COMPARE THIS: HOW EMPLOYERS USE COMPARATOR EVIDENCE TO DEFEAT EMPLOYMENT DISCRIMINATION CLAIMS

Marc Chase McAllister[*]

2020 MICH. ST. L. REV. 803

ABSTRACT

Employment discrimination statutes prohibit employers from discriminating against individuals on the basis of certain protected characteristics, such as race or sex. For intentional discrimination claims, plaintiffs often attempt to prove an employer's discriminatory intent with comparator evidence demonstrating that the plaintiff was treated differently than a similarly situated individual outside of the plaintiff's protected class. Although plaintiffs often invoke comparator evidence to prove discriminatory intent, comparator evidence may also be helpful in disproving that alleged intent. Based on a review of recent federal court of appeals decisions, this Article identifies the four primary ways employers use comparator evidence to defeat employment discrimination claims and shows how courts have analyzed those defenses. Applying rhetorical stasis theory, this Article then places those defenses into a logical sequence of arguments for employers to consider when creating a defense to an employment discrimination claim involving comparator proof.

TABLE OF CONTENTS

* Marc McAllister is an Assistant Professor of Business Law at Texas State University. His articles have been published in journals such as the *Boston College Law Review*, *Florida Law Review*, *Washington and Lee Law Review*, and *Alabama Law Review*. The author would like to thank his Fall 2019 Employment Law students, whose curiosity about proving discriminatory intent inspired this research.

INTRODUCTION

To prevail on a disparate treatment employment discrimination claim, a plaintiff must prove that her employer intended to discriminate against her on the basis of one or more protected characteristics, such as race or sex.[1] Because direct evidence of discriminatory intent is rare, plaintiffs often use circumstantial

1. *See* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986–87 (1988). The category of disparate treatment claims can be subdivided into individual and systemic (pattern or practice) claims. This Article focuses on individual disparate treatment claims. For the federally protected classes, see, for example, 42 U.S.C. § 2000e-2(a)(1) (2018) (making 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"); Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 623(a) (2012) (making it unlawful for an employer to discriminate on the basis of age); Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112 (2012) (making it unlawful for an employer to discriminate on the basis of disability).

evidence to prove the requisite discriminatory intent.[2] Although circumstantial evidence of intent comes in many forms, one common form is comparator evidence purporting to show that the employer treated the plaintiff less favorably than a similarly situated individual outside the plaintiff's protected class.[3] Given enough similarities between the plaintiff and a comparator, such evidence may be persuasive in proving discrimination because "[a]ll things being equal, if an employer takes an action against one employee in a protected class but not another outside that class, one can infer discrimination."[4]

Although plaintiffs routinely invoke comparator evidence to *prove* an employer's discriminatory intent, comparator evidence can also be helpful in *disproving* that alleged intent. Examining this issue, this Article identifies the four most common defense strategies regarding comparator proof, describes how federal courts have analyzed those defenses, and proposes a framework for defendants to employ in crafting a defense to an employment discrimination claim involving comparator proof.

As outlined in this Article, the first defense tactic regarding comparator proof is to argue that a plaintiff cannot prove her employer's alleged discriminatory intent because no comparator exists in the plaintiff's workforce. This defense strategy reflects the role of comparators as central to discrimination analysis and is particularly effective when case law requires comparator evidence as part of the

---

2. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (stating that "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by"); *see also* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 120 (2007) (noting that the "*McDonnell Douglas* [test] remains firmly entrenched in disparate treatment law"); Paul D. Seyferth, *Evaluating Employment Discrimination Claims from a Defense Counsel's Perspective*, 58 J. MO. BAR 268, 272 (2002) (noting that "[n]ot many [employment discrimination] cases have direct evidence or 'smoking guns'").

3. *See* Rathbun v. AutoZone, Inc., 361 F.3d 62, 72 (1st Cir. 2004) (recognizing that circumstantial evidence offered by an employment discrimination plaintiff might include "evidence of differential treatment, evidence of discriminatory comments, statistical evidence, and comparative evidence"); *see also* Laing v. Fed. Express Corp., 703 F.3d 713, 719–20 (4th Cir. 2013) (examining the federal courts' reliance on comparator evidence in discrimination cases).

4. Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (citations omitted) (internal quotation marks omitted); *see also* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 (1977) ("[S]imilarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin."); *see* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 743–45 (2011) (discussing the role of comparators in employment discrimination claims).

plaintiff's prima facie case or in cases where no other evidence of discrimination exists—as when a plaintiff lacks direct evidence or other forms of circumstantial proof.[5]

Unlike the first defense tactic regarding comparator proof, the second defense comes into play once a comparator has been identified. The strategy here is to argue that a plaintiff's proposed comparator entirely misses the mark by inviting a wholly improper comparison and should be disregarded given the comparator's inability to demonstrate discriminatory intent. As outlined in this Article, this particular strategy has been employed in cases involving claims of sexual orientation and gender identity discrimination, including those recently decided by the United States Supreme Court.[6]

Unlike the second defense strategy, which seeks to block the plaintiff's purported comparison from the outset, the third defense strategy may be used when the parties have agreed upon a theoretically proper comparator, such as a male comparator in a sex discrimination suit brought by a female plaintiff.[7] Despite the parties' agreement upon the proper comparator, the third defense strategy is to argue that the plaintiff's proposed comparator cannot generate an inference of discriminatory intent because there are material differences between the plaintiff and her proposed comparator—ones having nothing to do with the plaintiff's protected class—that led to their difference in treatment.[8]

Lastly, for cases where a plaintiff has presented a viable comparator that cannot be reasonably distinguished based on some nondiscriminatory variable, a final strategy is for a defendant to invoke its own comparator evidence in order to negate any inference of discriminatory intent arising from the plaintiff's comparator proof.[9] An employer could use this strategy, for example, by arguing that a plaintiff's otherwise legitimate comparator proof is negated by the existence of other comparators outside the plaintiff's protected class who were treated the same as the plaintiff.[10]

As this Article contends, the four defenses outlined above can be organized into a logical sequence of arguments for employers to

5. *See* Goldberg, *supra* note 4, at 742; cases cited *infra* notes 103, 128–129.
6. *See* discussion *infra* Part IV.
7. *See infra* Part V.
8. *See id.* As one court recently declared, "[w]ithout controlling for important variables, comparator evidence cannot generate an inference . . . of discriminatory intent." *Rathbun*, 361 F.3d at 77.
9. *See* discussion *infra* Part VI.
10. *See id.*

consider when devising a defense to a disparate treatment discrimination claim.[11] Inspired by the classical Greek and Roman rhetoric theory of stasis, this Article thus culminates with a proposed hierarchical checklist of potential issues and suggested arguments for defendants to consider in developing a defense based on comparator proof.[12]

Part I of this Article provides an overview of disparate treatment discrimination claims, including the role of circumstantial evidence in proving discriminatory intent.[13] Part II then summarizes the ways plaintiffs use comparator evidence to prove discrimination claims, including as evidence of an employer's discriminatory intent and as evidence of pretext.[14] Shifting to employer use of comparator evidence, Part III outlines the first defense argument regarding comparator proof; namely, by arguing that a discrimination claim necessarily fails when no comparator exists in the plaintiff's workforce.[15] Part IV examines the second defense strategy of arguing that the plaintiff's selected comparator should be ignored because it invites an improper comparison.[16] Part V considers the third defense strategy of highlighting critical differences between the plaintiff and her proposed comparator—ones having nothing to do with the plaintiff's protected class—that explain their difference in treatment.[17] Part VI examines the final defense strategy, in which employers invoke their own comparator evidence to undermine a plaintiff's comparator proof.[18] Finally, Part VII places these four defenses into a logical sequence of arguments for employers to consider when devising a defense to a disparate treatment employment discrimination claim.[19]

---

11. *See* discussion *infra* Part VII.

12. Stasis is a system designed "to locate the key issues in a given case." Ray Nadeau, *Hermogenes'* On Stases*: A Translation with an Introduction and Notes*, 31 SPEECH MONOGRAPHS 362, 367 (1964); *see also* MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 25 (Routledge 2005) (describing stasis as a system for helping parties see which issue is in dispute so that they can develop arguments and counterarguments around that issue); JAMES A. HERRICK, THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION 104 (4th ed. 2009) (calling stasis a method used for thinking through a judicial case by identifying the likely issues of conflict).

13. *See infra* Part I.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See infra* Part VI.

19. *See infra* Part VII.

I. PROVING DISPARATE TREATMENT DISCRIMINATION WITH CIRCUMSTANTIAL EVIDENCE

For disparate treatment discrimination claims, an employer's discriminatory intent may be proven with direct or circumstantial evidence.[20] Direct evidence of discriminatory intent is "evidence which, if believed . . . does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group."[21] Direct evidence would include, for example, "a facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group."[22]

When a plaintiff lacks direct evidence of discriminatory intent, the plaintiff must typically navigate the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, which may permit a plaintiff to prove a discrimination claim with circumstantial evidence of intent.[23] Because direct evidence is hard to come by, courts often apply the *McDonnell Douglas* test.[24]

The *McDonnell Douglas* test first requires a plaintiff to establish a prima facie case of discrimination.[25] The precise requirements of the prima facie case vary, depending on the type of adverse employment

20. *See* Blackwell v. Alliant Techsystems, Inc., 822 F.3d 431, 435 (8th Cir. 2016).

21. Johnson v. Kroger Co., 319 F.3d 858, 865 (6th Cir. 2003).

22. Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000).

23. *See* 411 U.S. 792, 802–05 (1973); *see also* Williams v. Zurz, No. 10-4161, 2012 WL 5351270, at *6–7 (6th Cir. Oct. 30, 2012) ("In cases involving circumstantial evidence, this Circuit has long applied the . . . *McDonnell Douglas* framework."); King v. Ferguson Enters., Inc., 971 F. Supp. 2d 1200, 1210 (N.D. Ga. 2013), *aff'd*, 568 F. App'x 686 (11th Cir. 2014) (stating that "[i]n the Eleventh Circuit, sex-discrimination claims based on circumstantial evidence are analyzed under the burden-shifting framework established in *McDonnell Douglas* . . . ."); Fuller v. GTE Corp./Contel Cellular, Inc., 926 F. Supp. 653, 656 (M.D. Tenn. 1996) (stating that "[t]he *McDonnell Douglas* formula is inapplicable to cases in which the Title VII plaintiff presents credible, direct evidence of discriminatory animus"); *see also* Katz, *supra* note 2, at 124–25 (explaining that the *McDonnell Douglas* test provides another avenue, beyond direct evidence, for plaintiffs to prove that an adverse employment action occurred "because of" the plaintiff's protected characteristic).

24. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) (stating that "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by").

25. *See McDonnell Douglas Corp.*, 411 U.S. at 802.

action at issue.[26] In the hiring context, for example, a plaintiff alleging race discrimination must show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[27]

The plaintiff's burden at the prima facie stage is not onerous and is simply designed to force a defendant to come forward with a nondiscriminatory explanation for its employment action.[28]

If a plaintiff establishes a prima facie case of discrimination, a rebuttable presumption of unlawful discrimination arises.[29] The burden then shifts to the employer to produce evidence of a legitimate, nondiscriminatory reason for its adverse employment action, which it must do to avoid liability.[30] If the defendant carries its burden, which is again not onerous, the presumption of unlawful discrimination generated by the prima facie case "drops from the case."[31] At that point, the burden shifts back to the plaintiff to prove as a factual matter that she suffered unlawful discrimination, which may be accomplished by providing evidence that the defendant's nondiscriminatory explanation is merely a pretext for the employer's real reason: intentional and unlawful discrimination.[32] Thus, although the burden

---

26. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 506 (2002) (noting that "the precise requirements of the prima facie case can vary with the context and were 'never intended to be rigid, mechanized, or ritualistic'"); Smith v. City of Salem, 378 F.3d 566, 575–76 (6th Cir. 2004) (defining an "adverse employment action" under Title VII as a "materially adverse change in the terms and conditions of [plaintiff's] employment," and finding that a twenty-four hour suspension, which was the equivalent of three eight-hour days, could constitute an adverse employment action).

27. *McDonnell Douglas Corp.*, 411 U.S. at 802.

28. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F.3d 769, 776 (6th Cir. 2016).

29. *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983).

30. *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254.

31. *See Burdine*, 450 U.S. at 256 (quoting Bd. of Trs. v. Sweeney, 439 U.S. 24, 25 n.2 (1978)) (explaining that "the employer's burden is satisfied if he simply 'explains what he has done' or 'produc[es] evidence of legitimate nondiscriminatory reasons'"); *id.* at 255 n.10.

32. *See McDonnell Douglas Corp.*, 411 U.S. at 804; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507–08, 517 (1993); Flowers v. Troup Cnty. Sch. Dist., 803 F.3d 1327, 1339 (11th Cir. 2015) (recognizing that a plaintiff may not survive summary judgment by "merely contradicting the [defendant's] proffered legitimate, nondiscriminatory reason"; rather, the plaintiff must still provide sufficient evidence

of production shifts back and forth, the burden of persuading the factfinder that the defendant intentionally discriminated against the plaintiff remains at all times—and in the final analysis—with the plaintiff.[33]

II. COMPARATOR EVIDENCE AS PROOF OF DISPARATE TREATMENT DISCRIMINATION

This Part examines how plaintiffs use comparator evidence to prove discrimination claims. Because of its potency, plaintiffs employ comparator evidence for a variety of purposes, including to raise an inference of discriminatory intent as part of their prima facie case, as evidence of pretext to undermine the employer's nondiscriminatory explanation, or as evidence to prove the employer's ultimate discriminatory intent.[34] This Part examines these potential uses of comparator proof.

A. Using Comparator Evidence to Prove a Prima Facie Case

One need only look as far as the leading United States Supreme Court precedents on disparate treatment claims to see how comparator evidence may be used to establish a prima facie case of discrimination. This precedent includes one of the Court's early disparate treatment cases, *Texas Department of Community Affairs v. Burdine*, a decision

---

that the employer's action was discriminatory). In *Reeves v. Sanderson Plumbing Products, Inc.*, the Court clarified that the evidence of discrimination put forth in plaintiff's prima facie case, combined with the evidence "that the employer's asserted justification is false, may [be alone sufficient to] permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. 133, 148 (2000). There may be times, however, when a plaintiff presents evidence creating an issue of fact as to the credibility of the defendant's asserted nondiscriminatory explanation, but the defendant is still entitled to judgment as a matter of law due to a lack of evidence to prove unlawful discrimination. *See id.* at 148; *see, e.g.*, Fisher v. Vassar Coll., 70 F.3d 1420, 1437 (2d Cir. 1995) (finding plaintiff proved pretext but failed to prove that sex discrimination was the employer's true motive and stating that "our ruling on pretext does not require as a corollary that we affirm the ultimate finding of discrimination").

33. *See Burdine*, 450 U.S. at 253.

34. *See, e.g.*, Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 303 (6th Cir. 2016) (finding that an African American employee who was demoted established a prima facie case of discrimination with evidence that he was replaced in his manager position by a Caucasian); Coleman v. Donahoe, 667 F.3d 835, 841–42 (7th Cir. 2012) (recognizing that a plaintiff may demonstrate pretext through comparator evidence); *see also* Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 213 (2009); Vazquez v. Caesar's Paradise Stream Resort, No. 3:CV-09-0625, 2013 WL 6244568, at *6 (M.D. Pa. Dec. 3, 2013).

intended to clarify the precise analysis under the three stages of the *McDonnell Douglas* burden-shifting test.[35]

In *Burdine*, the Court noted that for a plaintiff to prove a prima facie case of discrimination in hiring, she need only "prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."[36] As noted previously, such "circumstances" might include comparator proof.[37] Employing a simple comparator analysis, the *Burdine* Court then declared that the plaintiff had proven a prima facie case of sex discrimination because her evidence showed that she applied for an available position for which she was qualified, and the position remained open for several months before the employer eventually rejected her in favor of a male.[38]

For purposes of the prima facie case, the *Burdine* Court employed a simple comparator analysis, merely stating that the female plaintiff was rejected in favor of a male.[39] This analysis is consistent with the *Burdine* Court's general instruction that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous."[40] Following the Court's lead, when a plaintiff invokes comparator evidence to prove a prima facie case of discrimination, lower courts are often lenient in regard to the proof necessary to meet this evidentiary burden.[41] Once the analysis moves past this initial stage,

35. *See* 450 U.S. 248, 252 (1981).

36. *Id.* at 253.

37. *See supra* notes 2–4 and accompanying text.

38. *See* 450 U.S. at 253 n.6.

39. *See id.*

40. *Id.* at 253; *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (discussing the requirements of the prima facie case in a manner similar to *Burdine*).

41. *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (articulating the standards for comparator evidence at the prima facie stage and adopting a "flexible standard," consistent with *Burdine*, that "[s]o long as the distinctions between the plaintiff and the proposed comparators are not 'so significant that they render the comparison effectively useless,' the similarly-situated requirement is satisfied"); Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 660 (9th Cir. 2002) (finding Caucasian plaintiff had put forth sufficient evidence to meet his minimal prima facie burden of race discrimination based on declarations asserting that only white or white-looking casuals were laid off, while non-white casuals remained employed to perform the same duties as plaintiff's). *But see* Lewis v. City of Union City, 918 F.3d 1213, 1224 (11th Cir. 2019) (determining "that a meaningful comparator analysis must remain part of the *prima facie* case"); Lee v. Kan. City S. Ry. Co., 574 F.3d 253, 259–60 (5th Cir. 2009) (applying a more rigorous comparator analysis at the prima facie stage).

however, courts employ a far more rigorous analysis of comparator evidence.[42]

B. Comparator Evidence that Falls Short of Proving Pretext

A recent Sixth Circuit Court of Appeals case, *Tennial v. United Parcel Service, Inc.*, illustrates the distinction in the level of rigor used to analyze comparator proof at the various stages of the *McDonnell Douglas* test and shows that in some cases, comparator evidence can satisfy the prima facie case while falling short of proving pretext.[43]

Tennial involved claims of race, age, and disability discrimination brought by William Tennial, an African American employee of defendant, United Parcel Service (UPS).[44] After numerous service failures during his time as Hub Manager of the Memphis Hub's "Twilight Sort," Tennial was placed on a Management Performance Improvement Plan (MPIP) and was demoted after further performance issues.[45] Although Tennial acknowledged his service failures, he sought to support his race discrimination claims, in particular, with evidence of Caucasian managers allegedly responsible for similar service failures who were less severely disciplined.[46]

The Sixth Circuit analyzed Tennial's race discrimination claims under the *McDonnell Douglas* test.[47] To prove a prima facie case of race discrimination, the court declared that Tennial would have to show, among other things, that "he was . . . replaced by a person outside the protected class or treated differently than similarly situated

42. *See, e.g.*, Johnson v. Securitas Sec. Servs. USA, Inc., 769 F.3d 605, 613 (8th Cir. 2014) ("At the pretext stage, the test for whether someone is sufficiently similarly situated, as to be of use for comparison, is rigorous."); Provenzano v. LCI Holdings, Inc., 663 F.3d 806, 813–14 (6th Cir. 2011) ("[A] general weighing of the qualifications of [the plaintiff and her comparator] is necessary at the prima facie stage; however, this light review must be distinguished from the more rigorous comparison conducted at the later stages of the *McDonnell Douglas* analysis."); *see also Burdine*, 450 U.S. at 255 ("If the defendant carries [its] burden of produc[ing evidence of a legitimate, nondiscriminatory reason for its employment action], the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity.").

43. 840 F.3d 292 (6th Cir. 2016).

44. *See id.* at 299.

45. *See id.*

46. *See id.*

47. *See id.* at 302–03.

nonminority employees."[48] The court found this requirement met by applying a simple comparator analysis reminiscent of *Burdine*, reasoning, quite simply, that Tennial "was replaced as Hub Manager by a Caucasian."[49]

From there, the burden shifted to UPS to produce evidence of a legitimate, nondiscriminatory reason for Tennial's demotion.[50] UPS met this burden by presenting evidence of Tennial's failure to correct on-going performance deficiencies, including his failure to meet the requirements of his MPIP.[51]

Finally, "the burden shifted back to Tennial to identify evidence from which a reasonable jury could conclude that the proffered reason is actually a pretext for unlawful discrimination."[52] Tennial attempted to prove pretext by proffering four Caucasian Hub Managers who allegedly had similar performance failures but were not disciplined.[53] The court rejected this argument, however, based on critical differences between Tennial and each comparator, including that several comparators had not engaged in performance failures of comparable seriousness to Tennial's and did not have the same "long-standing" performance issues as Tennial.[54] Because he was unable to prove pretext, Tennial's discrimination claim failed.[55]

C. Comparator Evidence that Proves Pretext

Reaching the opposite result as *Tennial* at the final stage of the *McDonnell Douglas* test, the United States Court of Appeals for the Sixth Circuit found enough similarities between a plaintiff and her comparators to survive summary judgment when the plaintiff's comparators were disciplined more leniently than the plaintiff, despite violating the same rule.[56] That case, *Jackson v. VHS Detroit Receiving*

48. *Id.* at 303 (finding the first three *prima facie* requirements met because Tennial was an African American, his demotion constituted an adverse employment action, and he was qualified for the job of Hub Manager because he had over thirty years of experience with UPS and had been placed in that position by the company).

49. *See id.*

50. *See id.*

51. *See id.*

52. *Id.*

53. *See id.* at 304.

54. *See id.* at 304–05.

55. *See id.* at 305.

56. *See generally* Jackson v. VHS Detroit Receiving Hosp., Inc., 814 F.3d 769 (6th Cir. 2016) (finding that factual issues were not resolved and denying summary judgment).

Hospital, Inc., further illustrates how plaintiffs may use comparator evidence at both the prima facie and pretext stages.[57]

In *Jackson*, the essence of the plaintiff's argument was that her employer treated her comparators more favorably despite having engaged in similar misconduct.[58] The plaintiff in that case, Karon Jackson, was employed as a mental health technician (MHT) in the Mental Health Crisis Center of Detroit Receiving Hospital (DRH).[59] As an MHT, Jackson's duties involved assisting registered nurses (RN) with psychiatric patients, including physically escorting patients out of DRH after an RN authorized a patient's discharge.[60]

On September 6, 2013, Jackson and RN Christine Moore discharged an incorrect patient from DRH after both failed to check the patient's identification wristband, which each was required to do.[61] Jackson promptly admitted her mistake and later testified that she had just finished assisting a different agitated patient when Moore instructed her to escort the wrong patient out of DRH.[62] Three days later, Jackson was fired.[63]

The memorandum explaining Jackson's termination stated that she had violated "major infractions" "k" and "q" of the employer's disciplinary policy.[64] In rather broad language, infraction "k" prohibited "[a]ny action or conduct that endangers or may be detrimental to the well being of a patient, co-worker, physician, contractor or visitor," while infraction "q" prohibited "[a]ny violation of health and/or safety standards established by law or [Detroit Medical Center] policy."[65] Jackson later sued DRH for sex discrimination, arguing that although she admittedly committed a terminable infraction, her employer did not terminate male MHTs who

57. *See generally id.*

58. This type of argument has been successful in similar cases. *See, e.g.*, Vazquez v. Caesar's Palace Stream Resort, No. 3-CV-09-0625, 2013 WL 6244568, at *1 (M.D. Pa. Dec. 3, 2013) (describing how plaintiff, an African American employee, brought successful race discrimination claim based on evidence that she was fired for wearing her hair in braids while a Caucasian employee was not).

59. *See Jackson*, 814 F.3d at 772.

60. *See id.*

61. *See id.* at 773.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.* (explaining how DRH's disciplinary policy defines major infractions as "those violations of policy or misconduct which are generally considered more serious and could therefore result in immediate dismissal or disciplinary suspension without having a prior disciplinary record").

had made similar mistakes, suggesting she was fired because she was a woman.[66]

After serving as an MHT for over two years, Jackson's closest male comparator, Ronald Duncan, was placed on "final warning" status in July 2011 for being absent from his work area (a minor infraction) and for improper personal use of DRH computers (a major infraction).[67] In February 2012, Duncan was again placed on "final warning" status for testing positive for drug use (a major infraction).[68] Thereafter, Duncan entered into a year-long "last chance agreement," under which he could be terminated for "any minor or major infraction."[69] Just two months later, Duncan walked the wrong patient out of DRH because he failed to check the patient's ID band.[70] Duncan was cited with two major infractions for this incident, including the same health and safety violation for which Jackson was terminated.[71] Duncan also committed an additional minor infraction later that day when he walked off the job without punching out.[72] Duncan and Jackson's supervisor, Leorea Heard, investigated these incidents and determined that Duncan was not to blame for the wrong patient's discharge, even though video evidence confirmed that Duncan failed to check the patient's ID band.[73] As a result, Duncan received no discipline, apart from a five-day suspension while the investigation was ongoing.[74]

For Jackson's prima facie case of sex discrimination, only one element was in dispute: whether "similarly situated nonprotected employees were treated more favorably" than Jackson.[75] Here, the court noted that three factors are particularly relevant when determining whether employees are "similarly situated" in a case involving differential disciplinary action: (1) whether the employees dealt with the same supervisor;[76] (2) whether the employees were

66. *See id.* at 774–75.
67. *See id.* at 774.
68. *See id.*
69. *Id.*
70. *See id.*
71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.* at 774.
75. *Id.* at 776.
76. *See* Coleman v. Donahoe, 667 F.3d 835, 847 (7th Cir. 2012) (according to the Seventh Circuit, the "same supervisor" factor is significant because "[w]hen the same supervisor treats an otherwise equivalent employee better, one can often reasonably infer that an unlawful animus was at play." By contrast, "[t]he inference

subject to the same employment standards; and (3) whether the employees "engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it."[77] The court further noted that factor (3), the only factor in dispute, examines whether the comparators' actions were of "comparable seriousness" to the conduct that led to plaintiff's termination, that a plaintiff is not required to prove that the comparator's actions were "identical," and that the plaintiff and her comparators must simply be "similar in all of the *relevant* aspects."[78]

On the merits, the court found the prima facie case satisfied based on the fact that Duncan's actions were of "comparable seriousness" to Jackson's, a standard employed by numerous circuit courts.[79] The court found that Duncan's actions were virtually identical to Jackson's—and therefore of "comparable seriousness"—because like Jackson, he escorted the wrong patient out of the DRH after failing to check the patient's ID band.[80] Emphasizing that Jackson's burden at the prima facie stage is "not onerous," and that any alleged differences between Jackson and her comparator would be dealt with in later stages of the burden-shifting framework, the court concluded that Jackson had sufficiently demonstrated "circumstances giving rise to an inference of unlawful discrimination."[81]

---

of discrimination is weaker when there are different decision-makers, since they 'may rely on different factors when deciding whether, and how severely, to discipline an employee.'").

77. *See Jackson*, 814 F.3d at 777 (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)); *see also Coleman*, 667 F.3d at 847 (identifying the same three factors).

78. *Jackson*, 814 F.3d at 777 (quoting Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 352 (6th Cir. 1992)) (internal marks omitted).

79. *See id.* at 778; *see, e.g.*, Tennial v. United Parcel Serv., Inc., 840 F.3d 292, 303 (6th Cir. 2016) (adopting "comparable seriousness" standard); *see also* Wheeler v. Georgetown Univ. Hosp., 812 F.3d 1109, 1115, 1118 (D.C. Cir. 2016) (employing "comparable seriousness" standard at the pretext stage); Hoyle v. Freightliner, LLC, 650 F.3d 321, 336 (4th Cir. 2011) (applying "comparable seriousness" standard at the prima facie stage); Lee v. Kan. City S. Ry. Co., 574 F.3d 253, 261 (5th Cir. 2009) (adopting "comparable seriousness" standard); Russell v. City of Kansas City, 414 F.3d 863, 868 (8th Cir. 2005) (employing "comparable seriousness" standard at the pretext stage); Graham v. Long Island R.R., 230 F.3d 34, 40, 43 (2d Cir. 2000) (employing "comparable seriousness" standard at the prima facie and pretext stages); Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230 (10th Cir. 2000) (employing "comparable seriousness" standard at the pretext stage).

80. *See Jackson*, 814 F.3d at 778.

81. *See id.*

In defense, DRH argued that it was justified in treating Jackson more severely than Duncan because her mistake was more egregious.[82] Relying on Jackson's comparator proof, the court found this explanation pretextual.[83] Here, the court found that both Jackson and Duncan had escorted an incorrect patient out of the DRH; as such, the employees had violated the same rule, the results of that violation were the same, and the harm that ultimately befell the patients was the same.[84] In addition, there were aggravating circumstances in Duncan's case that made his lesser punishment all the more implausible.[85] Unlike Jackson, at the time of his offense, Duncan had already twice been placed on "final warning" status for committing other major and minor infractions.[86] Duncan was also subject to a "last chance agreement" under which any infractions would result in his termination.[87] Also, on the same day that he violated the ID band rule, Duncan committed another (minor) infraction by improperly walking off the job.[88] Despite these aggravating circumstances, Duncan was not terminated.[89] Accordingly, the court concluded that a comparison to Duncan could allow a reasonable jury to reject DRH's explanation for Jackson's more severe treatment.[90]

Numerous other federal courts have employed comparator evidence at both the prima facie and pretext stages in a manner similar to *Jackson*, including the United States Courts of Appeal for the Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits.[91] Although

82. *See id.* at 779.

83. *See id.* (finding sufficient evidence of pretext for Jackson to withstand summary judgment); *see also id.* at 782–83.

84. *See id.* at 781.

85. *See id.* at 781–82.

86. *See id.* at 782.

87. *See id.*

88. *See id.*

89. *See id*.

90. *See id.* (rejecting the suggestion that Duncan's offense was less severe than Jackson's due to Heard's conclusion that he was not at fault by having discharged his patient "on the word of the nurse" because Jackson herself relayed a similar story).

91. *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835, 848–49, 853 (7th Cir. 2012) (relying on comparator evidence to find both a prima facie case of discrimination and sufficient evidence of pretext when the plaintiff and her two comparators worked at the same job site, were subject to the same standards of conduct, violated the same workplace rule, and were disciplined by the same supervisor); Hawn v. Exec. Jet Mgmt., Inc., 615 F.3d 1151, 1158 (9th Cir. 2010) ("The concept of 'similarly situated' employees may be relevant to both the first and third steps of the *McDonnell Douglas* framework."); Graham v. Long Island R.R., 230 F.3d 34, 43 (2d Cir. 2000); Equal Emp. Opportunity Comm'n v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195 n.6 (10th Cir. 2000) ("[W]hile evidence that a defendant

a comparator analysis like that conducted in *Jackson* can become tedious, there are common themes that arise across these cases.

First, as the Seventh Circuit has stated and as *Jackson* reveals, a plaintiff's "comparator evidence can do 'double-duty' at both the prima facie and pretext stages."[92] At the prima facie stage, the *Jackson* court simply considered whether Jackson's actions were of "comparable seriousness" to those of her comparators.[93] The court later ratcheted up its comparator analysis at the pretext stage, employing a more rigorous comparison, by examining whether those actions were "substantially identical."[94] Nevertheless, the same factors were relevant at both stages, including the nature and severity of the compared offenses and whether those actions violated the same company rule or policy.[95]

Second, cases like *Jackson* show what type of comparator evidence is sufficient to survive summary judgment.[96] For example, after the *Jackson* court had accounted for all potentially relevant nondiscriminatory variables—including whether the employees were disciplined by the same supervisor, were subject to the same employment standards, and had engaged in substantially similar conduct without differentiating or mitigating circumstances—the only variable left to explain the differential treatment between Jackson and

---

treated a plaintiff differently than similarly-situated employees is certainly sufficient to establish a prima facie case, it is '[e]specially relevant' to show pretext if the defendant proffers a legitimate, nondiscriminatory reason for the adverse employment action."); Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 646 (3d Cir. 1998) (finding comparator evidence relevant to both the prima facie and pretext phases, but imposing a more "rigorous" standard at the pretext stage). Notably, a 2019 en banc opinion of the Eleventh Circuit Court of Appeals arguably departs from the analysis of these cases by employing a much more stringent comparator proof analysis at the prima facie stage, as opposed to the above cases, which generally reserve such a rigorous analysis for the pretext stage. *See* Lewis v. City of Union City, 918 F.3d 1213, 1225 (11th Cir. 2019).

92. *Coleman*, 667 F.3d at 858; *see also Jackson*, 814 F.3d at 778–80.

93. *See Jackson*, 814 F.3d at 778.

94. *See id.* at 780–83. For both the prima facie and pretext stages, the court declared that "the relevant inquiry" would analyze the comparator's conduct "in all of the relevant aspects." *See id.* at 782. Regarding the "substantially identical" standard, the court clarified that this is merely "a change in the rigor with which we evaluate [the plaintiff's] similarity to her comparators" as between the *prima facie* stage and the pretext stage; "it is not an increase in the weight of her evidentiary burden." *Id.* at 780.

95. *See Jackson*, 814 F.3d at 780; *see also id.* at 778, 780 (stating prima facie standards and pretext standards).

96. *See id.* at 781.

her comparators was their sex.[97] Accordingly, Jackson's comparator proof demonstrated that her sex was at least one reasonable explanation for her termination, which was sufficient to withstand summary judgment.[98] In this respect, and in the words of the Seventh Circuit, comparator evidence can "provide plaintiffs the [evidentiary] 'boost' that the *McDonnell Douglas* framework intended," one that should not be transformed into "an insurmountable hurdle" by judicial rulings "[d]emanding nearly identical comparators."[99] With this framework in place, this Article turns to the ways comparator evidence may be used to defeat employment discrimination claims.

III. DEFENSE TACTIC #1: NO COMPARATOR EXISTS

The first defense argument regarding comparator proof is to argue that a plaintiff cannot prove she has been the victim of discrimination either because *no comparator exists* in her workforce or because she has *failed to identify* a relevant comparator where one is required.[100]

Depending on the factual context and jurisdiction, this argument can prove effective even at the prima facie stage.[101] In one recent case

97. *See* Sullivan, *supra* note 34, at 198 (noting that "when comparators are sufficiently alike, differences in treatment are probative of discrimination").

98. *See id.*

99. Coleman v. Donahoe, 667 F.3d 835, 852 (7th Cir. 2012).

100. *See, e.g.*, *Jackson*, 814 F.3d at 776. As used here, the term "comparator" refers to one similarly situated to the plaintiff in all material respects.

101. *See id.* (requiring proof that "similarly situated non-protected employees were treated more favorably" to establish a prima facie case of sex discrimination); Eaton v. Ind. Dep't of Corr., 657 F.3d 551, 554 (7th Cir. 2011) (requiring plaintiff to prove, as part of her prima facie case, that her employer treated similarly situated employees outside of the protected class more favorably); Burke-Fowler v. Orange Cty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006) (requiring proof that defendant "treated similarly situated employees outside of [plaintiff's] protected class more favorably than she was treated" in order to establish a prima facie case for disparate treatment in a race discrimination case); Turner v. Kan. City S. Ry. Co., 675 F.3d 887, 893 (5th Cir. 2012) (requiring comparator evidence to prove a prima facie case of discrimination in a work rule violation case); Lee v. Kan. City S. Ry. Co., 574 F.3d 253, 259, 261–62 (5th Cir. 2009) (requiring comparator evidence as part of the prima facie case, and applying a rigorous comparator analysis at that stage). *But see* McGuinness v. Lincoln Hall, 263 F.3d 49, 53 (2d Cir. 2001) (quoting Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 468 (2d Cir. 2001)) ("A showing that the employer treated a similarly situated employee differently is 'a common and especially effective method' of establishing a prima facie case of discrimination, but it 'is only one way to discharge that burden.'"); Bodett v. CoxCom, Inc., 366 F.3d 736, 744 (9th Cir. 2004) (recognizing that comparator evidence is just one method of

involving the prima facie case, for example, the Fifth Circuit Court of Appeals dismissed the race discrimination claim of a plaintiff of Arab descent who worked as a scientist at a chemical company because the plaintiff failed to identify a single comparator in his workforce, further admitting that no such comparator exists.[102] In another example, the Eleventh Circuit Court of Appeals found that an African American physician's employment discrimination claim was frivolous, leading to an award of over $200,000 in attorney's fees to the defendants, based in part on his failure to identify an appropriate comparator at the prima facie stage.[103]

This argument can also be employed at the pretext stage.[104] In one exemplary case, the Fourth Circuit Court of Appeals rejected a plaintiff's claim that she was terminated in retaliation for taking leave under the Family and Medical Leave Act (FMLA) because she was unable to prove that the defendant's legitimate explanation for her termination was pretextual, given that she had "not identified any similarly situated FedEx employee—that is, an employee accused of violating the same company policy but who did not take FMLA leave—who was given more favorable treatment."[105]

The "lack of comparator" argument has proven effective at times because, as legal scholars like Suzanne Goldberg have noted, many courts today insist upon comparator proof as "their preferred lens for evaluating discrimination claims."[106] Moreover, as Goldberg noted, "[T]here are several types of [employment discrimination] cases in which there are simply no comparators from which to choose."[107] Goldberg provided examples when there would naturally be no comparators available to a plaintiff, including cases where an employee's position within the company is unique; cases where a plaintiff's workplace conduct or performance situation is distinct from

---

proving a prima facie case of discrimination); Bryant v. Aiken Reg'l Med. Ctrs. Inc., 333 F.3d 536, 545 (4th Cir. 2003) (rejecting defendant's argument that plaintiff's race discrimination claim necessarily fails because plaintiff did not offer evidence that she was treated differently from a similarly situated white applicant and declaring that a plaintiff such as this "is not required as a matter of law to point to a similarly situated white comparator in order to succeed on a race discrimination claim").

102. *See* Alkhawaldeh v. Dow Chem. Co., 851 F.3d 422, 426–27 (5th Cir. 2017).

103. *See* Hamilton v. Sheridan Healthcorp, Inc., 700 F. App'x 883, 884, 886 (11th Cir. 2017).

104. *See* Laing v. Fed. Exp. Corp., 703 F.3d 713, 720–21 (4th Cir. 2013).

105. *See id.*

106. *See* Goldberg, *supra* note 4, at 749.

107. *See id.* at 757.

all other potential comparators; and cases involving workplaces where all potential comparators share the same trait that is the basis for the plaintiff's discrimination claim, as in the case of a racially homogenous workforce.[108]

Echoing these sentiments, scholar Charles Sullivan has concluded that "discrimination cases today increasingly turn not on whether the plaintiff has proven her prima facie case or established that the 'legitimate nondiscriminatory reason' is a pretext for discrimination . . . , but rather on whether the plaintiff has identified a suitable 'comparator' who was treated more favorably than she."[109] According to Sullivan, "cases increasingly turn on whether the plaintiff's proposed comparator(s) is sufficiently similar to her to justify—*with or without other evidence*—the ultimate inference of discrimination."[110] In this respect, "the absence of a comparator is often fatal to a claim."[111]

Although a blanket insistence upon comparator proof ignores the fact that discrimination claims can be proven with other forms of evidence, including direct evidence or other types of circumstantial evidence, the lack of comparator argument has been successful in various circuits in cases alleging "sex-plus" discrimination.[112]

In sex-plus discrimination scenarios, an employer does not discriminate against all members of a protected class.[113] Rather, the employer discriminates against only a particular subgroup of males or females on the basis of the employee's sex and another "plus" factor, as when an employer treats women with children differently than men with children, usually due to the employer's stereotypical belief that such women, but not such men, will be bad employees.[114]

---

108. *See id.* at 757–61.

109. Sullivan, *supra* note 34, at 193.

110. *Id.* at 194 (emphasis added).

111. *Id.* at 206.

112. *See supra* notes 20–24 and accompanying text.

113. *See* King v. Ferguson Enters., Inc., 971 F. Supp. 2d 1200, 1209 (N.D. Ga. 2013) ("To succeed on a gender-plus claim, plaintiffs need not establish that their employer discriminated against the entire class of men or women; instead, they need only establish that their employer treated a subclass of men or women (those with the plus characteristic) differently from those without the plus characteristic."), *aff'd*, 568 F. App'x 686 (11th Cir. 2014).

114. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544–45 (1971) (Marshall, J., concurring); *see also* Fisher v. Vassar Coll., 70 F.3d 1420, 1433 (2d Cir. 1995) (noting that in *Phillips*, "[t]he Supreme Court . . . adopted the proposition that sex considered in conjunction with a second characteristic—'sex plus'—can delineate a 'protected group' and can therefore serve as the basis for a Title VII suit"), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

Because sex-plus discrimination is simply one type of "sex" discrimination, courts have recognized that a sex-plus discrimination plaintiff must prove, at a minimum, that the sexes were treated differently.[115] And one common method of proving sex discrimination—whether for a pure sex discrimination claim or a sex-plus claim—is through comparator evidence.[116] Whether comparator evidence is *required* in sex-plus cases, however, is an issue that has splintered courts.

On the one hand, numerous courts have held, or impliedly expressed the view, that sex-plus discrimination claims *necessarily fail* without proof of a comparator outside of the plaintiff's protected class sharing the same "plus" characteristic—what this Article refers to as "opposite sex comparator evidence."[117] Courts following this approach include the United States Courts of Appeals for the Eighth, Tenth, and Third Circuits.[118] In one leading case, *Coleman v. B-G*

115. *See* 42 U.S.C. § 2000e-2(a)(1) (2018); DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 584 (E.D. Pa. 2010); *King*, 971 F. Supp. 2d at 1209.

116. *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 345 (7th Cir. 2017) (employing "the tried-and-true comparative method" on a claim of sexual orientation discrimination); *see also* Goldberg, *supra* note 4, at 744–45 (noting that "comparators have emerged as the predominant methodological device for evaluating discrimination claims").

117. *See generally* Marc Chase McAllister, *Proving Sex-Plus Discrimination Through Comparator Evidence*, 50 SETON HALL L. REV. 757 (2020) (explaining that in sex-plus discrimination claims, two types of comparator evidence may be relevant in proving sex-plus discrimination, each of which have been advocated by sex-plus plaintiffs: (a) "opposite sex comparator evidence," which compares an employer's treatment of the plaintiff to persons of the opposite sex who share the same plus characteristic as the plaintiff; and (b) "same sex comparator evidence," which instead shows how the employer treats persons of the same sex as the plaintiff who lack the relevant plus characteristic).

118. *See* Doucette v. Morrison Cty., Minn., 763 F.3d 978, 985 (8th Cir. 2014) ("'Sex-plus' plaintiffs can never be successful unless there is a corresponding subclass of members of the opposite gender."); Coleman v. B–G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1202–05 (10th Cir. 1997) (ruling on the merits that in a sex-plus-marital status claim a female plaintiff must show that her male co-workers with the same marital status were treated differently and reversing jury verdict for plaintiff due to lack of evidence on that point); Bryant v. Int'l Sch. Servs., Inc., 675 F.2d 562, 575 (3d Cir. 1982) (in rejecting a sex-plus-marital status claim, stating that "[t]o prove their *prima facie* case appellants' must produce evidence that similarly situated males were treated differently and that there was no adequate nonsexual explanation for the different treatment"). *Cf.* Lewis v. 20th-82nd Judicial Dist. Juvenile Prob. Dep't, No. 99-50189, 1999 WL 642898, at *3 (5th Cir. July 29, 1999) ("Although discrimination against married women is unlawful under Title VII, Lewis has presented no evidence that she was treated differently than married men in her office were treated."); Fisher v. Vassar Coll., 70 F.3d 1420, 1446–47 (2d Cir. 1995) (rejecting sex-plus-marital

Maintenance Management of Colorado, Inc., the Tenth Circuit Court of Appeals declared that "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender," and consequently no evidence of how such opposite-sex comparators were treated.[119] Without such comparator evidence, the court declared that sex-plus "plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender," a key component of any sex discrimination claim.[120]

Taking the opposite stance, in *Back v. Hastings on Hudson Union Free School District*, the United States Court of Appeals for the Second Circuit rejected the view that sex-plus claims must be supported by opposite-sex comparator evidence.[121] The *Back* Court found instead that a sex-plus plaintiff could prove her case through stereotyped remarks about the employment abilities of women with children without any comparator evidence.[122] In one passage, for example, the court described the issue in the case as "whether stereotyping about the qualities of mothers is a form of gender discrimination, and whether this can be determined in the absence of evidence about how the employer in question treated fathers."[123] The court "answer[ed] both questions in the affirmative."[124] Thus, although the plaintiff had "proffered no evidence about the treatment of male administrators with young children," this lack of comparator proof was not fatal to her claim because "there is no requirement that such evidence be adduced."[125]

Despite the Second Circuit's analysis, numerous federal district courts have continued to follow the Tenth Circuit's declaration in *Coleman* that "gender-plus plaintiffs can never be successful if there

---

status claim brought by female plaintiff in regard to her tenure denial because she "failed to present *any* evidence to show that married males who were up for tenure received 'better, or even different treatment'"), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

119. *Coleman*, 108 F.3d at 1204.

120. *Id.*

121. 365 F.3d 107, 118–19 (2d Cir. 2004) (stating that for a "sex plus" discrimination claim, "[t]he relevant issue is . . . whether the plaintiff provides evidence of purposefully sex-discriminatory acts").

122. *See id.* at 118–22.

123. *Id.* at 113.

124. *Id.*

125. *Id.* at 121 (deeming defendants "wrong in their contention that [a plaintiff like] Back cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently").

is no corresponding subclass of members of the opposite gender."[126] In one exemplary case, *Philipsen v. University of Michigan Board of*

126. *See* Llana-Aday v. Dist. Bd. of Trs. of Miami-Dade Coll., No. 11–22825–CIV., 2012 WL 5833612, at *4 (S.D. Fla. Nov. 16, 2012) (granting summary judgment to the defendant on female plaintiff's sex-plus claim based on having children because the plaintiff failed to present evidence regarding an opposite-sex comparator with the same child-rearing responsibilities); Cote v. Shinseki, No. 807-cv-1524-T-TBM., 2009 WL 1537901, at *14 n.30 (M.D. Fla. June 2, 2009) (quoting Coleman v. B–G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997)) (rejecting sex-plus claim and declaring that "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender [because] [s]uch plaintiffs cannot make the requisite showing that they were treated differently from similarly situated members of the opposite gender"); Jordan v. Radiology Imaging Assocs., 577 F. Supp. 2d 771, 785 (D. Md. 2008) (finding the plaintiff failed to make out a prima facie case of sex-plus discrimination because she did not produce "evidence that women with children were treated differently from men with children"); Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT., 2007 WL 907822, at *8 (E.D. Mich. Mar. 22, 2007) (establishing that a same-sex comparator evidence alone cannot prove discrimination on the basis of sex); Miller v. Grand Holdings, Inc., No. Civ.04–2688 ADM/AJB, 2005 WL 1745639, at *8 (D. Minn. July 26, 2005) (rejecting sex-plus-marital status claim brought by a female plaintiff because the plaintiff presented no evidence that "similarly situated men with children were treated more favorably"); Witt v. Cty. Ins. & Fin. Servs., No. 04 C 3938, 2004 WL 2644397, at *3 (N.D. Ill. Nov. 18, 2004) (dismissing a female plaintiff's sex-plus-marital status claim because she failed to present evidence of similarly situated males who were treated differently by her employer); Hess-Watson v. Potter, No. Cic.A. 703CV00389, 2004 WL 34833, at *2 (W.D. Va. Jan. 4, 2004) (rejecting a female plaintiff's claim alleging sex-plus discrimination due to having small children because she presented no evidence that males with small children were treated differently than women with small children; "[r]ather, she claims that the [employer favored] women without small children, but in the absence of a male comparator, this simply does not establish a viable 'sex plus' discrimination claim"); Longariello v. Sch. Bd. of Monroe, 987 F. Supp. 1440, 1449 (S.D. Fla. 1997) (granting summary judgment to the defendant on a male plaintiff's sex-plus-marital status claim, based on the fact that he was single, because he failed to provide any evidence of how his employer treated single women), *aff'd sub nom.* Longariello v. Sch. Bd., 161 F.3d 21 (11th Cir. 1998); Bass v. Chem. Banking Corp., No. 94 Civ. 8833 (SHS), 1996 WL 374151, at *5 (S.D.N.Y. July 2, 1996) (rejecting a female plaintiff's sex-plus-parental status or sex-plus-marital status claim based on a failure to promote because the plaintiff produced no evidence that her former employer "treated her differently than married men or men with children with regard to promotion"). *Cf.* King v. Ferguson Enters., Inc., 971 F. Supp. 2d 1200, 1214 (N.D. Ga. 2013) (stating that "when female plaintiffs alleging gender-plus discrimination point to a comparator to prove their prima facie case, they must show that the comparator is *both* male *and* has the relevant plus characteristic," but recognizing that such comparator proof is not the only means of establishing a prima facie case), *aff'd*, 568 F. App'x 686 (11th Cir. 2014); DeAngelo v. DentalEZ, Inc., 738 F. Supp. 2d 572, 585 (E.D. Pa. 2010) (stating that when a plaintiff alleges sex-plus-age discrimination against older women, the plaintiff "must present evidence that older men, the relevant comparator, were treated

Regents, the United States District Court for the Eastern District of Michigan established that when a sex-plus plaintiff lacks direct evidence of sex discrimination, she "must . . . prove that the subclass of women was unfavorably treated as compared to the corresponding subclass of men"—in other words, that an opposite-sex comparator exists and was treated differently than the plaintiff.[127] In reaching this result, the court rejected the alternative approach exemplified by *Back* and similar cases, finding *Coleman* and cases like it more persuasive.[128]

This debate took center stage in a recent First Circuit Court of Appeals case, *Franchina v. City of Providence*.[129] In *Franchina*, a lesbian employee, Lori Franchina, sued the City of Providence asserting a Title VII sexual harassment claim.[130] After losing at trial, the City argued on appeal that Franchina could not prevail under a sex-plus theory because she failed to "identify a corresponding sub-class of the opposite gender [i.e., gay male firefighters] and show that the corresponding class was not subject to similar harassment or discrimination."[131] To support its position, the City argued that most federal circuit courts "require . . . a comparator outside of the protected class with the same 'plus' characteristic."[132] Accordingly, the City argued that to prevail, Franchina must present evidence that the

more favorably" such that "evidence regarding [the employer's] alleged preference for hiring younger women is not on point for this claim"); Nesselrotte v. Allegheny Energy, Inc., No. 06–01390, 2009 WL 703395, at *11 (W.D. Pa. Mar. 16, 2009) (requiring a female plaintiff in a sex-plus-dependent children claim to present comparator evidence regarding the corresponding subclass of men, but noting that the plaintiff could rely on non-comparator proof consisting "of any other circumstances, such as impermissible stereotyping, that raise an inference of gender discrimination under Title VII").

127. 2007 WL 907822, at *6–8 (discussing the split among courts regarding the type of proof necessary to prove a sex-plus discrimination claim with circumstantial evidence, including comparator proof).

128. *See id.* at *7–8 (describing *Back* as having "held that stereotyped remarks . . . can constitute evidence that gender played a part in an adverse employment decision, even without evidence of a male comparator," and rejecting *Back* after concluding that the court "is [more] persuaded by the reasoning of . . . *Coleman*").

129. *See generally* 881 F.3d 32 (1st Cir. 2018).

130. *See id.* at 37, 45–46.

131. *Id.* at 37–38, 52.

132. *See* Brief of Defendant-Appellant at 19, *Franchina*, 881 F.3d 32 (No. 16-2401), 2017 WL 2629951, at *19.

relevant opposite-sex comparators, "gay male firefighters," were treated differently than Franchina.[133]

The First Circuit rejected the City's argument for numerous reasons.[134] First, the court declared that the City's position "would permit employers to discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender," a result that would "be inapposite to Title VII's mandate against sex-based discrimination."[135] Moreover, the court declared that "Title VII is not to be diluted because discrimination adversely affects a plaintiff who is unlucky enough to lack a comparator in his or her workplace."[136]

Cases like *Coleman*, *Back*, and *Franchina* reflect a fundamental disagreement among courts regarding whether a sex-plus plaintiff must present evidence that a relevant comparator actually exists and was in fact treated differently than the plaintiff,[137] or instead whether a plaintiff may prevail in other ways, such as with proof that a hypothetical nonexistent comparator would be treated differently by the employer in the event one existed.[138] This particular Article does

133. *See id.* at 21 (retreating somewhat from its position, the City suggested that in the event Franchina could not present evidence that gay male firefighters were treated differently, she might still prevail by presenting evidence "that gay male firefighters would have been treated differently or have historically been treated any differently from gay female firefighters"). In addition, the City noted that Franchina had not alleged that the treatment she received was based on sex-based stereotyping. *See id.*

134. *See Franchina*, 881 F.3d at 52 (stating that the City's argument "has some rather obvious flaws").

135. *Id.* at 52–53; *see also* King v. Ferguson Enters., Inc., 971 F. Supp. 2d 1200, 1217 (N.D. Ga. 2013) (making a similar point, and stating that permitting a defendant to escape liability for having no comparator in its workforce "is not now, nor has it ever been, the law in [the Eleventh C]ircuit").

136. *Franchina*, 881 F.3d at 53.

137. As the Fourth Circuit Court of Appeals recently declared when discussing the role of comparator evidence in employment discrimination cases, "the very term 'discrimination' invokes the notion of treating two persons differently on the basis of a certain characteristic that only one possesses." Laing v. Fed. Exp. Corp., 703 F.3d 713, 719 (4th Cir. 2013). "Thus, 'the ordinary interpretation and meaning of the term [discrimination] implies that a plaintiff has received differential treatment vis-á-vis members of a different group on the basis of a statutorily described characteristic.'" *Id.* (quoting Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 611 (1999)).

138. *See* Johnston v. U.S. Bank Nat. Ass'n, No. 08-CV-0296 PJS/RLE, 2009 WL 2900352, at *9 (D. Minn. Sept. 2, 2009) (stating that the plaintiff's burden in a sex-plus case is to show that a similarly situated male "would not have been" treated the same if such a man existed, not that a such a comparator existed and was in fact treated better).

not attempt to resolve this debate.[139] Nevertheless, as this dispute reveals, whether a plaintiff must present comparator evidence for certain discrimination claims litigated under *McDonnell Douglas* remains an open question, often making it a viable argument for defendants to pursue. Indeed, as scholars like Suzanne Goldberg and Charles Sullivan have noted, many courts today insist upon comparator proof as "their preferred lens for evaluating discrimination claims."[140] And beyond the specific context of sex-plus discrimination, there will inevitably be cases where plaintiffs alleging discrimination lack other forms of evidence, especially given the unlikelihood of uncovering direct evidence of discriminatory intent, and in those instances defendants might attempt to defeat a plaintiff's claim by pointing to the plaintiff's lack of comparator proof.[141]

IV. DEFENSE TACTIC #2: PLAINTIFF INVOKES THE WRONG COMPARATOR

Unlike the first defense tactic above, which could be argued as a basis for dismissal in cases where a plaintiff has failed to proffer

139. The author addressed this issue in greater depth in a previous article. *See generally* McAllister, *supra* note 117. To summarize the author's view on this issue, recall that sex discrimination claims require proof that "the employer actually relied on [plaintiff's] gender in making its decision," Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989), or more simply, that the defendant intentionally discriminated against the plaintiff "because of" her sex. *See* 42 U.S.C. § 2000e-2(a)(1) (2018). What matters most, then, is not whether the plaintiff can generate evidence of how the employer treated a comparator of the opposite sex, but rather whether the plaintiff can show that her gender motivated the employer. *See* Goldberg, *supra* note 4, at 777–78 (arguing that plaintiffs ought to be able to prove discrimination even in cases where comparison is not possible). Comparator evidence is one means of establishing the requisite intent, but it is not the only means. *See Johnston*, 2009 WL 2900352, at *9; *see also* Fisher v. Vassar Coll., 70 F.3d 1420, 1447 n.12 (2d Cir. 1995) (recognizing that when "the complainant establishes by evidence that there are no [similarly situated] males [with the same plus factor at issue] and that it is unlikely that there would be any, then it may be that the complainant would be able to prevail by providing some other evidence of discrimination"), *aff'd en banc*, 114 F.3d 1332 (2d Cir. 1997).

140. *See* Goldberg, *supra* note 4, at 749; *see also supra* note 91 (identifying case examples from multiple circuits).

141. *See, e.g.*, Philipsen v. Univ. of Mich. Bd. of Regents, No. 06-CV-11977-DT, 2007 WL 907822, at *4–9 (E.D. Mich. Mar. 22, 2007) (finding no direct evidence of gender discrimination in a sex-plus discrimination case and rejecting plaintiff's claim due to a lack of opposite-sex comparator proof, stating that "[i]f there is no comparable subclass of members of the opposite gender, the requisite comparison to the opposite gender is impossible").

comparator evidence, a second defense tactic regarding comparator proof is to dispute the validity of the plaintiff's proposed comparator.[142] This particular defense strategy was employed in the recent United States Supreme Court cases involving sexual orientation and gender identity discrimination, and as reflected in the lower court opinions in those cases, can prove outcome-determinative.[143]

A. Identifying the Proper Comparator in Sexual Orientation Discrimination Claims

Disputes regarding the proper comparator arose in *Altitude Express, Inc. v. Zarda*,[144] a case from the Second Circuit Court of Appeals considering whether discrimination on the basis of an individual's sexual orientation is a form of sex discrimination under Title VII.[145]

In 2010, Donald Zarda, a gay man, worked as a skydiving instructor at Altitude Express where he performed tandem skydives, often with female clients.[146] Zarda sometimes told female clients about his sexual orientation to ease any concern they might have about being strapped to the body of an unfamiliar man.[147] That June, Zarda told a female client that he was gay "and ha[d] an ex-husband to prove it."[148] Thereafter, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior.[149] After this information was conveyed to Zarda's boss, Zarda was fired.[150]

Zarda sued, insisting he was fired because of his sexual orientation, which he claimed was a form of "sex" discrimination under Title VII of the Civil Rights Act of 1964.[151] When Zarda's case reached the United States Supreme Court, Zarda argued that "[w]ere

142. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742–43 (2020).

143. *See, e.g.*, Zarda v. Altitude Express, Inc., 855 F.3d 76 (2d Cir. 2017), *vacated*, 883 F.3d 100 (2d Cir. 2018).

144. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.* Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019).

145. *See Zarda*, 883 F.3d at 107–08 (extending Title VII's prohibition of "sex" discrimination to claims of sexual orientation discrimination); s*ee also* Opening Brief for Respondents at i, *Zarda*, 139 S. Ct. 1599 (No. 17-1623).

146. *See Zarda*, 883 F.3d at 108.

147. *See id.*

148. *Id.*

149. *See id.*

150. *See id.*

151. *See id.* at 109.

he not a man, he would not have been fired for his attraction to men."[152] Drawing upon sex-plus discrimination precedents—including *Phillips v. Martin Marietta Corp.* and *Newport News Shipbuilding & Dry Dock Company v. Equal Employment Opportunity Commission*—Zarda identified heterosexual women as the appropriate comparator and argued that "persons who shared his attraction to men but not his sex (i.e., 'heterosexual women') were not denied job opportunities."[153] Zarda thus argued that he had "properly alleged discrimination 'because of [his] sex.'"[154]

The petitioners in the case, including employer Altitude Express, took issue with Zarda's proposed comparator, heterosexual women.[155] Applying the sex-plus doctrine, the petitioners argued that in Zarda's case, "the 'plus' factor must be '*attraction to the same sex*'" (rather than *attraction to men*).[156] This, in turn, would make the relevant female comparator a gay female, which would arguably disprove Zarda's sex discrimination claim due to the employer's identical treatment of all homosexuals, men and women alike.[157]

As indicated above, the parties' comparator-based arguments in *Zarda* rest largely on disagreements regarding the appropriate comparator for a claim of sexual orientation discrimination.[158] The same debate played out in a similar case arising out of the Seventh Circuit Court of Appeals, *Hively v. Ivy Tech Community College of Indiana*, which demonstrates how disputes regarding the appropriate comparator can be outcome-determinative.[159]

---

152. Opening Brief for Respondents, *supra* note 145, at 21.

153. *See id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) & Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Comm'n, 462 U.S. 669 (1983)).

154. *Id.*

155. *See* Brief for Petitioners at 34–35, *Zarda*, 139 S. Ct. 1599 (No. 17-1623).

156. *Id.* at 34 (emphasis added).

157. *See id.* at 35. In the end, the United States Supreme Court determined that when an employer fires an employee for their sexual orientation, unlawful "sex" discrimination has occurred under Title VII. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) (declaring it "impossible to discriminate against a person for being homosexual . . . without discriminating against that individual based on sex"). Along the way, the Court rejected the defendant's argument outlined above. *See id.* at 1742–43 (rejecting the defense that no sex discrimination occurs when an employer "fire[s] male *and* female employees who are homosexual").

158. *See* Marc Chase McAllister, *Sexual Orientation Discrimination as a Form of Sex-Plus Discrimination*, 67 BUFF. L. REV. 1007, 1036–56 (2019).

159. *See generally* 853 F.3d 339 (7th Cir. 2017).

Hively involved allegations of sexual orientation discrimination by a lesbian plaintiff, Kimberly Hively.[160] Writing for the en banc Seventh Circuit, Chief Judge Diane Wood phrased the Title VII issue in the case as "whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."[161] Finding that they were, the court provided three primary bases for extending Title VII's prohibition of sex discrimination to sexual orientation discrimination claims, the first based on the comparative method.[162] Under that method, the court declared that "[i]t is critical . . . to be sure that only the variable of the plaintiff's sex is allowed to change."[163] The court thus explained that the issue "is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once"; rather, "[t]he counterfactual we must use is a situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner."[164]

Rephrased in sex-plus terms, in delineating the proper comparator for Hively's sexual orientation discrimination claim, the court identified the key variables as the plaintiff's and comparator's gender (female and male, respectively), along with a "plus" factor of *attraction to a female*, as opposed to *attraction to members of the same sex*.[165] By holding constant the sex of the plaintiff's partner (female), as opposed to a particular sexual orientation (homosexual), a ruling for Hively became almost inevitable.[166] Indeed, immediately following this statement, the court declared:

> Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. [Assuming these allegations are true], [t]his describes paradigmatic sex discrimination.[167]

160. *See id.* at 341.

161. *Id.* at 343.

162. *See id.* at 345–52.

163. *Id.* at 345.

164. *Id.* at 345, 347 ("The dissent criticizes us for not trying to *rule out* sexual-orientation discrimination by controlling for it in our comparator example . . . . [But] [i]t makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is *whether* that type of discrimination is nothing more or less than a form of sex discrimination.").

165. *See id.* at 347.

166. *See id.* at 345.

167. *Id.*; *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 119 (2d Cir. 2018) (describing the issue similarly, and concluding, "[i]n the context of sexual

Not surprisingly, the dissent focused its analysis on a different comparator. As the dissent explained:

> [T]he proper comparison is to ask how Ivy Tech treated qualified gay men. If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination. If, on the other hand, an employer . . . rejects all homosexual applicants, then no inference of sex discrimination is possible. . . .[168]

The dissent's change in comparator analysis, although subtle, allowed the dissent to reach the opposite conclusion as the majority in regard to whether sexual orientation discrimination constitutes unlawful sex discrimination.[169] Although the United States Supreme Court ultimately rejected the dissent's comparator analysis, this dispute shows that arguments regarding who is the proper comparator can be outcome-determinative and demonstrates that defendants may sometimes defend discrimination claims by arguing that a plaintiff's proposed comparator misses the mark by inviting a wholly improper comparison.[170]

B. Identifying the Proper Comparator in Gender Identity Discrimination Claims

Similar disputes regarding the proper comparator were made in a gender identity discrimination case also recently decided by the United States Supreme Court, *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.* (*Harris*).[171]

The plaintiff in *Harris* was Aimee Stephens, who was born a biological male as Anthony Stephens.[172] Stephens's longtime employer, a funeral home in Michigan, terminated her shortly after she announced to the funeral home's owner, Thomas Rost, that she would begin dressing as a woman at work.[173] This became a problem for Rost, as he later explained, because the funeral home requires its public-

---

orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.").

168. *Hively*, 853 F.3d at 366–67 (Sykes, J., dissenting).

169. *See id.*

170. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1742–43 (2020).

171. *See generally* 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom.* Bostock v. Clayton Cnty., 139 S. Ct. 1599 (2019).

172. *See Harris*, 884 F.3d at 566.

173. *See id.*

facing male employees to wear suits and ties and its female employees to wear skirts and business jackets, and Rost believed that the funeral home's customers would be unduly distracted if Stephens appeared at work dressed as a female.[174] Accordingly, Rost fired Stephens because "he was no longer going to represent himself as a man" and "wanted to dress as a woman."[175]

The Equal Employment Opportunity Commission (EEOC) sued the funeral home alleging it had violated Title VII by terminating Stephens's employment on the basis of her transgender status and for her refusal to conform to sex-based stereotypes.[176] After the District Court granted partial summary judgment to the defendant, the Sixth Circuit Court of Appeals, relying on *Price Waterhouse v. Hopkins*, held that the funeral home had discriminated against Stephens on the basis of "sex" by firing her for failing to conform to sex stereotypes.[177] Along the way, the Sixth Circuit rejected the defendant's argument that sex stereotyping violates Title VII only when "the employer's sex stereotyping resulted in 'disparate treatment of men and women.'"[178] As the court explained, the question in cases like Stephens's is not "whether transgender persons transitioning from male to female [like Stephens] were treated differently than [a comparator consisting of] transgender persons transitioning from female to male," as the funeral home had argued; rather, the question is "whether a transgender person was being discriminated against based on 'his failure to

174. *See id.* at 568, 586; *see also* Brief for Respondent Aimee Stephens at 10, R.G. &. G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (No. 18–107).

175. *Harris*, 884 F.3d at 569 (citing Rost's deposition testimony). Further, "Rost admitted that he did not fire Stephens for any performance-related issues." *Id.* at 572.

176. *See id.* at 566–67.

177. *See* Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 840 (E.D. Mich. 2016), *rev'd and remanded*, 884 F.3d 560 (6th Cir. 2018); *Harris*, 884 F.3d at 571–74. In *Price Waterhouse*, the Supreme Court ruled that Title VII's prohibition of sex discrimination encompasses employment decisions based on sex stereotypes. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989). Later, the Sixth Circuit held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII because such "discrimination would not [have] occur[red] but for the victim's sex." Smith v. City of Salem, 378 F.3d 566, 572–74 (6th Cir. 2004). The Sixth Circuit thus explained that "Rost's decision to fire Stephens because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman'" is a clear form of sex-based discrimination under *Price Waterhouse* and *Smith*. *See Harris*, 884 F.3d at 572.

178. *See Harris*, 884 F.3d at 574.

conform to sex stereotypes concerning how a man should look and behave.'"[179] In other words, the question in Stephens's case is not whether the defendant's purported opposite-sex comparator exists and was treated differently, but rather whether Stephens herself was the victim of sex stereotyping.[180] In this respect, the court quoted the Second Circuit's opinion in *Zarda* for the proposition that "the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-nonconforming man as well as a gender-nonconforming woman any more than it could persuasively argue that two wrongs make a right."[181]

Apart from a sex stereotyping analysis, the Sixth Circuit determined that discrimination on the basis of transgender and transitioning status "is necessarily discrimination on the basis of sex."[182] Highlighting the importance of identifying the proper comparator, the court asked "whether Stephens would have been fired if Stephens had been a woman who sought to comply with the woman's dress code."[183] Because the answer to that question was "quite obviously . . . no," the court concluded that "Stephens's sex impermissibly affected Rost's decision to fire Stephens."[184]

On appeal to the United States Supreme Court, the funeral home once again argued that Stephens could not prevail on her sex discrimination claims—whether based on sex stereotyping or transgender status—due to the lack of an appropriate opposite-sex comparator who was treated differently than Stephens.[185] The funeral home proposed a comparator of a biological female who insists on dressing as a male.[186] The funeral home argued that it "would have

179. *Id.*

180. *See id.* (explaining "that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave"); *see also id.* at 578 (quoting Zarda v. Altitude Express, Inc., 883 F.3d 100, 123 n.23 (2d Cir. 2018)) ("Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular '*individual*' is discriminated against 'because of such *individual's* . . . sex.'").

181. *Id.* at 574 (quoting *Zarda*, 883 F.3d at 123).

182. *See id.* at 571.

183. *Id.* at 575.

184. *Id.* at 575–76. The court supported its holding on this issue by once again invoking sex stereotyping. *See id.* (stating that "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align").

185. *See* Brief for the Petitioner at 2–3, R.G. &. G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (No. 18-107).

186. *See id.* at 3; *see also id.* at 36–37 ("Harris chose to part ways with an employee who declined to follow the (legal and unchallenged) sex-specific dress code

responded to [such a comparator] the same way it responded to Stephens," demonstrating that it "does not discriminate based on sex."[187] As expected, Stephens again proposed a comparator of a biological female who, like Stephens, wished to live openly as a female.[188]

In the end, the Supreme Court determined that Stephens's comparator analysis was correct, and that Stephens had the better argument.[189] Regardless of this final outcome, the parties' comparator arguments in *Harris* reveal litigation strategies that can be employed in employment discrimination disputes on the whole.[190] Simply put, in employment discrimination cases, arguments regarding who is the proper comparator can be used to frame the issue for the court in a manner favorable to one party and can greatly influence the outcome of a given case, illustrating that in some cases, defendants should carefully consider who to propose as the plaintiff's most appropriate comparator.[191]

---

that Harris applied to all its employees based on biological sex. Harris would react the exact same way to a female employee who refuses to follow the female dress code. . . . [M]ean[ing] that Stephens has no claim for sex discrimination.").

187. *Id.* at 2; *see also id.* at 25–26.

188. *See* Brief for Respondent Equal Emp. Opportunity Comm'n at 12, R.G. &. G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n, 139 S. Ct. 1599 (2019) (No. 18-107); *see also id.* at 13 (comparing Stephens, who was assigned a male sex at birth and lived openly as a woman, against a person assigned a female sex at birth who also lived openly as a woman).

189. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741–42 (2020). The Supreme Court's analysis highlights the importance of identifying the proper comparator. As the Court declared:

> [I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. . . . [T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

Id.

190. *See* Equal Emp. Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 575 (6th Cir. 2018).

191. *See, e.g.*, Weil v. Citizens Telecom Servs. Co., 922 F.3d 993, 1004 (9th Cir. 2019).

V. DEFENSE TACTIC #3: NONDISCRIMINATORY VARIABLES

When a plaintiff invokes comparator evidence, the third, and perhaps most common, defense tactic is to argue that a plaintiff's proposed comparator is not sufficiently similar to the plaintiff to raise an inference of discrimination.[192] This can be done by showing that there are nondiscriminatory variables that could just as easily explain the difference in treatment between the plaintiff and her comparator, such that comparing the two fails to generate an inference of discriminatory intent.[193] Uses of this defense abound.[194]

In one recent Eleventh Circuit en banc case, plaintiff Jacqueline Lewis, an African American female police officer, suffered from a heart condition that made it impossible for her to comply with a new policy requiring all officers to carry Tasers.[195] Lewis's medical condition prevented her from performing the essential duties of her position and prompted Lewis's employer to place her on unpaid administrative leave until she was released to return to work.[196] A few weeks later, Lewis exhausted all of her available leave time, resulting in her termination.[197]

192. *See* Rathbun v. AutoZone, Inc., 361 F.3d 62, 76–77 (1st Cir. 2004).

193. *See* Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981). As the Supreme Court has noted, when there are material differences between a plaintiff and her comparator, the evidence has not "eliminate[d] the most common nondiscriminatory reasons" for the employer's action, and it therefore does not justify the legal presumption that the employer's acts "are more likely than not based on . . . impermissible factors." *Id.*

194. *See* Laing v. Fed. Express Corp., 703 F.3d 713, 720 (4th Cir. 2013); *Weil*, 922 F.3d at 1004 (rejecting plaintiff's purported comparators as being too dissimilar); Eaton v. Ind. Dep't of Corrs., 657 F.3d 551, 555 (7th Cir. 2011) (noting defendant's argument that it was entitled to summary judgment on plaintiff's discrimination claim because plaintiff's comparator was not similarly situated); Gacek v. Owens & Minor Distrib., Inc., 666 F.3d 1142, 1147 (8th Cir. 2012) (rejecting plaintiff's comparators as not sufficiently similarly situated to the plaintiff to establish pretext); Rea v. Martin Marietta Corp., 29 F.3d 1450, 1455–56 (10th Cir. 1994) (rejecting plaintiff's statistical data concerning layoffs, which purported to show a 1 in 2,500 probability that all ten individuals laid off in plaintiff's department would be over the age of forty if such decisions were age neutral, because the data failed to account for important nondiscriminatory variables such as performance evaluations and departmental rankings of selected employees).

195. *See* Lewis v. City of Union City, 918 F.3d 1213, 1218–19 (11th Cir. 2019) (en banc).

196. *See id.* at 1219.

197. *See id.*

Lewis later sued her former employer alleging that she was terminated based on her race, gender, and disability.[198] Lewis identified two comparators whom she claimed were treated more favorably.[199] The first was Sergeant Cliff McClure, a white man who failed the "balance" portion of a physical-fitness test in 2014 (four years *after* Lewis's termination) and was given ninety days of unpaid administrative leave to remedy the conditions that caused him to fail.[200] McClure retook and passed the test within the ninety-day period and returned to work.[201] The second was Officer Walker Heard, a white man who failed an "agility" test in 2013 (three years *after* Lewis's termination) and was also placed on unpaid administrative leave for ninety days.[202] Heard was offered, and ultimately declined, a position as a dispatcher.[203] The offer, however, remained open for nearly a year.[204] In the end, Heard was terminated after 449 days on unpaid administrative leave because he was unable to demonstrate his fitness to be a patrol officer.[205]

Lewis argued that she and her comparators were "similarly situated" because they "were all placed on administrative leave by the City when they could not meet a physical qualification of the job of police officer."[206] The court rejected the argument, however, because the purported comparison "gloss[ed] over critical differences" between Lewis and her comparators, including the fact that they were placed on leave pursuant to "altogether different personnel policies" and "for altogether different conditions."[207] Specifically, Lewis was placed on leave under a policy providing that "[a]ny unapproved leave of absence [is] cause for dismissal" (which explained why Lewis was terminated after exhausting her available leave time and remaining absent from work).[208] Lewis's comparators, by contrast, were placed on leave pursuant to a different policy—adopted years after Lewis was fired—stating that an officer who is "not deemed fit for duty will be placed on unpaid administrative leave for a period of ninety (90) days" to allow the officer time to improve his or her health through training,

198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.*
205. *See id.*
206. *Id.* at 1229.
207. *Id.* at 1230.
208. *Id.* at 1219, 1230.

diet, and exercise.[209] In addition, Lewis's comparators were given ninety days of leave to remedy problems that were at least theoretically remediable, whereas Lewis could not perform a job requirement as a result of a "chronic" and "permanent" heart condition that simply could not be remediated.[210] Based on these key differences, the court concluded that the plaintiff's purported comparators were not similar to Lewis "in all material respects," such that their differential treatment could not raise an inference of discrimination.[211]

Similar to *Lewis*, the United States Court of Appeals for the First Circuit recently rejected a plaintiff's attempt to invoke comparator evidence due to her failure to account for important, nondiscriminatory variables.[212] In that case, *Rathbun v. AutoZone, Inc.*, plaintiff Betsey Rathbun sued her employer for sex discrimination for failing to promote her to various management positions, each of which was given to a male.[213] After assuming Rathbun had satisfied her prima facie case and upon finding that AutoZone had provided nondiscriminatory reasons for each promotion at issue—i.e., that the successful applicants were better qualified—the court declared that Rathbun's claims boiled down to whether she could prove pretext.[214]

On the pretext issue, Rathbun argued primarily that she was better qualified than the men who received promotions over her.[215] Rejecting the argument, the court found that the plaintiff's qualifications were "not so obviously superior to those of the successful male applicants as to undermine the legitimacy of the selection process."[216] Nevertheless, the court went on to address whether the claimed difference in qualifications could be bolstered by independent evidence of pretext or discriminatory animus.[217] Rathbun sought to meet this standard by pointing to one particular male comparator, Rick Allen, who at the time of his promotion over Rathbun had lower performance reviews than Rathbun and nine disciplinary citations, eight more than the one Rathbun received.[218] In

209. *Id.* at 1230.
210. *See id.*
211. *See id.* at 1231.
212. *See generally* Rathbun v. AutoZone, Inc., 361 F.3d 62 (1st Cir. 2004) (rejecting comparator evidence because of a plaintiff's failure to account for nondiscriminatory variables).
213. *See id.* at 64–65, 73.
214. *See id.* at 74.
215. *See id.*
216. *Id.* at 75.
217. *See id.*
218. *See id.*

rebuttal, AutoZone pointed to other variables that justified Allen's promotion over Rathbun, including his superior parts knowledge and his longer length of tenure with AutoZone (seventeen months, as opposed to eight months for Rathbun).[219] Given these nondiscriminatory variables, the court concluded that the record as a whole would not permit a reasonable factfinder to infer that Allen's promotion over Rathbun was based on gender.[220]

As to the various other promotions at issue, Rathbun argued that pretext could be shown by a comparison of the length of time she spent with AutoZone before achieving a promotion (nineteen months), as compared to the time required for various men to obtain the same rank (including comparators who were promoted after one month, three months, five months, and eleven months).[221] Again siding with the defendant, the court determined that the swifter promotions for men could not prove pretext, especially since Rathbun and her comparators had not applied for the same openings at the same time.[222] The court explained away the comparison by pointing to the lack of evidence regarding "[a] multiplicity of factors" that "may have influenced the need to promote employees at a faster rate than [before]," such as new store openings, the number of vacancies for the management position at issue, the number and quality of applicants, differing unemployment rates, and increased customer demand.[223] "Without controlling for [such] important variables," the court declared, "comparator evidence cannot generate an inference either of pretext or of discriminatory intent."[224] For these reasons, the court felt that allowing Rathbun's discrimination claims to go forward based on the relatively swifter advancement of certain male comparators "would be an invitation to the jury to engage in unbridled speculation."[225]

As scholars have noted, *Lewis*, *Rathbun*, and similar cases demonstrate how difficult it is for a plaintiff to create a triable issue through comparator evidence.[226] Lewis, for example, argued that she

219. *See id.*

220. *See id.*

221. *See id.* at 76.

222. *See id.* The court explained that the speedier promotions of the male comparators occurred between eight and twenty-one months after the plaintiff's promotion. *See id.*

223. *See id.* at 76–77.

224. *Id.* at 77.

225. *Id.*

226. *See, e.g.*, Goldberg, *supra* note 4, at 753–54 (explaining that purported comparators often block discrimination claims because the plaintiff's best evidence comes from a comparison to an employee with a different supervisor; with different

and her comparators were "similarly situated" based on broad similarities between them, including that they "were all placed on administrative leave by the City when they could not meet a physical qualification of the job of police officer."[227] Yet, as the Eleventh Circuit noted, Lewis's broadly worded similarities "gloss[ed] over critical differences" between Lewis and her comparators.[228] Thus, Lewis's comparator evidence could not demonstrate discriminatory intent as the more likely explanation for her differential treatment.[229] Likewise, the *Rathbun* plaintiff failed to account for "[a] multiplicity of factors" that may have justified the employer's alleged differential treatment between the sexes, any of which could have defeated the plaintiff's claim.[230]

The takeaway for employers defending discrimination claims like these is to identify important differences between a plaintiff and her proposed comparators as a means of undermining the plaintiff's comparator proof.[231] Unlike the second defense strategy outlined above, which urges the court to set aside the plaintiff's proposed comparison as categorically invalid, this strategy accepts the plaintiff's comparator, but identifies nondiscriminatory variables that best explain the employer's difference in treatment between them.[232] As the next Part shows, even when this defense fails—i.e., even when a comparator's differential treatment cannot be explained by nondiscriminatory variables—defendants may still defeat a discrimination claim based on comparator proof by invoking additional comparators overlooked by the plaintiff.[233]

VI. DEFENSE TACTIC #4: ADDITIONAL COMPARATORS THAT COUNTERACT PLAINTIFF'S COMPARATOR PROOF

In defending discrimination claims, some defendants proffer additional comparators of their own that tend to defeat any inference

job responsibilities; or in disparate discipline cases, one who is subject to different disciplinary standards); *see also id.* at 742 ("[C]ourts' treatment of comparators as central to discrimination analysis functions primarily to filter out, rather than to facilitate recognition of, numerous types of discrimination.").

227. Lewis v. City of Union City, 918 F.3d 1213, 1229 (11th Cir. 2019).
228. *See id.* at 1230.
229. *See id.* at 1231.
230. *See Rathbun*, 361 F.3d at 76–77.
231. *See Lewis*, 918 F.3d at 1231.
232. *See supra* Parts IV, V.
233. *See infra* Part VI.

of discriminatory intent.[234] These comparators may be other individuals *outside the plaintiff's protected class* (i.e., in the "comparator class") who were either treated the same as the plaintiff or worse than the comparator identified by the plaintiff, or individuals *in the plaintiff's protected class* who were treated better than the plaintiff.[235] As this Part shows, regardless of which type of additional comparator proof is presented by the defense, each type of comparator proof has the ability to defeat an inference of discriminatory intent arising from the plaintiff's comparator proof.

A. Additional Comparators in the Comparator Class

In numerous cases, courts have recognized that an employer may rebut a plaintiff's evidence of discriminatory intent, including a plaintiff's otherwise legitimate comparator proof, with its own evidence that it treated the plaintiff and other comparators in the comparator class the same.[236] A leading case is *Simpson v. Kay Jewelers, Division of Sterling, Inc.*, which determined that a plaintiff's comparator evidence, consisting of a similarly situated individual in the comparator class who was treated better than the plaintiff, was undermined by proof of other comparators in the comparator class who were treated the same as the plaintiff.[237]

The plaintiff in that case, Sandra Simpson, was hired by Kay Jewelers in 1973, and was promoted to store manager in 1979.[238] From 1991 to 1994, Simpson's overall store sales were deficient, eventually leading to her demotion from store manager in 1994 at the age of fifty-seven.[239] After her demotion, Simpson sued Kay Jewelers for age discrimination under the Age Discrimination in Employment Act (ADEA), and she sought to prove her case under the three step *McDonnell Douglas* test.[240] Although the ADEA protects employees from discrimination "because of such individual's age," the statute only protects those aged forty and older, including fifty-seven-year-

234. *See* Sullivan, *supra* note 34, at 202.

235. *See id.*

236. *See, e.g.*, Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 645 (3d Cir. 1998); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883, 887 (11th Cir. 2016).

237. *See Simpson*, 142 F.3d at 642.

238. *See id.*

239. *See id.* at 642–43.

240. *See id.* at 643 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1978)).

old Simpson.[241] Moreover, the greater the age gap between the plaintiff and a comparator, the stronger the inference that age played a part in the employer's action.[242]

To prove pretext, Simpson pointed to evidence of Kay's more favorable treatment of a twenty-six-year-old store manager who was not demoted nor fired despite similar performance issues.[243] The Sixth Circuit rejected Simpson's argument, however, and held that "a plaintiff does not create an issue of fact," particularly at the pretext stage, "merely by selectively choosing a single comparator who was allegedly treated more favorably, while ignoring a significant group of comparators who were treated equally to her."[244] The court found it significant that Simpson relied solely on one younger comparator who was not demoted from store manager, even though from 1992 to 1994, thirty-five other managers were also demoted because of their overall store sales.[245] And of those thirty-five, all were younger than Simpson and all but one were under the age of forty.[246] Thus, the court declared, "Simpson's reliance on a single member of the non-protected class is insufficient to give rise to an inference of discrimination when Simpson was treated the same as thirty-four members of the non[-]protected class."[247]

As *Simpson* shows, "evidence of [an employer's] more favorable treatment of a single member of a nonprotected group," while relevant, "[cannot] be viewed in a vacuum."[248] "[T]o hold otherwise," the *Simpson* court noted, "would be to permit the inference of discrimination anytime a single member of a nonprotected group was allegedly treated more favorably than one member of the protected group, regardless of how many other members of the nonprotected

241. 29 U.S.C. § 623(a)(1) (2019); *see also* § 631(a).

242. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 313 (1996); *see also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 590–91 (2004).

243. *See Simpson*, 142 F.3d at 642, 645 n.7.

244. *Id.* at 642. The court declared that although such an inference may be appropriate at the prima facie stage, it would not be at the pretext stage, "where the factual inquiry into the alleged discriminatory motives of the employer has risen to a new level of specificity." *Id.* at 646 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516 (1993)).

245. *See id.*

246. *See id.*

247. *Id.*

248. *Id.* at 645; *cf.* Eaton v. Ind. Dep't of Corr., 657 F.3d 551, 556 (7th Cir. 2011) (recognizing that "[b]ecause the similarly situated analysis does not require numerosity, the plaintiff need offer evidence as to only one similarly situated comparator").

group were treated equally or less favorably."[249] In sum, a "plaintiff [cannot] 'pick out one comparator who was not demoted amid a sea of persons treated the same as her' to establish a jury question."[250]

A scenario similar to *Simpson* occurred in a 2018 case from the Second Circuit Court of Appeals, *Russell v. Aid to Developmentally Disabled, Inc.*[251] The plaintiff in that case, Faye Russell, failed to come to work on forty-four occasions and was late for work on eighty-five occasions between February 2009 and January 2010.[252] After she was terminated in part due to her absences and tardiness, she sued her former employer for sex discrimination, alleging that she was disciplined for conduct that went unpunished when committed by male co-workers.[253] Both the District Court and Second Circuit Court of Appeals rejected her argument, however, finding instead that male employees were terminated or disciplined for conduct similar to, and often less egregious than, Russell's.[254] The District Court, for example, noted two male employees who were disciplined for similar issues with absences and tardiness that were far less egregious than Russell's.[255] For this reason, Russell failed to prove a prima facie case of discrimination.[256] Other courts have endorsed this defense, and have dismissed cases based upon evidence that the plaintiff was treated the same as other comparator class employees.[257]

249. *Simpson*, 142 F.3d at 646.

250. *Id.* (quoting Simpson v. Kay Jewelers, No. 95–270J, mem. order at 2 (W.D. Pa. Mar. 18, 1997)).

251. *See* 753 F. App'x 9, 14 (2d Cir. 2018).

252. *See* Russell v. Aid to Developmentally Disabled, Inc., 416 F. Supp. 3d 225, 230 (E.D.N.Y. 2017), *aff'd*, 753 F. App'x 9 (2d Cir. 2018).

253. *See Russell*, 416 F. Supp. 3d at 231–32; *see also id.* at 231 (describing similar allegations in plaintiff's initial complaint to the Suffolk Human Rights Commission).

254. *See id.* at 233; *see also Russell*, 753 F. App'x at 14.

255. *See Russell*, 416 F. Supp. 3d at 233–34.

256. *See id.* at 234.

257. *See, e.g.*, Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883, 887 (11th Cir. 2016) (affirming summary judgment for the defendant on the issue of pretext because the plaintiff, a mechanic who intended to transition from male to female, admitted to sleeping on the clock and the defendant had previously fired a different male employee for identical conduct); *see also* Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1206 (N.D. Ga. 2014), *aff'd in part, rev'd in part*, 641 F. App'x 883 (referencing the incident of the comparator employee sleeping at work).

B. Additional Comparators in the Plaintiff's Class

In defending employment discrimination claims, defendants sometimes present their own comparators consisting of individuals in the plaintiff's class who were treated better than the plaintiff.[258] When coupled with additional comparator proof of the type described in the previous subsection, this defense can be quite effective.[259]

This defense was used successfully in a Seventh Circuit Court of Appeals case, *Bush v. Commonwealth Edison Co.*[260] The plaintiff in that case was Jay Bush, an African American man who was hired in 1978 as a repairman, or mechanic, by defendant Commonwealth Edison.[261] In 1982, Bush suffered a knee injury, which he reinjured the following year, making it impossible for him to resume his repairman's work.[262] As a result, Edison then transferred Bush to a lower-paying clerical position in the Customer Service Department.[263] Over the next thirteen months, Bush was absent or late to work numerous times.[264] After warnings and suspensions, Edison then fired Bush, who later sued claiming that Edison demoted and fired him because of his race.[265]

In analyzing Bush's claim, Seventh Circuit Judge Richard Posner found no direct evidence that Edison discriminated against African Americans, and noted that Bush had "an awful work record" highlighted by 221 days of missed work in less than seven years of employment.[266] "In these circumstances," Judge Posner declared, "Bush had to show that although he was not a good employee, equally bad employees [of a different race] were treated more leniently by Edison."[267] Attempting to meet this standard, Bush presented evidence of four other employees in the Customer Service Department, three white and one Hispanic, all but one of whom were not fired despite work records even worse than Bush's record.[268] Judge Posner noted, however, that Bush's evidence was misleading because it omitted

258. *See, e.g.*, Bush v. Commonwealth Edison Co., 990 F.2d 928, 931–32 (7th Cir. 1993).
259. *See id.*
260. *See id.*
261. *See id.* at 929.
262. *See id.* at 930.
263. *See id.*
264. *See id.*
265. *See id.* at 930–31.
266. *See id.* at 931.
267. *Id.*
268. *See id.*

other employees who were not fired, including another African American man who had received ten suspensions.[269] It also omitted evidence of other employees who were terminated, like Bush, including a white man who was fired despite fewer suspensions than Bush.[270] Demonstrating the significance of this additional comparator evidence, the court declared:

> A plaintiff cannot establish a prima facie case of racial discrimination by showing that, in a large department, a coworker of another race was treated more favorably than he, though other coworkers of his race were treated more favorably than other coworkers of other races. Such a pattern, in which [African Americans] sometimes do better than whites and sometimes do worse, being random with respect to race, is not evidence of racial discrimination.[271]

In the end, Bush failed to uncover "a statistically significant disparity between [African Americans] and whites with respect to Edison's departing from its disciplinary norms whether in the direction of severity or leniency."[272] Accordingly, the court summarized the case as follows:

> When a worker gives ample cause for discharge, as Bush did, his effort to defeat summary judgment by pointing to worse workers of a different race who were not fired is easily parried by pointing to instances of better workers of a different race who were also fired or worse workers of the plaintiff's race who were retained. The employer's parry can be parried in turn only with evidence, [which Bush failed to present], that the net effect was discriminatory.[273]

As the Seventh Circuit's analysis in *Bush* reveals, one defense strategy for an employer like that in *Bush*, which has a large workforce with numerous potential comparators, is to attack a plaintiff's comparator proof with additional comparator evidence that tends to defeat any inference of discriminatory intent. Numerous cases like *Bush* exist, demonstrating the effectiveness of this defense.[274]

---

269. *See id.*

270. *See id.*

271. *Id.* The court clarified, however, that "[d]iscriminating against [African Americans] on one occasion, in one department, etc. is not cured by discriminating in their favor on another occasion, or in another department, etc." *Id.*

272. *See id.* at 932.

273. *Id.*

274. *See, e.g.*, Bates v. City of Chicago, 726 F.3d 951, 955 (7th Cir. 2013) (rejecting plaintiff's race discrimination claim because "[a]cross the board, [defendant's] promotions, demotions, and lateral transfers did not demonstrate any clear racial bias;" rather, "[o]f the eight demotions, five were for non-black firefighters, which suggests that [defendant] demoted both black and non-black firefighters without regard to race"); Nolen v. City of Chicago, No. 99–3520, 2000

VII. PROPOSED DEFENSE STRATEGY FOR COMPARATOR EVIDENCE

Having summarized each of the four major defenses involving comparator proof, this Part places those defenses into a four-part hierarchical structure for employers to consider when devising a defense to a disparate treatment employment discrimination claim. In doing so, this section draws upon the classical Greek and Roman rhetoric theory of "stasis,"[275] one that modern legal scholars have employed as a formulaic means of determining the key issues in a lawsuit by identifying the "point of battle," or "point of stasis," between litigants.[276]

A litigation strategy based on identifying a point of stasis involves examining a slate of potential issues organized in an orderly sequence and discarding inapplicable or unwinnable issues until reaching a stopping point where the controversy has sound arguments on both sides.[277] From there, the party that "present[s] the better answer

---

WL 973629, at *3–4 (7th Cir. July 13, 2000) (finding that plaintiff, a Black man, failed to establish a prima facie case of race discrimination by basing his claim on only one, non-Black comparator when record evidence showed that the employer terminated hundreds of employees of various racial backgrounds, including non-Blacks, and hired hundreds of employees of various racial backgrounds, including Blacks).

275. *See* Nadeau, *supra* note 12, at 367 (describing "the purpose served by the doctrine of stases . . . [among] early writers was that of enabling one to locate the key issues in a given case or set of circumstances"); *see also id.* at 369 (describing rhetoric as "the ancient art of persuasion"); FROST, *supra* note 12, at 25 (describing stasis as a system for helping parties see which issue is in dispute so that they can develop arguments and counterarguments around that issue); HERRICK, *supra* note 12, at 104 (calling stasis a method used for thinking through a judicial case by identifying the likely issues of conflict).

276. *See, e.g.*, Stephen E. Smith, *Defendant Silence and Rhetorical Stasis*, 46 CONN. L. REV. ONLINE 19, 21 (2013) (describing the rhetorical term "stasis" as "the point at which battle is joined between two parties in judicial argument"); Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*, 50 ENV'T. L. 557, 592 (2020) (arguing that plaintiffs in environmental justice litigation should fight their case in the stasis of qualification because that gives them a better chance of prevailing on a motion to dismiss).

277. *See* Mathew D. McCubbins & Mark Turner, *Concepts of Law*, 86 S. CAL. L. REV. 517, 543 (2013) (explaining that stasis occurs when "[t]wo balanced opposing forces are in equilibrium"); *see also* Nadeau, *supra* note 12, at 366 (describing "stases" as "*issues* in modern parlance"); *id.* at 375–76 (describing this process and stating that "[a] stasis could occur . . . at any point in the proceedings at which the contesting parties met 'head-on' by taking opposing positions on a question at hand"); *id.* at 369 (noting that "it is not until the parties cease to agree that any question (i.e., issue) arises").

to the question succeed[s] in breaking down the stasiastic impasse in their favor."[278]

Building on classical Greek and Roman rhetoric,[279] modern legal scholars have identified four commonly used categories of stasis: conjecture, definition, qualification, and procedure.[280] When placed in this order, these four major stases create a "standard pattern through which a . . . defendant could approach a case."[281] A hypothetical murder prosecution illustrates this scheme.[282]

The first point of stasis, conjecture, deals with factual disputes regarding whether an alleged act or incident actually took place.[283] Using the example of a hypothetical murder prosecution, conjectural stasis might involve disputes regarding whether the defendant actually committed the act of killing the deceased, as in the event the defendant is found near a dead body and denies killing the deceased with no eyewitnesses to the killing itself.[284]

The second point of stasis, known as definitional stasis, involves a point of contention over how the facts should be characterized.[285] In the murder prosecution example, definitional stasis might involve the

278. *See* Nadeau, *supra* note 12, at 375; *see also* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 697 (1985) ("The basic idea of the legal hearing is that two stories will be told in opposition or competition and a choice made between them.").

279. *See* Nadeau, *supra* note 12, at 374–76 (describing Hermagoras' four-part system of stases as applied to a criminal murder case); *see also id.* at 386 (noting the similarities between Hermagoras' four-part system of stases and the stases of Hermogenes); MARCUS TULLIUS CICERO, CICERO: ON INVENTION, BEST KIND OF ORATOR, TOPICS 21 (H. M. Hubbell trans., 1949) ("Every subject which contains in itself a controversy to be resolved by speech and debate involves a question about a fact, or about a definition, or about the nature of an act, or about legal processes. This question, then, from which the whole case arises, is called *constitutio* or the 'issue.' The 'issue' is the first conflict of pleas which arises from the defence or answer to our accusation.").

280. *See* Smith, *supra* note 276, at 21–22; *see also* Todd, *supra* note 276, at 581. This Article uses conjecture, definition, qualification, and procedure for the four general stases rather than the Latin *conjecturalis*, *definitivus*, *generalis*, and *translativus* or the Greek *stochasmos*, *horos*, *poiotes*, and *metalepsis*. *See* Janet B. Davis, *Stasis Theory*, *in* ENCYCLOPEDIA OF RHETORIC AND COMPOSITION: COMMUNICATION FROM ANCIENT TIMES TO THE INFORMATION AGE 693, 693–94 (Theresa Enos ed., 1996).

281. Nadeau, *supra* note 12, at 375.

282. *See* Smith, *supra* note 276, at 22–23; Todd, *supra* note 276, at 581–83; Nadeau, *supra* note 12, at 374–75.

283. *See* Smith, *supra* note 276, at 22.

284. *See id.*

285. *See id.*

defendant's admission that he killed the deceased, with a dispute centered on whether that killing should be defined as murder (a form of homicide that may be proven with evidence of intent to kill),[286] manslaughter (a form of homicide often attributed to recklessness),[287] negligent homicide (a killing committed negligently),[288] or an accidental killing.[289]

Third, "[q]ualitative stasis addresses the nature of the act."[290] The dispute here is not about the occurrence of the act (conjectural stasis), or what it might otherwise be called (definitional stasis), but whether it should be excused.[291] Qualitative stasis would include, for example, disputes about whether an intentional killing should be justified or excused, such as with an admittedly intentional killing allegedly committed in self-defense.[292]

Finally, and if all else fails, procedural stasis represents a point of disagreement over procedural matters, as with an argument that a court lacks jurisdiction over the case, or the presentation of a statute of limitations defense.[293] Although procedure is listed last among the four grounds, procedure does not follow the progressive order of the three substantive grounds, so a party concedes nothing by arguing it.[294] Rather, procedural arguments shift the ground from substantive to procedural matters and may be asserted at the outset of a legal dispute before any substantive challenges are made.[295]

---

286. *See, e.g.*, MODEL PENAL CODE § 210.2 (AM. L. INST. 2019) (defining murder as a "criminal homicide . . . committed purposely or knowingly," or one "committed recklessly under circumstances manifesting extreme indifference to the value of human life"); *see also id.* § 2.02(2)(a)–(b) (defining "purposely" and "knowingly").

287. *See, e.g.*, *id.* § 210.3 (defining one form of manslaughter as a "[c]riminal homicide . . . committed recklessly"); *id.* § 2.02(2)(c) (defining "recklessly").

288. *See, e.g.*, *id.* § 210.4 (defining "negligent homicide" as a homicide "committed negligently"); *id.* § 2.02(2)(d) (defining "negligently").

289. *See* Smith, *supra* note 276, at 22; *see also* MODEL PENAL CODE § 2.02(1) (stating as a general rule that "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense").

290. Smith, *supra* note 276, at 22.

291. *See id.*

292. *See id.*

293. *See id.*; *see also* Seyferth, *supra* note 2, at 269 (listing common procedural defenses for employment discrimination claims); PATRICK JOHN MCGINLEY, FLORIDA ELEMENTS OF AN ACTION § 903:2 (2020-2021 ed. 2020) (listing defenses to a claim of employment discrimination based on race or ethnicity).

294. *See* Smith, *supra* note 276, at 22; Todd, *supra* note 276, at 588–89.

295. *See* Hanns Hohmann, *The Dynamics of Stasis: Classical Rhetorical Theory and Modern Legal Argumentation*, 34 AM. J. JURIS. 171, 176 (1989); Seyferth,

Although the four comparator defenses identified in this Article do not track each of the four traditional stases categories, those comparator defenses coalesce into a similar sequence of arguments or potential points of stasis.[296] Moreover, as with the four traditional stases, an employer developing a defense to an employment discrimination claim may proceed sequentially through each of the four proposed comparator defenses, eliminating each defense successively when it does not apply.[297] Also, as with stasis analysis, moving down the list usually means that the defendant concedes the higher ground.[298] For example, the hypothetical defendant charged with murder would typically concede that he, in fact, killed the victim in order to argue that the killing was accidental; in other words, he must concede the potential conjectural argument, perhaps because

---

supra note 2, at 268 (urging defense attorneys to "seek[] an early dismissal on procedural grounds").

296. This Article does not apply each of the four traditional categories of stases to employment discrimination lawsuits. Rather, this Article simply urges defendants to adopt a sequential method of analysis, similar to that of classical stasis theory, when creating arguments around comparator evidence for disparate treatment claims. In disparate treatment cases, there would normally be no dispute regarding whether the defendant did some act causing the plaintiff to suffer an adverse employment action, such as a demotion or firing. *See, e.g.*, Coleman v. Donahoe, 667 F.3d 835, 846 (7th Cir. 2012) (illustrating an adverse employment action that was conceded). Rather, the question would be whether the adverse action was the product of discriminatory intent. This type of issue would likely fall within the stasis of conjecture, which takes into account questions of motive. *See* Nadeau, *supra* note 12, at 375 (describing Hermagoras' stases as including "a consideration of motive" as part of the conjecture stasis). Alternatively, this type of issue might be a component of the stasis of definition, given that the purpose of comparator evidence is to help determine how the agreed-upon facts should be characterized—i.e., whether the adverse employment action plaintiff experienced was an intentional act of discrimination, or something else. In this respect, the four comparator defenses identified in this Article can be thought of as sub-stases of either the conjectural or definitional stasis. *Cf.* Smith, *supra* note 276, at 22 (questioning in which stasis "criminal intent questions belong").

297. *See* GEORGE A. KENNEDY, A NEW HISTORY OF CLASSICAL RHETORIC 98 (1994) ("Thus the process can be viewed as one of elimination of each type successively . . . ."); *see also* Ryan Weber, *Stasis in Space! Viewing Definitional Conflicts Surrounding the James Webb Space Telescope Funding Debate*, 25 TECH. COMM. Q. 87, 89 (2016) (arguing that "the stasis questions were intended to be taken in order").

298. *See* Smith, *supra* note 276, at 22; *see also* Harold Anthony Lloyd, *Raising the Bar, Razing Langdell*, 51 WAKE FOREST L. REV. 231, 236 (2016) ("If we start our debate at the stage of quality (for example, we agree that the debate is about whether a murder was justified), we have conceded the first two issue locations (i.e., that a killing occurred and that it was murder)."). *But see* Smith, *supra* note 276, at 21 (recognizing that multiple points of stasis may exist "[i]n rare cases").

there were numerous eyewitnesses to the killing, to focus his defense on the definitional arguments that are stronger in his case.[299] Likewise, when an employer takes the position that a plaintiff's purported comparator can be distinguished on some material, nondiscriminatory basis (the third defense identified in this Article), the employer usually abandons the two higher positions that would assert the plaintiff's comparator is categorically improper (the second defense), or that no comparator exists in the plaintiff's workforce (the first defense).[300]

The hierarchical nature of these defenses can be explained as follows. Recall that the first defense strategy regarding comparator proof is to argue that a plaintiff's discrimination claim necessarily fails because no comparator exists in the plaintiff's workforce.[301] This argument represents the highest ground for a defendant to take because it argues, in essence, that no defense is necessary because the plaintiff cannot prove her case.

If the first defense does not apply, a defendant might elect to begin its defense with the second defense strategy by arguing that the plaintiff's selected comparator invites an improper comparison and thus should be ignored.[302] Unlike the first defense strategy, which may be applied in cases where the plaintiff has failed to put forward comparator evidence, this argument may be used to attack a plaintiff's purported comparator as being wholly improper.[303]

If the second defense does not apply, a defendant might instead begin with the third defense strategy by arguing that there are critical differences between the plaintiff and her proposed comparator, ones having nothing to do with the plaintiff's protected class, that explain the difference in treatment between them. Unlike the second defense strategy, which urges the court to set aside the plaintiff's proposed comparison as categorically invalid—i.e., by inviting the wrong comparison—this strategy accepts the plaintiff's comparator but argues that there are nondiscriminatory variables that best explain the employer's difference in treatment between them, such as different job duties or different standards of behavior.[304]

---

299. *See* Smith, *supra* note 276, at 22.

300. *Cf. id.* ("As a logical matter, the categories of stasis are progressive and at odds with one another. . . If the battle is joined at the point of qualitative stasis, then the points of conjectural and definitional status are both conceded.").

301. *See id.* (discussing the first traditional stasis category).

302. *See supra* Part IV; Smith, *supra* note 276, at 22.

303. *See* Smith, *supra* note 276, at 22.

304. Although the second and third defenses might appear to overlap, the second defense does not attempt to distinguish an otherwise legitimate comparator on

Lastly, if a plaintiff has presented a viable comparator that cannot be reasonably distinguished based on some nondiscriminatory variable, a defendant might pursue the final defense strategy by invoking its own comparator evidence in order to negate any inference of discrimination arising from the plaintiff's comparator proof.[305] Unlike the third defense strategy, which "zooms in" on the plaintiff's proposed comparator by highlighting critical differences between the plaintiff and that comparator, the strategy here is to "zoom out" to the defendant's workforce as a whole and identify additional comparators, whether in the comparator class or the plaintiff's class, that undercut the plaintiff's comparator proof.[306] Finally, similar to the traditional stasis of "procedure," this final defense strategy may or may not involve a concession that the plaintiff's comparator cannot be distinguished based upon some nondiscriminatory variable, as a defendant could first seek to distinguish a plaintiff's comparator while also pointing to the existence of other comparators as a fallback argument.[307]

In sum, the author proposes the following series of issues and arguments for defendants to consider when devising a defense around comparator proof:

- Question 1: Do the requirements of the prima facie case in your jurisdiction require comparator proof, and has the plaintiff failed to identify a comparator that would support an inference of discriminatory intent? Otherwise, is there case law in your jurisdiction requiring the plaintiff's particular discrimination claim to be supported by comparator proof, which plaintiff has failed to proffer?[308] If so, employ the first comparator defense by arguing that the plaintiff cannot prove her case due to the lack of an adequate comparator.
- Question 2: Has the plaintiff identified a comparator that invites the wrong comparison? If so, employ the second comparator

---

the basis of potential distinguishing factors, such as different job duties or different standards of behavior. Rather, this strategy seeks to convince the court that the plaintiff's proposed comparator should be entirely disregarded. *See supra* Part IV. For this reason, this defense exists at a higher level than the next defense, which attempts to distinguish an otherwise proper comparator.

305. *Cf.* Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 646 (3d Cir. 1998) (finding employers' more favorable treatment of a single member of the nonprotected class insufficient to generate an inference of discrimination when plaintiff was treated the same as thirty-four members of the nonprotected class).

306. *See id.*

307. *See id.* at 645 n.8.

308. *See supra* Part III.

defense by arguing that the plaintiff's comparator should be entirely disregarded in lieu of an alternative comparator analysis.[309]

• Question 3: Has the plaintiff identified a comparator that can be reasonably distinguished in some material way based on the relevant case law in your jurisdiction? If so, employ the third comparator defense by arguing that there are material differences between the plaintiff and the plaintiff's proposed comparator, ones having nothing to do with the plaintiff's protected class, that led to their difference in treatment.[310]

• Question 4: Has the plaintiff identified a comparator that cannot be reasonably distinguished in some material way while ignoring other comparators—whether in the plaintiff's protected class or in the comparator class—that undermine the plaintiff's attempt to raise an inference of discriminatory intent? If so, employ the fourth comparator defense by arguing that no inference of discrimination may arise based on the plaintiff's comparator evidence when (i) there are other comparators in the comparator group who were treated equally or less favorably than the plaintiff (similar to *Simpson*),[311] or (ii) there are other individuals in the plaintiff's class who were treated better than the plaintiff (similar to *Bush*).[312]

As the murder prosecution example outlined above shows, a traditional stasis scheme is biased toward the defendant, who only needs "to win the judge over to his side for one of the four status" to prevail.[313] Similarly, an employer defending a discrimination claim premised upon comparator proof need only convince the judge of its position on one of the four stases to defeat the claim.[314] Nevertheless, making inconsistent or irrelevant arguments may harm an advocate's credibility with the court, and may reduce a litigant's overall chances of success.[315] Accordingly, when a defendant considers the four major points of dispute regarding comparator evidence, the defendant should ordinarily concede the points of dispute at the higher levels where the likelihood of a successful defense is slim or nonexistent, and should

309. *See supra* Part IV.

310. *See supra* Part V.

311. *See supra* notes 263–277 and accompanying text.

312. *See supra* notes 287–307 and accompanying text.

313. Antoine Braet, *The Classical Doctrine of Status and the Rhetorical Theory of Argumentation*, 20 PHIL. & RHETORIC 79, 83–84 (1987).

314. *See* Smith, *supra* note 276, at 22 (discussing the traditional stases categories).

315. *See id.* at 23 (calling it "folly to join a case at every point of stasis" due to credibility concerns for the party and counsel).

instead focus its dispute on one of the lower levels. In this manner, defendants will maximize their likelihood of success in defeating a discrimination claim premised upon comparator proof.[316]

CONCLUSION

Disparate treatment employment discrimination claims require plaintiffs to prove an employer's discriminatory intent. Although plaintiffs often use comparator evidence to prove discriminatory intent, comparator evidence may also be used to disprove that intent. This Article has identified the four primary ways employers use comparator evidence to defeat employment discrimination claims. When considered in light of stasis theory, the four defenses outlined in this Article can be placed into an organized framework of arguments for defendants to consider when crafting a defense to an employment discrimination claim involving comparator proof. By employing the framework this Article proposes, defendants will create stronger and more strategically sound defenses, generating efficiencies in case resolution through a streamlined approach to comparator proof.

316. As with the four traditional stases, there may be times when the four defenses identified in this Article overlap, or when more than one defense applies. *See id.* at 22 (recognizing that "[t]here are necessarily overlaps—or grey areas—between the categories of stasis"). Take, for example, Laing v. Federal Express Corp., in which the Fourth Circuit Court of Appeals rejected the plaintiff's claim that she was terminated in retaliation for taking FMLA leave on the basis that the plaintiff "has not identified any similarly situated [comparator class] employee . . . who was given more favorable treatment" despite violating the same policy. 703 F.3d 713, 721 (4th Cir. 2013). In addition, the court noted that the only potential comparator in plaintiff's workforce had likewise been terminated for violating the same policy as the plaintiff, even though that comparator had not taken FMLA leave. *See id. Laing* therefore illustrates that some cases might justify the assertion of multiple defenses; here, the first defense (by arguing that plaintiff had failed to present evidence of a similarly situated comparator), and the fourth defense (by arguing that the only relevant comparator favors the defense). *See id.*