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MCLE Self-Study:

Applying the Same-Actor Rule to Defend Against a Claim of Discrimination

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Consider the following hypothetical case of *Brown v. University:* the University's facilities manager, Ms. Smith, who was in her 40s, interviewed a number of applicants for a position as the University's plumber. She ended up choosing Mr. Brown, a person of her same race and approximate age. Ms. Smith placed Mr. Brown under the immediate supervision of Mr. Wong, and his first few months of work were uneventful until Mr. Wong purportedly began to observe work rule violations, including Brown's not performing assigned duties and taking longer than authorized meal and rest breaks. Mr. Wong counselled Mr. Brown about his behaviour on several occasions, and Mr. Wong also reported his observations to Ms. Smith. Mr. Wong and Ms. Smith both warned Mr. Brown about the consequences of not complying with the University's work rules and hours. However, after Mr. Brown allegedly failed to correct his behaviour, Mr. Wong again complained to Ms. Smith, who in turn terminated Mr. Brown's employment before the end of his one-year probationary period. Mr. Brown then sued the University for discrimination based on age and race. He claimed not only that he did not engage in the alleged misconduct, but also that other University employees who were younger and not of the same race as he had been guilty of the same conduct with which he had been charged, but received either less severe discipline or no discipline at all.

With evidence that similarly situated employees outside of his protected classifications (age and race) were treated differently, the plaintiff Mr. Brown and his counsel believe that they have a solid case to establish the University's discriminatory animus in firing Mr. Brown. But not so fast, responds the University's defense counsel. The facilities manager, Ms. Smith, who fired Mr. Brown, is the same person who hired him. Defense counsel maintains it is illogical to claim any discriminatory animus when the person who fired Mr. Brown is the "same actor" who hired him less than a year earlier. Which side is correct?

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Applying the Same-Actor Rule

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SAME-ACTOR PRESUMPTION OR SAME-ACTOR INFERENCE: DOES CALIFORNIA LAW SUPPORT EITHER?

The first California case to address the impact of the "same-actor" rule was the First District Court of Appeal's decision in *Horn v. Cushman & Wakefield Western, Inc.*[1] Horn was hired as a regional communications manager for Cushman & Wakefield, but then let go four-and-a-half years later, when the company restructured the position and determined that Horn was not a good fit for the new position. Horn was 59 when let go, and John Renard, the regional president who hired and later terminated Horn's employment, was 56. The company subsequently hired a 38-year old to fill the restructured regional communications manager position.[2]

In addressing whether the company's allegedly legitimate business reasons for firing Horn might have been a pretext for discrimination, the court invoked the "same-actor" rule cited by the Ninth Circuit in *Bradley v. Harcourt Brace & Co.*[3] and drawn from the Fourth Circuit's reasoning in *Proud v. Stone.*[4]

> "[W]here the same actor is responsible for both the hiring and firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."
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> * * *
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> As observed by the Fourth Circuit: "One is quickly drawn to the realization that '[c]laims that employer animus exists in termination but not in hiring seem irrational.' From the standpoint of the putative discriminator, '[i]t hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job.'" (*Proud v. Stone, supra,* 945 F.2d 796, 797.)[5]

As the theory goes, why would Renard have hired Horn simply to let him go later if Renard harbored a discriminatory bias toward Horn? It would be illogical if Renard behaved in that manner.[6] The court further observed that "[a]lthough providing a strong inference of nondiscrimination, the same-actor **presumption** is not irrebuttable."[7]

Besides arguing that another employee was responsible for his discriminatory treatment, Horn asserted that the same-actor rule should not apply because nearly five years had elapsed between the hiring and firing, and a presumption should only arise, if at all, when the termination occurs within a relatively short time after the hiring.[8] As summarized later by another division of the First District Court of Appeal in *West v. Bechtel Corporation*, "the [Horn] court noted that the passage of time would eventually attenuate this same-actor presumption but found that the presumption still applied in that case even though five years had elapsed between the hiring and firing at issue."[9] Neither *Horn* nor *West* provided a clear indication about the length of time between the hiring and firing that would preclude application of the rule. Thus, plaintiffs have been left to argue on a case-by-case basis that the overall lapse in time or other intervening events between the hiring and firing have served to erode or eliminate the presumption.

Horn was faced with a two-fold problem in addressing Cushman & Wakefield's stated reasons for

> *"Within the last several months, the Fourth District Court of Appeal further undercut the persuasive power of the same-actor rule in* Sandell v. Taylor-Listug, Inc.*"*

terminating his employment. First, he had the usual and significant burden of proffering substantial evidence that the reasons given by Cushman & Wakefield were untrue or pretextual.[10] Second, his evidence of pretext also needed to be strong enough to rebut the same-actor presumption. Thus, what might have been sufficient evidence to defeat summary judgment in a case involving different decision-makers, was insufficient for a case in which the same actor hired and fired the plaintiff.[11]

Ten years later, the First District Court of Appeal took another look at the same-actor rule in *Nazir v. United Airlines, Inc.*,[12] and turned the rule somewhat on its head. The court clarified that the same-actor rule is not a presumption as defined under Cal. Evid. Code § 600, and confirmed that no California case or statute had created a same-actor presumption.[13] Instead, the fact that the same actor both hired and fired an employee merely raises an inference, which is driven by logic, not law:[14]

> Clearly, same actor evidence will often generate an inference of nondiscrimination. But the effect should not be an a priori determination, divorced from its factual context. Nor should such evidence be placed [sic] in a special category, or have some undue importance attached to it, for that could threaten to undermine the right to a jury trial by improperly easing the burden on employers in summary judgment.[15]

Nazir sufficiently negated an inference of nondiscrimination through evidence that called into question whether the person who fired him had actually been responsible for or supported his promotion, plus evidence showing that the supervisor in question had failed to deal with the discriminatory and harassing treatment of Nazir prior to his promotion.[16]

Within the last several months, the Fourth District Court of Appeal further undercut the persuasive power of the same-actor rule in *Sandell v. Taylor-Listug, Inc.*[17] Sandell had been hired at age 57 as senior vice-president of sales for Taylor-Listug (the manufacturer of the world-famous Taylor guitars). Approximately six months later, he suffered a stroke that necessitated his use of a cane and caused his speech to become noticeably slower.[18] A few days after his 60th birthday, Sandell was fired by the same person who had hired him, Taylor-Listug's co-founder and CEO Kurt Listug. Sandell then sued, claiming he was let go due to disability and age discrimination.

The company argued, among other things, that "Sandell's case for age discrimination [was] 'further undermined because Listug both hired and fired Sandell within a short period of time.'"[19] The trial court agreed and granted the company's motion for summary judgment. The court of appeal, however, disagreed, noting first that Sandell's stroke was an intervening event that negated the "strong inference" normally created by the same-actor rule:

> [A]fter Sandell was hired, he suffered a stroke that caused him to appear to be significantly older than he may have appeared at the time he was hired. Taylor-Listug may have

"[W]here the same actor is responsible for both the hiring and firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."

viewed the mere fact that Sandell suffered a stroke as something that happens only to 'older' individuals. Thus, the period of time between Sandell's hiring and firing, even if considered to be short, might not, as Taylor-Listug suggests, create a 'strong inference' that no discriminatory motive existed.[20]

Second, the court explained that, *even if* the same-actor rule created a "strong inference" of non-discrimination as suggested by *Horn*, that inference could not serve as a reason to grant summary judgment: "A strong inference is just that—an inference [and t]he fact that a juror could reasonably draw a different inference is sufficient to preclude summary judgment."[21]

Hence, *Nazir* and *Sandell* seem to suggest, contrary to *Horn*, that the same-actor rule should play no role in summary judgment, or that its role is significantly diminished at the pre-trial stage.

FEDERAL LAW: THE NINTH CIRCUIT'S BROAD VIEW OF THE SAME-ACTOR RULE

The Ninth Circuit adopted the same-actor rule in *Bradley v. Harcourt, Brace & Company, supra,*[22] following the Fourth Circuit's decision in *Proud v. Stone*:[23] "[W]here the same actor is responsible for both the hiring and firing of a discrimination plaintiff, and both actions occur within a short period of time, a strong inference arises that there was no discriminatory motive."[24]

Mary Bradley was hired by Evelyn Sasmor in February 1992, but then, after having her probation extended, was fired by Sasmor approximately a year later for inadequate work performance and misconduct. Bradley argued that the real reason for her termination was sex discrimination, claiming that Sasmor wanted to give her position to a male. The court, however, noted that:[25]

> Sasmor, the person who terminated Bradley, is the same person who originally made the decision to hire her less than a year earlier. In this context, Bradley's allegation that her supervisor wanted a male in the position is at best suspicious. If Sasmor had preferred to place a man in the position, we can see no reason why she would have hired a woman only a year earlier.[26]

The court found no evidence that Sasmor's favoritism toward another male employee stemmed from his sex rather than his competence or performance.[27]

The Ninth Circuit subsequently expanded the same-actor rule beyond ultimate employment decisions, *i.e.*, hiring and termination, in *Coghlan v. American Seafoods Co.*:[28]

> We based our holding in *Bradley* on the principle that an employer's initial willingness to hire the employee-plaintiff is strong evidence that the employer is not biased against the protected class to which the employee belongs. Thus, although we phrased the same-actor rule in *Bradley* in terms of "hiring and . . . firing," its logic applies no less to cases such as this one, in which the plaintiff was not actually fired but merely offered a less desirable job assignment.[29]

Coghlan complained about national origin discrimination after failing to be assigned as captain of a boat. The person who made the assignment had over the previous five years retained Coghlan when laying off others and had provided other favorable assignments, including one as a boat captain.[30]

The Ninth Circuit framed the issue as "whether the showing necessary for an employee to prevail against his employer's motion for summary judgment . . . is heightened because the person who demoted him had previously appointed and promoted him."[31] The court then answered that question in the affirmative, finding Coghlan's burden "especially steep."[32] "The point of the same-actor inference is that the evidence *rarely is* 'sufficient . . . to find that the employer's asserted justification is false' when the actor who allegedly discriminated against the plaintiff had previously shown a willingness to treat the plaintiff favorably."[33] "If a plaintiff can muster the **extraordinarily strong showing of discrimination** necessary to defeat the same-actor inference, then the case likely must go to the jury."[34] "The same-actor inference is neither a mandatory presumption nor a mere possible conclusion for the jury to draw. Rather, it is a 'strong inference' that a court must take into account on a summary judgment motion."[35]

In *EEOC v. Boeing Co*,[36] the Equal Employment Opportunity Commission (EEOC) sued on behalf of two female engineers who were laid off after receiving low scores on reduction in force (RIF) assessments. One of the engineers, Sharon Wrede, had begun her employment with Boeing in 1989 and had transferred to a different unit in 1999 after complaining of sexual harassment. She received a positive evaluation in 2001, but was faced with the prospect of being laid off starting in April 2002. On her third RIF assessment

in October of 2002, Wrede received an assessment score low enough for Boeing to let her go.[37]

Boeing argued that the same-actor rule raised the inference of non-discrimination in Wrede's lay-off because the same actors who ultimately terminated her employment had on two prior occasions given her RIF assessment scores high enough to avoid termination.[38] While agreeing in the abstract, the court nonetheless found that the "same-actor inference" was weak because the EEOC proffered sufficient evidence from which a jury could conclude that Wrede's lay-off was motivated by a discriminatory animus.[39] First, the EEOC established that six other male engineers who had received lower RIF assessment scores than Wrede in April and July 2002 were retained by Boeing.[40] Second, Wrede's supervisor failed to adequately explain why he lowered her scores in different categories in the three RIF assessments. In addition, the EEOC produced testimony from co-workers who rated Wrede's skills and performance high and better than other manufacturing engineers.[41] The court further noted as follows:

> Although a termination is rarely motivated by bias when it is initiated by the same actors who recently selected the same employee for the job or promotion in the first place, the logic differs when applied to less overtly 'positive' employment decisions, such as refraining from firing an employee at the earliest opportunity or giving an employee a lukewarm evaluation, rather than a poor one. A supervisor who hires or promotes an employee affirmatively forwards the employee's career; this affirmative enhancement of the employee's career prospects is strong circumstantial evidence of a lack of bias on the supervisor's part. **In contrast, where a supervisor discharges an employee he did not affirmatively hire or promote by lowering her scores over time, rather than by firing her precipitously, there is no such strong circumstantial evidence of lack of bias.**[42]

Defendants have argued that the application of the same-actor rule should extend to situations in which the decision-maker hires someone within the plaintiff's protected class, but no court has made such a determination. *See, e.g., McKinney v. American Airlines, Inc.*, 641 F. Supp. 2d 962, 972 n.10 (C.D. Cal. 2009) ("the court declines to determine whether the 'same actor' doctrine extends to instances in which the party terminating the plaintiff did not hire the plaintiff but did hire other employees in the plaintiff's protected class"). Similarly, some defendants have argued that the same-actor rule should apply when the allegedly discriminatory actor recommended the plaintiff for a promotion but was not the final decision-maker. At least one district court has rejected this argument. See *Juell v. Forest Pharm., Inc.*, 456 F. Supp. 2d 1141, 1155 (E.D. Cal. 2006).

BROWN v. UNIVERSITY: HOW DOES THE PLAINTIFF STRIKE BACK?

Returning to our hypothetical, the fact that Ms. Smith hired and later fired Mr. Brown within a short time period raises a strong inference that discrimination did not play a role in the adverse employment action, considering both Ninth Circuit and California case law. This inference will enable the University to prevail on summary judgment in federal court, barring an **extraordinarily strong showing by the plaintiff** to defeat the same-actor rule. In state court, however, it is unclear whether this inference will play any role on summary judgment, much less prove dispositive for the University. Under federal and state law, however, the fact that Ms. Smith both hired and fired Mr. Brown within a short period of time is not helpful to Mr. Brown.

Notwithstanding the same-actor rule, Mr. Brown is convinced that his immediate supervisor Mr. Wong harbored a discriminatory animus and actually played a controlling role in Ms. Smith's termination decision. Does Mr. Brown have a plausible argument and sufficient evidence to prevail? Stay tuned for part two of *Brown v. University*—The Tale of the Cat's Paw. ⚖

END NOTES

1. 72 Cal. App. 4th 798 (1999).
2. *Id.* at 802-04.
3. 104 F.3d 267 (9th Cir. 1995).
4. 945 F.2d 796 (4th Cir. 1991).
5. *Bradley v. Harcourt, Brace and Co., supra,* 104 F.3d at 270-71 (additional citations omitted).
6. As a side-bar matter, sometimes people do act irrationally or illogically. Hence our jobs as employment lawyers.
7. *Horn v. Cushman & Wakefield Western*, 72 Cal. App. 4th at 810 (citation omitted and emphasis added).
8. *Id.* at 809 n.7.
9. 96 Cal. App. 4th 966, 981 (2002). In *West*, the court stated that the rule applied with "particular force . . . because Shotwell fired West scarcely more than a month

after he hired him." *Id.* Was the court suggesting that the type and degree of rebuttal evidence needed to overcome the presumption of nondiscrimination would depend upon the amount of time between the hiring and firing?

10. "To avoid summary judgment, an employee claiming discrimination must offer substantial evidence that the employer's stated non-discriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination." *Hersant v. Department of Social Servs.*, 57 Cal. App. 4th 997, 1004-05 (1997).
11. *See, e.g.*, *Coghlan v. American Seafoods Co. LLC.*, 413 F.3d 1090, 1097 n.10 (9th Cir. 2005) ("when the allegedly discriminatory actor is someone who has previously selected the plaintiff for favorable treatment, that is very strong evidence that the actor holds no discriminatory animus, and **the plaintiff must present correspondingly stronger evidence of bias in order to prevail**") (emphasis added).
12. 178 Cal. App. 4th 243, 272-73 (2009).
13. *Id.* at 273. The court had in fact used the term "same-actor presumption" in *Horn, supra,* while indicating that the presumption was rebuttable. 72 Cal. App. 4th at 810.
14. *Id.* *See* Cal. Evid. Code § 600(a); and *cf. Waldron v. SL Indus., Inc.*, 56 F.3d 491, 496 n.6 (3rd Cir. 1995) ("where . . . the hirer and firer are the same and the discharge occurred soon after the plaintiff was hired, the defendant may of course argue to the factfinder that it should not find discrimination. But this is simply evidence like any other and should not be accorded any presumptive value").
15. *Nazir,* 178 Cal. App. 4th at 273.
16. *Id.* at 275-76 and 257-59.
17. 188 Cal. App. 4th 297 (2010).
18. *Id.* at 302.
19. *Id.* at 323.
20. *Id.* at 324. The court also questioned "the *Horn* court's conclusion that five years is a 'short time' in the context of a hiring and firing by the same person, in part because the *Horn* court itself noted that in 'many' of the cases applying this inference, the hirings and firings occurred within a span of two years or less." *Id.* at 323 (citation omitted).
21. *Id.* at 324.
22. 104 F.3d 267 (9th Cir. 1996).
23. 945 F.2d at 797 ("in cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer.").
24. *Bradley*, 104 F.3d at 270-71 (citations omitted).
25. *Id.* at 270.
26. *Id.*
27. *Id.* at 271.
28. 413 F.3d 1090.
29. *Id.* at 1096.
30. *Id.* at 1092-93.
31. *Id.* at 1092.
32. *Id.* at 1096.
33. *Id.* at 1097 (emphasis in original).
34. *Id.* (emphasis added). Of course, the same actor inference does not warrant summary judgment when the plaintiff is able to establish a prima facie case and produce evidence of pretext. *Compare Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1287 (9th Cir. 2000) (relying in part on the same-actor inference in granting summary judgment against plaintiff when she "ha[d] not cast doubt on the sincerity of [defendant's] explanation") *with Rosales v. Career Sys. Dev. Corp.*, No. Civ. 08-1383, 2009 U.S. Dist. LEXIS 101808, *43, 2009 WL 3644867, *13 (E.D. Cal. 2009) ("while the same-actor inference may sway a fact finder in deciding whether plaintiff ultimately prevails on his claims, there is little support in the Ninth Circuit for the proposition that the same-actor inference warrants summary judgment for defendant where, as here, plaintiff has established a prima facie cased and adduced evidence of pretext.")
35. *Id.*, citing *Bradley, supra,* 104 F.3d at 271.
36. *EEOC v. Boeing Co.*, 577 F.3d 1044 (9th Cir. 2009).
37. *Id.* at 1047-48. The other employee, Antonia Castron, also had been terminated due to a low RIF assessment score, but her situation did not involve application of the same-actor rule.
38. *Id.* at 1051.
39. *Id.* at 1051-52.
40. *Id.* at 1052.
41. *Id.* at 1048-49, 1052-53.
42. *Id.* at 1052 (emphasis added).

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