Proving the Invisible:
Evidence of Intentional Employment Discrimination
(Selected Topics)

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I. INTRODUCTION & SCOPE

It's usually easy to prove that a plaintiff is within a protected category, say, that she is of a certain age or race or gender. And it usually isn't so hard to prove that a plaintiff was treated poorly, say, that she was fired for ostensibly poor performance when her written evaluations say the opposite. The rub in most so-called "intentional" discrimination cases (claims based on disparate treatment of an individual, as opposed to unintentional discrimination resulting from the adverse impact of a decision on a group) is proving that the poor treatment *resulted from* membership in a protected category. In the example above, the tough part for the plaintiff would be proving that the unjustified termination occurred *because of* the plaintiff's age or race or gender. Proving this "causal link" requires the plaintiff to be a bit of a mind reader, to prove what the decision maker was thinking about (at some level) when it made the adverse decision, and to read the defendant's mind clearly enough to persuade the fact finder as well. This task is all the more difficult because the employer testifies vehemently that he knows his own mind better than anyone, and his motives included no illegal considerations.

Fortunately for the victims of discrimination, discriminatory intent is defined to include not only overt hostility (racial slurs, sexual assaults, and the like) but also more subtle action, such as relying on stereotypes and exercising subconscious preferences. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989). Just as importantly, a smoking gun is not required: plaintiffs are allowed to prove intentional discrimination by indirect or circumstantial evidence. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100.

Finally, many courts have acknowledged the difficulty of proving causation in intentional discrimination cases and on this basis directed trial courts to review evidence carefully in such cases before excluding it, with reasoning typified as follows:

> Such review is particularly necessary in a case like this, where the substantive issue is whether there was intentional discrimination in employment. Proof of such discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against—the cost of discrimination is too great. The law tries to protect average and even below-average workers against being treated more harshly than would be the case if there were of a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for not hiring, or firing, or failing to promote, or denying a pay raise to, a worker who is not superlative. A plaintiff's ability to

> prove discrimination directly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

Riordan v. Kempiners, 831 F.2d 690, 697-98 (7th Cir. 1987) (reversing verdict for employer where district court excluded much of Plaintiff's evidence) (emphasis added); *see also Estes v. Dick Smith Ford, Inc*., 856 F.2d 1097, 1103 (8th Cir. 1988) ("The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motive").

The purpose of this paper is not to survey exhaustively all the kinds of evidence plaintiffs can use in an intentional discrimination case to prove the invisible link of causation. That task could fill a seminar of its own. Rather, the purpose of this paper is to provide a basic understanding of three specific types of evidence that are particularly prominent in this type of litigation right now:

1. Evidence of how the employer treated similarly situated co-workers outside the Plaintiff's protected category, so-called "comparators";

2. Evidence of the "cat's paw" theory of discrimination, under which the illegal motives of a lower-level employee are imputed to a higher-level decision maker; and

3. Evidence contained in email, text messages, and social media posts.

Although this paper discusses intentional discrimination (based on characteristics protected by law), the same reasoning and authority tends to apply to cases involving retaliation (based on activities protected by law).

II. SIMILARLY SITUATED CO-WORKERS

Likely the most common way in which employment discrimination and retaliation plaintiffs attempt to prove causation is through the use of evidence regarding the treatment of "comparators," similarly-situated persons outside the plaintiff's protected class (or, in a retaliation case, persons who did not engage in the same legally protected activity) who received different treatment. *See, e.g., Northwestern Resources Co. v. Banks*, 4 S.W.3d 92, 96-97 (Tex. App.—Waco 1999, pet. denied); *Azubuike v. Fiesta Mart, Inc*., 970 S.W.2d 60, 64 (Tex.App.–Houston [14th Dist.] 1998, no pet.) *Farrington v. Sysco Food Svcs., Inc*., 865 S.W.2d 247, 251 (Tex.App.—Houston [1st Dist.] 1993, writ denied); and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804; 93 S.Ct. 1817, 1825 (1973). Similarly, the Texas Supreme Court has enunciated several factors to consider when determining if the plaintiff in an employment *retaliation* case has provided circumstantial evidence of a causal connection between a legally protected act and an adverse employment action, including among others, evidence of "discriminatory treatment in comparison to *similarly situated* employees." *Continental Coffee Products v. Cazarez,* 937 S.W.2d 444, 451 (Tex. 1996) (emphasis added).

Consider this typical example of a gender discrimination case: a woman is fired, and the stated reason is excessive absenteeism, based on her missing three days of work during a rolling 30-day period. In such a case, the plaintiff might introduce evidence that one or more male employees in a similar job missed that much work or more and were not fired. This difference in treatment, if not adequately explained by the employer, could permit an inference by the finder of fact that the employer's decision was based in whole or in

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