) (“Judge Thompson believes that dispositive motions are overused. In discrimination cases, he rarely grants motions for summary judgment that dispose of the entire case.”). Judge Droney has since been confirmed as a Circuit Judge for the U.S. Court of Appeals for the Second Circuit. See *Circuit Judges*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/judgesmain.htm> (last visited Mar. 3, 2013).

27. Milton I. Shadur, *From the Bench: Trial or Tribulations (Rule 56 Style)?*, LITIG., Winter 2003, at 5, 5 (lamenting the replacement of trial by jury with summary judgment).

28. *Id.* at 66.

29. Milton I. Shadur, *An Old Judge’s Thoughts*, CBA REC., Jan. 2004, at 27, 27. Judge Shadur also added, in defense of trials, that they “are far more interesting” (I agree!) and “provid[e] an assured result, as an unsuccessful summary judgment motion does not.” *Id.*

worthy.”<sup>30</sup> Judge Jack Weinstein, of the Eastern District of New York, also recognized “[t]he dangers of robust use of summary judgment to clear trial dockets,” finding its use to be “particularly acute in current sex discrimination cases.”<sup>31</sup> Judge Donald Lay, of the Eighth Circuit Court of Appeals, cautioned in an insightful dissent,

Too many courts in this circuit, both district and appellate, are utilizing summary judgment in cases where issues of fact remain. This is especially true in cases where witness credibility will be determinative. In these instances, a jury, not the courts, should ultimately decide whether the plaintiff has proven her case. Summary judgment should be the exception, not the rule. It is appropriate “*only . . . where it is quite clear what the truth is, . . . for the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.*”<sup>32</sup>

One of the most highly regarded and respected members of the federal judiciary, Judge Brock Hornby, of the District of Maine, adroitly identified the misnomer that is “summary judgment” in a recent article:

The term “summary judgment” suggests a judicial process that is simple, abbreviated, and inexpensive. But the federal summary judgment process is none of those. Lawyers say it’s complicated and that judges try to avoid it. Clients say it’s expensive and protracted. Judges say it’s tedious and time-consuming. The very name for the procedure is a near-oxymoron that creates confusion and frustrates expectations.<sup>33</sup>

Judge Hornby proceeded to explain what summary judgment does *not* do: “Summary judgment does *not* save lawyer time. It does *not* save legal fees. It does *not* significantly reduce court time or trials.”<sup>34</sup> Judge Diane Wood, of the U.S. Court of Appeals for the Seventh Circuit, recently posed a probing question (already answered by many of the judges above): “[W]e need to ask whether, by creating a mechanism to speed things up and reduce cost, we have inadvertently managed to slow things down and allow expenditures to balloon.”<sup>35</sup>

#### IV. THE LEGAL ACADEMY WEIGHS IN

Many law professors have also weighed in, often praising the role summary judgment plays in our civil justice system,<sup>36</sup> although I imagine a very tiny percent of

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30. Wald, *supra* note 19, at 1942.

31. Gallagher v. Delaney, 139 F.3d 338, 343 (2d Cir. 1998).

32. Melvin v. Car-Freshener Corp., 453 F.3d 1000, 1003–04 (8th Cir. 2006) (Lay, J., dissenting) (quoting Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467 (1962)).

33. D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 273 (2010).

34. *Id.* at 274.

35. Diane P. Wood, *Summary Judgment and the Law of Unintended Consequences*, 36 OKLA. CITY U. L. REV. 231, 232 (2011).

36. See, e.g., Edward Brunet, *Six Summary Judgment Safeguards*, 43 AKRON L. REV. 1165, 1167 (2010) (“Summary adjudication places proof responsibilities upon the parties in an efficient ‘put up or shut up’ way.”); Randy J.

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them have ever participated in a civil jury trial in federal court. Others, however, raise grave concerns of injustice and troubling consequences from the growing federal summary judgment legal industrial complex. As early as 1993, Professor Ann McGinley observed that the Trilogy “silently curtails workers’ civil rights claims[] [through] the increased inappropriate use of summary judgment.”<sup>37</sup> Professor Arthur Miller maintains that judges’ “unfettered commitment to ‘efficiency’ in the pretrial disposition context” diminishes the right to trial by jury and that Rule 56 discretion must “be closely scrutinized and constricted since the safety valve of an opportunity to present one’s case in a complete and live format is absent in the pretrial context.”<sup>38</sup> Professor Elizabeth Schneider forcefully argues that summary judgment, “one of the most important procedural devices in federal civil procedure,” is “problematic,” and she explores the dangers of summary judgment, particularly in cases where women are the plaintiffs.<sup>39</sup> Professor Suja Thomas’s exceptionally incisive article, *Why Summary Judgment is Unconstitutional*,<sup>40</sup> has generated keen interest and fierce debate in the legal community.<sup>41</sup> Professor John Bronsteen’s remarkable article, *Against Summary Judgment*,<sup>42</sup> is a frontal assault on the notion held by Rule 56 apologists that summary judgment is necessary, efficient, and fair. Professor Bronsteen writes,

Specifically, I think that the civil justice system would actually enjoy a net benefit from abolishing summary judgment, in terms of both efficiency and fairness. To put it another way, *it would behoove us to abolish summary judgment even if we were not constitutionally obligated to do so*.<sup>43</sup>

Professor Jeffrey Stempel explores the unintended consequences of summary judgment through a deeply thoughtful analysis of the intersection between summary judgment and cultural cognition—specifically, how false certainty bias and false consensus bias adversely affect summary judgment rulings.<sup>44</sup> Professor Stempel’s conclusion is illuminating:

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Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1853 (2004) (arguing for mandatory summary judgment in class actions “as a condition precedent to entering into an enforceable settlement agreement” in order to “eliminate[] the potential payoff from nuisance-value strategies [by] removing any incentive to employ them”).

37. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 205–06 (1993).

38. Miller, *supra* note 18, at 1133.

39. Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 705–06, 709–11 (2007).

40. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007).

41. Courts and academics alike have considered Professor Thomas’s provocative argument. *See, e.g.*, *Cook v. McPherson*, 273 F. App’x 421, 425 (6th Cir. 2008); *Terranova v. Torres*, 603 F. Supp. 2d 630, 631 n.3 (S.D.N.Y. 2009); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613, 1621–22 (2008) (describing the reaction engendered by her argument).

42. John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007).

43. *Id.* at 526 (emphasis added) (footnotes omitted).

44. Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 635, 653 (2012).



Although it is a truism that no litigation system achieves perfect justice or optimal efficiency, the current move toward more aggressive use of summary judgment risks too many sacrifices of justice with little efficiency gain, or perhaps even net efficiency loss. Restoring pre-trilogy judicial humility, by rule change if necessary, to permit trial and jury deliberation in more cases can help to combat the innate cognitive illiberalism and error that afflicts judges making overly aggressive use of summary judgment.<sup>45</sup>

Other law professors use and misuse “empirical” studies by the Federal Judicial Center to argue that the U.S. Supreme Court Trilogy, while easily understood by law professors who teach first year civil procedure, is routinely and badly botched by federal appellate and district court judges. One professor declared that a summary judgment opinion, written by retired Justice Sandra Day O’Connor (herself in the *Celotex* majority!) while sitting by designation on the Seventh Circuit Court of Appeals, would have scored only a “solid ‘B’” in a first year civil procedure class!<sup>46</sup> The professor concludes her article by wondering about “the utility of requiring students to master a complicated analytical framework that *courts themselves more often than not do not apply*.”<sup>47</sup> Obviously, most of us on the federal bench who issue and review summary judgment rulings need to retake Civil Procedure I, especially from her. More important for this symposium, however, is this professor’s argument that “the summary judgment trilogy has had scant impact on judicial reception to enhanced utilization of summary judgment as a means to streamline litigation.”<sup>48</sup> So, I suppose that her bottom line is that, while we, as federal judges, don’t know what we are doing in applying the Trilogy, our dramatic failings in this regard have not affected the status quo of summary judgment.

Another law professor, who sings the praises of the current summary judgment industry in federal court, makes a mostly unsupported claim about Rule 56’s efficiency—“Summary judgment *is* efficient[,]” he declares!<sup>49</sup> This professor argues that, when a Rule 56 motion is denied, “the case becomes more expensive to settle[,]” creating a “summary judgment premium.”<sup>50</sup> Therefore, he maintains, “The possibility of denial of the summary judgment motion and the creation of a summary judgment premium play a valuable role in deterring the filing of frivolous summary judgment motions.”<sup>51</sup> While I agree that there is a “premium” associated with the denial of summary judgment, I suggest this scholar grossly exaggerates its real world effect. I suspect thousands of federal district court law clerks and virtually all federal district

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45. *Id.* at 687.

46. Linda S. Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 Loy. U. Chi. L.J. 561, 585 (2012).

47. *Id.* at 586 (emphasis added).

48. *Id.* at 561.

49. Edward Brunet, *The Efficiency of Summary Judgment*, 43 Loy. U. Chi. L.J. 689, 690 (2012) (emphasis added).

50. *Id.* at 692.

51. *Id.*

court judges would beg to differ with the professor. I am tempted to box up eighteen years’ worth of frivolous summary judgment motions that I have ruled on, rent two large semi-trucks, and send them off to this professor. If all my colleagues did this, I suspect he might reconsider his claim of a “summary judgment premium.”<sup>52</sup> With all due respect, some of these professorial claims about summary judgment are evidence that “[t]he difference between theory and practice in theory is much less than the difference between theory and practice in practice.”<sup>53</sup>

In contrast, one of the most illuminating articles by a law professor is *Summary Judgment: What We Think We Know Versus What We Ought To Know* by Brooke D. Coleman.<sup>54</sup> Professor Coleman does a superb job of summarizing both the criticism and the supportive scholarship on the current state of summary judgment.<sup>55</sup> “There is a lot to learn from what has been written[,]”<sup>56</sup> she declares—but she ultimately concludes that the works of both critics and supporters of summary judgment alike are essentially unreliable, as they rely on either anecdotal, hypothetical, or empirically insignificant evidence.<sup>57</sup> I think Professor Coleman’s greatest contribution to the debate is the way she reframes the issue in the last section of her article, where she concludes,

[T]he real question is not so much about the efficiency or fairness of the summary judgment process, but really just about one critical issue—the jury trial. Regardless of what the data might tell us, the bottom line is that one either has great faith in the value of the jury trial or one does not. And maybe that is where the debate about summary judgment should start and end.<sup>58</sup>

One thing is for certain: among the writings on summary judgment by the legal academy, there is support for critics like me, who smack summary judgment, and for Rule 56 Kool-Aid drinkers<sup>59</sup> alike. From this literature, one cannot help but wonder

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52. With all due respect, this professor is a brilliant and productive scholar and a superb, award-winning classroom professor—but, by his own admission, his practical experience in federal court is limited to a two-year stint as an associate at a prominent Chicago law firm more than forty years ago. See *Curriculum Vitae of Edward J. Brunet*, LEWIS & CLARK LAW SCH., <http://law.lclark.edu/live/files/3846> (last visited Feb. 17, 2013).
  53. Source unknown, though often attributed to Randal L. Schwartz. See Vinay Krishna, *Theory and Practice*, IN THIS BEAUTIFUL WORLD . . . (Oct. 7, 2009), <http://vinaykrishna.blogspot.com/2009/10/theory-and-practice.html>.
  54. Brooke D. Coleman, *Summary Judgment: What We Think We Know Versus What We Ought To Know*, 43 LOY. U. CHI. L.J. 705 (2012).
  55. *Id.* at 713–19.
  56. *Id.* at 719.
  57. *Id.* at 721–22.
  58. *Id.* at 725.
  59. Edwin Perkins invented Kool-Aid in 1927 in Hastings, Nebraska, when he devised a way to remove the liquid from Fruit Smack drink mix concentrate, leaving the powder—which he named Kool-Aid—behind. *The History of Kool-Aid*, HASTINGS MUSEUM, <http://hastingsmuseum.org/exhibits/kool-aid/the-history-of-kool-aid> (last visited Feb. 17, 2013). The term “Drinking the Kool-Aid” is commonly attributed to “the November 1978 Rev. Jim Jones Jonestown Massacre, where members of the Peoples Temple were said to have committed suicide by drinking a Kool-Aid drink laced with cyanide.” *Drinking the Kool-Aid*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Drinking\\_the\\_Kool-Aid](http://en.wikipedia.org/wiki/Drinking_the_Kool-Aid) (last visited Feb. 18, 2013).

if summary judgment is either the second coming to save the federal civil justice system or the primary evil causing its demise. My thirty-five-plus years of experience with employment discrimination litigation and summary judgment cause me to strongly favor the latter: summary judgment is a huge part of the problem with our civil justice system, and its expanded and aggressive use is not part of the solution. However, I readily confess that my unbounded faith in the jury system, so deeply imprinted in my legal DNA nucleotides, strongly shapes and biases my views on summary judgment.

## V. MY MUSINGS

During the quarter century since the Trilogy, the federal judiciary has become increasingly unfriendly towards employment discrimination cases going to trial. Those of us in the legal profession not living under a large rock would be hard pressed not to have noticed this. This increasing judicial preference for motions to dismiss and summary judgment—which Judge Brock Hornby urges should be renamed, at least for summary judgment, “motion for judgment without trial”<sup>60</sup>—is deeply troubling. There is no single turning point, no single reason, and no blaring signpost on this gradual shift to trial by paper instead of by live witnesses. One scholar describes this shift, in the context of employment discrimination law, as “the gradual and continuing erosion of the factfinder’s role in federal employment discrimination cases and its replacement by an increasing use of summary judgment through which the courts make pretrial determinations formerly reserved for the factfinder at trial.”<sup>61</sup> “This trend,” the author continues, transfers “power from juries to judges, but also substantially undermines the efficacy of the nation’s laws against discrimination.”<sup>62</sup> Nationally recognized plaintiffs’ employment lawyer Paul Mollica noted over a decade ago that “[t]he invisible hand of myriad court of appeals and district court decisions have led us to this pass, where federal litigants must struggle mightily just to get to a trial.”<sup>63</sup> He also perceived “the emergence of summary judgment as the new fulcrum of federal dispute resolution.”<sup>64</sup> Mollica’s high tide in 2000 has risen so fast that employment discrimination cases are being drowned out of the federal courts.

Let me be blunt. Employment discrimination cases today are to the federal judiciary what prisoner rights cases were before the passage of the Prison Litigation Reform Act in 1996.<sup>65</sup> In Yogi Berra terms, it’s déjà vu all over again: “Plaintiff’s claims lack merit,” “Plaintiff’s claims are frivolous,” and the newest *Twombal-*

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60. Hornby, *supra* note 33, at 284.

61. McGinley, *supra* note 37, at 206.

62. *Id.*

63. Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 218 (2000).

64. *Id.* at 141.

65. See Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman II, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1556–57 (2003) (observing that since the passage of the Prison Litigation Reform Act of 1996, “the total number of prisoner lawsuits has dropped significantly”).

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induced mantra, “Plaintiff’s claims are implausible”—all incantations heard with stunning frequency in the federal district courts.<sup>66</sup> In the courts of appeals the mantra morphs slightly: “Defendant’s Summary Judgment (or Motion to Dismiss) affirmed without comment” appears with alarming frequency. One recent study “revealed that over 80 percent of defendants’ motions for summary judgment in employment discrimination cases are either granted or granted-in-part when decided by the district court.”<sup>67</sup> The same study also found that, between the six and twelve months following the decision in *Twombly*, almost 81% of district court decisions citing *Twombly* in employment discrimination cases granted, in whole or in part, a motion to dismiss.<sup>68</sup> Two Cornell law professors, who have done extensive empirical studies of “win” rates in employment discrimination cases from data from the Administrative Office of the United States Courts, note, “The most significant observation about the district courts’ adjudication of employment discrimination cases is the long-run lack of success for these plaintiffs relative to other plaintiffs.”<sup>69</sup> From 1979 to 2006, “the plaintiff win rate for jobs cases (15%) was lower than for non-jobs cases (51%).”<sup>70</sup> Employment discrimination plaintiffs fare even worse on appeal!<sup>71</sup> Federal appeals courts “reverse plaintiffs’ wins below far more often than defendants’ wins below.”<sup>72</sup> A plaintiff who wins at trial has “a chance of retaining [the] victory that cannot meaningfully be distinguished from a coin flip.”<sup>73</sup> In contrast, a defendant who wins at trial “can be assured of retaining that victory” on appeal.<sup>74</sup> The Cornell Law professors reach a very disturbing conclusion: “In this surprising plaintiff/defendant difference in the federal courts of appeals, we have unearthed an *anti-plaintiff effect* that is troublesome.”<sup>75</sup> Of course, even a casual reader of the courts of appeals’ employment discrimination decisions would not have needed an empirical study to

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66. See generally Lonny Hoffman, *Twombly and Iqbal’s Measure: An Assessment of the Federal Judicial Center’s Study of Motions to Dismiss*, 2012 FED. CTS. L. REV. 6 (Feb. 2012), <http://www.fclr.org/fclr/articles/html/2010/Hoffman.pdf>.

67. Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1015 (2009).

68. *Id.* at 1030. *Twombly*, though only five years old, is the seventh most cited Supreme Court case of all time. Steinman, *supra* note 18, at 1357. *Twombly* has been cited more than *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Miranda v. Arizona*, 384 U.S. 436 (1966). See Steinman, *supra* note 18, at 1357. *Twombly* also tops the charts as the case cited at the fastest rate in the federal courts in the period from June 30, 2009, to March 17, 2010, with *Iqbal* gaining speed in fourth place. See *id.* at 1360.

69. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 127 (2009).

70. *Id.*

71. See *id.* at 108–15.

72. *Id.* at 111.

73. *Id.* at 112.

74. *Id.*

75. *Id.*

observe this trend. There is something seriously amiss here, and it cannot be blamed solely on the number of employment discrimination cases filed that lack merit.

Likewise, courts' use of summary judgment and motions to dismiss to dispose of claims under the Equal Pay Act of 1963 (EPA)<sup>76</sup> has increased dramatically in the last several decades. Data tracking EPA cases on appeal reveal that, in the 1970s, 97% of EPA decisions on appeal had been resolved by bench or jury trials, rather than by granting motions to dismiss or for summary judgment; in the 1980s, the rate of EPA claims resolved by trial declined to 92%; in the 1990s, the rate dipped to 42%, and, from 2000 to 2009, to a mere 31%.<sup>77</sup> The dramatic decline in trials in EPA cases ought to raise serious concerns, even among the Kool-Aid drinkers, about the expanded use of pretrial motions to eliminate trial by juries.

I am not asserting that this increased unfriendliness to trying the merits of employment discrimination claims is part of some overarching conspiracy, philosophy, or agenda to deny employment discrimination plaintiffs their day in court.<sup>78</sup> I am not even assuming, for the most part, that it is ideologically driven,<sup>79</sup> at least not at the U.S. Supreme Court level.<sup>80</sup> After all, one of the most conservative U.S. Supreme Courts in the last forty years has been surprisingly even-handed in its employment

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76. 29 U.S.C. § 206 (2006).

77. Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 33 (2010). Moreover, "[f]rom 2000 to 2009, the courts of appeal affirmed grants of summary judgment for the employer by the district courts 92% of the time." *Id.* at 34.

78. In her article criticizing federal judicial use of judge-made legal "shortcuts" to deny employment discrimination plaintiffs their day in court, Professor Kerri Lynn Stone writes:

The question of why judges have created these shortcuts and seemingly confined them largely to the employment discrimination field is also of seminal importance. An obvious response is that courts, and specifically judges, may harbor an increased skepticism, and perhaps even hostility toward plaintiffs alleging employment discrimination. Certainly scholars have posited as much. It is important to ask why this would be the case.

Kerri Lynn Stone, *Shortcuts in Employment Discrimination*, 56 ST. LOUIS U. L.J. 111, 159 (2011) (footnote omitted).

79. However, one interesting, recent empirical study of the Eighth Circuit Court of Appeals found that, after reviewing 1068 appellate decisions, "the odds of reversal for a Democratic district court judge is 1.536 times greater than the odds of reversal for a Republican district court judge in the Eighth Circuit." Robert Steinbuch, *An Empirical Analysis of Reversal Rates in the Eighth Circuit During 2008*, 43 LOY. L.A. L. REV. 51, 61 (2009). The study noted that, during its period of study in 2008, the Eighth Circuit had "fourteen Republican and three Democratic appellate court judges." *Id.* at 64.

80. See Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 565 (2009) ("[E]ven though the Supreme Court does seem hostile to litigation, it does not seem hostile to employment discrimination litigation in particular, given the amount of its discretionary docket it has spent issuing unanimous reversals of too-restrictive circuit views of the employment discrimination statutes. . . . [W]hen the Supreme Court has to issue five unanimous reversals in less than a decade to correct most circuits as to a single body of law—employment discrimination—that indicates a relatively widespread problem of circuit hostility to that particular body of law, which constitutes a sizeable portion of the federal docket." (footnotes omitted)); see also Stone, *supra* note 78, at 164–65.

discrimination decisions.<sup>81</sup> I do believe, nonetheless, that the increased unfriendliness of federal trial and appellate court judges (excluding the U.S. Supreme Court), in general, is undeniable. Further, I do not believe that my views are idiosyncratic. The opening paragraph of Professor Kerri Lynn Stone’s compelling and extremely insightful article, *Shortcuts in Employment Discrimination Law*, states,

Research confirms everyday observations of how much more difficult it is for employment discrimination plaintiffs than for other plaintiffs to survive pre-trial motions to dismiss their cases and to win at trial or on appeal. Indeed, recent studies confirm that judicial hostility toward Title VII claims is on the rise. In one recently conducted evaluation and analysis of federal civil cases filed between 1970 and 2006, the authors found that employment discrimination claims that go before a bench are more likely than other kinds of claims to fail, both at the district court and at the appellate level.<sup>82</sup>

81. See *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 (2011) (recognizing “cat’s paw” liability under Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)): “[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.” (footnotes omitted)); *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011) (determining that a third-party retaliation claim is permitted under Title VII: where both plaintiff and fiancée were employees at same company, plaintiff who was fired after his fiancée filed a sex discrimination charge had standing under Title VII to sue for retaliation); *Crawford v. Metro. Gov’t of Nashville*, 555 U.S. 271, 276–78 (2009) (finding that Title VII’s prohibition on retaliation against employees who oppose discrimination extends to employees who report discrimination in response to an employer’s questions, not just those who come forward on their own initiative); *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008) (concluding that a federal employee’s claim of retaliation for filing an age discrimination claim is cognizable under the Age Discrimination in Employment Act of 1967 (ADEA)); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008) (recognizing retaliation claims under 42 U.S.C. § 1981); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (determining that Title VII’s antiretaliation provision prohibits actions that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination” (internal quotation marks omitted)). But see *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–78 (2009) (concluding that a mixed-motives age discrimination claim is not permitted under the ADEA); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 638–43 (2007) (rejecting as time-barred plaintiff’s claim under Title VII that Goodyear paid her less on the basis of her sex, because the payment decision was not made within six months of the date she made her complaint to the U.S. Equal Employment Opportunity Commission (EEOC), even though Ledbetter received paychecks during that period), *superseded by statute*, Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat. 5.

82. Stone, *supra* note 78, at 112 (footnotes omitted). Although I have omitted Professor Stone’s footnotes in the text, I have included them in this footnote, as she provides a wealth of research regarding judicial hostility to employment discrimination claims. The first footnote of Professor Stone’s article reads:

See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) (“Employment discrimination plaintiffs have a tough row to hoe. They manage many fewer happy resolutions early in litigation, and so they have to proceed toward trial more often. They win a lower proportion of cases during pretrial and at trial. Then, more of their successful cases are appealed. On appeal, they have a harder time upholding their successes and reversing adverse outcomes.”); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999) (analyzing statistics of 615 ADA cases terminated between 1992 and 1998 and finding that 92.7% of those cases were won by defendants, and of those, 38.7% were resolved on summary judgment); Ann C. McGinley, *Credulous Courts and the Tortured*



I believe this increased unfriendliness towards resolving employment discrimination cases by jury trial comes from a combination of six factors that have coalesced into the perfect summary judgment storm: 1) the filing of too many frivolous employment discrimination lawsuits; 2) an overworked federal judiciary; 3) greater sophistication of employers; 4) more subtle discrimination allegations than in the earlier years; 5) the role of implicit bias in judicial decisionmaking; and 6) the notion held by many federal judges that we are not trial judges, but case managers. I will briefly comment on each factor.

#### A. Increase in Frivolous Cases

There are significant numbers of federal employment discrimination cases that lack merit. Lawyers, especially ones inexperienced in the complicated nuances of

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*Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 205–06 (1993) (observing the difficulties that employment discrimination plaintiffs face on summary judgment); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 897–900, 899 n.49 (2006) (discussing statistics demonstrating that employment discrimination plaintiffs are seldom successful); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007) (observing that 73% of summary judgment motions in employment discrimination cases are granted, and that nearly all are in favor of defendants); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 574–75 (2001) (arguing that “employment discrimination cases are unusually difficult to win, contrary to the reigning perspective, and that the various biases courts bring to the cases deeply affect how courts analyze and decide cases”); Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to the Honorable Michael Baylson, U. S. Dist. Court Judge, E. Dist. of Pa. (June 15, 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/\\$file/sujufy06.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sujufy06.pdf/$file/sujufy06.pdf) (analyzing 17,969 cases terminated in the seventy-eight federal district courts and finding that 73% of summary judgment motions in employment discrimination cases are granted, while the average for all civil cases is just 60%).

*Id.* at n.1. The second footnote reads:

See generally Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103 (2009) (documenting various statistics that led the authors to conclude that judges harbor anti-plaintiff views); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 95 (2010) (“Recent studies indicate that judicial hostility to Title VII claims in particular continues.”).

*Id.* at n.2. The third footnote reads:

Clermont & Schwab, *supra* note 2, at 105–06, 127, 130 (“Employment discrimination plaintiffs, unlike most other plaintiffs, have always done substantially worse in judge trials than in jury trials. In numbers, employment discrimination plaintiffs have won only 19.62% of judge trials. While employment discrimination plaintiffs have thus won fewer than one in five of their judge trials, other plaintiffs have won 45.53% of their judge trials.”); see also Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 958 (2002) (“Job discrimination plaintiffs are one of the least successful classes of plaintiffs at the trial court level.”).

*Id.* at 112–13 n.3.

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discrimination law, fail to do their due diligence in evaluating the strength of plaintiffs’ proof before filing suit. It seems like plaintiff lawyers get way too jazzed about their ability to make out the so-called prima facie case. These are a dime a dozen—six out of ten folks walking out of a state unemployment benefits office could make out a prima facie case, but very few would have a snowball’s chance of proving their former employer’s asserted legitimate nondiscriminatory reasons were pre-textual. Lawyers, particularly inexperienced ones, fail to internalize this. Many employment discrimination cases are filed with little or no thought (and even less evidence) about how the plaintiff will prevail at the third stage of the *McDonnell Douglas* paradigm.<sup>83</sup> All federal district court judges see a significant number of employment discrimination cases that should not have been filed. Over the years, either consciously or subconsciously, is it surprising that many federal judges have become jaundiced towards the merits of employment discrimination claims?<sup>84</sup> On many occasions at judges’ meetings, I have heard colleagues remark, “There are way too many discrimination cases filed,” and even, “These have become just like prisoner cases,” or similar statements of frustration.<sup>85</sup> Some even display their unfriendliness (or downright hostility) to employment discrimination cases on the record, like a district court colleague who, during the third day of an employment discrimination jury trial, stated—thankfully not in the presence of the jury—

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83. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804–07 (1973). I explain the *McDonnell Douglas* framework in my recent ruling denying summary judgment on the plaintiff’s retaliation claim in *Truckenmiller v. Burgess Health Ctr.*, 814 F. Supp. 2d 894 (N.D. Iowa 2011):

[C]ourts “apply the familiar *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (*McDonnell Douglas*), burden-shifting framework to [a] retaliatory discharge claim” under § 215(a)(3). *Grey v. City of Oak Grove, Mo.*, 396 F.3d 1031, 1034 (8th Cir. 2005). “To establish a prima facie case of retaliation under the FLSA [and hence the EPA], [the plaintiff] would have to show [1] that she participated in statutorily protected activity, [2] that the [employer] took an adverse employment action against her, and [3] that there was a causal connection between [her] statutorily protected activity and the adverse employment action.” *Ritchie v. St. Louis Jewish Light*, 630 F.3d 713, 717 (8th Cir. 2011) (citing *Grey*, 396 F.3d at 1034–35). If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-retaliatory reason for the plaintiff’s discharge, and if the employer does so, the burden shifts back to the plaintiff to demonstrate that the employer’s proffered reason for the discharge is not the true reason, but a pretext for retaliation. *Grey*, 396 F.3d at 1035. The ultimate issue, however, is whether the employer intentionally retaliated against the employee. See, e.g., *Blakley v. Schlumberger Tech. Corp.*, 648 F.3d 921 (8th Cir. 2011).

*Id.* at 905–06 (parallel citations omitted).

84. See *Stone*, *supra* note 78, at 160–61 (“Judges adjudicating employment discrimination cases, then, appear to observers as increasingly skeptical of these cases and of the plaintiffs who bring them.”).

85. *Id.* at 163 & n.217 (“It seems clear that the sheer number of employment discrimination cases wending their way through the court system has served to increase judicial skepticism, if not antagonism, by reinforcing the incorrect notion that employees tend to file frivolous claims.” (citing Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 *How. L.J.* 45, 67–68 (2010) (“For some judges, the large number of charges reflect [sic] employees’ propensity to file frivolous claims. . . . Bad-faith filings and pressures on judicial resources have likely increased . . . judicial antagonism.”))).

Those are Title VII cases. Congress has created a nightmare because they entice anybody and everybody to file those things and entice any attorney to file them in the mere chance that if they win a dollar they can win attorney fees. So I think any Title VII cases ought to be looked at with suspicion to begin with because it's a crap shoot, which everybody engages in.<sup>86</sup>

Oh really? I suspect the growing judicial unfriendliness towards employment discrimination cases creates more of a “crap shoot” for all involved than do plaintiff lawyers looking for attorney fees. Another federal district court judge wrote,

The Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was an enactment then long overdue and noble in its objectives. It unquestionably has served to deter, if not entirely eradicate, the pernicious practice of discrimination in employment decisions. It has, however, also unquestionably served to embolden disgruntled employees, who have been legitimately discharged because they were incompetent, insubordinate, or dishonest, to file suits alleging that they have been the victims of discrimination. The motives prompting those baseless filings may be inferred to be harassment or intimidation with a view towards being rehired. Whatever the motives, the frequency with which such cases are filed unduly burdens the federal courts and subjects innocent employers to incredible expense which they cannot recoup if successful . . .<sup>87</sup>

I would think a fair reading of this judge's opinion indicates a degree of “unfriendliness” towards plaintiffs' employment discrimination claims. It also reveals a disturbing belief that discrimination in employment might no longer exist.

What is alarming to me about quotes from judicial opinions like the two above is, as Professor Scott A. Moss astutely observes, that these opinions are likely just the tip of the judicial hostility iceberg: “[f]or every one judge willing to go out on a limb declaring open skepticism or upset about employment cases, there presumably are others who hold the same view but have the sense of propriety not to declare so in public documents.”<sup>88</sup>

### *B. Pressing Caseloads*

As lamented above, most federal judges have too many cases. The explosive increase in federal criminal cases and their command of a speedy trial place enormous pressure on skyrocketing federal district court dockets. As Judge Richard Arnold, one of the most beloved federal judges of modern times so eloquently penned,

I think in the 20 years since I was a district court judge, we've seen a tremendous increase in volume, tremendous pressures to decide cases without thinking very much about them, tremendous pressures to avoid deciding cases. I mean, some judges will do almost anything to avoid deciding a case on the merits and find some procedural reason to get rid of it, coerce the parties into settling or whatever it might be.<sup>89</sup>

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86. *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1055 (8th Cir. 1991) (quoting district court trial transcript).

87. *Edwards v. Interboro Inst.*, 840 F. Supp. 222, 231 (E.D.N.Y. 1994).

88. Moss, *supra* note 80, at 565–66; *see also* Stone, *supra* note 78, at 164–65.

89. Hon. Richard Arnold, *Mr. Justice Brennan and the Little Case*, 32 LOY. L.A. L. REV. 663, 670 (1999).

## FROM “NO SUMMARY JUDGMENT” TO “AFFIRMED WITHOUT COMMENT”

There hasn’t been an omnibus judgeship bill in thirty-five years.<sup>90</sup> Is it surprising that, for many judges, this makes *Twombal* and summary judgment motions increasingly alluring tools for docket control? Some circuit courts of appeals are so summary-judgment-affirmance-prone that district court judges often go many years without a reversal of a grant of summary judgment in an employment case. I have wondered over the years, how I can be so “right” in granting summary judgment and yet so “wrong” in sentencing criminal defendants?

Also, the whole federal employment discrimination summary judgment industry has changed dramatically over the years. In the good old days, the rare summary judgment motion in a garden-variety employment discrimination case was the size of the coupon section insert in the Saturday *Sioux City Journal* newspaper. Today, summary judgment motions, with their concomitant briefing, statements of fact, and appendices, more often than not, exceed the size of the white and yellow pages of the Chicago phone directory—combined.<sup>91</sup>

The time spent on summary judgment motions in my chambers has ballooned over my eighteen years of service. It is far and away the most time-intensive activity of any chambers’ function. It has become the large bulge in the python. Virtually none of the legal academy’s writing on the subject of the state of summary judgment, or the empirical research on the subject, ever touch on the enormous burden the expanded summary judgment industry places on federal district court judges and the inevitable adverse consequences on our other work. Judge Hornby insightfully observes that “judges and magistrate judges must be careful that their chambers’ investment of substantial time and energy assessing motions does not subliminally counsel *granting* them so as to justify the investment.”<sup>92</sup> In my experience, in nine out of ten cases, it would be less time-consuming to try the case to a jury than rule on the bulge in the python.

### C. Greater Sophistication of Employers

Based on my four decades laboring in the cotton rows of employment discrimination litigation, I think it could not reasonably be questioned that, as a whole, employers do a far better job today in reducing discrimination in the workforce. One primary reason is the excellent job sophisticated defense lawyers do in employment audits with sage advice to employers to help eradicate discriminatory practices. Employers today are much more apt to seek the advice of counsel on employment matters. The level of sophistication of employment defense lawyers has, in my view, skyrocketed, and much of their practice is now targeted to advising employers with state-of-the-art knowledge about an incredible array of employment law problems. I am sure there are many other reasons for increased employer

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90. The last such law was the Omnibus Judgeship Act of 1978, Pub. L. No. 95–486, 92 Stat. 1629.

91. Every year in the advanced employment discrimination litigation class I teach, I use an actual summary judgment case file from my current docket. Last year the “shortest” summary judgment record I could use was over 800 pages long. The students were not happy campers.

92. Hornby, *supra* note 33, at 287.

motivation to comply with federal anti-discrimination laws—not least of which are large jury verdicts following denials of motions to dismiss and summary judgment. But federal judges need to be wary of falling into the trap of thinking that, because there may be less discrimination in the workplace, there are fewer employment discrimination cases that have merit.

As federal trial court judges, we have to work extra hard to recognize that, while there may be less overt discrimination than in the past, we cannot become jaundiced to employment discrimination claims.<sup>93</sup> As Professor Kerri Lynn Stone notes, “[J]udges may be under the misapprehension that society has somehow transcended the problem of unlawful bias, and thus the problem of discrimination in employment.”<sup>94</sup> Federal judges need to be aware of and avoid this pitfall.

#### *D. Increasingly Subtle Discrimination*

For the most part, employment discrimination today is more subtle than one, two, or three decades ago. In my view, while employers discriminate less today than decades ago, when they do discriminate, it is in more subtle ways. These “second generation” employment discrimination claims create new challenges for the federal judiciary as “most employers by now know what first generation discrimination looks like and how to avoid certain patterns of behavior to preclude claims of discrimination.”<sup>95</sup> Thus, judges often see cases with less direct, overt, and obvious evidence of discrimination. As Professor Trina Jones recently summarized,

[P]ost-racialists believe that the United States is beyond race: that racism is largely a relic of the past as evidenced by America’s pronounced racial progress. Interestingly, for some people, post-racialism appears to be the fulfillment of colorblindness. Instead of aspiring to be blind to color differences, post-racialists believe that Americans are in fact colorblind. Because a majority of Americans no longer see race, we are no longer a racist society. Any remaining racism is rare and limited to a few isolated bigots or radical fringe groups.<sup>96</sup>

The implications of post-racialism beliefs, to the extent that these views taint judges’ perceptions of employment discrimination cases, are extremely problematic for current summary judgment practices. Professor Jones continues,

The present climate does not bode well for plaintiffs asserting claims of racial discrimination. Because these claims are premised on the continuing presence of racism, they are now counter to society’s normative beliefs. Thus, it is not

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93. See Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 94 (2010) (“In a ‘post-racial’ society, judges, like many Americans, may operate from the presumption that discrimination—at least racial discrimination—is a thing of the past.”).

94. Stone, *supra* note 78, at 160.

95. See Hila Shamir, *About Not Knowing—Thoughts on Schwab and Heise’s Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 CORNELL L. REV. 957, 960 (2011) (footnote omitted); see also Stone, *supra* note 78, at 161 n.212.

96. Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 433 (2010) (footnote omitted).

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surprising that they are met with suspicion and skepticism. If judges believe that discrimination is rare and aberrant, then they will perceive no need to probe deeply an employer’s justifications, even when those justifications are specious and proved false. Rather, a burden will be placed on plaintiffs to come forth with additional proof to counter the colorblind, post-racial presumption. Oddly, this presumption is not supplied by law and is counter to 400 years of U.S. history and abundant evidence of continuing racial inequality.<sup>97</sup>

As Judge Hornby has noted, “Judges should be slow to take inference questions away from juries, even when colleagues are affirmed in doing so.”<sup>98</sup> Unfortunately, just the opposite appears to be happening with all too much frequency.

*E. Implicit Bias in Judicial Decisions*

Contributing potent fuel to this changing environment are the judges’ own implicit biases. And we most assuredly have them.<sup>99</sup> In fact, I would bet that, among my colleagues who deny the existence of any implicit biases, like anti-black race bias, you would find the very judges who would score the worst on the race bias Implicit Association Test (IAT).<sup>100</sup> I also wonder if those judges who grant summary judgment or vote to affirm these grants more frequently than the norm would also test higher than the federal judge norm on the IAT. Of course, “[m]ost judges view themselves as objective and especially talented at fair decisionmaking.”<sup>101</sup> For instance, one study found that 97% of judges consider themselves to be in the top 25% of all judges in

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97. *Id.* at 433–34.

98. Hornby, *supra* note 33, at 287.

99. See generally Jerry Kang, Hon. Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); see also Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149 (2010).

100. The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit the same response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that White and harmless item are on the same key; African American and weapon are on the other same key. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly. Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people’s responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.

Kang, Bennett et al., *supra* note 99, at 1130.

101. *Id.* at 1172.



“avoid[ing] racial prejudice in decisionmaking.”<sup>102</sup> While this statistic reflects a hilariously impossible self-confidence among judges, it should also sound alarm bells in readers’ heads, as empirical research has shown that, “when a person believes himself to be objective, such belief licenses him to act on his biases.”<sup>103</sup> So, is it any wonder that, with all these factors coming into play, judges have increased antipathy to employment discrimination cases, either on an overt, conscious level or, more likely, in an implicit, unconscious way?<sup>104</sup>

*F. A Shift from Trial Judging to Case Managing*

Couple all of this with the movement in federal judicial training to see oneself as more of a case manager than a jury trial court judge,<sup>105</sup> and it is no wonder that federal district court judges use motions to dismiss and motions for summary judgment as nuclear weapons to blast through their docket. I was stunned last year while speaking at a CLE program on an antitrust litigation panel when a federal judicial colleague and friend boldly declared that a “jury trial was a failure of the system.”<sup>106</sup> Before calling 911, I did manage to blurt out my strong disagreement! With all due respect, this colleague suffers from a lethal dose of “managerial judging Kool-Aid.” But, in his defense, he came from a large firm “litigation” practice, not a true trial practice. He is a terrific judge, but simply doesn’t share my love, respect, and passion for trial by jury. I have, on occasion, heard similar expressions at judges-only conferences and in private conversations with a few judges, but to hear a colleague publicly declare that a jury trial was a failure of the system was absolutely flabbergasting. Unfortunately, this is a powerful testament to the extremes which some judges take “managerial” judging. Other judges, however, share my concerns and report similar observations about our colleagues’ use of summary judgment as a docket-purging tool. District Judge William G. Young noted, “Today, commentators are in near unanimous agreement that federal courts overuse summary judgment as a case management tool . . . and the courts

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102. *Id.* (quoting Rachlinski et al., *supra* note 99, at 1225).

103. *Id.* (citing Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*: Effects of Self-Perceived Objectivity on Hiring Discrimination,” 104 ORGANIZATIONAL BEHAVIOR & HUMAN DECISION PROCESSES 207, 210–11 (2007)).

104. As Professor Schneider reports, “[s]everal federal Gender Bias Task Force reports have suggested that the application of summary judgment, at least in employment discrimination cases, is problematic.” Schneider, *supra* note 39, at 709–10. Remarkably, the Eighth Circuit Task Force report revealed that 10% of *defense* attorneys believe that courts too readily grant summary judgment for defendants in discrimination cases. *Id.* at 710. Moreover, federal task force reports confirm judges’ palpable hostility to employment discrimination cases: “[T]he Ninth Circuit Report suggests that there is a perception that judges dislike employment discrimination cases and are more dismissive of these cases . . .” *Id.* at 710 n.24.

105. See, e.g., Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981).

106. My law clerk informed me that, in her first-year civil procedure class, her professor instructed the class that a jury trial was a failure of the system—a comment the students all dutifully typed into their notes. Is it a surprise, then, that lawyers and judges gravitate towards summary judgment, when they are indoctrinated in law school to think that jury trials are an abomination?

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themselves acknowledge the force of the charge.”<sup>107</sup> District Judge Nancy Gertner reported, “When I was a ‘baby judge’ I attended a training session. The trainer was to address employment discrimination cases. He began his presentation with: ‘Here’s how you can get rid of these cases . . .’”<sup>108</sup>

In my view, the fallout from the federal courts’ unfriendliness towards employment discrimination plaintiffs, specifically, and the overuse of *Twombal* motions and motions for summary judgment, in general, is the creation of a serious and potentially life-threatening illness to our federal civil justice system as we have known it. We have gone from trial by jury to trial by paper, from trial lawyers to paper-pushing litigators, from trial judges to pretrial case managers, and, as a result, civil jury trials in federal court are vanishing rapidly before our very eyes.<sup>109</sup>

Nearly a decade ago I warned of this fallout, when, in the context of a Title VII attorney fees opinion, I wrote,

Trial lawyers . . . who routinely try complex federal jury cases, are certainly entitled to a premium fee in comparison to litigators who push lots of papers, take lots of depositions, file lots of motions, but who seldom actually try cases in federal court.

This is especially true in light of the disturbing trend of fewer and fewer civil jury trials being tried in federal courts nationwide. Thus, it seems to this court that while there appears to be no shortage of “litigators”—indeed they seem to be propagating throughout the profession—true federal civil “trial lawyers,” those willing to delve into the crucible of federal civil jury trials on a regular basis, are becoming an endangered species. Moreover, there is probably no greater shell game in the law than “litigators” attempting to pass themselves off as real “trial lawyers.” Stories of “litigation partners” at mid- and large-size firms with virtually no or extremely limited real federal civil jury trial experience are legion. In sum, while there are many terrific litigators, there are far fewer terrific federal trial lawyers who ply their craft on a regular basis before federal civil juries.<sup>110</sup>

In my view, summary judgments are inappropriately granted in a shocking number of employment discrimination cases. This is hardly a new or novel view. Nearly twenty years ago, Professor Ann McGinley recognized that the Trilogy had a “profound effect of increased use of summary judgment in defeating civil rights claims” and that “[t]his increased use of summary judgment to dispose of civil rights

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107. *In re One Star Class Sloop Sailboat Built in 1930 with Hull No. 721, Named “Flash II”*, 517 F. Supp. 2d 546, 555 (D. Mass. 2007) (citations omitted).

108. *Id.* at n.4 (quoting Judge Nancy Gertner, Address to the Employment Law Conference, Mass. Bar Ass’n (May 7, 2007)). Judge Gertner’s presence at this symposium greatly enriched and enlivened its substance.

109. See, e.g., Bennett, *supra* note 25; Marc Galanter, *The Hundred Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255 (2005) [hereinafter Galanter, *Hundred Year Decline*]; Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67 (2006).

110. *Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161, 1190–91 (N.D. Iowa 2003).

actions has deprived plaintiffs of the fairer, more accurate decision-making assured by a factfinder's decision at trial."<sup>111</sup> Of course, the full extent of this assault on civil rights and employment discrimination plaintiffs is not necessarily something that is, as Professor Brooke D. Coleman pointed out, "knowable" about summary judgment.<sup>112</sup> But I still fervently believe it! It's called experience and reasonable inferences drawn from all the data. Further, it is the key question to the whole debate about summary judgment, and no one is addressing it. If I am right, and summary judgment is impermissibly granted and affirmed even a small percentage of the time, the whole debate by the legal academy that has felled entire forests about the alleged efficiency of summary judgment is irrelevant.

The trends that are described here have driven employment discrimination plaintiffs from our federal courts in unprecedented numbers. In the last few years there has been a shocking drop of nearly 40% in the number of federal court employment discrimination filings.<sup>113</sup> This is even more dramatic, given the rise in charges filed with the Equal Employment Opportunity Commission (EEOC).<sup>114</sup> For much of my judicial career, employment discrimination cases "reigned as the largest single category of federal civil cases, at nearly ten percent of that docket."<sup>115</sup> Now, they are exceeded by personal injury, product liability, and habeas corpus petitions. Employment discrimination cases have been dropping as a percentage of the federal court docket every year since 2001.<sup>116</sup> Interestingly, this decline is the steepest in those circuits that a nationally prominent plaintiff lawyer had "previously described as circuits perceived by the bar to be the most hostile to employment discrimination plaintiffs."<sup>117</sup> As Marcellus speaks in the play, *Hamlet*, "Something is rotten in the state of Denmark."<sup>118</sup> When litigants seeking to enforce this nation's comprehensive employment discrimination laws feel the need to flee our federal courts—the very institution tasked by Congress to hear these cases—something is horribly amiss in our federal civil justice system.<sup>119</sup>

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111. McGinley, *supra* note 37, at 208–09.

112. Coleman, *supra* note 54, at 725.

113. Clermont & Schwab, *supra* note 69, at 131–32.

114. *EEOC Intake, Relief Obtained and Charges Resolved Hit Record Highs in 2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Nov. 15, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/11-15-11a.cfm> ("The EEOC received a record 99,947 charges of discrimination in fiscal year 2011, which ended Sept. 30, the highest number of charges in the agency's 46-year history.").

115. Clermont & Schwab, *supra* note 69, at 103.

116. *Id.* at 104.

117. *Id.* at 119.

118. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 1, sc. 4.

119. In the related *Twombly* context, Professor Brooke Coleman observed, "Cases that have defined rights for individuals—rights that many still hold dear, whether they consider themselves ideologically conservative or liberal—would likely not have been decided on the merits under a *Twombly/Iqbal* regime." Brooke D. Coleman, *What If?: A Study of Seminal Cases as if Decided Under a Twombly/Iqbal Regime*, 90 OR. L. REV. 1147, 1169–70 (2012).

## VI. THE GRAND POOBAB EXPOUNDS

If I were anointed Grand Poobah of the Federal Rules of Civil Procedure for a day, my first edict would be to eliminate summary judgment altogether.<sup>120</sup> The elimination edict would be for a five- to ten-year period to evaluate the pros and cons of our federal civil justice system without summary judgment. Armed with new data and experiences in this summary-judgment-free-zone, judges, lawyers, litigants, jurors, the legal academy, and other stakeholders could weigh in, and we could have a vigorous national debate on the merits of summary judgment. Alternatively, if there was a way to do it, perhaps just some jurisdictions could opt out of Rule 56 as an experiment. I realize most critics of this idea—and I expect there will be no shortage of them—will censure this proposal as throwing the baby out with the bathwater.<sup>121</sup> And they are absolutely correct. I have very little criticism of language of Rule 56, itself. Rather, it is the judicial gloss and judicial corruption of the rule in practice that motivates this essay. I have little faith that, absent its burial, summary judgment’s abuses can be curbed. The current culture of impermissibly granting summary judgment is far too ingrained to reverse course. As Professor Bronsteen notes in the last paragraph of his article *Against Summary Judgment*,

Powerful interests are aligned in favor of summary judgment. Large corporations, the typical defendants in important civil litigation, benefit from the procedure and would no doubt exert inexorable political pressure to retain it. Judges too might support it, though only because they would overlook the fact that without summary judgment, most cases they now adjudicate would settle early rather than go to trial. Perhaps these interests cannot be overcome. But if that is the case, then we should at least acknowledge that summary judgment owes its continued existence primarily to our system’s capitulation to those who undeservedly benefit from it. In a better world, it would not exist.<sup>122</sup>

We should at least strive to determine whether a world without summary judgment would be better for our federal civil justice system and help promote the First Commandment of the Federal Rules of Civil Procedure “to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>123</sup> Our current summary judgment industry does not do this.

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120. Additional edicts as Grand Poobah of federal summary judgment for a day would be to dramatically reduce the amount of unnecessary, time-consuming, and costly discovery that seldom yields any meaningful fruit, but costs the litigants and society untold vast fortunes. I would dramatically shorten pretrial deadlines and require federal trial court judges to set firm early trial dates like I have done for years. While not returning to the old days of trial by ambush (which, by the way, produced much better trial lawyers), it would more closely resemble that system than the current litigation/summary judgment industrial complex that has become federal civil litigation.

121. This well-known idiom originated in Germany (*das Kind mit dem Bade ausschütten*), with its earliest known usage in the sixteenth century. *Throw out the baby with the bath water*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Throw\\_out\\_the\\_baby\\_with\\_the\\_bath\\_water](http://en.wikipedia.org/wiki/Throw_out_the_baby_with_the_bath_water) (last visited Feb. 18, 2013).

122. Bronsteen, *supra* note 42, at 551 (footnote omitted).

123. FED. R. CIV. P. 1.

Contrary to current and popular belief, summary judgment, as we know it today, is a gross distortion of its very limited historical underpinnings. English common law did not permit a trial judge to withdraw claims from a jury without the parties' agreement.<sup>124</sup> When the first Federal Rules of Civil Procedure were promulgated in 1938, summary judgment existed in only twenty of the states.<sup>125</sup> The summary judgment procedure of that time, in both England and the twenty states, was limited to "debt collection cases and analogous circumstances."<sup>126</sup> I suspect that medieval judges in England, Dean Charles Clark of the Yale Law School, the central drafter of the original Federal Rules of Civil Procedure,<sup>127</sup> and most judges and scholars in between, from medieval times to the time of the Trilogy, would turn over in their graves knowing the current distorted role of summary judgment. More importantly, not only does summary judgment not work as intended, there is simply no proof that its alleged efficiency outweighs the range of negatives discussed by the small cadre of scholars referred to in this essay. Why is summary judgment so well ingrained and accepted when there is simply no empirical evidence it works as intended and is efficient? I suspect the answer lies in an observation from Noam Chomsky: "Either you repeat the same conventional doctrines that everybody else is saying . . . Or else you say something which in fact is true and it will sound like it's from Neptune."<sup>128</sup>

Very little has been written about some of the benefits that likely would occur if summary judgment were given a swift but dignified burial. I think there would be an uptick in jury trials. I agree with Professor Bronsteen that many parties would settle early rather than spend money on trial preparation.<sup>129</sup> But I also believe that by eliminating the enormous sums spent on the litigation/summary judgment industry, more parties would choose to go to trial because it would become less expensive and faster to get there in the vast majority of cases. Is it simply a coincidence that, when summary judgment was adopted in 1938, 19.9% of all federal civil cases were tried, and, by 2003, the number had dropped to 1.7%?<sup>130</sup> As Professor Martin H. Redish has observed, "It is reasonable to assume that the more available summary judgment becomes and the more vigorously it is enforced, the fewer trials will take place."<sup>131</sup>

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124. Richard L. Steagall, *The Recent Explosion in Summary Judgments Entered by the Federal Courts Has Eliminated the Jury from the Judicial Power*, 33 S. ILL. U. L.J. 469, 471 & n.20 (2009) (citing *Gibson v. Hunter*, 126 Eng. Rep. 499 (1793)) (other citations omitted).

125. *Id.* at 471.

126. *Id.* at 486.

127. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914, 961 (1987).

128. DAVID BARSAMIAN & NOAM CHOMSKY, PROPAGANDA AND THE PUBLIC MIND: CONVERSATIONS WITH NOAM CHOMSKY 50 (2001).

129. See Bronsteen, *supra* note 42, at 536–38.

130. Galanter, *Hundred Year Decline*, *supra* note 109, at 1258–59.

131. Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005). Professor Redish continues, "In the so-called 'trilogy of 1986,' the U.S. Supreme Court simultaneously increased the procedure's availability and more aggressively

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Because the declared goal of Rule 56 is to eliminate allegedly “unnecessary” trials, “one need not be a trained logician to conclude that an increase in the availability of summary judgment will naturally have a corresponding negative impact on the number of trials.”<sup>132</sup> An increase in the number of federal civil jury trials would have many positive consequences.

Federal trial court judges and their law clerks would be spared what I have described as the bulge in the python,<sup>133</sup> and we would have much more time to spend on other important matters. The simple truth and dirty little secret of summary judgment is that these motions have become so complex, with crushingly large records, that a busy trial court judge has no choice but to delegate far too much of the summary judgment decisional process to law clerks. Increased hands-on judge involvement would necessitate unconscionable delays in summary judgment rulings. The vast majority of civil cases could be tried by a jury, spending far fewer chamber and judge resources than are currently spent on the summary judgment industry.

Trial lawyers could quickly be removed from the Endangered Species List. Trial advocacy professors would no longer be teaching courses that are becoming obsolete. Expanded opportunities to try civil jury trials would invigorate many lawyers who are not fulfilled by pushing paper in the litigation/summary judgment industry. Senior “litigators” who have never or rarely ever tried a civil jury trial would try cases and feel less fraudulent. Mentoring by real trial lawyers to younger wannabes would return like in the good old days. Law students not in the top 10% of their class, even mediocre ones, with great people skills who want to be trial lawyers, not paper pushers, would see their value and soar to untold heights. Jury consultants would go on a feeding frenzy.

Alexander Hamilton recognized the importance of trial by jury when he wrote, in *The Federalist* 83,

The friends and adversaries of the plan of the [constitutional] convention, if they agree on nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.<sup>134</sup>

Chief Justice William H. Rehnquist noted,

The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary. Those who passionately advocated the right to a civil jury trial did not do so because they considered the jury a familiar procedural

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enforced the procedure as a limit on the availability of trials. It should therefore not be particularly surprising that the number of trials in federal court has dropped precipitously since the mid-1980s.” *Id.* (footnote omitted).

132. *Id.* at 1335.

133. *See supra* Part V.B.

134. THE FEDERALIST No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).



device that should be continued; the concerns for the institution of jury trial that led to the passages of the Declaration of Independence and to the Seventh Amendment were not animated by a belief that use of juries would lead to more efficient judicial administration. Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the "passional elements in our nature," and thus keep the administration of law in accord with the wishes and feelings of the community. O. Holmes, *Collected Legal Papers* 237 (1920). Those who favored juries believed that a jury would reach a result that a judge either could not or would not reach.<sup>135</sup>

Critical societal benefits would be achieved from more citizens participating in the federal jury process. As Alexis de Tocqueville, the erudite Frenchman who wrote so passionately of the democratic and cultural institutions at the heart of our independence, observed,

I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.<sup>136</sup>

After every jury trial over which I have ever presided, I have "debriefed" the jury following their verdict. In my estimation, well over 95% of the jurors find federal jury service to be exceptionally fulfilling, rewarding, and are truly honored to be able to serve their country as jurors. At the end of every discussion, I ask the jurors to be "goodwill" ambassadors for *their* federal court and tell five friends and neighbors about their jury service experience. Based on the feedback I receive, I am confident many do this.<sup>137</sup> One potential juror sent me a letter after he was not selected. I show this letter on a large screen in my courtroom to potential jurors during jury selection:

Dear Sir,

I just wanted to take a minute to thank you for opening my eyes. This morning I sat on the jury panel and was released. I really regret that I did not take the questionnaire seriously and spent most of my time since I received my jury summons trying to get out of serving. Not till today did I slow down and realize that it was a privilege not a chore to be selected to be on the juror panel.

This experience has changed my outlook and my attitude so very much. Tonight at the supper table I will be making sure that my girls understand how important this service is and will most likely steal your reference to the privilege of voting and paying taxes. It is my hope that I just may raise the

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135. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343–44 (1979) (Rehnquist, C.J., dissenting) (footnote omitted).

136. ALEXIS DE TOCQUEVILLE, 1 *DEMOCRACY IN AMERICA* 337 (Henry Reeve trans., Schocken Books 1961) (1835).

137. As part of my "jury-centered" approach to judging, every juror is given a questionnaire to take home and return in a self-addressed, stamped envelope, in which they are asked to critique every aspect of their jury service, including the lawyers and me!

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child that someday in your court room will raise their hand that they had in fact looked forward to the opportunity to serve.

Thank You again, Ed J. \*\*\*\*\*138

Increased participation of jurors in the federal civil justice system would reap incredible rewards in terms of increasing the faith and confidence that the public has in our federal civil justice system.

Do I think summary judgment will be eliminated anytime soon? Of course not. But then I thought no one would pay for bottled water or radio, either. As Professor Bronsteen noted, there are too many powerful interests afoot for that to happen.<sup>139</sup> So, failing elimination of summary judgment, what potential changes should become part of the national debate on summary judgment? I offer a few and leave it to others to develop their pros and cons.<sup>140</sup>

Summary judgment would not be eliminated where the parties consent to its use. Certainly there is a significant minority of cases where both parties move for summary judgment and often, but not always, the case may be decided on cross motions and a trial is truly unnecessary. I have no problem with summary judgment if both parties seek to invoke it.

Amend Rule 56 to alter the American rule on attorney fees.<sup>141</sup> Award the party who successfully defeats a summary judgment motion its actual attorney fees plus the fees spent by its adversary. Frivolous and nonmeritorious summary judgment motions would all but disappear overnight. Unlike Professor Brunet’s alleged summary judgment “premium,”<sup>142</sup> this would provide a true incentive not to file frivolous or nonmeritorious summary judgment motions. We could debate the amount of fees, such as whether just awarding the party defeating the motion its own fees would be

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138. Letter from prospective juror to author (2011) (on file with author).

139. See *supra* note 122 and accompanying text.

140. At the risk of the academy and others criticizing my approach of leaving these suggestions to others, I am trying to keep this an “essay” within the meaning of the term. I have already failed to keep it “short,” but it is, at least, a presentation of my “personal views,” and they are “tentative.” See *supra* note 1. However, I will be more than pleased to join the debate on future occasions, as I have plenty to say!

141. A brief history of the American rule follows:

Originally, the United States followed the English rule with respect to fee-shifting, which required the losing party to pay the prevailing party’s attorney fees. This rule had roots stretching as far back as Roman law. The English rule, however, never took root in American courts; in 1796, the Supreme Court [in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796)] rejected the English approach and created the American rule, which requires each party to pay its own attorney fees. The Court opined that the “general practice of the United States [was] in opposition to” the English rule. Moreover, the Court noted that “even if [the American rule is] not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.”

Jacob Singer, Note, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?*, 84 ST. JOHN’S L. REV. 693, 695 (2010) (footnotes omitted).

142. Brunet, *supra* note 49, at 690.

sufficient. A balance would need to be drawn that would help dramatically eliminate nonmeritorious motions while not being unduly punitive.

Rule 56 could be amended to abrogate its use in certain kinds of cases, such as low dollar cases and cases that could be tried in less time than preparing, resisting, and ruling on a typical summary judgment motion. Standards would have to be debated and drafted to determine which cases would be excluded and how they would be selected for exclusion.

Another potential solution to the overuse and abuse of summary judgment would be to alter the current standard for granting a motion. Richard Steagall, a trial lawyer from Peoria, Illinois, has forcefully argued that Rule 56 should be amended to return to “the common law standard applied in the 48 years from the 1938 adoption of the Federal Rules of Civil Procedure to the 1986 trilogy,” under which summary judgment would only be granted “when the movant has negated the existence of any genuine issue of material fact to the extent that no reasonable person can disagree on what is true.”<sup>143</sup> In the final analysis, after all the judges and scholars weigh in, this suggestion from a real “trial lawyer” from Peoria may be the best of all. Why am I not surprised?

The trouble with all of these suggestions short of abolishment is that they do little, if anything, to overcome the main problem that I see: inappropriately granting summary judgment and routinely invading the province of the trial jury as to weighing evidence, determining credibility of witnesses, determining the legitimacy of the employers’ articulated nondiscriminatory justifications, and weighing the plaintiff’s evidence of pretext.<sup>144</sup> As Professor McGinley observed, “Many recent decisions wrongly interpret the trilogy 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.”<sup>145</sup> Rule 56 simply no longer works as intended.

One of the most egregious (and very recent) examples I have encountered of Rule 56 failing to work as intended comes from Seventh Circuit Judge Richard Posner’s comments in oral argument in the Family and Medical Leave Act (FMLA) case *Nicholson v. Pulte Homes Corp.*, in which the plaintiff, Donna Nicholson, alleged she was terminated after taking two days off to care for sick family members.<sup>146</sup> Faced

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143. Steagall, *supra* note 124, at 507. Like Steagall, Professor Stempel makes a persuasive argument for a return to the pre-Trilogy standard for summary judgment—what he calls the *de facto* scintilla rule—under which a nonmoving party could survive its opponent’s motion for summary judgment by producing at least some evidence (more than a mere scintilla) in its favor, even if the judge viewed the evidence as weak: “One virtue of the *de facto* scintilla rule that dominated pre-1986 summary judgment was that it minimized the trial court’s weighing and assessment of the evidence, which acted as a restraint on the judge’s ability to substitute his or her personal preferences for jury deliberation.” Stempel, *supra* note 44, at 684–85.

144. As detailed earlier, many scholars have also recognized the serious problems caused by the judiciary’s post-Trilogy invasion of the jury’s rightful role. See *supra* notes 37–45, 61–64, and accompanying text.

145. McGinley, *supra* note 37, at 229 (footnotes omitted).

146. See 690 F.3d 819 (7th Cir. 2012) (affirming the district court’s summary judgment ruling in favor of employer on both the FMLA claims of interference and retaliation because employee failed to provide employer adequate notice before taking FMLA leave).

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with evidence produced by the plaintiff that the decisionmaker, when asked why she fired the plaintiff, responded, “Well, I can’t say, but Donna’s dealing with personal family issues that she needs to attend to,” Judge Posner remarked, “But it would be natural to say, yeah, ‘personal reasons.’ That’s more polite than saying, well, ‘She was fired for incompetence,’ or ‘Not doing her job,’ right? I wouldn’t attach any weight to that.”<sup>147</sup> Judge Posner formed inferences based on the facts and assumed there could be no other opinion on the subject. It is the jury’s role, not the judge’s, to weigh the evidence. That a highly respected and brilliant circuit court judge would so openly substitute his inferences for the jury’s demonstrates just how far gone Rule 56 is.

Given the virtual impossibilities of altering the paradigm shift of how judges currently decide these motions, it is time for Rule 56 to go the way of carbon paper. It simply has outlived its utility. Trial by jury has constitutional underpinnings—summary judgment does not. As Judge Hornby wrote, “[T]here is no constitutional right to summary judgment, but there is to jury trial. Federal judges should not be reluctant to send parties to trial.”<sup>148</sup>

## VII. CONCLUSION

In the December 20, 1937 U.S. Supreme Court Order referring the original rules of civil procedure to the attorney general and then on to Congress, the last sentence reads, “Mr. Justice Brandeis states that he does not approve of the adoption of the Rules.”<sup>149</sup> I am quite confident his objections had nothing to do with the unintended and then unforeseen consequences of summary judgment. But nearly seventy-five years after Rule 56 went into effect, we now know that summary judgment is increasingly overused, that this problem is magnified in employment discrimination cases, and that employment discrimination plaintiffs are fleeing federal courts in unprecedented numbers. There is strong circumstantial, anecdotal, and empirical evidence that federal courts have an anti-plaintiff bias effect in summary judgment rulings. The rise of summary judgment is probably strongly related to the vanishing civil jury trial. I propose eliminating summary judgment or, at the very least, dramatically amending it. I believe this would help fulfill the command that federal civil litigation would be “administered to secure the just, speedy and inexpensive determination of every action and proceeding”—the directive of the first rule of federal civil procedure that our federal civil justice system has failed miserably to follow. If federal judges spent half the time they currently do dismissing cases on summary judgment and turned their energies toward making litigation just, speedy,

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147. Oral Argument at 7:50-7:56; 8:04-8:18, *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819 (7th Cir. 2012) (No. 11-2238), *available at* [http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=11-2238&submit=show\\_dkt&yr=11&num=2238](http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=11-2238&submit=show_dkt&yr=11&num=2238). One should listen to the full exchange between plaintiff’s counsel, Alejandro Caffarelli, and Judge Posner to appreciate the full impact of Judge Posner’s one-sided inference drawing. His tone clearly conveys his inexplicable inability to understand that many others could not only easily draw a strong inference of discrimination, but also conclude that the reason given by the decisionmaker was direct, compelling, and, for some, conclusive evidence of discriminatory animus.

148. Hornby, *supra* note 33, at 287.

149. Order of Dec. 20, 1937, 302 U.S. 783 (1937).

and inexpensive, the federal civil justice system would undergo a gigantic and much needed transformation. Jury trials would increase, costs would be reduced, and society would be the huge winner.

I believe, as Professor Brooke D. Coleman does, that “[r]egardless of what the data might tell us, the bottom line is that one either has great faith in the value of the jury trial or one does not.”<sup>150</sup> I plead guilty to the charge that four decades of working in the cotton rows of employment discrimination have made me a true believer in the jury system. However, as a true believer in the jury, I am in the good company of the Framers of our Constitution:

In drafting the Constitution, the Founders cemented the role of the jury as a political and constitutional actor. The right to a jury is the only right present in both the body of the Constitution and the Bill of Rights. For all the disagreements the Founders suffered in drafting the Constitution, they did not quarrel over the wisdom of a robust jury system as a vital component of a democracy. To the Founders, an independent jury was at the heart of the Bill of Rights.<sup>151</sup>

All of us in the federal civil justice system need to be reminded of the indelible words of Charles May, in his commencement address to a class of future lawyers in 1875: “The jury system is the handmaid of freedom. It catches and takes on the spirit of liberty, and grows and expands with the progress of constitutional government. . . . Rome, Sparta and Carthage fell because they did not know it[;] let not England and America fall because they threw it away.”<sup>152</sup> My hope is that this essay will stimulate further spirited discussion on the viability of summary judgment. In Noam Chomsky’s nomenclature, I am pleased to be from Neptune.<sup>153</sup>

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150. Coleman, *supra* note 54, at 725.

151. Jenny E. Carroll, *The Jury’s Second Coming*, 100 GEO. L.J. 657, 673–74 (2012) (footnotes and internal quotation marks omitted).

152. Charles S. May, Commencement Address to the University of Michigan Law School (Mar. 1875), in J.W. DONOVAN, *MODERN JURY TRIALS AND ADVOCATES* 165–90 (2d rev. ed., New York, Banks & Bros. 1882). Charles May’s observations are some of my favorite to include in my opinions regarding the right to trial by jury. See, e.g., *Baldwin v. United States*, 823 F. Supp. 2d 1087, 1092 (D. N. Mar. I. 2011).

153. See *supra* note 128 and accompanying text.