In Memoriam

# *Torgerson's* Twilight: The Antidiscrimination Jurisprudence of Judge Diana E. Murphy

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To be a clerk for Judge Diana Murphy was not just one of the great honors of my life as a lawyer.[1] It was also one of the great joys. Many judges have a reputation for fairness, intelligence, wit, or compassion stemming from their performance on the bench—and Judge Murphy well deserved hers. But Judge Murphy was rare in that her reputation as a mentor for her clerks—the kindness, love, and support she gave to all of us while we served and throughout our careers—extended just as far. It is a cliché to speak of clerking as "the best job you'll ever have," but working for Judge Murphy gave life to the adage "it's not a job if you love what you do."

Still, every workplace has its unwritten sets of rules, and Judge Murphy's chambers were no different. The first, and by far most important, rule of being a Judge Murphy clerk[2] was to always ensure the chamber was stocked with Tab soda. This cannot be overstated: running out of Tab was a drop-everything, Category-5-hurricane level emergency. Like most humans born after 1975, I had no idea before beginning my clerkship that Tab soda was still offered for sale, but I quickly learned that Judge's consumption alone was enough to keep at least one production line going. One could get a fairly accurate gauge of Judge Murphy's daily workload based on the number of Tabs she drank: one

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1. I respect the advice given by Paul Horwitz in his recent clerkship tribute, but I will not follow it. Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes*, 69 ALA. L. REV. 663 (2018).

2. I attempted to popularize the moniker "Murphette" to refer to Judge Murphy's clerks, with limited success.

Tab on a standard day, two Tabs on a particularly heavy day, and three Tabs . . . well, let's just say it was fortunate there were very few three-Tab days.[3]

The second rule of clerking for Judge Murphy was that one could only have positive opinions about the building that housed the Federal Courthouse in Minneapolis. Judge Murphy was Chief Judge of the District of Minnesota at the time the building was constructed and had a hand in the choice of architect and design.[4] This rule had become widely enough known that I was aware of it before I even began clerking—it was a piece of advice relayed to me in the utmost seriousness to help me prepare for my interview. Fortunately for me, I genuinely *do* like the architecture of the courthouse building (including the grassy mounds out front which serve the dual role of security measure and greenery feature), so this one was no trouble to follow.

The third rule was not to talk about cats. I never did get the story behind that one, though it did sometimes require some creative writing around the subject of "cat's-paw" discrimination liability.[5]

And the fourth and final rule was to avoid, if at all possible, citing the case of *Torgerson v. City of Rochester*.[6]

Of all the unwritten rules, this one may well have been the strangest—and not just because it was the only one to touch on an actual legal case. *Torgerson* was a 2011 en banc antidiscrimination law decision, the most consequential portion of which seems at first blush to be entirely uncontroversial and which

3. Once, after a doctor advised her to drink less soda, I observed Judge Murphy drinking LaCroix Sparkling Water. It was an experiment that lasted all of one day.

4. For more on Judge Murphy's role in the construction of the courthouse, see Letter from Richard L. Gilyard, Former Architect of the Eighth Circuit of the U.S. Courts, to the Minn. Cong. Delegation (June 12, 2018) (on file with the Minnesota Law Review).

5. A term coined by Judge Posner, "cat's-paw" liability occurs where a supervisor—not accused of discriminatory animus him or herself—simply serves as a conduit for the prejudicial action of someone else in the organization. Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990). A search of Judge Murphy's opinions on Lexis Advance reveals she never once used the phrase.

6. Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011) (en banc).

Judge Murphy (along with all of the other judges on the court) joined.[7] So what about it could possibly provoke such antipathy?[8]

Answering that question takes us on a tour of some of Judge Murphy's most important antidiscrimination law opinions. Her jurisprudence in this field was marked by a profound and empathic understanding of how deep the wrongs of discrimination can cut, even in circumstances where relatively insulated judges may have difficulty understanding the gravity of the harm. But her opinions stand out particularly for recognizing how these claims are often deeply fact-laden, and therefore should not be preemptively dismissed on summary judgment by judges overconfident in their ability to declare what does and does not count as actionable discrimination. Resisting judicial trends that seek to narrow the boundaries of a viable discrimination claim and intrude further and further into the province of juries, Judge Murphy pushed for antidiscrimination doctrine to include the full breadth of what can plausibly count as unlawful discrimination.

## I.

The summary judgment standard in federal court is at this point exceedingly familiar: courts should grant summary judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[9] Summary judgment is not, however, a license for judges to weigh evidence or apply their independent judgment to the facts—those activities remain the sole province of the jury.[10] Consequently, a court considering a summary judgment motion must "view[] the evidence in the light most favorable to the nonmov-

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7. The portion that was unanimous, and likely prompted the case to be heard en banc in the first place, was the declaration that "[t]here is no 'discrimination case exception' to the application of summary judgment . . . ." *Id.* at 1043 (citations omitted). This will be discussed at length below. While agreeing that the normal rules of summary judgment should apply, Judge Murphy joined four other judges in dissenting with respect to their application—namely, whether there was a genuine dispute of material fact regarding the underlying discrimination claims in the case. *Id.* at 1054 (Smith, J., dissenting).

8. As it happens, *Torgerson* actually *does* mention cat's-paw discrimination liability. *Id.* at 1045 (citing Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011)). But I do not believe that suffices as the answer.

9. FED. R. CIV. P. 56(a).

10. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.").

ing party and draw[] all justifiable inferences in favor of the nonmoving party."[11] It is only in those cases where no "rational trier of fact [could] find for the nonmoving party" that summary judgment can be granted.[12]

Prior to *Torgerson*, a series of Eighth Circuit precedents had suggested that discrimination cases may present especially inapt candidates for summary judgment.[13] As many of these cases observed, proof of discrimination often is a matter of inference rather than direct evidence, and whether a finding of discrimination ought to be inferred from a given bit of evidence generally represents a question of fact rather than law.[14] Hence, as one case put it, "summary judgment should be used sparingly in the context of employment discrimination and/or retaliation cases[,]"[15] in order to permit the jury to fulfill its proper role of deciding what inferences to draw from potentially ambiguous or indirect evidentiary records.[16]

The first holding in *Torgerson*, joined by all of the judges on the Eighth Circuit (including Judge Murphy), addressed this line of precedent.[17] It concluded, in straightforward fashion, that "[t]here 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."[18] Stated thusly, this conclusion is clearly correct—it simply restates the Supreme Court's oft-reiterated point that

11. Putman v. Unity Health Sys., 348 F.3d 732, 733 (8th Cir. 2003).

12. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

13. *See* Torgerson v. City of Rochester, 605 F.3d 584, 593 (8th Cir. 2010) (collecting cases), *vacated*, 643 F.3d at 1053.

14. *See, e.g.*, Peterson v. Scott County, 406 F.3d 515, 520 (8th Cir. 2005), *abrogated by Torgerson*, 643 F.3d at 1031 ("Summary judgment should seldom be granted in employment discrimination cases because intent is often the central issue and claims are often based on inference."); Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1156 (8th Cir. 1999), *abrogated by Torgerson*, 643 F.3d at 1031 ("Summary judgment seldom should be granted in discrimination cases where inferences are often the basis of the claim . . . .").

15. Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1117 (8th Cir. 2006), *abrogated by Torgerson*, 643 F.3d at 1031.

16. *See id.* at 1118 ("Where reasonable fact finders could extend an inference in favor of the non-moving party without resorting to speculation, we may not declare the inference unjustifiable simply because we might draw a different inference.").

17. *See Torgerson*, 643 F.3d at 1043.

18. *Id.*

courts should not "treat discrimination differently from other ultimate questions of fact."[19] Where summary judgment is appropriate in a discrimination case—that is, where, after "viewing the evidence in the light most favorable to the nonmoving party and drawing all justifiable inferences in favor of the nonmoving party" the movant is entitled to judgment as a matter of law—it should be granted.[20] Where it is not, it should not be.[21] Who could argue?

Nobody, one would think. But there remains an open question as to whether, in practice, Eighth Circuit discrimination jurisprudence has in fact followed this admonition. The summary judgment standard, after all, serves a dual role. It allows for early disposition of cases where there are no disputed material facts and one side is entitled to prevail as a matter of law;[22] but it also guarantees that in those cases where facts are contested, and reasonable inferences could be drawn supporting either side, the parties are entitled to a jury trial.[23] A "discrimination case exception" to the summary judgment rule can exist just as much when precedents illicitly strip cases away from juries as it would when cases are improperly submitted to them.

## II.

Many of the key antidiscrimination statutes are admirably succinct. Title VII, for example, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[24] Section 1981 is similarly terse in its verbiage:

19. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993)); *St. Mary's Honor Ctr.*, 509 U.S. at 524 (quoting U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)); *Aikens*, 460 U.S. at 716.

20. Putman v. Unity Health Sys., 348 F.3d 732, 733 (8th Cir. 2003).

21. *See id.*

22. FED. R. CIV. P. 56(a).

23. *See generally id.*

24. 42 U.S.C. § 2000e-2(a)(1) (2016). Other federal antidiscrimination statutes use parallel language. For example, the Age Discrimination in Employment Act (ADEA) renders it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (2016). Consequently, as Judge Murphy has noted, Title VII precedents can be used to assist in interpreting ADEA cases and vice versa, "since the relevant definitions are

it gives all persons "the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens," including "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[25] Nonetheless, mighty oaks from little acorns grow, and these relatively simple federal mandates have generated a wealth of doctrine and case law interpreting, applying, and extending discrimination jurisprudence across a seemingly endless array of fact patterns and social contexts. What unites Judge Murphy's jurisprudence in this arena is an uncompromising demand that judges take seriously these diverse facts and contexts, and resist the temptation to substitute their own subjective assessments of what counts as meaningful discrimination for those of juries.

*Gregory v. Dillard's, Inc.* is a good place to begin.[26] In *Gregory*, the Eighth Circuit sat en banc to consider § 1981 discrimination claims brought by over a dozen Black customers of Dillard's department stores.[27] While the precise factual allegations varied, the account of one plaintiff, Crystal Gregory, is illustrative. While shopping at a Dillard's store, she recounted being closely followed by a sales associate to the dressing room even after she had informed the associate she did not need assistance.[28] When she emerged from the dressing room, Gregory encountered the associate "guarding the fitting room door with her arms crossed and a smirk across her face. Two police officers were also waiting just outside the entrance to the fitting rooms."[29] After an unsatisfactory discussion with the store manager, Gregory left in disgust without completing her purchase.[30] Gregory also testified that "she could not recall a time when she had visited [this] Dillard's" without being closely trailed, and that she had at least once heard an employee "characterize African Americans as thieves."[31]

In general, the plaintiffs alleged that they were subjected to racially motivated surveillance and shadowing that was degrading, humiliating, and ultimately deterred them from making a

nearly identical and the underlying purpose is similar." Devine v. Stone, Leyton & Gershman, P.C., 100 F.3d 78, 80 (8th Cir. 1996).

25. 42 U.S.C. § 1981(a)–(b) (2016).

26. Gregory v. Dillard's, Inc., 565 F.3d 464 (8th Cir. 2009) (en banc).

27. *Id.*

28. *Id.* at 481 (Murphy, J., dissenting).

29. *Id.*

30. *Id.*

31. *Id.*

purchase at the store outright.[32] Despite this, the court concluded that none of the plaintiffs' claims sufficed to reach a jury and, over a dissent by Judge Murphy, granted summary judgment to the store.[33]

The core legal questions in *Gregory* were whether the plaintiffs had "engage[d] in a protected activity" (that is, had they sought to make a contract) and whether they had experienced "interference with that activity by the defendant."[34] Judge Murphy's dissent addressed both of these questions by stressing the degree to which the majority sought to transform factual disputes into legal certainties via extraordinarily narrow interpretations of relevant antidiscrimination doctrine.[35] Indeed, her opening salvo against the majority opinion was to note that "the majority largely neglects to discuss the facts of this case until the last quarter of its opinion and then seems to sweep them aside."[36]

The Supreme Court made clear that § 1981 "protects the would-be contractor along with those who already have made contracts."[37] The majority in *Gregory* took a narrow view of this mandate, effectively limiting it to when a buyer places an item in front of a cashier and offers to pay.[38] But, as Judge Murphy observed, "[i]t is difficult to generalize about when a shopper's interactions with a merchant ripen into a protected 'tangible attempt to contract' because by definition the determination must be fact based."[39] "The steps toward contract formation will vary by context"[40]—there is a difference between the amount of inter-

32. *Id.*

33. To be precise, most of the plaintiffs' claims were dismissed for failure to state a claim as their complaint had solely alleged that they were "followed and surveilled while they were in the store" but had not "attempted to purchase merchandise." *Id.* at 473–74 (majority opinion). The remainder, where the plaintiffs expressly pled that they were planning on making a purchase, were dismissed on summary judgment. *Id.* at 474.

34. *Id.* at 469 (citing Green v. Dillard's, Inc., 483 F.3d 533, 538 (8th Cir. 2007); Bediako v. Stein Mart, Inc., 354 F.3d 835, 839 (8th Cir. 2004)); *see* Runyon v. McCrary, 427 U.S. 160, 172 (1976) (asserting that a case where plaintiffs "sought to enter into contractual relationships" with the defendant but were blocked from doing so represented "a classic violation of § 1981").

35. *Gregory*, 565 F.3d at 478–97 (Murphy, J., dissenting).

36. *Id.* at 479.

37. Domino's Pizza, Inc. v. McDonald, 546 U.S. 470, 476 (2006).

38. *See Gregory*, 565 F.3d at 470.

39. *Id.* at 484 (Murphy, J., dissenting).

40. *Id.* at 485.

action and give-and-take between customer and staff that typically precedes purchasing a pack of gum versus purchasing durable home goods.

> In the specific context of department store shopping, it is incontrovertible that customers will often want to inspect garments for quality and fit or sample fragrances for scent before concluding a purchase. Modern retailers such as Dillard's place much of their merchandise on open display, inviting browsers to examine, sample, and inspect their goods, all with an eye towards generating sales. The atmosphere and ambience of a high end retail store are part of its overall allure and contribute both to the shopping experience and the customer's willingness to consider goods for purchase. When a shopper in good faith takes advantage of these opportunities, she is surely protected by § 1981. It would be remarkable indeed to conclude otherwise and to permit a merchant out of pure racial animus to deny African American customers access to fitting rooms so long as it allowed such customers to purchase outfits straight from the rack.[41]

Similar problems plagued the majority's interpretation of "interference."[42] At the summary judgment stage, Dillard's conceded that the plaintiffs had provided evidence of intentionally discriminatory actions targeting Black shoppers.[43] But the majority nonetheless concluded that certain forms of intentional discrimination were permitted under the Act in cases where they did not "actually interfere" with the customer's ability to contract.[44] Racially discriminatory surveillance and shadowing, it argued, do not represent an "interference" with the making and enforcement of a contract.[45] It is instead the sort of conduct that the reasonable customer would shrug off; it would not "'block' or 'thwart' the creation of a contractual relationship."[46] But this is the epitome of a factually laden question. Did the behavior of Dillard's employees towards Gregory—shadowing her when she went to fitting rooms, smirking at her when she left the dressing room while having police officers waiting for her outside, direct-

41. *Id.*

42. *See generally id.* at 469–76 (majority opinion).

43. *Id.* at 469.

44. *Id.* at 471 (quoting Arguello v. Conoco, Inc., 330 F.3d 355, 358–59 (5th Cir. 2003)).

45. *Id.* at 476 ("As noted, several courts have concluded that not all offensive conduct of a merchant constitutes actionable interference.").

46. *Id.* ("To recognize a § 1981 claim on the facts in this case, we believe, would dilute the requirement that a defendant 'block' or 'thwart' the creation of a contractual relationship.") (citations omitted).

ing racist remarks towards her, all done on a consistent and regular basis each and every time she visited the store[47]—"interfere" with her desire to contract a sale at Dillard's? One suspects that different observers would answer that question differently. Some might find that Gregory was too sensitive; they would imagine that were they in her shoes they would simply ignore the hostile store workers and complete the purchase. Others might be more empathic with her decision, deciding that many persons would find it intolerable to continue shopping under those conditions and that they therefore pose a tangible and nontrivial barrier to Black persons' ability to contract as equals in the store.[48]

Our legal system does not conclusively decide which answer to that question is right, particularly given how nested it is inside the very particular facts that the plaintiffs testified to. Rather, the core function of a jury trial is to ensure that the ultimate answer—whatever it is—is provided by a body drawn from a diverse cross section of the community instead of the rather rarefied and insulated panel of federal court judges.[49] But the majority in *Gregory* flipped this concern on its head: it suggested that an expansive, context-laden interpretation of "interfering" with a contract would mean that "virtually any case in which there is a disputed issue regarding the merchant's [racist] motivation would be submitted to a jury" (an outcome it clearly viewed as intolerable, though it is unclear why).[50]

47. *Id.* at 481 (Murphy, J., dissenting).

48. *Id.* at 492 ("A reasonable jury could certainly conclude from Gregory's evidence that the behavior exhibited by [a Dillard's employee] was hostile and intimidating. Dillard's may argue that a more patient shopper would have endured this treatment and persisted in making a purchase in spite of it. The proper forum for questions of fact, however, is at trial and not here on review of a motion for summary judgment.").

49. *See* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 20–21 (2017) ("Federal judges are appointed by the President of the United States and have elite backgrounds and credentials. . . . Juries, on the other hand, include more of a mix of the population, with, for example, more income levels, women, and people of different races and religions.").

50. *Gregory*, 565 F.3d at 472.

The upshot of the court's decision in *Gregory* is to establish as a matter of law "that § 1981 tolerates a certain level of intentional discrimination."[51] Of course, the majority emphatically denied this conclusion.[52] In its view, it was merely enforcing what it took to be Congress's policy judgment "that § 1981 as presently drawn does not regulate the retail shopping environment to the extent urged by the plaintiffs in this case."[53] But § 1981 prohibits *any* racial discrimination that interferes with the making and enforcement of contracts, regardless of whether it represents a small or large imposition on the practices of departmental retailers.[54] The text of § 1981 does not disappear simply because it requires greater policing of corporate retailers than some appellate judges would generally prefer.[55] And our jury system and summary judgment standard are designed to ensure that cases where core facts are contested are decided by juries, not judges.

51. *Id.* at 493 (Murphy, J., dissenting).

52. *Id.* at 476 (majority opinion) (denying that its ruling meant "that a certain level of race discrimination in retail establishments is 'acceptable'").

53. *Id.* at 476–77.

54. 42 U.S.C. § 1981(a)–(b) (2016) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . includ[ing] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.").

55. There are other arenas where Judge Murphy has resisted efforts to place additional hurdles on top of clear statutory text because adherence to the plain language was thought to place too heavy a burden on corporate interests. In *Keiran v. Home Capital, Inc.*, 720 F.3d 721 (8th Cir. 2013), *vacated*, 135 S. Ct. 1152 (2015), an Eighth Circuit panel considered how a debtor can rescind a transaction under the Truth in Lending Act (TILA). The statutory text states that "the obligor shall have the right to rescind the transaction . . . by notifying the creditor, in accordance with regulations of the [Consumer Financial Protection] Bureau, of his intention to do so." 15 U.S.C. § 1635(a) (2017). The relevant regulations likewise state that a consumer may "exercise the right to rescind" by "notify[ing] the creditor of the rescission by mail, telegram or other means of written communication." Truth in Lending Act, 12 C.F.R. § 226.23(a)(2) (2018).

For Judge Murphy, this was a simple case: the "statutory text is clear" and so the "sole function of the courts is to enforce the plain language of the statute" which requires that debtors only notify creditors of their intention to rescind. *Keiran*, 720 F.3d at 731 (Murphy, J., dissenting) (quoting Coop v. Frederickson, 545 F.3d 652, 656 (8th Cir. 2008)). But the panel majority disagreed, concluding that TILA required not just the notice demanded by the statute, but also a filed lawsuit—in part because it worried that a contrary ruling would allow for homeowners to place an indefinite cloud on the bank's title to property. *Id.* at 727–28 (majority opinion). Judge Murphy's position was eventually vindicated by a unanimous Supreme Court in their "[s]hortest opinion of the year." *See* Jesinoski v. Countrywide Home Loans, Inc., 135 S. Ct. 790 (2015); Ronald Mann, *Opinion Analysis: Shortest Opinion of the Year Explains TILA Rescission Right*,

*Gregory* has reverberations. Earlier this year, there was an incident at a St. Louis-area Nordstrom that was highly reminiscent of the facts in *Gregory*.[56] Three Black teenagers were shopping for prom wear, only to find themselves continually eyed and closely shadowed by Nordstrom employees as they moved throughout the store.[57] They were made so uncomfortable that they left, but they returned when they realized one had left a hat behind.[58] At that point, a White customer called them "a bunch of bums."[59] When they asked to speak to a manager about that comment and the harassment they had experienced, employees refused to allow them to do so.[60]

The teenagers then left the store again, but decided to return because, as they later put it, "[w]e have money, we came here to shop and demonstrate to them that we aren't thugs. We have money like anybody else."[61] After they paid for their items, they were informed that store employees had called the police, claiming the teenagers had shoplifted.[62] The teenagers waited for the officers to arrive and showed them their bag and receipts, at which point the police concluded no crime had occurred.[63]

The Nordstrom apologized in this case and the teenagers seem uninterested in filing suit—which is fortunate, because under *Gregory* it would almost certainly be dismissed even if there was conclusive evidence that the behavior of the Nordstrom employees was racially motivated.[64] But it is worth noting the catch-22 that *Gregory* placed the teenagers in. Had the teenagers left the store after the initial round of shadowing and not returned, *Gregory* would have foreclosed the contention that they

SCOTUSBLOG (Jan. 13, 2015, 4:22 PM), http://www.scotusblog.com/2015/01/opinion-analysis-shortest-opinion-of-the-year-explains-tila-rescission-right.

56. Rachel Siegel, *Nordstrom Rack Apologizes After Calling the Police on Three Black Teens Who Were Shopping for Prom*, WASH. POST (May 9, 2018), https://www.washingtonpost.com/news/business/wp/2018/05/08/nordstrom-rack-called-the-police-on-three-black-teens-who-were-shopping-for-prom.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See supra* notes 26–46 and accompanying text.

had been blocked or thwarted in their desire to shop at the establishment[65]—even though, as it turns out, their instincts regarding Nordstrom's willingness to sell to them as equals turned out to be precisely on target.[66] On the other hand, once they decided to test the proposition and ring up the sale, they had the police called on them[67]—certainly compounding their humiliation and potentially putting them in physical danger.[68]

Put another way, *Gregory* is really a case about whose instincts one trusts. Black shoppers who experience constant, obtrusive shadowing and surveillance feel threatened; they take this treatment as evidence that they will not be able to freely contract with the store on the same basis as White shoppers. The *Gregory* majority asserts that this sentiment is irrational: nobody (certainly no juror) could reasonably believe that customers are blocked or thwarted from transacting with a department store on this basis.[69] The Nordstrom teenagers, in effect, called that bluff, and the result was a police encounter. What is happening here is that Black customers are not being respected as "knowers": as the sorts of persons with knowledge and testimony that is credible and deserves to be taken seriously.[70] Their regular experience of having to traverse largely White spaces should, in the abstract, give them significant insight into what sorts of behaviors do and do not signal that they are being viewed as threats or accepted as equals. They know what it *means* when store employees begin to shadow them, including what it may mean if they do try to carry through with the transaction.[71] But

65. Gregory v. Dillard's, Inc., 565 F.3d 464, 476–77 (8th Cit. 2009) (en banc).

66. *See* Siegel, *supra* note 56.

67. *See id.*

68. Note that under *Gregory* it is unlikely that even Nordstrom's decision to call the police would clear the way for a suit. At least one of the plaintiffs in *Gregory* had police officers waiting for her when she emerged from a dressing room, *Gregory*, 565 F.3d at 492 (Murphy, J., dissenting), and the majority favorably cited a Seventh Circuit decision rejecting a § 1982 claim where shoppers were approached by police officers while considering a purchase. *Id.* at 470–71 (majority opinion) (citing Morris v. Office Max, Inc., 89 F.3d 411, 413–15 (7th Cir. 1996)).

69. *See Gregory*, 565 F.3d at 476–77.

70. *See* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING 20 (2007) (explaining the concept of an "epistemic injustice" as "a kind of injustice in which someone is *wronged specifically in her capacity as a knower*").

71. On the experience of being Black in predominantly White spaces, and the distinctive knowledge that one accrues from that experience, see Jamelle Bouie, *White Spaces*, SLATE (Apr. 16, 2018), https://slate.com/news-and

the *Gregory* majority did not seem to accept that this knowledge was reliable or meaningful compared to their own intuitions about what does and does not block a consumer transaction.[72] And therein lies the problem: the summary judgment standard does not permit judges to simply substitute their own perspective for that of a jury. Where reasonable minds could differ as to the impact of a store's practices, then juries make the call.[73] But the *Gregory* majority did not accept any room for disagreement: it believed that shadowing and surveillance could not reasonably obstruct someone from contracting with a department store, and any counter-narratives emerging from the lived experience of Black shoppers did not even rise to the level of a genuine dispute of material fact.[74]

*Gregory* is one example of an endemic problem in antidiscrimination law. A great many antidiscrimination doctrines demand that legal actors make assessments regarding the seriousness or severity of discriminatory practices. These include fine-grained determinations regarding how pervasive harassment

-politics/2018/04/how-raced-spaces-explain-the-philadelphia-starbucks-arrests .html; Jamelle Bouie et al., *Being Black in Public*, SLATE (Apr. 19, 2018), https:// slate.com/news-and-politics/2018/04/a-conversation-about-starbucks-white -fear-and-being-black-in-public.html.

Discussing the arrest of two Black patrons waiting for a White colleague at a Philadelphia-area Starbucks, Tressie McMillan Cottom and Jamelle Bouie note how while White persons are always shocked when incidents like this result in an arrest, for Black observers this sort of escalation is normal and unremarkable. Bouie et al., *supra*. The disjuncture between what White people perceive as exceptional and aberrant versus what Black people experience as mundane and everyday is demonstrative of how Black testimony simply does not penetrate the White imaginary. *Id.* And this mismatch between White and Black perceptions has an ironically self-insulating character: cases where racial profiling leads to a police encounter are assumed by White actors to be rare, and because they are viewed as rare, those victimized by them are not assumed to have any distinctive insight to offer on the normal operation of the practice—including, say, that for Black individuals in White spaces being threatened with or experiencing a call to the police is *not* rare and *is* normal. *See* David Schraub, *Playing with Cards: Discrimination Claims and the Charge of Bad Faith*, 42 SOC. THEORY & PRAC. 285, 286 (2016) (explaining how epistemic injustice in the case of discrimination claims is dangerously self-insulating, because "prejudice yields the injustice, and simultaneously wards off complaints aimed at attacking the prejudice").

72. *See Gregory*, 565 F.3d at 476–77.

73. *See id.* at 478 (Murphy, J., dissenting) ("Since [plaintiffs] established prima facie cases under § 1981 by raising issues of material fact, their claims should not have been dismissed on summary judgment.").

74. *See id.* at 477 (majority opinion) (affirming dismissal on the grounds that "§ 1981 as presently drawn does not regulate the retail shopping environment to the extent urged by the plaintiffs in this case").

is,[75] or the degree of power and authority that one employee has over another in a given workplace,[76] or when new, less desirable job requirements are materially adverse to an employee.[77] Context is critical in making these determinations—what are the *actual* conditions of employment; what are the *practical* relationships between employer and employee (or worker and customer) that are being traded upon?[78] Yet, putting aside the fact that neither the text of Title VII nor § 1981 provides a safe harbor for "*de minimis* discrimination,"[79] it is fair to ask whether relatively empowered and insulated judges are reliable arbiters of what conduct actually is perceived as—and functionally acts as a form of—discrimination. What conduct *actually* interferes with the ability of a racial minority to contract? What conduct *actually* materially alters the terms and conditions of one's employment?

Harassment law is particularly notorious in this respect. One barrier facing many harassment claims is the doctrine that an employer can only be held vicariously liable for harassment if the harassment is perpetuated by supervisory employees—a doctrine which makes the question "who is a supervisor" of central importance.[80] In *EEOC v. CRST Van Expedited, Inc.*, the Eighth Circuit considered that question in the context of a discrimination complaint by novice female interstate truckers who were sexually abused by lead drivers during mandatory twenty-eight day training trips.[81] The court described the training environment as follows:

> [E]ach trainee embarks on a 28-day, over-the-road training trip with an experienced, "Lead Driver," who familiarizes the trainee with CRST's Team Driving model and evaluates the trainee's performance on this maiden haul. At the conclusion of the trainee's 28-day training

75. *See infra* notes 89–108.

76. *See infra* notes 80–88.

77. *See* Fenney v. Dakota, Minn. & E. R.R. Co., 327 F.3d 707, 716–17 (8th Cir. 2003) (concluding that while an adverse employment action need not involve tangible reductions in pay or benefits, it also does not encompass "everything that makes an employee unhappy" (quoting Montandon v. Farmland Indus., Inc., 116 F.3d 355, 359 (8th Cir. 1997))).

78. *Cf.* Richard Delgado, *Introduction* to CRITICAL RACE THEORY: THE CUTTING EDGE, at xv (Richard Delgado ed., 1995) ("Normative discourse . . . is highly fact sensitive—adding even one new fact can change intuition radically.").

79. *See generally* Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121 (1998) (discussing the development of "de minimis" employment discrimination).

80. *See* Alvarez v. Des Moines Bolt Supply, Inc., 626 F.3d 410, 419 (8th Cir. 2010).

81. EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012).

> trip, the trainee's Lead Driver gives the trainee "a pass/fail driving evaluation" that superiors consider when determining whether to certify the trainee as a full-fledged CRST driver.[82]

The instigating charge alleged that lead drivers subjected their trainees to sexually-explicit remarks and repeatedly forced female drivers to have sex with them in exchange for a passing grade.[83]

The court insulated CRST from liability by concluding that the lead drivers were not supervisory employees.[84] "Lead Drivers," the court concluded, "could only (1) dictate minor aspects of the trainees' work experience, such as scheduling rest stops during the team drive and (2) issuing a non-binding recommendation to superiors at the training program's conclusion concerning whether CRST should upgrade the trainee to full-driver status."[85] On this point, Judge Murphy vigorously dissented. While on the training trip, the trainee and lead driver were effectively alone and the lead driver "controlled almost all of a trainee's day to day activities, including when she was permitted to drive, when she could stop to use the bathroom, and when she could use the truck's satellite device to communicate with the outside world."[86] Context was key, and Judge Murphy sharply criticized the majority for

> overlook[ing] the practical reality created by the relationship between the trainer and the trainee in living and working together in the confined space of a truck over long routes and by the unusual level of control the trainers exercised over every aspect of the trainees' existence while on the road. The isolated work environment, trainees' extended time alone with the trainer, the lack of oversight from company management, the trainers' near total control over trainees' daily lives, and the trainers' substantial control over trainees' promotion chances are sufficient to categorize the trainers as supervisors.[87]

In context, it seems patently obvious that the lead drivers had—in the Supreme Court's words—"immediate . . . authority over the employee" and consequently qualified as a supervisor.[88]

82. *Id.* at 665.
83. *Id.* at 666.
84. *Id.* at 684.
85. *Id.*
86. *Id.* at 697 (Murphy, J., concurring in part and dissenting in part).
87. *Id.* at 698.
88. Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998) (describing a supervisor as one holding "immediate (or successively higher) authority over the employee"). The Supreme Court has since taken a view much closer to that of the *CRST* majority, concluding that to be a supervisor one must be an employee "empowered . . . to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing

Yet here, the blunt object of summary judgment was used to override a more fine-grained analysis of the actual relationship between trainee and lead drivers—with the result that the case was not allowed to go to trial.

A better use of context in a harassment case can be found in 2014's *Ellis v. Houston*.[89] In order for harassment to be actionable under Title VII, it must be sufficiently "severe and pervasive" so as "to affect a term, condition, or privilege of employment."[90] This has been interpreted to pose quite the high bar, and many scenarios which a lay reader might perceive as obvious cases of harassment have been prevented from reaching trial. In *Cottrill v. MFA, Inc.*, for example, repeated acts of peeping on a female employee in the bathroom—followed by the demand that the employee participate in a bait and tape operation to catch the violator (exposing herself again in the process)—were held to be not sufficiently severe forms of harassment to even reach a jury.[91] In *McMiller v. Metro*, the court held that being "embraced and kissed by a supervisor both before and after vocally objecting to such advances, being subjected to an intimate request for personal body grooming that requires close bodily proximity, and being physically prevented from leaving a room by being held in place and kissed" could not constitute sexual harassment.[92] The same conclusion was reached in *LeGrand v. Area Resources for Community and Human Services*, where the allegation was that a member of the board of the plaintiff's organization asked to watch pornographic movies with the plaintiff and asked if they could masturbate together, suggested that acceding to those requests would help the plaintiff advance in the company, grabbed

to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" Vance v. Ball State Univ., 133 S. Ct. 2434, 2443, 2453 (2013) (quoting *Ellerth*, 524 U.S. at 761) (citing *CRST* favorably). Justice Ginsburg, dissenting on behalf of three other colleagues, contended that this standard "is blind to the realities of the workplace" and indicted the majority for "constructing artificial categories where context should be key." *Id.* at 2457, 2466 (Ginsburg, J., dissenting).

89. Ellis v. Houston, 742 F.3d 307 (8th Cir. 2014).

90. Singletary v. Mo. Dept. of Corr., 423 F.3d 886, 892 (8th Cir. 2005) (citing Faragher v. City of Boca Raton, 524 U.S. 775 (1998)); *see* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986).

91. Cottrill v. MFA, Inc., 443 F.3d 629 (8th Cir. 2006); *see id.* at 639–40 (Murphy, J., concurring in part and dissenting in part).

92. McMiller v. Metro, 738 F.3d 185, 191 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part).

the plaintiff's butt and reached for his genitals, and later gripped his thighs.[93]

Given precedents such as these, the plaintiffs in *Ellis* would seem to have had a difficult row to hoe. In *Ellis*, every Black prison guard at the maximum security Nebraska State Penitentiary (all five of them) alleged racial harassment (and retaliation) by five of their White supervisors.[94] The harassment was not physical in nature; rather, it came in the form of "jokes" and snide remarks—referring to the Black guards as "the back of the bus" or saying "it's dark in the corner" (where the Black guards typically congregated).[95] These remarks were sometimes made by the supervisors themselves, and sometimes made by other guards in the supervisors' presence (without punishment).[96] The plaintiffs had the burden of persuading the court that such behavior could qualify as severe and pervasive harassment—a burden they did not successfully carry in the district court, which dismissed their complaint before a trial.[97]

In comparison to some of the fact patterns discussed above,[98] the conduct perpetuated against the Black prison guards might seem to be mild sins. But context matters in discrimination cases, and Judge Murphy ably marshalled the relevant contextual facts in the record to demonstrate that a reasonable jury could find that the Black guards were the victims of unlawful harassment.[99] In an earlier case, Judge Murphy had written that a hostile work environment "is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it into a series of discrete incidents."[100] Here, the "jokes" and racially offensive remarks persisted over a period of months—a pattern of repetition which reinforced and accentuated their damaging nature.[101] Moreover, Judge Murphy emphasized the particular work environment of a maximum security

93. LeGrand v. Area Res. for Cmty. & Human Servs., 394 F.3d 1098, 1100 (8th Cir. 2005).

94. *Ellis*, 742 F.3d at 311.

95. *Id.* at 313.

96. *Id.*

97. *Id.* at 311.

98. *See supra* notes 90–93 and accompanying text.

99. *Ellis*, 742 F.3d at 320 (holding that "the context in which abusive remarks are made and by whom can increase their severity and the detrimental impact").

100. Hathaway v. Runyon, 132 F.3d 1214, 1222 (8th Cir. 1997) (quoting Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) (internal quotation marks omitted)).

101. *Ellis*, 742 F.3d at 321–22.

prison—where absolute trust in one's colleagues and assurance that they will have your back are nonnegotiable features of a functioning work environment.[102] One of the Black guards was unnerved when none of her colleagues came to her aid when her alarm accidentally went off;[103] another contended that he "felt more threatened by his fellow shift members than by the prison inmates."[104] An investigator who looked into the complaints trenchantly described the scope of the problem in the context of the particular working environment of a maximum security prison:

> [T]he safety and the security concerns raised by their comments must be addressed. The Nebraska State Penitentiary is a maximum security facility in which staff must be able to work with and trust each other. [Two of the plaintiffs] have reported that trust no longer exists. This adversely affects their safety and security as well as that of other staff, inmates, and the public . . . . It also can adversely affect the institution's security.[105]

Had the Court simply done an abstract, context-free comparison of the sort of harassment the *Ellis* plaintiffs endured to other harassment cases which had been dismissed before trial, it is unlikely that the case would have proceeded. But context is key, and hence (as Judge Murphy had forcefully argued in an earlier case) "[t]he facts of any alleged harassment should first and lastly be considered on their own merit without comparing them line by line to a summation of facts in some other case which the court has or has not considered to be triable."[106] The context here was that the harassment was occurring in the work environment of a maximum security prison where there are heightened security demands and absolute trust is non-optional.[107] Under these circumstances, Judge Murphy successfully convinced a panel to reinstate part of the plaintiffs' harassment complaint.[108]

102. *Id.* at 317, 324.

103. *Id.* at 313.

104. *Id.* at 317.

105. *Id.* (quoting prison investigator transfer report).

106. McMiller v. Metro, 738 F.3d 185, 191 (8th Cir. 2013) (Murphy, J., concurring in part and dissenting in part).

107. *Ellis*, 742 F.3d at 317, 324. Put another way, not being able to trust one's coworkers to watch one's back may not materially alter the terms and conditions of employment at an accounting firm, but it most certainly alters the terms and conditions of employment at a maximum security prison.

108. Following remand, the prison guards settled their lawsuit with the State for a six-figure sum. Paul Hammel, *Nebraska Prison Guards' Bias Lawsuit Settled for $777,000*, OMAHA WORLD-HERALD (June 28, 2014), http://www.omaha.com/news/crime/nebraska-prison-guards-bias-lawsuit-settled-for/

Consider, as a final example, the use of comparator evidence as a means of providing indirect evidence of discrimination.[109] Of all the ways one might establish discriminatory intent in absence of a direct prejudiced statement, this might be the most intuitive: one points to a "similarly situated" employee who was of a different race (or gender, or age, and so on) who was treated differently than the plaintiff.[110] In the seminal employment discrimination case *McDonnell Douglas Corp. v. Green*, for example, the Court suggested that "evidence that white employees involved in acts against petitioner of comparable seriousness" to the acts which were used to justify failing to hire the Black plaintiffs "were nevertheless retained or rehired" would be "[e]specially relevant" to the ultimate finding of discrimination.[111]

This, of course, raises the question of how similar is similar enough. Given that the ultimate issue of whether there was discriminatory intent is a factual matter reserved for the jury, one might suspect that the answer lies on a continuum. At one end of the spectrum, where the alleged comparator and the plaintiff have little in common, the fact of dissimilar treatment might not provide sufficient evidence for a reasonable jury to even possibly justify a conclusion of discriminatory intent.[112] At the other end, where the individuals being compared are virtually identical in character—say, where they "dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without *any* mitigating or distinguishing circumstances"[113]—we might think that dissimilar treatment provides close to smoking gun evidence of discriminatory intent (assuming those facts aren't contested, we could even at that point wonder if there is a genuinely disputed issue of material fact that the defendant did *not* discriminate). In the middle—where there is much in common between the plaintiff and the comparator but also some distinguishing circumstances that complicate a

article_0d3d8719-c707-5161-bcf1-c24f55a13fa8.html.

109. *See generally* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (discussing the challenges with comparators and proposing alternate methodologies); Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191 (2009) (analyzing comparator jurisprudence and proposing ways to create a jury issue).

110. Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 258 (1981) ("*McDonnell Douglas* teaches that it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally.").

111. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

112. *Cf.* Goldberg, *supra* note 109, at 753–56 (discussing differences between comparators).

113. Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000) (emphasis added).

straightforward inference of discrimination—we have what seems to be a quintessential jury question.

This, however, is not the rule in the Eighth Circuit. For many years, Eighth Circuit precedent was simply that a comparator had to be similarly situated to the plaintiff in all relevant respects.[114] But in *Clark v. Runyon*, the Eighth Circuit took the extreme case of comparator evidence articulated above—that in which the plaintiff and the comparator "dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances"—and declared it to be the *minimum* threshold showing a plaintiff must produce in order to reach a jury.[115] This extraordinary evidentiary burden is charmingly described in Eighth Circuit precedent as "rigorous."[116]

The case of *Ridout v. JBS USA*[117] provides a good example of just how far off the rails this comparator standard had gone—and Judge Murphy's efforts to restore the proper role of the jury in discrimination cases. In *Ridout*, a long-time employee (Ridout) was terminated from his supervisory position at a pork processing plant, allegedly for swearing and raising his voice during an argument on a loud factory floor.[118] He sued alleging age discrimination.[119] Among the evidence he mustered for his case was the fact that his replacement was a younger man who had been previously terminated for racist behavior (he had crafted a mock Ku Klux Klan hood and displayed it to an African-American coworker)—seemingly a considerably *more* serious infraction than yelling in the workplace.[120] The forgiveness shown to that employee, in contrast to his own summary termination, was in Ridout's view probative evidence that the true motivation for his dismissal was age.[121]

114. This language first appears in passing in *Meyers v. Ford Motor Co.*, 659 F.2d 91, 93 (8th Cir. 1981). By 1985 it had been elevated to a holding. Smith v. Monsanto Chem. Co., 770 F.2d 719, 723 (8th Cir. 1985); *see* Lanear v. Safeway Grocery, 843 F.2d 298, 301 (8th Cir. 1988) ("[The] claim of disparate treatment must rest on proof that [the comparators] were 'similarly situated in all relevant respects.'" (citing *Smith*, 770 F.2d at 723)).

115. *Clark*, 218 F.3d at 918.

116. EEOC v. Kohler Co., 335 F.3d 766, 775 (8th Cir. 2003) (quoting Harvey v. Anheuser-Busch, Inc., 38 F.3d 968, 972 (8th Cir. 1994)).

117. Ridout v. JBS USA, 716 F.3d 1079 (8th Cir. 2013).

118. *Id.* at 1084.

119. *Id.*

120. *Id.* at 1086.

121. *Id.*

Under *Clark*, however, Ridout had a problem: racist misdeeds are not the same conduct as raising one's voice in a loud factory setting.[122] To get around this issue, Judge Murphy's opinion placed three important constraints on the "rigorous" comparator standard that was then prevailing. First, drawing from the Seventh Circuit, she observed that the "similarly situated coworker inquiry is a search for a substantially similar employee, not for a clone."[123] Second, she emphasized that a valid comparator did not need to have engaged in the exact same offense as the plaintiff—particularly where the comparator had engaged in relatively more serious misconduct.[124] Third, she cabined the "rigorous" comparator requirements by suggesting that they stood for "the unremarkable proposition that the ideal comparator will match the characteristics of the plaintiff employee in as many respects as possible" and that "the probative value of comparator evidence will be greatest when the circumstances faced by the putative comparators are most similar to the plaintiff's."[125]

In many ways, the comparator evidence standard is the most egregious example of courts using doctrinal workarounds to subvert the purpose of summary judgment. Declaring that only comparators who are functional clones of the plaintiff suffice to create a triable issue of fact is nothing but a case of courts taking it upon themselves to independently weigh the evidence. *Ridout* thus served as an important brake on a trend in discrimination jurisprudence where genuine issues of disputed fact were being removed from consideration by juries. Clearly, the ideal comparator is one who meets the "rigorous" standard articulated in *Clark*—one who is, more or less, a clone of the plaintiff. And equally clearly, at some point the proffered comparator is so dis-

122. *Id.* at 1084–85. Indeed, part of Ridout's dilemma was that nobody at the company could ever remember any case where another employee was terminated for yelling on a loud factory floor—presumably because yelling on loud factory floors is in fact quite common and usually unobjectionable behavior. *See id.* at 1084; *see also* Goldberg, *supra* note 109, at 753 (discussing the problem where there are "no sufficiently comparable coworkers").

123. *Ridout*, 716 F.3d at 1085 (quoting Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 916 (7th Cir. 2010)).

124. *Id.* (citing Lynn v. Deaconess Med. Ctr.-W. Campus, 160 F.3d 484, 487 (8th Cir. 1998)).

125. *Id.* Lest these all seem like obvious points, note that the district court had granted summary judgment to the employer in part because it refused to concede the legitimacy of Ridout's comparator evidence. Ridout v. JBS USA, 886 F. Supp. 2d 1127 (S.D. Iowa 2012).

similar from the plaintiff that it does not suffice to create a genuine issue of material fact around the question of discriminatory intent. But it should not be controversial that there exists space between these two poles where the evidence is ambiguous and could be interpreted in a variety of different lights. When circuit precedent removes such cases from the hands of the jury and disposes of them at summary judgment, it indicates that there *is* in fact a "special" summary judgment standard in discrimination cases—one in which employers are unduly favored over employees.

## III.

There is a whole network of precedents which seek to preemptively strip discrimination cases away from juries and dispose of them at summary judgment.[126] Judge Murphy had generally resisted this practice, with varying degrees of success. But what accounts for this trend in the first place? One potential answer is the sense among many members of the legal community that discrimination cases tend to be weaker than other filed claims.[127] Is that sense accurate? We know that discrimination cases are notoriously difficult to win—indeed, they have among the lowest rates of success of any type of case filed in federal court.[128] In itself, that does not necessarily demonstrate the claims are weaker without resorting to tautology—discrimination claims are disproportionate losers because they tend to be bad claims, and we know they are bad claims because they lose disproportionately.

Nonetheless, one can construct some plausible pathways for why plaintiffs might file antidiscrimination cases even in circumstances where evidence supporting the claim is weak. For example, it may be that employees who have endured generic bad behavior by their employer—an unjust termination or an arbitrary demotion—do not realize that such conduct is not unlawful unless it can be attributed to a covered form of discrimination.[129] In this way, a case that is really an (intuitively strong,

126. SPERINO & THOMAS, *supra* note 49, at 21.

127. *Cf.* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 571 (2001) ("Nevertheless, it does seem, for whatever reason, that there are a fair number . . . of employment discrimination cases that should never have been filed . . . .").

128. Katie R. Eyer, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1282–85 (2012).

129. *See generally* Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (suggesting,

but legally null) assertion of generic unjust treatment might get converted into a (intuitively weak, but legally cognizable) claim of discrimination. If such circumstances are common, they could easily yield a glut of filed discrimination cases with systematically weaker facts than other sorts of federal claims.

This instinct is buttressed by the fact that—while discrimination claims are overwhelmingly dismissed before ever reaching a trial—even those that make it to a jury lose far more often than they win.[130] Assuming that only the strongest claims survive the gauntlet of hostile precedents sketched above, the fact that most of them still end up losing before a jury is strongly suggestive that most of the cases dismissed before trial would have ended up losing in front of a jury as well.

Defenders of the above precedents might therefore suggest that they are simply engaged in efficient dispute resolution: all these precedents do, in practice, is act to weed out cases that would have lost at the trial stage anyway.[131] One potential problem with this line of reasoning is that it assumes that judicial assessments of what makes a strong or weak case track attitudes in the broader population—an assumption which may be questionable.[132] But there's a more fundamental concern: the court's role on summary judgment is not to predict, even accurately, the

from survey evidence, that workers overestimate their legal rights to challenge unjust employer conduct, and that the existence of at-will employment rules does not alter their perceptions).

130. Eyer, *supra* note 128, at 1283–84 (finding that eighty-six percent of discrimination claims litigated to conclusion lose either at the motion to dismiss or summary judgment stage, and that, of the remainder that reach a jury, defendants are two-and-a-half times as likely to prevail as plaintiffs).

131. *See* Torgerson v. City of Rochester, 643 F.3d 1031, 1043 (8th Cir. 2011) (en banc) (describing summary judgment as "a useful pretrial tool to determine whether any case, including one alleging discrimination, merits a trial").

132. The keynote study here is Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe?:* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009), analyzing the Supreme Court case of *Scott v. Harris*. In *Scott*, the Supreme Court used video evidence to conclude that no reasonable jury could have determined that the respondent (Harris) was not driving "in such fashion as to endanger human life," such that a chasing police officer (Scott) would not be reasonable in ramming Harris's vehicle. Scott v. Harris, 550 U.S. 372, 380 (2007). Kahan, Hoffman, and Braman showed the video to a large sample of Americans and found that, while a majority agreed with the Court's assessment, a significant (and nonrandomly distributed) subset disagreed. Kahan, Hoffman & Braman, *supra*, at 879. This suggests that, while it was likely that Scott would have ultimately prevailed, the Court was incorrect to conclude that *no* reasonable jury would have found in Harris's favor. *Id.* at 881.

ultimate conclusion of a jury. The operative question at summary judgment is not whether the jury *will* rule for the nonmoving party, but rather whether a reasonable jury *could*, given the existence of contested facts and the multiple reasonable potential inferences one could draw from them.[133] If judicial doctrines stripping cases away from juries are justified on efficiency grounds, that would also represent a "special" summary judgment rule applicable only in the discrimination case context.

Put another way, there is a built-in asymmetry in assessing the validity of summary judgment rulings. If a court consistently denied summary judgment in cases where the nonmoving party subsequently lost at trial, that would not in itself call into question the propriety of the pre-trial ruling. Our jury system fully accounts for the fact that many filed cases which make it to trial may nonetheless lose. But if a court consistently *grants* summary judgment in cases where the party resisting the motion would have *prevailed* at trial, that would raise significant red flags. It would suggest that the court's sense of what a reasonable jury could or could not do were significantly out of sync with actual jury appraisals—with the result that judges were functionally substituting the jury's assessment of the evidence with their own.[134]

The larger problem is this: antidiscrimination doctrine in the Eighth Circuit (and, to be fair, often outside of the Eighth Circuit) allows judges to peremptorily declare that actions which

133. *See, e.g.*, *Scott*, 550 U.S. at 380.

134. To be clear, it is not the case that any time a jury would find in favor of a party that resisted summary judgment, then summary judgment for the other party would by definition have been unjustified. Putting aside the potential problem of unreasonable juries, in some circumstances it might be the case that the jury simply misunderstood the legal rules it was trying to apply. For example, if a jury in an age discrimination suit found for the plaintiff, but only because it viewed the plaintiff's termination as unfair (without concluding that *age* had anything to do with it), that verdict would clearly be improper.

But note how that is different from a jury concluding that the termination *was* based on age in circumstances where a judge did not think the evidence of age discrimination was sufficiently strong to send the case to the jury (perhaps due to the comparator evidence rules described above, see *supra* notes 109–26 and accompanying text). Again, there might well be cases where juries are making strained inferences from extraordinarily thin evidence, such that we might deem the verdict to simply be unreasonable. But if there was a consistent mismatch between a jury conclusion that discrimination did occur and a judicial determination that a reasonable jury could only conclude that discrimination didn't occur, that would suggest a serious deficiency in the summary judgment determination that would not be paralleled in cases where courts declined to grant summary judgment and juries nonetheless ruled in favor of the defendant.

many consumers would likely consider significant obstructions of their attempts to contract are no barrier at all;[135] that behaviors many employees would deem shocking cases of harassment are not severe enough to matter;[136] that coworkers who control the functional working life of trainees under their charge are not supervisors;[137] and that significant comparator evidence of discriminatory intent is insufficient to persuade any reasonable juror.[138] This is not how summary judgment is supposed to work, and in other areas of law it is not how summary judgment does work. The straightforward rule of summary judgment is that where a reasonable jury could draw inferences supporting the claim of the nonmoving party, the case goes to trial.[139] To the extent antidiscrimination precedents do not adhere to that rule, then there has once again come to be a special discrimination case exception to the summary judgment standard.

Which brings us back to *Torgerson*. As noted at the outset, the major legal shift in *Torgerson* was to officially renounce a series of precedents which had suggested that summary judgment should be sparingly granted in discrimination cases.[140] At the outset of his dissent, Judge Smith (joined by Judges Murphy, Bye, Melloy, and Shepherd) agreed that the "cautionary language for handling discrimination cases . . . probably should not have survived the mid-eighties as there is no 'discrimination case exception' to the summary judgment standard."[141] But, he continued "we should *never* forget that, '[a]t the summary judgment stage, the court should *not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter* . . . . *If reasonable minds could differ* as to the import of the evidence, *summary judgment is inappropriate*.'"[142]

In this context, it is worth revisiting the precise language of the cases that supposedly created a special discrimination case standard for summary judgment. "Summary judgment should seldom be granted in employment discrimination cases because

135. *See supra* notes 26–46 and accompanying text.
136. *See supra* notes 89–97 and accompanying text.
137. *See supra* notes 80–88 and accompanying text.
138. *See supra* notes 114–26 and accompanying text.
139. *See generally* Scott v. Harris, 550 U.S. 372 (2007) (discussing the summary judgment standard).
140. *See supra* notes 13–15 and accompanying text.
141. Torgerson v. City of Rochester, 643 F.3d 1031, 1054 (8th Cir. 2011) (Smith, J., concurring in part and dissenting in part).
142. *Id.* (quoting Quick v. Donaldson Co., 90 F.3d 1372, 1376–77 (8th Cir. 1996)).

intent is often the central issue and claims are often based on inference."[143] "Summary judgment seldom should be granted in discrimination cases where inferences are often the basis of the claim . . . ."[144] One way of reading this language is prescriptive: demanding a different, looser summary judgment standard in the discrimination case context to account for the fact that "claims are often based on inference."[145] If that is what these precedents mean, then indeed they cannot survive the Supreme Court's clear instruction that the summary judgment rule is a universal one.[146]

But another way of reading these cases is descriptive: observing that features of the typical discrimination case will often make them poor candidates for summary judgment under the universal standard because compared to other sorts of cases, discrimination "claims are often based on inference[s]" that are ultimately for a jury to decide upon.[147] Under the latter reading, courts "should" be less likely to grant summary judgment in discrimination cases—not because they are concocting a special discrimination case summary judgment rule, but because they are applying the regular one. And by the same token, if courts are too willing to adopt their own inferential judgment regarding what does and does not qualify as discrimination across diverse and deeply contested fact patterns, that would suggest that—contrary to *Torgerson*'s mandate—there is a discrimination case exception to summary judgment: one favoring employers over employees and perpetrators over victims.

When the Supreme Court first instructed lower courts that they should not "treat discrimination differently from other ultimate questions of fact," it was in the context of admonishing a court which was too *quick* to dismiss a discrimination claim by merging questions of fact and law together.[148] Yet *Torgerson* has come to stand for the proposition that courts have been too solicitous of discrimination claimants and should stretch to ensure that as few of their claims reach juries as possible. The irony of *Torgerson* is that almost as soon as it was decided it already had fallen into twilight: yielding a new discrimination case standard

143. Peterson v. Scott County, 406 F.3d 515, 520 (8th Cir. 2005) (citations omitted).

144. Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1156 (8th Cir. 1999).

145. *Id.*

146. *See* cases cited *supra* note 19.

147. *See, e.g.*, *Peterson*, 406 F.3d at 520.

148. Postal Serv. Bd. of Governors v. Aiken, 460 U.S. 711, 716 (1983).

for summary judgment, just as exceptional as the old one, but merely flipping which party is favored. Whereas Judge Murphy's antidiscrimination jurisprudence was marked by an uncompromising insistence that facts and context matter and that nothing about discrimination claims makes judges more apt at substituting their judgment for those of a jury of peers, *Torgerson*'s legacy has been the opposite. In the course of defending a single, universal standard of summary judgment, *Torgerson* has emboldened judges to plow over context and wash away reasonable disputes over relevant facts. The results have been incompatible with the true role of summary judgment and hostile to the underlying purposes of antidiscrimination law. And until the court which authored *Torgerson* is willing to actually abide by its dictates—actually ensuring that there is no discrimination case exception to the application of summary judgment—it seems more than fair that Judge Murphy's rule be followed, lest the case continue to be cited for a proposition so repeatedly breached.